REPORTS

OF

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

JANUARY TERM, 1856, AND CLOYES' HEIRS CASE, JAN'Y. TERM, '57.

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L. E. BARBER, REPORTER.

VOLUME XVII.

LITTLE ROCK, ARK.:
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1857.

Rec May 3, 1858

OFFICERS OF THE SUPREME COURT.

Hon. Elbert H. English, Chief Justice,
" Christopher C. Scott, } Associate Justices.
" Thomas B. Hanly. }

Samuel H. Hempstead, Esq., Solicitor General.
Thomas Johnson, " Attorney General.
Luke E. Barber, " Clerk and Reporter.
Benj. F. Danley, " Sheriff.

CHANCELLOR:

Hon. Hulbert F. Fairchild,

JUDGES OF THE CIRCUIT COURTS:

1st. Circuit, Hon. George W. Beazley,
2d. " " Theodoric F. Sorrells,
3d. " " William C. Bevens.
4th. " " Felix J. Batson,
5th. " " John J. Clendenin,
6th. " " Abner A. Stith.

TRIBUTE OF RESPECT TO THE MEMORY OF E. CUMMINS, ESQ.

IN THE SUPREME COURT, }
MARCH 14, 1857. }

Mr. *Fowler* arose and addressed the court.

MAY IT PLEASE THE COURT:

Under the direction of my associates, I have risen to perform the painful duty of presenting to this tribunal, resolutions adopted on yesterday at a meeting of the bar and officers of the court, touching the death of one, who, though yet young, has long occupied a prominent position here — and, deservedly.

Who of us, in making a survey of the probable chances of long life and usefulness, irrespective of age, from his apparently iron constitution, would not have assigned to EBENEZER CUMMINS the palm, and that he would still be in the field, when our mortal bodies were mouldering in ruin? Not one! Yet he is gone, and we still live! What more forcible evidence that "in the midst of life, we are in death!" Should not every one of us, then, on this sad occasion, renew that cardinal resolution, too often, perhaps, neglected, to render justice, love, mercy, and perform our whole duty to God and man?

At the last meeting of this court, he was with us in full life, and as late as Monday evening, was actively preparing for fresh and laborious duties before him, for his vigilance was sleepless; yet, before the next morning's sun arose upon him, he was paralysed, striken down by the hand of Destiny, for his appointed hour had come — and, about sun rise on the morning of the 11th, breathed his last. In the bosom of his mother earth, "Urien sleeps!"

For almost twenty years he has been one of us; and for his indomitable energy, industry, perseverance and integrity, which have placed him in the van, as well as his kindness of disposition, faith to his clients, comity to his peers. I am sure, that none who hear me, entertain a thought that he was not justly pre-eminent. He had literally no enemy.

But he is gone—and this *forum*, which has been the theatre of many of his highest efforts, and which has known him so long and so well, will "know him no more forever." He has gone to that land, from whose "bourne no traveler returns." "*Nulla vestigia retrorsum!*" Yet we trust, not a land of gloom: but, in whose fields of light, in our native home, all who do their duty on earth will bloom in eternal youth.

I have now feebly to complete my duty by asking that these resolutions may be placed upon the records of the court:

"At a meeting of the bar and officers of the Supreme Court, at the court room, on the 13th day of March, A. D. 1857, *George C. Watkins, Esq.*, was appointed Chairman, and *Joseph Stillwell*, Secretary.

On motion, the chair appointed *A. Fowler*, *A. H. Garland*, and *S. H. Hempstead*, a committee to prepare and report resolutions expressive of the regret of the meeting at the death of EBENEZER CUMMINS, a member of the bar—who made the following report, which was adopted:

In addition to the ruin that Death has wrought in our ranks within the last few years, our brother, EBENEZER CUMMINS, since the adjournment of the Supreme Court, on Saturday last, has been suddenly cut down in our midst — hurried from a life of high hope and usefulness to his race, in manhood's early morn — and the surviving

members of this bar and officers of the court, entertaining a lively regard for his memory, and high respect for his character, energy and professional abilities, and cherishing his amiable disposition and deportment in all the relations of life, have

Resolved, That this meeting, with unfeigned sorrow, deeply lament the untimely death of their brother, EBENEZER CUMMINS, and will retain an affectionate remembrance of his many virtues, his perseverance, his ability, and his worth, as a lawyer, and as a man, which have placed him in the front rank of his profession, and made him eminent as a citizen.

Resolved, That, in manifestation of their sense of the great loss, sustained by the bar and the community at large, in this afflicting dispensation of Providence, they will wear the usual badge of mourning for thirty days.

Resolved, That a copy of these resolutions be furnished to the nearest relation of the deceased, with an assurance to his family of the sincere sympathy and condolence of the bar and officers of the court; and also, that the Supreme Court be requested to enter the same on its minutes.

On motion, Col. *Fowler* was requested to present the proceedings of the meeting to the Supreme Court; and directed that copies thereof be furnished to the newspapers of this city for publication.

GEO. C. WATKINS, *Chairman.*

J. STILLWELL, *Secretary.*"

To which the court, by Mr. Chief Justice *English*, responded:

"The court, in common with the members of the bar, and the community generally, were greatly shocked and deeply pained by the sudden and unexpected death of Mr. CUMMINS.

Comparatively a young man, in the full vigor of life, engaged in a laborious and highly useful professional career, and making rapid strides to very great eminence, his sudden fall was as unexpected as it is melancholy in its consequent losses to his relatives, the community in which he lived, the bar, and the State. Thus wastes man! Truly, he cometh forth as a flower, and is cut down—he fleeth also as a shadow, and continueth not! To day, *health* and *hope* flatter him with a promise of the enjoyment of many years, but *to-morrow* he sleeps with the pale tenants of the tomb!

Though the deceased has been cut down at the meridian of life, he has left many monuments of his genius and learning as a lawyer, which will be transmitted to other ages, not only in the reports, but in the memories and traditions of the people of the extensive district of country which constituted the field of his labors on the circuit.

Such was his integrity of character, his amiable and even temperament, and universally kind disposition, that whilst, as well remarked by Col. *Fowler*, he has left, perhaps, not a single enemy, many friends survive him to regret his death, and cherish his memory.

The court sincerely concur in the resolutions adopted by the bar, and will direct them to be put upon its record."

As a further mark of respect for the deceased, the court then adjourned.

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CASES

ARGUED AND DETERMINED

IN THE

SUPRENE COURT OF ARKANSAS,

AT THE JANUARY TERM A. D. 1856.

CONTINUED FROM VOL. XVI.

Brown vs. Wright.

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Where the declaration upon a bond contains two counts, one in the usual form; the other, also, in the usual form, but setting up matter intended to meet the defence, a plea, that there was no consideration for the bond, but failing to notice the matter set up in the second count, will be intended to apply to both counts.

Where the defendant pleads, generally, that there was "no consideration for the bond sued on," the burden of the issue is upon the plaintiff; but if he pleads, specially, the matters showing a want of consideration, he thereby assumes the proof of the issue.

The burden of the issue being assumed by the defendant, by pleading specially, it is not removed from him to the plaintiff by a replication averring that there was a "valuable consideration for the bond"—such averment will be taken as a simple traverse of the plea, or treated as surplusage. *McDaniel vs. Grace et al.*, 15 *Ark. Rep.* 490.

Where the maker of a bond assures the assignee, before assignment, that the bond will be paid at maturity; and afterwards, to an action upon the bond by the assignee, pleads that there was "no consideration," he must prove that, at the time of such assurance, he was ignorant of any fraud or deception in the contract—if he was

aware of any equity that would release him from the payment of the bond, and he concealed it, he is forever precluded from setting it up against the assignee.

Under a special plea of *no consideration*, it is incumbent upon the defendant to prove every material fact set out in his plea, and a failure to do so, will determine the issue against him.

A plea of *no consideration*, is sustained by proof, that the consideration of the bond sued on, was the sale of a "*patent right*" to make, use, and vend a certain medicine, represented as being patented, and that no patent had ever been issued for such medicine.

The acts, declarations, and admissions of a person, who has sold and transferred an article, or a right or privilege, made subsequent to such sale, are not admissible in evidence in a suit between others, growing out of a contract in relation to the same subject.

Appeal from the Circuit Court of Jefferson County.

HON. THEODORIC F. SORRELLS, Circuit Judge.

CUMMINS, for the appellant.

YELL and S. H. HEMPSTEAD, for the appellee.

Mr. Justice HANLY delivered the opinion of the Court.

On the 14th day of August, A. D. 1852, the appellee commenced his two actions of debt against the appellant, in the Circuit Court of Jefferson county. The one was founded on a writing obligatory for the sum of $300, alleged to be made by the appellant to one Peter German, or bearer, date, 28th October, 1851, and payable 1st January next thereafter, and averring an assignment thereof by the payee to the appellee, before suit was brought, and before payment. In this declaration, there are two counts: the first being an ordinary count in debt on the writing before described, averring and stating the above facts. The second count in this declaration, is similar to the first in every particular, except that the appellee avers therein, that before he took the assignment from the payee, German, he advised the appellant that he was about to become the assignee of the writing set forth, and

desired to know if he should purchase, and was assured that all was right, and that he would pay the amount thereof at maturity; that in pursuance of this, appellee bought, and paid a valuable consideration for the said writing, &c.

The other declaration is substantially the same as the one above stated, except that the writing described therein, bears date 16th June, 1851, and is only for the sum of $150, but is described as payable as the first, and assigned to the appellee as the other.

At the return term of the summons, issued on these declarations, the appellant appeared, and on his motion the two suits were consolidated, and ordered to proceed as if but one suit had been actually brought. At the same term, and on the 4th November, the appellant filed two pleas in bar of the appellee's action—the first of which was as follows: "That heretofore, to wit: on the 16th of June, 1851, at, &c., one G. W. Cottingham, and the said Peter German, the payee in the said bond, were partners, and jointly interested in the ownership of an alleged patent-right to a certain medicine, known and commonly called "*Newsom's Vegetable Tonic;*" and said Cottingham, as such partner, then and there offered, and proposed to the said defendant, to sell and convey unto him, "the knowledge of making, vending and using, in any way, in the counties of Hot Spring, Pulaski and Saline, the said medicine, and to have all the proceeds arising from the same during the term of the patent," and then and there the said Cottingham, falsely and fraudulently represented and stated, that said medicine had been and was regularly patented under the United States laws, and the exclusive use thereof secured thereunder; and that said parties were the sole owners of, and had the exclusive right to sell and dispose of the same, and the said defendant fully relying on the representations, so made by the said Cottingham, and having, within his reach, no other means of information in respect thereof, agreed to, and did purchase of, and from the said ——— (the name of the person is omitted; it is presumed the pleader must have intended Cottingham,) the right of making, using and vending the said medicine in the said counties

of Hot Spring, Pulaski, and Saline, and to receive the proceeds arising therefrom during the term of the patent, for the price and sum of eight hundred dollars, and then and there, to secure part of said price and consideration, and for no other cause or consideration whatever, he executed and delivered to the said Peter German, the said bond for $150, in said declaration mentioned; and the said defendant in fact says, that in truth, and in fact, said persons, or either of them, never had any exclusive right to the said medicine, or right to sell the same, and that the same never had been patented under the United States laws, to any person or persons whatsoever, and the whole pretended right to the said medicine, and the representations in respect thereof, were, and are, a mere and sheer fabrication to defraud defendant. And so the said defendant says that the said contract was a gross and naked fraud upon, and that said bond was given without consideration by, defendant, and is void, and he ought not to be charged or made liable thereon, and this he is ready to verify, &c.

The second plea is identical with the one we have given above, except that it was intended to apply to the $300 bond, and in which the false and fraudulent representations, in respect to the medicine and the right to its exclusive use, and the fact of its being patented, are averred to be made by Peter German, the payee therein.

These were the only pleas and the only defence interposed by the appellant in the action aforesaid. After a demurrer to these pleas was overruled, the appellee filed general replications thereto, concluding to the country; and the issues being thus made up, at the November term of the Jefferson Circuit Court for 1854, the cause was submitted to a jury, on the following evidence:

On the part of the appellant, Samuel F. Sargent swore, that he was acting commissioner in the Patent Office of the United States; that on examination of the books and archives of said office, he did not find that any patent had ever been granted to *N. Newsom;* that Nathan Newsom, of Warrenton, Alabama, on the 15th April, 1850, made application for a *Tonic Medicine,*

which application was rejected on the 2d May, 1850, and subsequently withdrawn by the applicant.

A. M. Barrington testified, that G. W. Cottingham proposed to sell to him the right of making and selling a medicine called "*Newsom's Vegetable Tonic*," and said to him, that he (Cottingham) had not seen the patent, but had no doubt but that it was patented. Cottingham further stated to the witness, that a man by the name of Roser had procured the right of making and vending said medicine in the States of Arkansas and Texas, and that he (Cottingham) had procured the right for the State of Arkansas from the said Roser; further stating, that Roser had seen the patent and promised to send him a copy; that these conversations grew out of the fact, that Cottingham had proposed to sell witness the right to make and vend said medicine in two counties in the State of Arkansas; that on observing the discrepancies in his statements, witness declined to make the purchase from him; and that the letters, hereinafter copied, purporting to have been written by the said Cottingham, together with the bill of sale purporting to have been made by him, are in his hand writing: witness being familiar with it.

Lewis S. Marshall testified, that he was of a committee, appointed by the Conference of the Methodist Church, to investigate charges against G. W. Cottingham, and that upon that investigation, the papers referred to by Barrington, (those hereinafter copied) were before said committee; that they came addressed to witness through the post office, and supposed they came from Cottingham, in due course of correspondence; that Cottingham voluntarily submitted to the trial before the church, and that the papers referred to, were submitted in his defence, which resulted in his suspension from further exercise of ministerial duties.

Peter Haskew testified to about the same fact, as stated to have been made by Marshall, as above.

Doctors *Wright, Tucker and Connel* swore, that the several ingredients specified in the document hereafter copied, marked

M, have been long known to the medical profession, and the medical properties thereof well understood; that they are of common use among physicians, and are useful in some cases, and that they are all mentioned in the United States Dispensatory, and their qualities and uses therein pointed out.

Peter F. Morton stated, that he has known the use of the compound, denominated "Newsom's Tonic," for several years past; thought it good in some cases of chills and fevers; has used it himself in Kentucky and this State; has known it as long ago as 1849. It was then sold through Kentucky, and was not then patented. In 1851, or about that time, in Jefferson county, Arkansas, he had a conversation with G. W. Cottingham about said medicine; witness told him he did not believe it was patented; that he knew it was not in 1849; that at the time this conversation occurred Cottingham had sold the patent-right, to a part of this State, to Barrington; who, in consequence of the discovery that no patent existed, rescinded the trade. This was before Cottingham sold to German or Brown. Cottingham remarked to witness, that he had great confidence in Roser, who claimed the right to dispose of it in Mississippi; and said from Roser's statement, he thought the medicine had been, or would be, patented. After German bought the right from Cottingham, witness knew German sold it in the vicinity of Pine Bluff, for witness had bought some of it from German. The medicine was advertised in Pine Bluff, and through the country. There were also hand bills circulated, similar to the one hereafter copied. Witness believed German was active in recommending the medicine, and giving it character.

T. S. James stated, that Cottingham came to him, and offered to sell Brown's note for $500, or several notes amounting to about this sum, and proposed to take $200 or $250 for them. Witness thought there must have been something wrong, from the large discount offered, and declined having anything to do with it; but told him Brown was good, and advised him that Brown would take up his own note at the proposed discount, if there was nothing wrong in the matter. Witness saw the medicine called

"Newsom's Vegetable Tonic" advertised, but did not know at whose instance.

Peter German deposed that the document hereafter copied, marked M, and referred to by Doctors Wright, Tucker and Connel, contains a correct statement of all the ingredients, and the mode of making and compounding the medicine known as "Newsom's Vegetable Tonic," which said exhibit so referred to, marked M, is as follows:

A RECIPE.

5 Gallons Precipitated Bark.
4 pounds Willow inner bark, fresh.
4 " Cherry " " "
4 " Dogwood " " "
4 " Sarsaparilla in root.
4 " Boneset—fresh—boiled in as much clear water as will cover the articles. Boil down to one gallon, then strain through a fine cloth, and add 4 gallons American Brandy; then take 6 or 8 ounces of extract of barks dissolved in the brandy, 1 ounce of the oil cinnamon, 1 pint of alcohol, make an essence, then mix all together, and it is ready for use.

Peter German further stated, that during the year 1851, he made and sold this medicine; bought the patent (supposed) right for Jefferson and Dallas counties, from Cottingham. Paid him for the right to Jefferson, $400 in cash. Witness afterwards sold the same to appellant—Jefferson for $300, and Dallas for $150. At another time, witness bought from Cottingham the right to Saline, Pulaski, Hot Spring, Drew and Bradley counties, in this State, which he also afterwards sold to appellant for $600. That the contract, or bill of sale hereafter copied, marked L was the bill of sale executed by witness to appellant, for the sale of the right to Jefferson and Dallas counties; that the note for $150, sued on in this cause, was given for the right to Dallas county, and was executed at the same time that the bill of sale above referred to was made; that the sale of the right to the other counties named, was made by the witness in person to appellant; that

witness had bought from Cottingham the absolute right to the counties he sold appellant, before the sale to him; had no recollection that Cottingham was present, or had anything to do with the sales made to appellant, but was fully confident he had not; that the $300 note sued on was given by the appellant for the sale of the right to Jefferson county alone; that appellant applied to witness to purchase this right; that witness had every confidence in Cottingham, and implicitly believed his statements as to the patent and said medicine; that appellant seemed to have the same confidence in Cottingham that the witness had; and he, witness, thought that appellant knew just as much about the matter, in every way, as witness did; that when appellant applied to buy witness out, he said he thought he could make money out of the medicine, and said *he* intended to make or break at it; that witness did not know whether the document, marked K, hereafter to be copied, was executed by Cottingham upon the sale that he, witness, made to appellant; if it was, witness had no recollection of it, and it must have been done, if at all, without his knowledge; that on each of his sales to appellant, he, witness, pursued the same form adopted to the one already referred to marked, L; that the second sale, which he made to appellant, was for several counties, and the price was $600, and the $300 note sued on in this cause, was no part of this, but for the right to Jefferson county; that the last sale made to appellant, was made prior to his, witness', removal from Pine Bluff, about 24th December, 1851; that appellant applied to him to rescind all the contracts about the medicine, stating as the ground, that it was not patented; that witness refused, and told appellant he could not, as he had assigned his notes. Appellant then knew that appellee had the notes; that in the fall of 1851, appellant was informed that appellee had the notes, and he then said he would pay them when due: that when the notes were given, appellant fixed his own time, at which he thought he could pay them, and said he would pay them out of his crop, if he could not make the money out of said medicine; that witness and appellant then fully believed

the medicine had been patented; that witness never was present at, or had any thing to do with, any transaction or trade between appellant and Cottingham; that when appellant bought of witness, he said he was going largely into the business, and when he was informed of the assignment to the appellee, of the bonds sued on, he seemed to be satisfied, and approved of it; that the medicine was a valuable one, and that witness made money out of it, and could have made a great deal more, if several members of his family had not died, which induced him to give over the business; that when witness had the medicine, he issued hand-bills, such as the one set forth below, and circulated them through the country; that he also advertised the said medicine, for the purpose of giving to it further notoriety, hoping to extend its sale thereby.

The following documents and letters were also read to the jury, as the residue of the evidence for the appellant:

TEXANA, February 9th, 1854.

BROTHER BROWN—*Dear Sir:* I am now ready to make what reparation is right. I have sold every thing for that purpose. I am willing to pay every *cent* I have ever received, and ten per cent. This will be an entire loss, as S. D. Roser has run away and gone to California. It smashes me, but this will matter nothing in the day of final account. Please write if this will satisfy you; and, if I cannot obtain a draft on some house in New Orleans, that will answer, or that I obtain a check and send it at your risk, or can you find some trusty man, coming to look at the country, by whom I may send it? Write me soon, as wish this thing immediately. Direct your letter to Texana, Jackson county, Texas.

Yours, &c.

G. W. COTTINGHAM.

HALLATSVILLE, February 22d, 1853.

BROTHER HASKEW—*Dear Brother:* In looking over my letters, which I sent to the committee, I see that I have not been as ex-

plicit on one point, I ought to have been—it is this: Bishop Payne publicly stated to the members of the Texas Conference, that there was nothing against my moral character, and that it was only necessary for me to make restitutions, (explaining the case) and then he would transfer me to this conference immediately; and, in view of this fact, left work for me. He also stated, in the presence of my father, that there was nothing else against me, and so soon as I could arrange this matter to your satisfaction, that you would furnish him with a statement of the facts at Aberdeen, Mississippi, and he would transfer me immediately. He also stated, that the secretary of your conference would furnish me with all the particulars, but not one word have I received. Now, Brother Haskew, you know all about the matter; how I sold to German, and German to Brown, all in good faith, all believing the medicine patented. It was not; we were all deceived, and I am giving up all I have to cure the evil. Is this enough? Brothers Harris and Wood, both from Arkansas, say it is. The situation of my family will not permit me to return, and I wish to be free, and if there be anything else necessary, will you let me know immediately, at Huntsville, Lavaca county, Texas; and will you endeavor to adjust this matter as soon as possible, if you please? I want to do right, live right, and die right.

Your afflicted friend and brother in Christ,

G. W. COTTINGHAM.

The appellant then read to the jury, as evidence in his behalf, a copy of charges preferred before the conference of the Methodist Church, against the said Cottingham, as follows: 1*st Charge*—Fraud, specification: In selling the right to Rev. Fountain Brown and others, to make and vend a certain patent medicine, viz: "Newsom's Vegetable Tonic," when there was no such medicine patented.

As further evidence, the appellant read to the jury the following letters, written by the said Cottingham, *to wit:*

"To the committee of investigation appointed on my case, by the Arkansas Annual Conference—

DEAR BRETHREN: You have in the communication which I send you, a fair statement of what I am willing to do in this matter. I further state, relative to delivering up my property, that I am willing to put it into the hands of the presiding Elder of the Victoria District, Daniel Carl, Uriah Clay, or Judge Holt of Texana.

So far as the others have suffered through my misrepresentations, my property stands pledged to make them whole: but, if any acknowledgement of guilt is expected on my part, I must beg to be excused, as I have not been conscious of any intentional wrong in the matter. I have no acknowledgement to make. At any time when I shall be convinced of any intentional wrong, I am ready to make all reasonable acknowledgements that may be required. The reason of my not having made these propositions before, is, that I had not learned that the medicine was not patented until I learned it from Bishop Payne.

Now, brethren, I feel that my appropriate work is to "*preach Christ*" to the people, to offer to the starving thousands the bread of life. In this, all my interests are embarked, in this I glory; but, so long as this matter is unsettled, it, in a great measure, hedges up my way. Yet I am determined, if hungry starving souls perish through the lack of my labor, that their blood shall not be required at my hands.

But I trust the matter may be amicably arranged, and I go about my Master's work. Should it be thought necessary, in order to correct any false impression which may have been made, you are at liberty to publish any part, or all, of these communications.

Your brother in Christ,

G. W. COTTINGHAM.

HALLATSVILLE, April 19th, 1853.

DEAR BROTHER SLOAN: I received your letter yesterday, and the spirit of the letter made me feel it was from a brother and friend, and would to God, that I could comply with the request you

make, and be with you at Richland. But the condition of my family is such that no man, acquainted with all the circumstances, would advise me to such a course. Besides, my property consists in cattle and land, which I have not been able to cash, or would send what I ought to restore with this letter. I have an arrangement, which I expect to make in a few days, that will enable me to make such restoration. It will strip me of every thing, and leave me in abject poverty, and my only recourse will be Roser; and what I have recently learned, it will be a total loss. Now brother Sloan, if there is truth in me, I will do every thing in my power to liquidate all defaults where there may be a moral obligation.

Now, is not this all that is required—all that can be required of me? As to my intending wrong in this thing, I never did. I wish you to tell brother Brown that I will do right, by the grace of God; I will do right. If your committee suspend me, I am ruined; and, unless a great change in my mind, I shall give up my credentials, and I know not what I shall do; if you acquit, and transfer me, I have brought myself under obligations, as strong as words can make them. If this committee suspend me, I am ruined. If you acquit, I am saved, and shall forever feel grateful to your committee, for extending that charity and clemency that erring and unfortunate man so often needs. I am an itinerant preacher at heart, and I should never have risen in my defence, had I not felt that necessity was laid upon me. God called me to the work, and is still blessing me in it, in a signal manner, for his grace has been sufficient for me in all my difficulty, in whom I trust; may he guide you aright in your decision.

Your afflicted and fraternal brother,

G. W. COTTINGHAM.

HALLATSVILLE, April 15, 1853.

Brothers Haskew, Martial and Sloan—DEAR BRETHREN: Your letter has just come to hand, as also a few days since a letter from Brothers Haskew and Ratcliff, which I should have re-

ceived months before. These letters present my difficulty in a different light to that which Bishop Payne received it. What the Bishop said to me, he said publicly to the Texas Conference. It is very strange the Bishop so misunderstood this matter. I am almost ready to give it up and not make another effort, for it appears unnecessary to do or say more; for, my friends from Arkansas and Texas Conferences, to whom this matter has been submitted, say that I have offered all that is right and fair; and it would most certainly be settled at once, but your committee would require my presence. Permit me to say, this I cannot do, without neglecting my family, nor do I find any of my friends, who know my condition, who advise me to such a course. Brother Harris (well known to Brother Brown,) felt sure, if my propositions did not satisfy, that he had no thought that anything that I could say or do, in person, would satisfy: and remarked: "He wrote to your committee, in my behalf, that I denied any wrong in all this matter." But there was a wrong, but did I persist in that wrong, when convinced? No! but at once proposed to strip myself of everything, and reduce myself and family to abject poverty, in order to cure the evil. Now, if your committee can find any reasonable set of men that will require more, then, if I can, I will do more. Now, what I have written from time to time, on this subject, has been written in the fear of God, with an eye single to *his* glory, intending to dedicate to God and his church my time, talents, and my influence with others. Now, if with all this before you, you suspend me, you ruin me and my family. It would be far better for us, for you to consign us to one grave; there soon we would be forgotten. But, if you sespend me, odium and a stigma, that no body of men can wipe off, must attach itself to us. Hence, unless my mind changes, your decision, in my case, is final. As to my having made false assertions about the medicines, whatever Barrington may have understood me as saying, it is false, and *woe* to that man who would crush an innocent man, for if the withering curse of Deity does not fall on such a man, in this life, there is a com-

ing world: therein shall I see those accusors, and if they have judged without mercy and charity, then will confusion fix itself upon an immortal brow, for you will not be as men; for, thank God, I feel that I can settle the evil that has grown out of my ignorance; but without, you can make no restitution. Now, brethren, in your hands my all rests. You can save, or you can destroy me. I am willing to do whatever any disinterested man and christian will say; and if, with such propositions, you suffer me ruined, the blood of innocence be on you. May the God of Heaven bless you in your deliberations in my case.

Your afflicted brother,

G. W. COTTINGHAM.

The appellant read to the jury the following placard, or hand bill, as further evidence in his behalf:

"NEWSOM'S VEGETABLE TONIC.—A new article in medical practice—a safe, certain and *prompt* cure for *ague and fever, congestion, dysintery, cholera-morbus, female obstructions, dyspepsia, general debility*," &c.

EXHIBIT K.—Know all men by these presents, that I, G. W. Cottingham, of the county of Jefferson, and State of Arkansas, for and in consideration of the sum of eight hundred dollars, to me in hand paid, by Fountain Brown, of the county and State aforesaid, have granted, bargained, and sold and conveyed, unto the said Fountain Brown, the knowledge of making, and the right of vending and using, in every way he may think proper, in the counties of Hot Spring, Pulaski and Saline, a new patent medicine, to wit: "Newsom's Vegetable Tonic," and to have all the proceeds arising from the same, during the term of the patent.

G. W. COTTINGHAM, *Agent for State of Arkansas.*

Pine Bluff, June 16, 1851.

EXHIBIT L.—1851.

PINE BLUFF, October 28th.

Know all men by these presents, that I have this day sold to Fountain Brown, the patent-right to Jefferson and Dallas counties, of "Newsom's Vegetable Tonic." He is to have all the rights and benefits arising to him from the same.

PETER GERMAN.

PATENT OFFICE, February 2, 1852.

SIR: I return herewith Mr. Brown's letter; and, in reply to his inquiry, state that no patent for a "Vegetable Tonic" has been issued to Nathan Newsom.

I have the honor to be,
Very respectfully, your obt. serv't.,

THOS. EWBANK, *Com.*

To Hon. R. W. JOHNSON,
House of Representatives.

The evidence, as above, was introduced by the appellant, which being concluded, the appellee then read to the jury, on his part, the two bonds, *to wit:* the one for $150, and the other for $300, described in the declaration, which was all the evidence adduced in the cause.

The court, on the motion of the appellant, instructed the jury as follows:

1*st.* If the jury believe, from the evidence, that the medicine, for which the bonds in controversy were given, was not, in truth, patented by the Government of the United States, and the contract was for the exclusive patent-right to such medicine, then the transaction was, and is, in law, a fraud on the purchaser.

2*d.* That, in this case, William Wright, the assignee of the instruments sued on, stands on the same grounds, and is subject to be defeated by the same defence as if the suit were brought in the name of Peter German, the payee.

3d. The written contracts in evidence in the cause, are conclusive upon the parties, and no evidence can be considered by the jury to change, alter, or vary the written contract.

4th. Without a patent, duly granted by the United States, no one can have an exclusive right to any medicine, or other invention, and could not sell the same so as to vest an exclusive right to make or vend the same, in his vendee; any one having as much right as another to make and sell the same; but a party may sell an exclusive right to property.

5th. No patent can be granted for the exclusive use of a medicine, if all the ingredients and qualities thereof have been long known to the medical profession, or the public.

6th. All evidence in this case, which goes to show the good qualities or properties of the medicine referred to, should be disregarded by the jury.

7th. When a party undertakes to sell, and does sell a patent-right, he cannot recover on notes given therefor, unless he prove he had a patent from the proper authority of the United States.

It does not appear, from the bill of exceptions, that the appellee moved or asked for any instructions at all: but the court, without motion, charged the jury as follows: "That the jury should exclude from their consideration all the evidence in relation to the acts, declarations and admissions of Cottingham, with which German was not connected, and in which he did not participate; and that the notes and contracts of the parties, are conclusive on them; and all parol evidence, in regard to contracts, should be excluded from the minds of the jury: and the notes sued on, were *prima facie* evidence of debt, and it devolved on defendant to prove that they were obtained by *fraud* or *without consideration.*"

On the foregoing issues, evidence and instructions, the jury returned a verdict for the appellee, for the amount of the two notes declared on: that is to say, for the one for $300 and $150, and the accrued interest. On the return of this verdict, the appellant filed his motion in the court below for a new trial, and assigned the following causes, *to wit:*

1. Because the jury found contrary to the evidence.

2. Because the jury found contrary to the instructions of the court.

3. Because the jury were wholly misled as to the issues joined, and the law arising upon the facts, or misunderstood the charge of the court, as to what would avoid the instruments sued on.

4. Because the court erred in the general charge to the jury.

5. Because the finding was for too much, according to the proof in the case.

Which was overruled by the court; and, thereupon, the appellant excepted, setting out the evidence aforesaid, the instructions, and the said motion for a new trial, in his bill of exceptions; filed his affidavit, prayed an appeal which was granted, and entered into the recognizance required by law, to the end that his appeal might operate as a supersedeas.

On this state of facts, the appellant has filed in this court his assignment in errors, setting out the following, *to wit:*

1*st.* That the court erred in overruling the motion of said appellant for a new trial.

2*d.* The court erred in giving the instructions to the jury.

3*d.* That the court erred in refusing certain instructions moved by said appellant.

4*th.* The finding of the jury was contrary to the law and evidence.

5*th.* The finding of the jury was for too much.

6*th.* General assignment of errors.

The record brought to this court is quite a voluminous one, embodying, as it does, all the facts submitted to the jury in the form of oral testimony, depositions and documentary evidence, as well as the pleadings in the cause. We have thought proper to give a full and concise statement of the case; and have, in many instances, copied the evidence in the very language in which it appears in the transcript. This we have done to the end, and with the view that our conclusions, upon the law, may be properly understood, and their application made to the facts

and particular state of the case, as it really and truly exists on the record.

Before proceeding to the determination of the several errors assigned, we desire to premise that the record, in this instance, shows a most unprecedented liberality, on the part of the counsel for the appellee in the court below, in not objecting to the *admissibility* or *competency* of much of the evidence copied in the transcript; for it does not appear that any objection was urged to the introduction of any portion of it at the trial. In noticing the fact, we do not desire to be understood as disapproving the liberality manifested by counsel in the court below. Our object in doing so, being, in part, to record our approval of the liberal spirit indicated; and, at the same time, place the court, before whom the proceedings were had, in a proper position in respect to the matter, to the end that it should not be held responsible for what otherwise might seem an improper admission of evidence.

To review the errors assigned, the judgment of this court is invoked.

Before proceeding to determine the several errors assigned, we will take up and consider several incidental and preliminary questions presented by the record, and raised by the argument of counsel in this cause.

It is insisted, upon the part of the appellee, that the judgment of the Circuit Court must be sustained and affirmed, for the reason, that the appellee inserted in his declarations on both bonds, counts averring that after said bonds were made, appellant induced appellee to buy them by assuring him that they were good and valid, and that they would be paid, and that the pleas interposed by the appellant are not responsive to those counts; and, in point of fact, that those counts remain to this time unanswered, and virtually confessed by the appellant.

On examination of the pleas, we think it very evident the pleader did design them to apply only to the usual counts on the bonds, *i. e.:* the first count in each declaration, for it will be

observed that no allusion is made in them to the averments contained in the above counts in the declaration. Conceding this point, then, for the appellee, the question results, whether the appellee should not have had judgment in the court below.

It has been the rule of practice of this court, sanctioned and authorized by legislative enactment, (*Digest*, 827, *sec.* 37,) from the period of its organization to the present, "In all cases coming before it for revision or correction, by appeal, or upon writs of error, &c., &c., &c., to open the whole record for re-examination and revision, and that the party injured shall have full benefit of all and every objection and exception, that would have availed him upon the proceedings in the court below, though not formally taken or made at the time of the trial, &c., &c., &c., if not cured by the statute of amendments and jeofails, or aided by verdict. See *Pope Gov. use of Reed vs. Latham et al.*, 1 *Ark. Rep.* 72. With this broad and liberal rule before us, let us return to the position of the appellee, stated above, and determine whether he is sustained in it. To do so, we shall have to recur necessarily to his declaration, and the appellant's two pleas. Does the appellee attempt in his declaration to count on the promise which he avers to have been made by appellant to the appellee before he bought and became the purchaser of the bonds set out in his declaration; or does he count on the bonds, and set up the matters averred as a reason why he should not be barred from having and maintaining his action thereon? If the latter, then the pleas of the appellant will be intended to apply to these counts, as to the first. In pleading, all intendments are taken most strongly against the pleader, and most favorable to his adversary; for the reason, that it is to be presumed that every person states his case most favorable to himself. 1 *Chitty's Pleadings* 237. In view of this, then, how are we to construe the latter counts in the appellee's declaration? We are constrained to hold that he declared, in these counts, on the two bonds set out, and that he intended the matter in reference to the understanding between himself and appellant, as only inducement, or that it is surplus-

age. And we conceive that we are sustained in this, from the fact, that the appellee absolutely makes profert of the bonds in these counts; which, of course, he would not have done if *they* had not been intended by him, as the causes of action declared on. Besides this, the court would be doing violence to its own feelings to suppose, for a moment, that the counsel intended, by his declaration, to anticipate from his adversary, a defence which he should have made, if at all, at law, in response to a plea denying the consideration of the bonds sued on. The bonds being regarded as the causes of action in each count; it follows, therefore, that the pleas of the appellant denying their consideration, are responsive to the whole declaration.

Having disposed of the question just considered, invited by the argument of the appellee, we will next proceed to the determination of one, to which the attention of the court has been called by the argument of the appellant, being like the first, outside, but resulting from the errors assigned. It is insisted by the appellant, that the burden of the issues presented by the record, was upon the appellee, and specious arguments are resorted to with the view of establishing this position. We shall have to resort again to the pleas and the replications thereto, to determine the question.

The pleas interposed are, virtually, pleas denying the consideration superinducing the execution of the instruments sued on. The gravaman of the pleas, in the one case, is that Cottingham represented that the medicine was patented, when it was not; and in the other, that German made the representation. A failure of consideration must proceed from some fact or occurrence, which intervenes between the making the contract and the time of pleading. In the case at bar, the appellant avers in his pleas that at the time the representations were made by the parties respectively, in respect to the medicine, it was not patented, nor had it been up to the time of the filing the pleas. The appellant might have plead generally, "no consideration:" (see *Dickson vs. Burke*, 1 *Eng. Rep.* 412), in which event the burden of

the issue would have been upon the appellee, but electing to plead the matter specially, as in case of *failure* of consideration, he must be held to the consequences thereof, *i. e.;* the proof of the issue assumed by himself; for by pleading specially, he pleads by way of confession and avoidance, as in case of special *non est factum*, and the issue is on him. See *Pope Gov. use, &c. vs. Latham et al.*, before referred to, and the authorities cited. And this we say in respect to both bonds, notwithstanding the replication of the appellee to the plea of appellant averring the want of consideration of the one for $300, replies that, as to that, there was a "*valuable consideration;*" for this averment, on his part, we can hold in no other light than as a simple traverse, though perhaps inartificial, of the appellant's plea, to which it was intended to apply. See *McDaniel vs. Grace et al.*, 15 *Ark. Rep.* 490.

Having thus disposed of all the incidental, or preliminary questions presented by the record, and argument of counsel in this cause, we will at once proceed to the determination of those directly involved in the assignment of errors.

The appellee stands before this court as the assignee of the choses in action declared on. The evidence, upon which the jury acted, is before us, and we are asked to set aside the verdict predicated upon those facts, and reverse the judgment of the court based thereon, for the reason, as it is asserted "that the finding of the jury was contrary to law and evidence."

In determining this question, we are irresistibly forced into the inquiry, whether the fact of appellee's relation to the original parties to the bonds sued on, taken in connection with the facts elicited at the trial, do not place him in such a position as to make it imperative on the court, to affirm the judgment of the court below?

The 3*d section* of our *act* of *Assignments*, (*chap.* 15, *Dig.*, *p.* 162,) provides that: "Nothing contained in this act shall change the nature of the defence, or prevent the allowance of discounts or off-setts, either in law or equity, that any defendant may have against the original assignor, previous to the assignment, or against the plaintiff, or assignee after the assignment."

We have holden, that though the pleas of the appellant are special pleas, and as a consequence thereof, that the burden of proof was on him, that nevertheless they were pleas setting up a want of consideration of the instruments sued on. If the pleas had been *no consideration*, generally, from analogy to the rule of evidence in the case of an issue on a *general non est factum*, as well as the principles of law laid down by this court in the case of *Chancy use &c. vs. Higginbotham*, 5 *Eng. Rep.* 275, and authorities there cited, the issue would have been upon the appellee.

The *special plea of no consideration*, though it imposes burdens upon the party pleading it, does not, in the slightest degree, alter or change the rights of the adversary party, in respect to his defence thereunder. Under an issue on a general plea of "no consideration," the appellee might well have shown, standing in the attitude of an assignee, as he does in this instance, the facts that he attempts to make available to him in his declaration, to the effect, that before he bought the bonds, he gave notice of his intention to do so, to the appellant, and that appellant assured him the said bonds were good, and would be paid at maturity; for we hold that nothwithstanding the above recited statute, and the subsequent adjudications of this court construing it, which we fully approve and re-affirm, the appellant, if he was cognizant of the fraud alleged to have been perpetrated by Cottingham and German, or by German alone, in the sale of the patent-right to the "*Vegetable Tonic*," when he was applied to, as is alleged by the appellee declaring his purpose to purchase and become the assignee of the bonds sued on, as a consequence thereof, has forever precluded himself from all relief in consequence of a want, or because of their being no consideration moving from Cottingham and German to himself for the act; and we are sustained in this view by both principle and authority. See *McLain & Badgett vs. Coulter*, 5 *Ark. Rep.* 16; 1 *Tucker's Com.* 335, where the author says: "If *before* the assignee takes an assignment, he applies to the obligor, informs him of his design to buy, and requests to

be informed if he has any objection to the payment; if the obligor is *aware of his equity, and conceals it*, he cannot afterwards set it up against the assignee, who has been thus induced by his representations and fraudulent conduct to pay his money for the bond." See, also, *Davis vs. Bar*, 9 *Serg. & Rawle* 141; *Reedy and wife vs. Warner*, 16 *Serg. & Rawle* 21; *Elliott use &c. vs. Callan*, 1 *Pen. Rep.* 30; *Decker use &c. vs. Eisenharrer & Bolander*, *ib.* 478, *et seq.*; *Buckner et al. vs. Smith et al.*, 1 *Wash. Va. Rep.* 381. Indeed, some of the authorities, which we have quoted, go much further than we have thought proper to go in the present case; holding, as they do, that the above would be the effect, whether the party, the obligor, was aware of his equity, or not, at the time of the application to him by the intended assignee of the bond. Not having an opportunity of examining all the authorities on the subject, and the point not being directly involved in the cause under consideration, beyond the qualification as contained in the extract from Judge TUCKER's work, we will content ourselves, for the time being, with adopting that as the law.

It is insisted by appellee, that it is manifest, from the testimony adduced at the trial, that appellant was applied to by appellee, to know if the bonds sued on, which he also insists he represented at the time, he was about to buy and purchase, were good and valid; and that appellant assured appellee that they were, and would be paid; and it is further insisted by the appellee, that he bought and paid a valuable consideration for the bonds in question, under this assurance. If this were true in point of fact, which we cannot admit from the evidence set out in the bill of exceptions, it would undoubtedly have been incumbent upon the appellant, as a material matter of defence, on his part to prove that, at the time application was made to him, as is supposed by the appellee, saying he was about to purchase the bonds, he was ignorant of the fraud and deception said to have been practised upon him by Cottingham and German.

But, as we have before stated, the proof shows no such state of

facts. German was the only witness who made any statement in relation to the matter at all, and his statement is to this effect: "That in the fall of 1851, Brown was informed Wright had the notes, and he then said he would pay them when they fell due, but asked me not to assign the others." This was, of course, posterior to the assignment to appellee, and gives evidence, to us conclusive, that appellant had not been consulted by appellee, before he became the assignee of the bonds in question; and, consequently, under the provisions of the statute, which we have quoted above, and in conformity with the ruling of this court, in the case *Walker ad, et al. vs. Johnson et al.*, 13 *Ark Rep.* 522, his proof, as qualified by this opinion, should have been available to him before the jury.

We will, therefore refer, to the pleas of the appellant, the issues thereon, and the proof introduced in support thereof, so far as it may be necessary for our present purposes, and in conformity with our views hereinafter expressed.

Then, as to the plea of the appellant as to the $150 bond. In this, he substantially avers that Cottingham and German were partners, or were jointly interested in an alleged patent-right to a certain medicine called Newsom's Vegetable Tonic—that the former offered to sell to appellant the knowledge of making and the exclusive right of using and vending the same, in the counties of Hot Spring, Pulaski and Saline, in this State, and have the proceeds arising therefrom, during the term of the alleged patent; that Cottingham falsely and fraudulently represented said medicine to be regularly patented under the acts of Congress, traversing the issuance of the patent; and, as a consequence, a want of consideration for said bond. The proof of the issue upon this plea, as we before remarked and held, was on the appellant. Do the facts of the case prove beyond all doubt, question or cavil, every fact that was material and necessary for the appellant to have made out to support and maintain the issue which he himself invirted and tendered? An appeal to them will show that the appellant failed to prove that Cottingham made the sale to

him; that Cottingham and German were partners, or were jointly interested in the alleged patent-right; or that Cottingham had anything to do in the sale to, and the purchase of appellant. But from the evidence of German introduced by the appellant, the reverse thereof would seem to be true. The plea in respect to the $150 bond, being based upon these facts, it follows, as a necessary consequence, that a failure to establish them would determine the issue thereon for the appellee; for we hold that it was necessary for the appellant to have shown some agency, or community between Cottingham and German, before the declarations or admissions of the former could be taken or regarded as affecting the latter. Otherwise, there would be no security for the rights of individuals. After the purchase from Cottingham by German was concluded, the subject matter of the contract, as far as Cottingham was concerned, had departed from him. He stood in respect to *it*, and his vendee, as a stranger, and as if he had never known them. His feelings and sympathies for German, though never so kind, without other privity, could not authorize him to make representations, which could conclude German, or in anywise embarrass or hinder his rights in respect to the thing bought. What he may have said to appellant or his Methodist brethren, posterior to the sale to German, so far as the transaction between the appellant and German and his assignee are involved, must be regarded as wholly foreign to the subject under consideration: and as was properly remarked by the judge, who tried this cause in the court below, should have been "discarded from the minds of the jury in making up their verdict," which it seems they did. As to the issue, then, upon the first plea of the appellant, in respect to the $150 bond, we hold that the verdict of the jury must be affirmed.

As to the second plea of the appellant, applicable to the $300 bond, it will be perceived on reference to it, as we have shown from our statement of the case above, it is, in effect, like the one we have just been considering, except that it is averred therein, that German did what was charged in that to have been done by Cottingham.

What is the evidence in support of the issue on this plea? It is the bill of sale made by German to appellant, in these words: "That I have this day sold to Fountain Brown the patent-right to Jefferson and Dallas counties of Newsom's Vegetable Tonic:" the testimony of German, to the effect that this note was given as the consideration, and the evidence of the Commissioner of Patents, and of the Patent Office, that no such medicine had ever been patented under the acts of Congress.

There can be no doubt, from this proof, that the subject matter of the sale was not the knowledge of making and the right of using and vending this medicine, but that it was *the exclusive rights known to be conferred upon the inventor and his assignees by the act of Congress in respect to it, within the counties named.* It is evident from this instrument, that *this* was the consideration inducing the purchase on the part of the appellant. If it was not, why did appellant go to the witness, German, as he states, after he discovered and ascertained that the medicine was not *really patented*, and demand of him his notes, and ask that the trade which he had made, might be canceled? The bill of sale purports to convey "a patent-right." If such right is the subject of sale, strictly speaking, such sale only conveys *an incorporal right*, one that is intangible, and subsists only in essence, or action. When German sold to appellant the patent-right to "Newsom's Vegetable Tonic" for the counties of Jefferson and Dallas, he sold him the art and mystery of its manufacture; the exclusive right to use, vend and sell it within those counties, as incidents of the patent. If, therefore, it is manifest from the evidence, as we have already held it to be, that there was no patent really issued to the original (supposed) patentee of this medicine, it follows as a legitimate fact, that appellant bought nothing from German; for we hold that, to make a sale executed, in legal parlance, the subject matter must be in existence at the time, or the contract is utterly and absolutely void. We do not pretend to hold, that a man may not make an *executory sale* of articles not manufactured, or of things at a distance, &c., &c., but we apprehend that in re-

spect to executed sales, the thing must be in existence at the time, or the contract be void. Wherefore, in respect to the $300 bond, we hold there was no evidence before the jury which could have authorized them to find for the appellee. There was no conflict in the testimony in respect to this bond. There was no counter testimony for them to weigh. It was all on one side. Without intruding upon the principles contained in the former adjudications of this court, or doing violance to the constitutional powers of the jury, we hold that the finding for the appellee, in respect to the $300 bond, was unwarranted by the law and the evidence, and that the verdict is therefore for too much, to the amount of such bond, and the interest which had accrued thereon to the date of the judgment in the court below.

As it is possible, from the judgment which we will render in this cause, that it may go back to the Circuit Court of Jefferson county for future adjudication, and inasmuch as these and other points presented by the assignment of errors, may arise in the court below, we feel that we are called upon, also, to pass upon them.

It is assigned that the Circuit Court erred in its instructions to the jury. We think it very clear, from the principles already stated, that the court did err in giving several of the instructions asked for by the appellant, and that it was possible for the jury to have been misled by them. But as they were asked for by him, and as the injury likely to result from them, must have been in his favor, he cannot be heard to complain; he is estopped from setting up the error in his behalf, and must abide the consequences of his own wrong. And in regard to the instruction given by the court, on its own suggestion, though we do not approve of it in detail; yet, in the main, we conceive he correctly stated the law bearing upon the particular state of facts developed at the trial. And we entirely concur with him, so far as his instructions went to exclude the declarations made by Cottingham, after the purchase made from him by German, for the reasons before herein assigned; and see 1 *Greenleaf's Evidence, section* 111, 112 113, 114.

We only object to the instruction under consideration, because of its ambiguity and uncertainty, but do not conceive it possible that the jury could have been misled by it, farther than in respect to the $300 bond.

Wherefore, unless the appellee will enter a remittitur for the sum of $300, and the interest which had accrued thereon from the time of its maturity to the date of the judgment below, the judgment of the Jefferson Circuit Court will be set aside, and a new trial granted.

GOODWIN VS. ANDERSON ET AL.

A judgment by attachment, before a justice of the peace, without personal service of process upon the defendant, or appearance, is a judgment *in rem;* and cannot be transferred to the office of the clerk of the Circuit Court, for the purpose of constituting a lien upon the realty of the debtor, or of being satisfied by execution or garnishment, out of property or effects, other than the goods attached.

Appeal from the Circuit Court of Union County.

The Hon. THOMAS HUBBARD, Circuit Judge.

WATSON, for the appellant.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

It appears from the transcript in this case, that Anderson & Coulter brought suit, by attachment, before a justice of the peace

of Union county, upon an account against one Gosney, and the constable returned the writ of attachment not found, as to Gosney, but levied upon a trunk, three pair of pants, a coat, inkstand, American Form-book, and the life of John Randolph, as the goods and chattels of the absent debtor. That after posting up notices, as prescribed by law, judgment was finally rendered by the justice against Gosney, on default of appearance, for $30 75, and for costs. That execution was issued upon the judgment, and returned with a credit of $5 endorsed. That Anderson & Coulter afterwards filed a transcript in the office of the clerk of the Circuit Court of Union county, and caused to be issued thereon a writ of garnishment against Goodwin, returnable into said court. At the return term, allegations and interrogatories were filed by the plaintiffs, against Goodwin, which he answered, stating that he had previously executed his note to Gosney for $1100, but whether he was still the owner and holder of the note, or had transferred it to some other person, respondent was not informed, and did not know; he, therefore, denied that he was indebted to Gosney, except as above stated. Upon this answer, the court rendered judgment against him for the amount due upon the judgment of the justice against Gosney, with costs, &c., to which he excepted, and appealed to this court.

There being no personal service of process upon Gosney, and no appearance by him, in the attachment suit, the proceedings and judgment were *in rem*, and of no vitality, except for the condemnation and sale of the property attached. The judgment could not be transferred to the clerk's office for the purpose of constituting a lien upon the realty of the debtor, or of being satisfied by execution or garnishment, out of property or effects other than the goods attached. *Boothe vs. Estes*, 16 *Ark.*

The judgment of the Circuit Court must be set aside, and the cause remanded, with instructions to dismiss it for want of jurisdiction.

SWINNEY ET AL. VS. BURNSIDE & CO.

The allegation, in the body of a declaration upon a promissory note, that the defendants "at New Orleans, to wit: at the City of New Orleans, in the State of Louisiana, made their promissory note in writing," &c., is immaterial, not traversable, and may be treated as surplusage. The venue in the margin, if necessary at all, is sufficient.

It is sufficient, in a declaration upon a promissory note signed by the defendants, by their firm name, to allege that they made the note without stating that they were partners, or setting forth in the body of the declaration, the manner or style in which they executed the note.

Appeal from the Circuit Court of Scott County.

The Hon. FELIX I. BATSON, Circuit Judge.

THOMASSON, for the appellant.

STILLWELL, for the appellees.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Burnside & Co, brought an action of debt in the Scott Circuit Court, against Swinney and Tumlinson, on a promissory note. The defendants craved oyer of the note sued on, which was granted, the record states, by filing the original; and they demurred to the declaration: the court overruled the demurrer, and they permitted final judgment to be rendered thereon, and appealed to this court.

One of the causes assigned for the demurrer, is an alleged variance between the note declared on, and that granted on oyer, in this, that the declaration described the note as payable to the plaintiffs, and the note granted on oyer is payable to the *order of* plaintiffs. The note filed on oyer does not appear in the transcript

before us; and we are, therefore, unable to determine whether the alleged variance existed or not, saying nothing of its materiality.

The next cause of demurrer questions the sufficiency of the venue as alleged. After the usual commencement in debt, the declaration proceeds thus: "For that, whereas, the said defendants, &c., heretofore, *to wit*, on, &c., at New Orleans, *to wit:* at the City of New Orleans, in the State of Louisiana, made their certain promissory note in writing, &c. The venue of the action (Scott county) is in the margin, but not laid in the body of the declaration.

In *Pullen vs. Chase*, 4 *Ark. Rep.* 210, this court held, that in transitory actions upon contracts, it was not necessary to state the venue in the body of the declaration.

The statement that the note was made in New Orleans, was perhaps designed, by the pleader, as descriptive of the instrument.

It has been held that where a bond, bill or note is dated at a place in a foreign country or State, the declaration must set out the place where it was made, and then allege the venue of the action under a *videlicit*, as at New Orleans, *to wit:* in the county of Scott. 1 *Chit. Pl.* 280, 281; *Gould Plead., chap.* 3, *sec.* 160; *Alden vs. Griner*, 13 *John. Rep.* 449; *Fairfield vs. Adams*, 16 *Pick.* 381. But in the case of *Lemon et al. vs. Hill ad.*, 2 *Eng. Rep.* 73, this court cited, with approbation, the case *Houreit et al. vs. Morris*, 3 *Camp.*, in which Lord ELLENBOROUGH held that it was unnecesaary to state the place where the instrument was made. See, also, *Chitty on Bills, p.* 564; *Payne vs. Britton's ex.*, 6 *Randolph* 101.

In the case last cited, the court said: "In England, the venue is material as serving for a direction as to what county the issue, if any, should be made up, is to be sent for trial; but even there, it is of such little consequence that the *venue* generally determined by the name of the county written in the margin of the declaration, as with us, if it be wrong, does not hurt; and if it be right, helps; as if the *venue* in the margin be wrong, and that

in the body of the declaration be right, or *vice versa*. With us, it is of no consequence whatever, in transitory actions, as I believe all personal actions are. For, upon a declaration filed in the court of Faquier, stating the contract to be made in Culpepper, the court of Faquier, is the proper tribunal to try it," &c.

We think the allegation in this case, that the note was made in New Orleans, was immaterial, not traversable, and may be treated as surplusage.

The place where the instrument is made, may be matter of substance in some cases, as upon a foreign bill or note, where the plaintiff seeks to recover damages, or a rate of interest different from that allowed by the law of the forum, &c. But not otherwise.

The third and last ground of demurrer is, that the defendants are not sued as partners, and yet the declaration alleges that they executed the note "by and under the name, style and firm of Swinney & Tulinson."

In the commence of the declaration, the plaintiffs "complain of James M. M. Swinney and Wiley A. Tulinson, defendants herein, that they render unto them, the said plaintiffs, the sum of," &c., and then in setting out the cause of action, the declaration describes the note as having been executed by the defendants, as above stated.

It was not necessary to state in the commencement of the declaration, that the defendants were partners, or to set forth in the body of the declaration, the manner or style in which they executed the note, though it is usual in declaring against partners to do both. It would have been sufficient, it seems, to have alleged simply that the defendants made the note. *Mack vs. Spencer*, 4 *Wend.* 412; *Peas vs. Morgan*, 7 *John. Rep.* 468; *Jones vs. Mars et al.*, 2 *Camp.* 305; *Vallett et al. vs. Parker*, 6 *Wend.* 615; *Nutt vs. Hunt*, 4 *Sm. & Marsh.* 702; *Goelet vs. McKinstry*, 1 *John. Cases* 405.

The declaration was substantially good, and the judgement of the court below is affirmed.

McFarland vs. Shipp as ad.

An instrument of writing, that the defendant "received" of the plaintiff "one hundred and ten dollars," does not import an admission of indebtedness, and will not, without other evidence, support an action for money lent.

Writ of Error to Montgomery Circuit Court.

Hon. THOMAS HUBBARD, Circuit Judge.

FLANAGIN, for the plaintiff. That the instructions asked for by the plaintiff in error ought to have been given. 4 *Phill. Ev.* 121; 2 *Saund. Pl. & Ev.* 677; 2 *Greenlf. Ev.* 98, *sec.* 112; 1 *Stark. Rep.* 474; 4 *Esp.* 9.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Thomas G. Shipp, as administrator of Elias L. Hughes, deceased, brought assumpsit in the Montgomery Circuit Court, against William D. McFarland, on the following instrument:

"Received of Elias L. Hughes, Mount Ida, February 2d, 1853, one hundred and ten dollars.

WM. D. McFARLAND."

The declaration alleged that the receipt was given for so much money lent and advanced by Hughes to McFarland. It also contained a common count, &c.

The defendant filed three pleas.

1. Non-assumpsit.

2. That the receipt mentioned in the declaration was given for money paid the defendant, by the plaintiff's intestate, and was intended by the parties as a discharge of a portion of indebtedness due from said intestate to the defendant; without this, that

said receipt was intended to evidence indebtedness from the defendant to the plaintiff's intestate, &c.

3. Set-off.

Issues being joined to these pleas, as the record states, the cause was submitted to a jury, and verdict in favor of the plaintiffs for $124 85 damages.

From a bill of exceptions taken by the defendant, it appears that upon the trial, the plaintiff introduced no evidence except the receipt above copied, and the defendant none. Whereupon, the defendant asked the court to instruct the jury as follows: 1st. "That proof of the defendant having received money from the plaintiffs's intestate, was not sufficient, of itself, to enable the plaintiff to recover.

2. "That the legal import of the instrument offered in evidence, is evidence of payment of money due from the plaintiff's intestate, unless it was explained by other testimony."

Which instructions the court refused to give, but instructed the jury to return a verdict for the amount mentioned in the receipt and the defendant excepted, and brought error.

The receipt did not import upon its face any admission of indebtedness from the plaintiff in error to the defendant's intestate, or promise to pay him money. It was not, of itself, sufficient evidence to maintain the action, and the plaintiff should have been required to produce additional testimony.

Had a witness testified merely that he saw Hughes *deliver* to McFarland, on some occasion, $110, this would not have sustained a count for money lent, (2 *Greenl. Ev.*, *p.* 98, *sec.* 112,) and yet this would be as much evidence of indebtedness as the receipt relied upon in this case.

The court erred in instructing the jury to return a verdict in favor of the plaintiff, without additional evidence to sustain the action, and for this, the judgment is reversed, and the cause remanded, with instructions to grant a new trial.

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CLARK VS. CROSLAND.

The latter clause of the 3d section of the act of Congress, approved 3d of March, 1847, amendatory of acts in relation to the Department of Indian Affairs, and to trade and intercourse with the Indians, is too broad and comprehensive, in its terms, to be restricted to contracts for spirituous liquors.

Appeal from Crawford Circuit Court.

Hon. FELIX I. BATSON, Circuit Judge.

FOWLER & STILLWELL, for the appellant.

WALKER & GREEN, for the appellees.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Solomon F. Clark brought an action of debt, by attachment, against Richard Crosland, in the Crawford Circuit Court, upon a writing obligatory, for $325, executed by Crosland to Clark, on the 6th of November, 1848, due one day after its date.

The defendant filed a special plea as follows: "*Actio. non*, because, he says that by the third section of the act of the Congress of the United States, approved the 3d of March, 1847, entitled 'An act to amend an act entitled an act, to provide for the better organization of the Department of Indian Affairs, and an act entitled an act to regulate trade and intercourse with the Indian Tribes, and to preserve peace on the frontier, approved the 30th of June, A. D. 1834, and for other purposes;' it is among other things enacted, and declared, that all executory contracts, made and entered into by any Indian, for the payment of money or goods, shall be deemed and held to be null and void, and of

no binding effect whatever: And the said defendant further avers that he, the said defendant, is a Cherokee Indian, and a native-born subject of the Cherokee Nation, west of the State of Arkansas: and that the said writing obligatory, in the said plaintiff's declaration mentioned, was executed in said Cherokee Nation; whereof, he, the said defendant, was a citizen and subject at the time of its execution: and this the said defendant is ready to verify"—wherefore, &c.

To this plea, the plaintiff interposed a general demurrer, which the court overruled; and he declining to respond further to the plea, final judgment was rendered for the defendant: and the plaintiff appealed to this court.

The sufficiency of the plea is the only question in the case.

The last clause of the 3d section of the act referred to in the plea, declares: "All executory contracts, made and entered into by any Indian, for the payment of money or goods, shall be deemed and held to be null and void, and of no binding effect whatsoever." 9 *vol. United States Statutes at Large, p.* 203.

It is insisted, by the counsel for the appellant, that this clause of the act, when construed in connection with its other provisions, must be held to apply only to contracts made by Indians to pay for spirituous liquors, &c., introduced into their country, and sold to them, contrary to the prohibitions of the act—this being the subject matter of the enactment.

We think the clause of the act in question, is too broad and comprehensive, in its terms, to admit of this restriction.

The first section of the act relates to the limits of the Indian Superintendencies, Agencies, &c. The second prescribes the penalty for introducing into the Indian country, and selling spirituous liquors, &c. The third section provides for the payment of annuities, &c., due from the United States to the Indians, to the heads of families, &c.; but forbids the distribution of moneys, goods, &c., to them while intoxicated; and then follows the clause above copied.

Had it been the design of Congress to restrict the application

of this clause of the act to contracts made upon the sale of spirituous liquors, &c., the presumption is, that this design would have been manifested in the language employed.

The Indians upon our western frontier, since their removal from their former homes, east of the Mississippi, have been, to some extent, under the parental guardianship and protection of the Government of the United States: have been receiving annuities under treaty stipulations, &c.: and being of an inferior race, many of them ignorant, and easily imposed upon, Congress deemed it expedient, no doubt, to pass the clause of the act in question to guard them against imposition, &c.

The plea appearing to be good in substance, and no other objection being taken to it here, than the one above stated, the judgment of the court below must be affirmed.

PRICE AND WIFE VS. NOTREBE'S HEIR AND EXRS.

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In a proceeding in equity by the widow, against the heirs and executors of her deceased husband, for dower, an executor, who is a party to the record, liable to cost, and interested in freeing himself from responsibility, and charging the estate in the hands of the heirs, is an incompetent witness for the complainant.

There is no pretence for a bill of review, where the decree is in accordance with the whole scope and tenor of the original bill, in which there was no allegations upon which the decree prayed for in the bill of review, could have been based, and no discovery alleged of any new matter or evidence, which could not have been had when the original decree was passed.

A bill of review cannot be maintained upon allegations that the decree, on the original bill, was entered without the assent of the complainant; or through the mistake, carelessness, or unfaithfulness of her solicitors:

Nor for the failure of the court to decree to the complainant, on a bill for dower against the heir and executors, her dower on the rents and profits of her deceased husband's real estate, and in the money on hand at his death, where the court had referred the question of such rents and profits to the master—the right claimed as to the money on hand being conceded in the answer, and not decreed against her. This court, in such case, will intend that the question, as to the money on hand, as well as the rents and profits, was reserved by the court, in the original case, until the coming in of the report of the master, and the final decree.

Appeal from the Circuit Court of Arkansas County in Chancery.

The Hon. THEODORIC F. SORRELLS, Circuit Judge.

FOWLER, for the appellant. The court below, we think, clearly erred in dismissing the bill of review, for whatever may be the evidence as to the new matter charged, or the law arising thereon, some of the errors pointed out by the bill as existing in the former decree, clearly ought to have been corrected. And, if so, to dismiss the bill, was erroneous. See 2 *Sm. Chan. Rep.* 51, 56; 4 *Mon. Rep.* 145; 3 *Gilm. Rep.* 10; 4 *Hen. & Munf. Rep.* 244; *Story's Eq. Plead.*, *sec.* 407, 420; 10 *B. Mon. Rep.* 301.

In the original bill, which is responded to by the pleadings, dower was claimed in the cash on hand at the testator's death; and the decree does not give the complainant any part of it, although the answers admit that there was money on hand. See *Ark. Digest*, *p.* 448, *sec.* 20; 5 *Ark. Rep.* 620.

She was also clearly entitled to one-third of the *rents* and *profits* of the real estate, and of the *hire* of the slaves, from the death of her husband. See 1 *Story's Eq. Jur.*, *sec.* 512, 626, 625; 2 *Cond. Rep.* 538; 7 *Cranch Rep.* 370; 2 *Bro. C. R.* 631 *to* 634; 4 *John. Ch. Rep.* 604; 5 *ib.* 488; 4 *Kent Com.* 69; 4 *Paige Ch. Rep.* 99; 6 *ib.* 479; 10 *Misso. Rep.* 749.

The rents and hire are not embraced in the decree, and if the court had any right, after the final decree, in which they were not mentioned, to direct the master to take an account of them, which the master never did, this forms no part of the decree, and

the complainant's rights can only be secured by such a bill as this, asking the *supplemental decree*, as prayed for in this case. See 13 *Pet. Rep.* 462; *Cooper's Eq. Plead.* 305, 306.

CUMMINS, contra. The decree can only be according to the case made by the bill and the relief prayed. *Lube's Eq. Plead.* 18, *and note;* 13 *Ark. Rep.* 187; *ib.* 94, *and cases cited; Story's Eq. Plead., sec.* 41, 42.

In the original bill, one-third the *nett profits* and *income* is prayed, and no more could be given.

The claim of dower in negroes and lands, necessarily involved the question as to the extent of her right.

She could not split up her rights in a particular subject—recover for part of a right, and then sue for residue. *Story's Eq. Plead., sec.* 287; 3 *Cow. and Hill's Notes, n.* 588, *p.* 830, *et seq.; n.* 590, *p.* 839, 840; *n.* 592, *p.* 842; *n.* 692, *p.* 965, 957, 966 *et seq.*

All the facts in the case were known before and at the time of the decree—the party voluntarily took decree on the answers confessed. An amendment or supplement in such case would be a novelty. *Story's Equity Plead. sec.* 887, 890, 336, *&c.*, 338; 4 *Paige* 130.

There is no error in law, or newly discovered evidence, to warrant a bill of review. *Story's Equity Plead., sec.* 403, 407 *and note;* 411, 421 *and notes;* 422.

The deposition of the executor ought to have been suppressed, because he was subject to personal decree for the whole claim set up, and was liable for costs.

Mr. Justice SCOTT delivered the opinion of the Court.

This bill, as well as the original one, the proceedings in which are now sought to be reviewed, was filed by Mrs. Notrebe, as widow of Frederick Notrebe, deceased, against the executors and heirs at law of the latter. Mrs. Notrebe having afterwards intermarried with Price, he, therefore, was made a party complainant.

The case presented on the original bill, was, that on the 23d of October, 1843, Frederick Notrebe made his last will and testament, whereby he devised one-half of his estate to his wife, and the other to his son and grand-daughter. The son having died in the lifetime of the father, the grand-daughter took under the will the share devised to him. In April, 1849, Mr. Notrebe died. On the seventeenth of June following, his will having been probated, letters testamentary were issued, and the estate was taken in custody by the executors. On the 10th of September, 1850, the widow, by deed, which was recorded on the 16th of that month, released her right under the will, and proceeded, by bill, against the executors and heir at law, in the Circuit Court of Arkansas county, for dower: alleging all that was needful, with specific averments, as to all the varieties of property constituting the estate; and after avering that no sum of "money" had been paid her, as dower, proceeds to allege that she had often applied to the executors "to account with her, and pay to her the amount of one-third part of the nett income, proceeds and profits of the said estate accrued, due since the said Frederick's death, and received by them, or either of them, and to let your oratrix into possession of the one-third part of the proceeds and profits of said estate and premises, and to assign and set out for your oratrix, a full third part of the said estate, as and for her dower therein," charging refusal, and interrogating as to whether they had not "possessed themselves of all the real, personal and slave estate, moneys, goods, chattels and effects of the said Frederick Notrebe, deceased;" whether or not "large profits of said estates and premises" had come into their hands, and whether or not they had "refused to pay her one-third part of said profits," &c., &c., and praying inventory of all estates, &c., and where, and in whose "custody, possession or power, the same have been since the death of F. Notrebe, and at what profit"—that she might be decreed dower in all of said estate, and an account be taken, and she "be let into possession, and the receipt of the profits of one-third part thereof, both accrued and to accrue," and for a commission

to assign dower to her, that she may hold the same in severalty, and for general relief.

All the defendants answered fully: the executors admitting that they were in possession of the whole estate of every description, and setting out inventory of all; except, as they state, a large amount of plate and household stuff, which they had not inventoried, but suffered to remain in the hands of the complainant; that they had paid the complainant various sums of money, which they name over, and that she had had the use of various slaves, which they specify, as well as of the mansion house, from the time of the death of the testator: that the plantations had been carried on as in the lifetime of the testator: state the amount of cotton made and sold, and the moneys arising therefrom, which they say was insufficient to supply and carry on the plantation: that some buildings in the Post of Arkansas had been rented out, and another small place in the country, the residue of the real estate being wild and unproductive lands.

No exceptions being taken to the answer, and replication having been filed thereto, and all the parties submitted the cause, it was heard at the October term, 1851, when commissioners were appointed, with plenary powers, to lay off dower to the complainant, according to her prayer, instructing them to allow her to select such slaves as she might desire for her body and household servants, and deliver them to her immediately, estimating them at their real value, in the general division, and to report at the next term, when either party should have the right to raise any objection. Accordingly, the commissioners performed their duties, and reported to the April term, 1852, as instructed, showing how they had divided the lands, slaves, stock, and other property, and recommended that the respective parties should not enter upon the respective parts of the estate allotted to each, until the ensuing first day of January, 1853.

At the October term, 1852, no objection having been interposed to the report of the commissioners, and all the parties appearing by their respective solicitors, the cause was again heard

upon the bill, answer, replication and report of the commissioners, and confirming the same, the court decreed the complainant, in due form, dower estate in severalty in the lands, slaves, mules, horses, oxen, and silver plate, and that she should enter upon, and take possession of the same, on the 1st of January next following, and also decreed "That William Refeld should be appointed master, and be required, by the next term of that court, to make and state an account of the income and profits of the property of Notrebe, from the time of his death to the 1st day of January, 1853, and to deduct therefrom all taxes, outlays and expenses in respect thereof, and exhibit the balance; and what is the one-third of such nett profits, after all expenses are deducted.

Whether or not the master ever performed this duty, does not appear from the record. It appears, however, that at the term to which he should have reported, the bill, on which these proceedings before us are founded, was filed. In which, after setting out at full length, all the proceedings, which we have substantially set out above, and alleging some unimportant matters of no relevancy, and which are fully denied by the answer of Morton and wife, and wholly unsustained by the record, the complainant proceeds to allege, that she was aggrieved by the decree, and ought not to be bound by it, for the following reasons, specifically assigned, *to wit:*

1st. Because it does not give her one-third of the money on hand at the death of her husband.

2d. Because it does not give her one-third of the rent of the town property at the Post of Arkansas.

3d. Because it does not give her the hire of the slaves, and the rent of the land, which were assigned to her for dower, from the death of her husband up to the 1st January, 1853.

4th. Because said decree was made without her assent, and through mistake and oversight of her solicitors. That it was the result of haste and surprise, and was entered without replication and without ever being read to the court; that neither the com-

plainant nor her solicitor, was apprized of the defects, imperfection and incompleteness of said decree, until some weeks subsequent to the adjournment of the court.

5th. Because, by it, the complainant is restricted to one-third part of the mere income and profits of the plantation, and does not, as it should, give her the value of the hire of her negroes and rent of her lands.

And after the statement of some other irrelevant and unimportant matters, the bill concludes with a prayer that the proceedings aforesaid should be reviewed, added to, altered and annulled, and the defendants be made to account with the complainant for the moneys on hand at the time of the death of her late husband, and pay over to her one-third part; and also, account for the rent of the town property, and give her the one-third part; and for the reasonable hire of the slaves and rents of the land assigned to her as dower, from said death, up to the 1st January, 1853, and for general relief.

The executors failed to appear, and a decree, *pro confesso*, was taken as to them; but Morton and wife answered the bill very fully, denying emphatically many charges in the bill, which we have not thought it at all necessary to notice, in stating its purport, since they were, as we have said irrelevant and immaterial, and totally unsustained by the record; and, therefore, we shall state such portions of his answer only as relates to the matters complained of in the purport of the bill, as we have set it out above.

As to the complaint that the decree does not give the complainant one-third part of the money on hand at the death of Mr. Notrebe, he answers that the answer of the executors to the original bill, discovers the sum on hand at that time, and that the complainant's claim to dower therein, was fully admitted by all the defendants, and that, by agreement, T. Farrelly was to pay complainant her one-third part thereof. That he still fully admits her rights as to this money, but that none of it ever came into respondent's hands. And he submits that, inasmuch as her rights

on this point were fully admitted by the pleadings, no new bill was necessary; but that the enlargement of the reference to the master, already pending, was amply sufficient, respondent being perfectly willing, as he has always been, that she shall have the one-third part of this money, either under the agreement aforesaid, or in any way otherwise. And as to the rents of the town property at the Post of Arkansas, he answered that he had been informed, and believed, that that was likewise intentionally kept out of the reference by both parties, to be also settled by Col. Farrelly, who knew all about the matter; the amount being very small after deducting taxes and expenses, not being of sufficient importance to be worth the expense of a reference: complainant's right to the one-third part thereof, having been, by said pleadings, and otherwise, always admitted. And as to the charge in reference to the decree, he answered that if it was meant by the bill to charge, or intimate that said decree was entered in the present form, without the knowledge and assent of complainant's solicitors, duly employed in the cause, it was simply false. If it was intended to charge or insinuate that any concealment or undue advantage, on the part of respondents, or their solicitor, was exerted, in any respect, it was wholly false; and they averred the truth to be, that the decree and orders were drawn up and submitted to the complainant's solicitor, who read and fully understood them at the time, and if any of the orders were not read in court, it was simply because they had been read and approved by solicitors of both sides. And if complainant's solicitor has since discovered the omission in regard to the moneys on hand at the death of Mr. Notrebe, and the rents of the houses at the Post of Arkansas, it is simply because he has forgotten the understanding at the time, and the reason for the same.

With regard to the complaint, that the decree did not give complainant the hire of the negroes and rent of the land, which were assigned to her for dower, from the death of Mr. Notrebe up to the 1st of January, 1853, and restricted her to one-third part of the nett profits of the plantation and estate, the respond-

ents answered, that complainant had never claimed in any otherwise, and under her bill was entitled to no other decree in that regard, than that made. And if the executors were bound to rent out the lands and hire out the negroes, and did not do so, and the value of complainant's dower was diminished thereby, that might be the foundation of an individual claim of complainants on them, in respect of such dereliction, but no ground for a charge on her part against the estate. That from the first, she knew the course of management of the executors, and acquiesced in it; and was, therefore, estopped to set up such a claim. That, in truth, said lands could not have been rented out for much, if any thing; and said negroes, if hired out, would have greatly jeopardised the interest of all concerned in the estate. And insisting that the proceedings already had are binding upon all the parties thereto, and conclusive as to all matters embraced; and that all the relief claimed, to which complainants are entitled, can be rightfully obtained by a mere extension of the reference to the master, now pending, if complainants persist in rejecting the agreement aforesaid, to receive the money from Col. Farrelly, without troubling the court with the matter, and harassing respondents so unnecessarily, the respondents demur to said bill of review and supplement, and submit that complainants have not made such a case as entitle her to the relief prayed, or any part thereof, or any relief whatsoever.

Replication was put in to this answer, and leave given to take depositions. And also, leave against objection of Morton, to take the deposition of the executors. Under this latter order, the deposition of Terence Farrelly was taken, which was afterwards suppressed, and properly so: he being incompetent by reason of his being one of the parties to the record liable for costs, and interested in freeing himself from liability to the complainant, and casting the same upon the heirs. *Pryor et al. vs. Ryburn, January Term*, 1856. The proof introduced by the other depositions, go to show the value of rent of land and hire of negroes, allotted to Mrs. Notrebe for dower, from the death of her husband up to

the 1st January, 1853. That the Notrebe plantation was a very uncertain one, in consequence of liability to overflow; that it was actually overflowed three years out of four. That it was, in consequence, scarcely rentable at all, at any price: several of the witnesses saying, that rather than cultivate it because of the liability to overflow, they would prefer to clear land in the woods, not liable to overflow; and all the witnesses say that the slave property was in such a condition that it would have been dedrimental to the estate to hire out the negroes, and the interest of all concerned was better subserved by keeping them on the plantation; and some of them prove that the complainant lived on the plantation, in the mansion-house, all the time, in a condition to see, and daily know all that was done by the executors and heir with the plantation and slaves, and never made any objection to the employment of the slaves on the plantation, as was done: and one of the witnesses proves a settlement of the executors in the Probate Court, showing the disposition of the whole receipts from the plantation thus cultivated.

The court, upon the hearing, dismissed the bill of review, and going back to the original bill of complaint, and the proceedings thereon, ordered an account to be taken, under the decree therein rendered, of the profits arising from the estate from the death of Mr. Notrebe to the 1st January, 1853, and an account of the moneys on hand at his death, and that a decree should be rendered for one-third of each, in favor of complainant, and directed the master to proceed to make and state such account in pursuance of the original bill and decree thereon; specifically directiug him as follows, *to wit:*

1. "That he state an account of all moneys at the death of said Frederick Notrebe.

2. That he state an account of all expenses and profits of said plantation, slaves, and other property thereon, from the death of said Frederick Notrebe, up to the 1st of January, 1853, the time when dower was assigned to complainant, Mary F., under said decree upon her original bill, and that he strike and report the balance.

3. That he state an account of all rents of the property of said Frederick Notrebe, at the Post of Arkansas and elsewhere, other than the plantation aforesaid, from the death of said Frederick to this time, and report the amount thereof.

4. That he state an account of all other sources of income from said estate, other than from choses in action and debts due the same, and report the amount thereof.

5. That he state an account of all moneys received by complainant, Mary F., or paid out for her from said estate, since the death of said Frederick Notrebe; and that the master report at the next term of this court, to which time further orders are reserved.

From which decree the complainants appealed to this court, excepting to so much thereof as dismissed their said bill of review and supplement.

With regard to the complaint against the decree on the original bill, that it did not give the complainant hire for the negroes and rent for the land, assigned to her for dower, from the death of her late husband, but restricted her to one-third part of the nett profits of the plantation and estates, we think it totally groundless in a legal point of view; because there can be no pretence of error in the judgment of the court, as to this, since it is in exact accordance with the whole tenor and scope of the bill, and in which there were no allegations upon which could have been based a decree for hire and rents, in lieu of nett profits specifically, directly, and formally proceeded for; (*Cook vs. Bronaugh*, 13 *Ark. Rep.* 187, 188,) and as little pretence of the discovery of any new matter, or evidence, which could not possibly be had or used at the time when the decree passed. On the contrary, as to this, it abundantly appears that the complainant knew every fact when the original bill was filed. Under such circumstances, to permit her to hold on to such portions of the decree only as she likes, and let her go back and make a new case, as to such portion as she does not like, although the latter be in strict accordance with her case first made, would be a novelty,

to say the least of it, as inconsistent with the general doctrine of non-divisibility of rights, as with the chancery doctrine, in accordance with it, of multiplicity of suits.

Indeed, under the peculiar facts of this case, when it is considered that the complainant was devisee, under the will, of one-half of the entire estate, was tardy in changing her character from devisee to dowress, when so many circumstances indicated her acquiescence in the former, when she was so fully cognizant of all that was transpiring on the plantation where she daily resided, there would seem to be some fair ground of natural equity, in view of the disasters from overflow by the act of God, upon which the heir might have stood, without any impeachment of duty or affection, and invoked a strict adjudication of the dowress' rights in the premises, had she originally claimed rents and hires. If so, much more may she now occupy this position, when having originally chosen an equitable ground, the complainant now seeks to flee from it, under no stress of adverse pecuniary circumstances, to carry fruits to a stranger, who can have no peculiar equitable claim to them.

Besides these considerations, which we regard as satisfactory on this point, the counsel for the heir takes a higher ground; which, in the views we have taken, need not be passed upon. And this is, that under our peculiar laws, making all species of property, assets in the hands of an executor or administrator, even conceding the complainant the right to recover the rents and hires, the estate cannot be charged with the neglect of the executor, but the executor himself must pay the dowress for his own neglect. A proposition which, as we have said, we have not found it necessary either to consider or to pass upon.

With regard to the complaint against the decree, for the alleged imperfections specified above, in the 4th division of complainant's present complaints, it seems sufficient to say, in view of the fulness of the answer on that point, that the complainant cannot be permitted to repudiate her acts of record, done by her solicitors, but she must abide by them, and hold her solicitors

responsible, if they were careless, or otherwise derelict, or unfaithful to her injury, notwithstanding, as seems very unreasonably alleged, the court and the opposite solicitors were as careless and as unfaithful in the premises as her own.

With regard to the complaint, as to the town property at the Post of Arkansas, the reference to the master Refeld, which was pending at the time these proceedings were commenced, was sufficiently broad to embrace that, because in its terms it was not confined to the "income and profits" of the plantation, but extended to the "property" of the estate generally; and was, therefore, directly responsive to the original bill, and consistent with the decree.

The complainant's right to dower in this town property, as well as in the cash on hand, at the death of Mr. Notrebe, was conceded by the pleadings, and admitted by the evidence in the answers. And upon the hearing of the case on bill, answer, replication, and the report of commissioners, who had admeasured and set apart dower to the widow in the lands, slaves, stock, and other visible property, the record states that the court was of opinion, upon consideration, that the complainant was entitled to dower "as prayed," and thereupon proceeded to decree to the complainant, dower, in severalty, in so much of the estate as was referred to the commissioners, and was embraced in their report, and then omitting to make any specific decree as to the money on hand at the death of Mr. Notrebe, although embraced in the general opinion expressed, that the complainant was entitled to dower "as prayed," proceeded as to the "income and profits," generally, to refer these to the master Refeld, to take an account and report at the next term. Doubtless, upon the ground, as we must presume, in favor of the doings of the court below, of the uncertainty of this income and profits, both as to whether there was really any nett amount, and, if so, how much—and these could be ascertained only by a statemect of accounts, either by the court, or by a master. Hence, as to this part of the complainant's case, the merits had not been sufficiently developed to

enable the court to pass upon it finally, otherwise than hypothetically, which the court, it is true, might have done by appropriate further order and directions; which, however, it does not appear, from the record, was done. Hence, there was something remaining to be done by the court, judicially, between the parties remaining in court, which we cannot suppose was erroneously omitted, as we might have otherwise supposed as to the money; because, as to these rents and profits, such an erroneous omission cannot be supposed, in the face of an express reference to the master, to take and report an account, as to them, by the next ensuing term, at which time, it is reasonable to infer, the court designed to put an end to the case, and grant or refuse the complainant a remedy, *as on her whole case*, upon which, under the statute contemplating but one final decree, the parties, if any of them felt aggrieved, might appeal. *Crittenden Ex parte*, 5 *Eng.* 350; *Haynie vs. McLemore*, 7 *Eng.* 397.

And this mode of proceeding by the court corroborates so much of the answer as states "That when said decree was made, it was extremely desirable to both parties to have the matters in controversy of most importance settled, and finally ended, without delays therein, or involving them with inferior matters, which would cause delay by requiring the interposition of a master in chancery, and the delays incident thereto;" and the further matter stated as to the verbal understanding among the solicitors, at the time the decree complained of was rendered, that Col. Farrelly should pay over to the complainant one-third part of the money on hand at the death of Mr. Notrebe, and one-third part of the nett amount of the rents and profits of the town property at the Post of Arkansas, without troubling the court to render a specific decree therefor; which Morton and wife, in their answer, say they are still willing shall be done, or that she may have those sums in any way otherwise—"her rights in the premises having never been disputed by them, and never will be."

Suppose, that in addition to what appears in the record in this case, there had been an express reservation, to the effect, that as

to all the matters touching the income and profits, and touching the cash on hand at the death of Mr. Notrebe, and unitl these should have been, in future, judicially passed upon, all that had been done, in reference to the visible property, should remain interlocutory, no one would have supposed the decree in question final, even under a practice which might allow of more than one final decree in a cause. The expressed reservation, in such a state of case, having the effect to prevent any presumption that might have otherwise arisen, that the decree was final.

To the same effect, as an implied reservation, under our practice, tolerating but one final decree in a cause, must be regarded the affirmative action of the court in the case at bar, in referring to the master the matter of income and profits unconnected with any decree, in advance, as to the final disposition of this part of the complainant's case. Otherwise, the Circuit Court would be taken to have committed the error of having omitted to pass judgment on a part of the case made by the complainant, in the face of the record, showing that court to have been in the actual progress, in a legitimate mode, to the very point complained of.

To intend such an implied reservation, under such a state of case, is even less than to indulge the ordinary presumption in favor of the regularity of the proceedings in the court below. And to refuse to do so, is to do more than simply to reverse that common rule. Because, that presumption is ordinarily indulged when nothing appears in the record to repel it. Much more, then, should it be indulged, when in fact something does affirmatively appear in the record, to authorize and sustain it.

Regarding, then, the decree in the original proceedings complained against, as open, and the matter of income and profits pending before the master, as embracing the specific matter of the rents of the town property at the Post of Arkansas, nothing remained of the matters complained of in the proceedings before us, except the matter of the money on hand at the death of Mr. Notrebe, of which there was no ground for complaint, until the complainant's admitted rights in the same had been adjudicated

against by the court, either with or without a reference to the master.

Upon the whole case, therefore, we find no error authorizing the reversal of the decree, and think it ought to be affirmed.

DUNN ET AL. VS. GRAHAM ET AL.

The answer of one defendant, is not evidence against his co-defendant, unless upon proof of such an absolute unity and identity of interest and design between the defendants as under the ordinary rules of law, will make the acts or admissions of one, the acts or admissions of the other, &c. *Blakeny vs. Ferguson et al.*, 14 *Ark. Rep.* 641.

Quare: When, and how far, is the answer of one defendant, when responsive to the bill, evidence in favor of his co-defendant?

When the answer of a defendant, in all material points, is responsive to the allegations in the bill and to the special interrogatories based thereon and propounded to him, it must be taken as true, unless disproved under the rule requiring two witnesses, or one with corroborating circumstances.

G., as assignee of W. & Co., obtained a judgment against V. and D. and others as his securities, on a note payable to W. & Co., or bearer. The securities file a bill against G., and V. alleging that V. had paid the note, and again put it in circulation, and interrogate G. as to his title to the note: G. answers that he bought the note of the agent of the payees, and that V. was his agent to make the purchase; the complainants prove by one witness, the agent of the payees, that V. paid him, and that he delivered the note to him: HELD, That the answer of G., as to his title to the note, must be taken as true, and that the evidence of the witness is not irreconcilable with the truth of the statements in the answer.

Appeal from Calhoun Circuit Court in Chancery.

Hon. JOHN C. MURRAY, Circuit Judge.

CUMMINS, for the appellant. There is no proof that Graham furnished Varn with any money, or appointed him his agent. The answer in this respect is not responsive; and, therefore, no evidence.

Varn's answer is no evidence for Graham, and if it were it could only be so, so far as responsive to the bill. 1 *Eng.* 317; *ib.* 79; 5 *Ark.* 9; 9 *Cow.* 37; 2 *Dana* 167; *Gres. Eq. Evidence* 24.

The evidence of Case, unexplained by other evidence, was conclusive. The denial could not be direct and positive. The only facts in the answer, which could overturn Case's statement, were not embraced in discovery asked, and here are to be rejected as not existing as facts. This leaves Case uncontradicted. *Gres. Eq. Ev.* 4.

CURRAN & GALLAGHER, for appellees. The bill alleged that Graham fraudulently purchased the note from Varn, and by collusion with him, and interrogatories to that point, were propounded to him; and, also, that he state in what manner he got possession of the note, if not from Varn. Graham answered the allegations and interrogatories fully, denying fraud and stating in what manner he became entitled to, and from whom he purchased the note. Had not the complainants a right to require an answer to such interrogatories? Assuredly they had; therefore, the answer of Graham was evidence in his favor, and required one witness and corroborating circumstances, equivalent to a second witness, to overturn the same. *Woodcock vs. Bennett*, 1 *Cow. Rep.* 743; *Closson vs. Morris*, 10 *John* 542; *Field vs. Holland*, 6 *Cranch* 24; *Ten Eyck vs. Hart*, reversing in this respect the decision of Chancellor KENT, A. D. 1817, not reported. See

Emmet's Argument, 1 *Cow.* 744, *et seq.*, *Moupin vs. Whiting*, 1 *Call.* 224; *Snellgrove vs. Bailey*, 3 *Atk.* 214; *McCall vs. Blewett*; 2 *McCord Ch. Rep.* 102; *Bank vs. Block et al.*, 2 *McCord Ch. Rep.* 349; *Semon vs. Cherry*, 1 *Bibb.* 253; *Pollard vs. Lymon*, 1 *Day* 156; *Ragsdale vs. Buford*, 3 *Hayne* 192.

Mr. Justice SCOTT delivered the opinion of the Court.

The complainants, Allen D., John and James S. Dunn, and David Daugherty, filed their bill in the Calhoun Circuit Court, against the defendants, Joseph M. Graham, John M. Varn, Elijah F. Strong and Wills, Pease & Co., alleging that Varn, having purchased a lot of merchandise at auction, from Leonard E. Case, as agent for Wills, Pease & Co., they, together with Strong, none of them having any interest in such purchase, as the mere securities of Varn, executed with Varn, a promissory note, on the 29th of May, 1849, payable on the first of January next following, to Wills, Pease & Co. or bearer, for the sum of $382 90, and delivered the same to Case as such agent.

That on or about the time the note matured, it was entirely discharged and paid off by Varn, who paid into the hands of said Case, the amount of the same, and received into his own hands, from the hands of Case, as agent, the note in question, as a full discharge of the debt for which it was given. That afterwards, the note was again put in circulation by means unknown, but which they charge to have been fraudulent. That eventually it came into the possession of defendant Graham, who pretended to have derived his title to the same from Wills, Pease & Co.; but complainants believed his only title was derived by a fraudulent contract with Varn, long after the before alleged payment of the same by Varn, and delivery of it to him by Case, as agent. But in either case, complainants charged that the title of Graham was fraudulent. That after the execution of the note, Varn became notoriously insolvent. That at the spring term of the Calhoun Circuit Court, A. D. 1852, the complainants together with Varn and Strong, were sued on the note in question by Graham as assignee of

Wills, Pease & Co., and none of them making any defence, he obtained a judgment. That two of the complainants, *to wit:* John Dunn and James S. Dunn, knew nothing of the alleged payment of the note, and its fraudulent re-circulation, until after the adjournment of that term of the court. But that the two others, *to wit:* Allen D. Dunn and David Daugherty, had heard something of it, but knew of no person by whom they could establish the facts, except Varn and Graham themselves, until the adjournment of said term. They also charge that when Graham came into the possession of the note, he well knew it had been paid and delivered up to Varn, and that the latter was notoriously insolvent. The bill then proceeds to propound numerous special interrogatories to Varn, among them, the following, *to wit:* whether he did not entirely discharge, pay-off and take up the note, as alleged? Whether he did not pay into the hands of Case, as agent, the entire amount of the note, and receive into his own hands the note from Case, in full discharge of the debt it was given to secure? Whether, afterwards, he did not again put the note in circulation? If not, by whom, or by what means, was it again put in circulation? Whether he did not trade the note to Graham, and if so, by what fraudulent intent? Was it to defraud Graham, or the complainants? If neither, then who? If nobody, then why did he again put it in circulation after its payment and discharge as aforesaid? Whether the contract, between him and Graham, was not fraudulent, so far as Graham was concerned? Whether Graham was aware that the note had been paid before it came into his possession, and whether he was not fully aware that Varn was, at that time, insolvent? Whether or not he, Varn, is insolvent? If so, when did he become so?

Varn after responding to various allegations and interrogatories, proceeds upon oath to answer, in reference to the interrogatories above copied, as follows, *to wit:* "This respondent further answering, says, that it is not true that this respondent ever paid off and discharged said note, when the same became due, or at

any time, or that this respondent ever put the said note in circulation, after having paid off and discharged the same, as is by said complainant alleged. This respondent, however, admits, that at the time the said note became due, he did pay into the hands of said Leonard E. Case, the amount of the principal of said note, there being, at that time, no interest due thereon. And that this respondent did receive the said note from the said Leonard E., the agent of the said Wills, Pease & Co., but this respondent most positively affirms, that the money he paid to the said Leonard E. for the purchase of said note, was the money of, and belonging to the said Joseph M. Graham; that this respondent acted in the whole matter and transaction, as the agent of the said Joseph M. Graham; that the said Joseph M., having supplied this respondent with the money necessary to purchase said note as his agent; that this respondent did so purchase said note, and did so receive the same as the agent of the said Joseph M. Graham, and that this respondent did, immediately upon receiving said note, deliver the same to his principal, the said Joseph M. Graham, and this respondent affirms positively that he never did put said note into circulation, except when he first delivered the same to the said Leonard E., in payment of his debt to the said Wills, Pease & Co.; and that this respondent never had said note in his possession, except as the agent of the said Joseph M. Graham; and this respondent affirms that said note, to the best of his knowledge, hearsay, information and belief, never has been out of circulation at all, from the time the same was executed until the same was sued upon by the said Joseph M. Graham, who is the *bona fide* purchaser of the same, from the said Wills, Pease & Co. This respondent further emphatically denies that he ever traded said note to the said Joseph M. in any manner whatsoever. And this respondent, further answering, says, that the charge of fraud in said complainant's bill contained against him, is absolutely false and untrue. This respondent never attempted to defraud the said complainants, or the said Joseph M., or either, in any manner whatsoever. That he never put said note

in circulation, except when he delivered the same, as above stated, to the said Leonard E. Case. And this respondent most positively affirms, that he never was, for one moment in his life, the owner, or the part owner of the said note, or that he has ever paid one cent on the same to any person in the world, although, as he has above stated, he did as agent of the said Joseph M. Graham, pay the amount of the note to the said Leonard E., but that was done solely for the use and benefit of the said Joseph M., and with the money of the said Joseph M., to enable the latter to become the *bona fide* purchaser, and legal holder of said note. This respondent further most positively affirms it to be false, that he was insolvent at the time of the purchase of said note by the said Joseph M., or for some time thereafter, as is by said complainants alleged. He admits himself now insolvent, but he did not become so until about eighteen months after the note was lifted by the said Joseph M. from the said Leonard E."

Various special interrogatories are then propounded to the defendant, Graham. By what title does he hold the note? Whether he holds it as *bona fide* assignee of Wills, Pease & Co., or by a purchase from Varn? If by the former, by what member of the firm was it assigned and delivered, and what was the consideration given for it? If by the latter, at what time, and under what circumstances, was the purchase made? Whether he was aware at the time of the purchase, that the note had been paid? To which he makes sworn responses, as follows, *to wit:* "That he is the *bona fide* assignee and holder of said promissory note. That he purchased the same, for a valuable consideration, from L. E. Case, the agent of Wills, Pease & Co., some time in the latter part of the year 1849, *to wit:* about the 25th of December, for the sum of the principal due thereon, *to wit:* $382 90. That a short time after he had arrived in this State, having money on hand yielding him no profit, and having been informed of the existence of the note in question, and that it would bear interest at the rate of ten per centum per annum, from maturity, and that the makers were perfectly solvent, he determined to

purchase the same as an investment. The note, at that time, being in the possession of L. E. Case, as agent of Wills, Pease & Co., and at Camden, in Ouachita county, and being unable to go there at that time himself, and John M. Varn being about to visit that place, he requested Varn to purchase said note as his agent, and he consenting to do so, respondent furnished him with the sum of money, *to wit:* $382 90 for that purpose. Thereupon Varn, as the agent of respondent, purchased the note, with the money of respondent, furnished him for that purpose as aforesaid, from L. E. Case, as agent of Wills, Pease & Co., and received the same, and immediately on his return from Camden, delivered the note to respondent, who thus became, by mere delivery of the said Leonard E., as agent of Wills, Pease & Co., to Varn as agent for respondent, the promissary note being payable to Wills, Pease & Co., or bearer, for the consideration aforesaid, the *bona fide* and legal holder of the same, for full value. That he had never heard that the said note ever had been paid, except in the manner just stated by respondent; neither does he believe that it ever was; on the contrary, he expressly avers the truth to be, that it never has been paid in any manner." From information and belief, he avers that complainants knew, at the time he purchased the note, that respondent employed Varn, as his agent, to make the purchase. Avers that the charge of fraud contained in the bill, against respondent, is absolutely and entirely false and untrue. That Varn, at the time the respondent purchased the note, and for the space of more than a year afterwards, was generally considered perfectly solvent. That respondent loaned Varn $150, at the time the note was purchased; and denying that Varn ever paid said note, otherwise than as stated, he prays his answer may be taken as a demurrer; that plaintiff's are not under their bill, entitled either te discovery or relief: their remedy at law being ample and complete.

Besides these answers, there is no evidence in the record, other than a statement of L. E. Case, which seems to have been filed by the complainants, "and by consent made a part of the testi-

mony in the cause," as is stated in the record. That statement is as follows, *to wit:* "In the spring of the year 1849, the firm of Wills, Pease & Co., of New Orleans, placed in the hands of myself and partner, a claim for about $5000, against Smith & Thorn, of Camden, for collection. In liquidation of this claim, Messrs. S. & T. handed over to us their stock of goods, to be sold by us at auction, and the proceeds to be applied to their claim. The auction was advertised for the 28th of May for that year, and the goods were sold on a credit until the first of January, 1850, the purchaser giving note with security. At the sale John M. Varn bid off goods to the amount of $382 90, for which he gave his note, due 1st January, 1850, with Elijah Strong, A. D. Dunn, and perhaps some one or two more names, as security. On the day the note fell due, Mr. Varn called at our office and paid, and took up the note. We allowed him a credit of $8 90, as he said that certain goods, amounting to that sum, which he had bid off at the sale, and which were included in the note, were not delivered. I know nothing further with regard to the note.

L. E. CASE."

To Graham's answer a general replication was filed, but it does not appear that any was filed to the answer of Varn. The bill prayed relief against all the defendants by injunction, and also general relief. The cause having been previously set down for hearing, was heard and determined at the spring term, 1854, upon the bill and exhibit, upon these two separate answers, and the statement of L. E. Case read as evidence by consent. The decree was, that as to all the sum theretofore enjoined, except $8 90, the injunction should be dissolved, and as to the latter sum, it should be perpetuated. The complainants appealed to this court.

It will be seen, that the answer of Varn was sworn to, and that irrespective of the rule, that the answer will be taken as true, whether responsive or not, when no replication has been put in; his was actually responsive; and, therefore, must be taken as true against the complainants, for that reason also. It will also be seen, that it went to the complete destruction of the foundation,

upon which the complainants built their case, for relief against each and all of defendants.

It is perfectly clear, that had Varn'sanswer been the opposite of of what it was, it could never have been read by the complainants *against* Graham, unless, in connection with other testimony establishing—not a community of interest merely, like that of tenants in common—but such an absolute unity and identity of interest and design between Graham and Varn, by means of the fraud charged against them in the bill, as under the ordinary rules of law, would have made the acts or admissions of either the acts or admissions the other—like the acts or admissions of co-partners, or joint tenants, having a complete unity of title and interest, or of co-conspirators identified in a common design. And this, because of the established rule, no longer open to question, that the answer of one defendant cannot be read in evidence against his co-defendant, unless he refers to such answer as correct, or is so combined and identified with the answering defendant, as to be bound, under the ordinary rules of law, by his confessions, declarations, and admissions. *Blakeny vs. Ferguson et al.*, 14 *Ark.* 641, and cases there cited.

But although that proposition is perfectly clear, is it equally clear, that Graham could not, nevertheless, insist that that answer should enure to his benefit by way of a legitimate operation, *against the complainants?*

The adjudged cases, favoring the affirmative of the proposition, so far as they have come under our observation, do not go the length of holding that in every case, where the responsive answer of the responding defendant goes to destroy the foundation of the case made in the bill, it shall enure to the benefit of the co-defendant, by operating as evidence against the complainant in the whole case; but the reasoning, upon which these adjudged cases are based, and by which they are supported, does seem to go that far. They are, so far as we have seen cases, where the defendant, protected in this wise, was either *claiming under* the responding defendant, as in the case of *Field et al. vs. Hol-*

land et al., 6 *Cranch Rep.* 8–24; and see, also, Judge BALDWIN'S exposition of that case in *Pettit vs. Jennings*, 2 *Robinson's* (*Va. Rep.* 581); or elsewhere he occupied the attitude of a *stake-holder* for the complainant and his co-defendant, as in the case of *Mills vs. Gore*, 20 *Pick. Rep.* 35. See, also, *Greenl. Ev.*, *vol.* 3, *sec.* 283, *p.* 269.

The reasoning, in support of the ruling in both of these classes of cases, is to the effect, that the complainant, having called upon the responding defendant for discovery, as to the whole case made in his bill, has thereby made him a credible witness against himself, as to his whole case; having interrogated him only as he desired; upon allegations framed in the manner most favorable to his own interest, and obtained the discovery sought, by searching and leading questions, the response has been obtained under the most favorable auspices for the complainant; and that the response, thus obtained, is not, as against the complainant, obnoxious to the objection for want of cross-examination, as it would be, if allowed to be used against a co-defendant. Hence, it was supposed not unfair to hold in these cases, that it should not lay in the mouth of the complainant—when the response thus obtained went to destroy the foundation of the case made in his bill, to say it was not evidence *against* himself on the *whole case* made by his bill; in imperfect analogy to the rule, which holds a party to the answer of his own witness, who unexpectedly, testifies the very opposite of what he anticipated.

The argument to the contrary is, that the answer to a petition for discovery, stands as a deposition, and is not evidence, for any purpose, until read by the party obtaining it, who may read it, or not, at his election. *Conway & Reyburn vs. Turner & Woodruff*, 3 *Eng. Rep.* 362, and cases there cited. But conceding this to be so, do the reasons, which sustain the rule, apply with full force, when the bill is not only for discovery, but also for relief consequent thereon; and that, too, in some one aspect of the bill, against all the defendants therein?

But it is not necessary for us to determine any point as to Varn's

answer, nor has any been mooted by counsel; because, waiving any question as to that, and also any question of jurisdiction, as we do, the decree of the court below is well enough sustained on the merits, without any reference to Varn's answer.

In the light of the case of *Wheat et al. vs. Moss et al.*, 16 *Ark. Rep.*—(decided at the last term) the answer of Graham, in all material points, is responsive to the allegations in the bill, and to the special interrogatories based thereon, and propounded to him; and must, therefore, be taken as true, until overbalanced under the established rule. And so far from this having been done in this instance, the evidence of the only witness, produced on the other side, is, by no means, irreconcilable with the truth of the statements contained in Graham's answer. Hence, all that is stated by the witness may be true, as it doubtless is; and nevertheless, Graham has stated the truth also, in his answer.

Finding no error in the record, for which the decree should be reversed, it will be affirmed with costs.

FENTER ET AL. VS. OBAUGH ET AL.

A sheriff, having in his hands a writ, issued in a chancery cause, commanding him to take into his possession certain property, then in the possession of the defendant in chancery, and to keep the same until the final decree, unless the defendant should enter into bond, with sufficient security to abide the decree, &c., upon application to F. who was illiterate, and could neither read nor write, to become security in such bond, assured him that it was a *delivery bond*, and that his obligation, upon it, would cease upon delivery of the property at the then next succeeding term of the court; upon which assurance, F. executed the bond, protesting that he would not execute a bond for any other purpose:

HELD, 1st: That the facts set up inducing the execution of the bond, if the representations, as to its character, had been made by the obligees, were a good defence under a special plea of *non est factum.*

2. That the plaintiffs in the chancery cause, the obligees in the bond, were as much bound by the representations made by the sheriff to the obligor, as to the character of the bond, as if made by themselves.

3. That the bond, when returned and filed in the chancery cause, was not a record, in such sense as would estop the obligor from denying the obligation for fraud in its execution.

Appeal from Hot Spring Circuit Court.

Hon. JOHN C. MURRAY, Circuit Judge.

ENGLISH, for the appellant. No principle is better settled by authority, than that where the signature of an unlettered man is obtained to a bond, by misreading, or misrepresentation as to its true character he may avoid it, by plea of fraud, or special *non est factum.* If a man, that is illiterate, desire a bond read, that he is to seal, and it is not done, and he seal it, it is not a good deed. So, if the party to whom the deed is given, or a *stranger* shall read, or declare the contents of the deed falsely,

or otherwise than the truth is, the deed will be void. 1 *Shep. Touch.*, *p.* 53, 54, 55, 56, 60; *Hallenbeck & wife vs. Dewitt*, 2 *John. Rep.* 404; *Jackson ex dem.*, *Tracy vs. Hagner*, 12 *John. Rep.* 469; *Dorr vs. Munsell*, 13 *John. Rep.* 430; *Van Valkenburgh vs. Rouk*, 12 *John. Rep.* 337; *Story's Plead.* 205, *Title* COVENANT.

WATKINS & GALLAGHER, for the appellees. The gravamen of the plea is, that the defendant, being an illiterate person, was misinformed, by the sheriff, as to the purport or nature of the bond. No doubt a deed may be avoided if misread to an illiterate person, by the party who is to be benefitted by it, or any agent of his, or by a stranger, whose acts are considered as adopted and ratified by the acceptance of a deed obtained under such circumstances. All the authorities cited imply that the deed is purposely or fraudulently misread, so as to be executed under imposition. Here the sheriff did not read the bond at all, being unable, as he said, to do so, but undertook to state the purport of it, with which Fenter was satisfied, and he must now bear the consequences of his own ignorance, and that of the sheriff, upon whom he relied.

The bond in suit was taken in the course of a judicial proceeding, and was necessarily made a part of the officer's return to the writ, which issued to him, against Pond; and, therefore, cannot be collaterally impeached, or questioned upon any such allegation as that set up in the plea. Surely it will only be necessary, on this point, to refer to the decision of this court in *Newton vs. The State Bank*, 14 *Ark.* 1, and the authorities cited in the briefs of counsel in that case.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of debt, brought by the appellees against the appellants, and one Rippetoe, as sureties, for William Pond, in the Hot Spring Circuit Court, on the following bond:

"Know all men by these presents, that we, William Pond, as

principal, Samuel Floyd, Andy Fenter, and P. B. Rippetoe, as securities, are held and firmly bound unto James B. Obaugh, and Matilda E., his wife, William Pond, jr., Willis Pond, Augustus B. Pond, and Mary Ann Pond, in the sum of one thousand dollars, &c., &c. Signed and sealed, this 25th day of August, 1856.

Conditioned, that whereas, the Hon. John J. Clendennin, Judge of the Circuit Court of Hot Spring county, sitting as Chancellor, in and for said county, in vacation, on the 2d day of July, A. D. 1846, on hearing the bill of complaint about to be filed in said court in chancery, by James Obaugh, and Matilda E., his wife, William Pond, jr., Willis Pond, Augustus B. Pond, and Mary Ann Pond, complainants, against William Pond, senior, and William F. S. Barkman, made an order on said bill, that upon said complainants entering into bond in the sum of one thousand dollars, to said William Pond, senior, with sufficient security, to be thereafter approved, conditioned that they would prosecute their said bill with effect, and would pay whatever damages the said William Pond, senior, might show to have sustained, if said bill should be adjudged and decreed in his favor, the clerk of said Circuit Court, of Hot Spring county, should issue a writ to the sheriff of said county, commanding him to take into his possession and custody, certain negro slaves, *to wit: Mariah*, a woman, aged about 33 years; *Sopha*, a girl, aged about 5 years; *Dennis*, a boy, aged about 4 years, and an infant child, about 8 months old, child of said negro woman *Mariah*, (all then in the possession of the said William Pond), and hold the same, subject to the further order of said court, or the chancellor thereof, unless said defendant, William Pond, should enter into bond to the said complainants, in the sum of one thousand dollars, with sufficient security, to be approved by said sheriff, conditioned that he would abide the decree that might be rendered in said case, and surrender said slaves, in case a surrender thereof should be required; and, whereas, said writ was issued in pursuance of said order, and the said sheriff is prosecuting to execution the same; and, whereas, said William Pond desires to retain possession of said negroes until

the determination of said cause; now if said William Pond, senior, *shall abide the decree that may be made in said case*, and surrender the said negro slaves above described, in case a surrender thereof shall be adjudged, then the above obligation to be void; else to be and remain in full force and effect."

The declaration set out the bond, and assigned as special breach of the condition thereof, that on the 29th August, 1851, a final decree was rendered in said chancery cause; that the right and title to said slaves should pass to, and vest in, the complainants; that William Pond, senior, should be perpetually enjoined from asserting any claim thereto, and forthwith surrender to complainants the possession of said slaves, which he had failed to do, or otherwise *abide* the decree. The value of the slaves is stated, and general breach of non-payment of the bond, &c.

Defendant *Pond* was not served with process, and *Rippetoe* made default.

Fenter and *Floyd* craved oyer of the bond and its condition, which was granted by filing a copy.

Fenter filed four pleas: 1st. A special plea of *non est factum;* in substance, that on the 25th August, 1846, the date of the supposed bond, and ever before and since, he was illiterate, uneducated and wholly unable to read or write; that after Fullerton, the sheriff, had taken possession of said slaves, by virtue of the writ of injunction mentioned in the declaration, *to wit:* on the 25th August, 1846, he, as such sheriff, and said William Pond, senior, called on defendant, whilst he was at labor in the wood, and then and there solicited him to sign a paper, which they called a bond for the delivery of said slave at the then approaching term of the Hot Spring Circuit Court, to be holden at Rockport, on the second Monday of September, then immediately following; that defendant declared, positively, that he would not sign a bond for any other purpose, than for the delivery of said slaves to said sheriff, at said term of said court, which was but a few days off, and that if the bond would bind him for any longer time, or any other purpose, he would not sign it. That the said Fullerton and the

said Pond, both assured him that the bond was for no other purpose than to secure the delivery of said slaves to the sheriff at said term of said court; that if said defendant would sign it, he would then be relieved from all obligations thereon, on delivery of the negroes as aforesaid; that defendant asked the said sheriff, Fullerton, to read to him said bond and its condition, but said Fullerton, after attempting so to do, said he could not read the handwriting in which it was written, but again positively assured the defendant, that it was for the delivery of said negroes to him at the court aforesaid, and for no other or different purpose; that thereupon, said defendant permitted his name to be signed to said bond, and made his mark thereto; that afterwards, on the second Monday of September, 1846, said defendant obtained possession of said slaves, and took them to said town of Rockport, and delivered them to the said Fullerton, as such sheriff, in accordance with what he, defendant, understood and believed to be his undertaking in said bond; that the said sheriff received into his custody and possession said slaves, and during that day defendant was informed, for the first time, that the bond, which he had so executed as aforesaid, was not a delivery bond, as had been represented to him, but was conditioned, as its tenor shows, and so the defendant says, that the said supposed bond in the said declaration, is not his act and deed—concluding with a verification. Plea sworn to.

It is deemed unnecessary to set out the other pleas of Fenter, or to notice the proceedings had upon them.

Floyd filed a special plea of *non est factum*, the same, in substance and effect, as Fenter's first one.

The plaintiffs took issue to Fenter's first plea; also, to the one interposed by Floyd.

A jury was sworn to try the issues between the plaintiffs and defendants, *Fenter* and *Floyd*, upon their respective pleas of *non est factum*, and also to enquire into the truth of the breach assigned in the declaration, and assess the damages sustained by the plaintiff's by reason thereof, &c.

The jury returned a verdict in favor of Fenter and Floyd upon the issues, and found the breaches true, and assessed the damages at $1.500, as against *Rippetoe*, defendant, who was in default.

The plaintiffs then filed a motion for judgment *non obstante verdicto*, against *Fenter* and *Floyd*, on the grounds that their pleas of *non est factum* were not sufficient, in law, to sustain the verdict rendered in their behalf.

The court sustained their motion, and rendered judgment against *Fenter* and *Floyd*, as well as *Rippetoe*, for $1000, the penalty of the bond.

It does not appear from the transcript, that after the rendition of the judgment, *non obstante*, against *Fenter* and *Floyd*, any other proceedings were had in the court below, in the way of calling in a jury to find the breaches assigned and the assessment of damages thereunder; but the judgment was made final at once.

The defendants *Fenter* and *Floyd* excepted, and appealed to this court.

Three several causes are assigned by the appellants, why the judgment of the Hot Spring Circuit Court should be reversed, and under them, in consequence of the position assumed by the appellees, the broad ground is presented to this court, whether or not the appellants can controvert, in an action brought upon the character of bond which we have stated, the fact of the execution of the instrument, either by a *general or special plea of non est factum;* maintaining, as they do, that the appellants are estopped from denying their deed; because, by the return of the sheriff, made in conformity with the fiat of the chancellor, it has become a part of the records of the chancery cause, to which it relates and applies, relying upon the well established principle, that a record cannot be collaterally questioned by either the parties thereto, or their privies.

In determining the point involved in the above proposition, we will do so in reference to the defence set up in the first plea of the appellants, which we will denominate, as it evidently is a special plea of *non est factum* of the instrument sued on.

And in considering the subject, we shall sub-divide the proposition into the following heads of enquiry:

1. Is the matter set up in the plea a good bar, supposing the representations charged to have been made by the sheriff of Hot Spring county, were charged to have been made by the appellees, and leaving out of the question the assumption, that the bond, after return, is a record?

2. Admitting that if the representations stated in the plea had been made by the appellees, the defence would have been good and available to the appellants; does not the fact that they were made by the sheriff of Hot Spring county, whilst executing process, alter their effect or render them unavailable to appellant?

3. And if the representations being made by the sheriff do not alter their effect as to the appellants, can they be set up as a defence, after the bond is returned and becomes a record?

We shall consider these several questions in the order in which they are respectively presented, conceiving, as we do, that their solution must determine this cause, one way or the other, without reference to the other errors assigned. The only effect of pleading *non est factum* specially, instead of *generally*, is, that in the former case the burden of the issue is on the party pleading it. See 2 *Greenl. Ev.*, *sec.* 300, *p.* 303, and the case of *Brown vs. Wright*, determined at the present term of this court, and the authorities there cited. Besides this, there are many defences which could only be rendered available by pleading in this form. See *same reference; also* 1 *Chitty's Pl.*, *p.* 483, *text and note A*. Such, for instance, as the defence set up in the plea under consideration; which, we therefore, hold to be in due form, and appropriately pleaded, if the substance thereof is available as a bar; which we will proceed to determine under the heads above proposed.

As to the first head: It is said that if a man, that is illiterate, desire a bond read to him, that he is to seal, and it is not done, and he seal it, it is not a good deed. See 1 *Sheppard's Touchstone*, *p.* 53, 54, 55, 56, 60; 2 *Tucker's Com.* 414. And this is so, for

the reason, that the act thus performed, wants that essential quality which is necessary to exist in all contracts, to make them effective and operative: *i. e.*, the *assent of the parties*: for, says MR. PARSONS, in his invaluable work on contracts: "There is no contract unless the parties thereto assent, and they must assent to the same *thing*, in the same sense. A mere assent does not suffice to constitute a contract, for there may be an assent in a matter of opinion, or in some fact which is done and completed at the time; and, therefore, leaves no obligation behind it. See 1 *Parsons on Con.* 399. And we apprehend that this assent must as well exist in reference to the *substance* of the contract itself, as to its *subject matter*, as maintained by the author whom we have just quoted. But we are not left to speculation as the only means of solving this branch of our problem; for it hath become an established principle of the law, that "if the party, to whom the deed is to be given, or a *stranger*, shall read or declare the contents of the deed, *falsely or otherwise than the truth is*, the deed will be void." See *our references to* 1 *Sheppard's Touchstone, as above;* also, *Hallenbek and wife vs. Dewitt*, 2 *J. R.* 404; *Jackson, ex dem., Tracy vs. Hayner*, 12 *J. R.* 369; *Van Valkenburgh vs. Rouk*, 12 *J. R.* 337; *Daw vs. Munsell*, 13 *J. R.* 430, cited by the appellant's counsel; and, also, see 2 *Tucker's Comments* 415; 1 *Fondb. Eq.* 115.

In *Van Valkenburgh vs. Rouk*, SPENCER Judge, said: "If a deed be misread or misexpounded to an unlettered man, this may be shown on *non est factum*; because he has never assented to the contract. So, if a man be imposed upon, and signs one paper while he believes he is signing another, he cannot be said to have assented to it." We will not pursue this branch of our subject farther, remarking, in passing, in justice to the counsel for the appellees, that the position is conceded in their argument. We hold, therefore, that the matter set up in the plea is a good bar, conceding the representations, therein charged to have been made by the sheriff of Hot Spring county, were charged to have

been made by the appellees, leaving out of question the assumption that the bond, after return, is a record.

Secondly. In the execution of process, such as the sheriff of Hot Spring county had in his hands at the time it is averred he made the representations to the appellants, touching the bond, though acting in the capacity of a public officer or functionary, he sustained towards the appellees, to some extent, the relation of agent or servant, resulting as well from the particular phraseology of the fiat of the judge or chancellor, as from the special act, which he was required to do thereunder, within the scope of his general duties, and for the reason, as expressed by WALKER, J., in a case not without analogy to this, in which he was speaking of an execution, the return of which was attempted to be controverted by the defendant therein, which he held could not be done for the reason among others,) "It is executed for their (defendants') benefit by the officer of the law." See *Newton vs. The State Bank*, 14 *Ark.* 13.

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Beside this, from the official position of the sheriff, at the time the representations were made by him, it was fair for the appellants to presume, that he was not only cognizant of the particular duties, which he had to perform, but likewise of the character and import of all documents legitimately resulting from the performance of those duties; thereby rendering him the proper person to be applied to for such information as the appellants demanded, before they would execute the bond in question. His relation, in this view, was official, and *quasi fiduciary*, in respect to both parties to the chancery suit. He was the person whose duty it was made, ordinarily, in such cases, to prepare the bond or have it done; and, consequently, to know its contents and purport, even though he might not be able to read the hand in which it was written. He was the person whose duty it was, as he really did, on the occasion referred to, to take the bond, it is true, not payable to himself, but the appellees. The appellants, it seems, were unlettered. This fact must have been known to the sheriff, for the plea avers that they asked him to read them the bond; and, also, when

they were told he could not do so, on account of the illegibility of the writing, they replied they would sign the instrument, but would only do so on the assurance that the negroes could be delivered thereunder, at the next term of the court, which was then near at hand, in pursuance of its condition. The assurance of the sheriff was then the inducement, which influenced the appellants to seal the deed. This assurance may have been made in good faith on the part of the sheriff, which we have no reason to doubt or question, from the face of the plea; but it was untrue and unauthorized, and if an injury must result from it, on whom must and should it fall? Certainly not on the unfortunate, unlettered appellants, but upon the party who, though perhaps, innocently, yet unadvisedly, occasioned the injury. The consequences must rest upon the sheriff, at the suit of the appellees, for we conceive there can be no fault laid to the appellants from the facts set up in the plea. It is true, the appellees had no part in the false representation which induced the appellants to make the deed. *They*, therefore, are equally innocent, and stand as favorable before the court; but the maxim of the law, in such cases, is, "that where the rights of the parties are equal, the condition of the defendant is best." But independent of the foregoing considerations, the authorities we have already given, in treating of a previous branch of the subject, particularly the extract which we gave from 1 *Sheppard's Touchstone*, in which the following passage occurs, "if the party to whom the deed is given, or *a stranger*, shall read or declare the contents of the deed falsely or otherwise than the truth is, the deed will be void," (which we find fully sustained by the adjudicated cases, which we have referred to, in the same connection,) render it clear to our minds, that though the plea charges the false representations which induced the appellants to make the deed in question, to have been made by the sheriff of Hot Spring county; yet, that does as effectually bar the appellees, under all the attendant facts, as if the representations had been made by themselves, and so averred in the pleadings.

Thirdly. It is insisted by the counsel for the appellees, con-

ceding, by way of argument, the above points, as we have determined them, that in consequence of the bond in question having relation to the chancery suit, to which it applied, and being returned by the sheriff, and filed in that cause by the clerk, it became, *ipso facto*, a record, and as a consequence thereof, that no defence can be heard whereby to *impeach* or *question* it in any way, and the case of *Newton vs. The State Bank*, 14 *Ark. Rep.*, *page* 1, is cited in support of the latter part of the proposition. By referenee to that case, it will be perceived, the adjudication was made on the following facts: The action was ejectment, brought by the plaintiff against the defendant for two lots. Plaintiff claimed title to them as purchaser at execution sale, and at the trial, produced the record showing judgment against defendant, an execution duly returned, showing a regular levy on the lots, their advertisement and sale according to law; and, also, the deed of the sheriff duly executed, acknowledged and recorded. The defendant then offered to prove, by parol, that the sale to the plaintiff was made without notice, and on a different day, and on one subsequent to that stated in the sheriff's return. This court, in that case, held, that "the acts of an officer done in obedience to the law, when required to be certified and returned, form a part of the records of the case in which they are had, and being part of the records, the return, as well as the execution and the judgment, imports absolute verity, and is alike conclusive, as the judgment, upon the rights of the parties to the record.

It will be perceived from the language of this court, in the extract which we have given, that the judgment of the court was predicated upon the fact, that the defendant in that case, was the defendant in the case under which the sale had been made to Newton; or, in other words, that he was the "*party to the record*" in that case. In the case that we are considering, the appellants were not parties to the record in the chancery cause, except so far as they may have collaterally been made so, by making the bond in question. The fact of their being connected with the cause in this way, would not conclude them upon the record, in

reference to the subject matter of the suit. A decree in that cause, one way or another, could not affect them, except to afford evidence, *in pais*, to enable the appellees to establish their breaches. But the court say, in passing upon the deed, in the case of *Newton vs. The State Bank*, "our conviction is, that the deed is conclusive and cannot be impeached on a collateral issue, except for fraud in the execution of the deed, when the process, under which the land was sold, is supported by an existing, unsatisfied judgment."

There is a marked and evident difference between the case referred to by the counsel, as above, and the one being considered, in this; 1st. In the present case, the proceeding is a *direct one* upon the bond; and *secondly:* Because fraud is charged in the plea to avoid the record. We understand the difference between a *direct* and *collateral* proceeding, in the acceptation of this court in the above case, to be this. A direct proceeding upon a record is, where the record is itself the *foundation*, or *cause* of action, and the proceeding designed to impeach it is for fraud, &c. A collateral proceeding upon a record is, where the action is *for* or *on* something else, but where the record *may*, or *does* incidentally arise, or come in question. In the former case, according to the case of *Newton vs. The State Bank*, the record may be impeached; for the proceeding is for that purpose. In the latter case, it cannot except for *fraud*, on the universal principal, that where fraud exists in any of the varied transactions of men, the party, who may be affected by it, may be relieved in one or other of the forums ordained and established for the adjudication of rights between man and man. In the case at bar, the appellants have virtually charged, in their plea, *fraud* against the appellees, by which they hope to avoid the deed: for we hold that the facts averred are substantially to this effect. That we are sustained in the above views, we refer again to the case of *Newton vs. The State Bank*, and the reasoning urged by WALKER, Judge, in delivering the opinion of the court in that case, in which he says, after holding parol evidence inadmissible to contradict a sheriff's deed: "The door for re-investigation is closed

upon the parties to the record. It is not to be questioned by them; this, because they are parties to the record, and have had day in court, and it is not only their interest, but their duty to look to the regularity of the proceedings, and when passed without objection, they may be said, in effect, to have received the approval of the parties," &c. If, *now*, the doors of the court having ample jurisdiction to determine their cause, are to be closed against appellants having had no day in court in the chancery cause, verily they would be in a most deplorable and lamentable condition; for, if they cannot be relieved under the state of facts set out in the plea, by making the same case by bill in equity, they could not expect to share a better fate, and thus they would have no remedy against a bond, which is not their deed, whether by *direct* or *collateral* proceeding thereon. But we will not further reason on the subject, holding as we do, that, independent of what we have said, it has virtually been put at rest by former adjudications of this court. See *Ruddell vs. Magruder*, 6 *Eng. Rep.* 583, 584; *Reardon ex parte*, 4 *Eng. Rep.* 453; *Dugan ad. vs. Fowler*, 14 *Ark. Rep.* 136, in which latter case, the suit was directly founded upon a delivery bond, and in which the court say: "When suit is brought upon the bond, it may be defended against just as when brought upon any other instrument, upon which there has been a recovery had." By which, as we understand it, the court laid down the law to be, that, in consequence of a delivery bond, after forfeiture having the force and effect of, and being in fact an office judgment, no defence could be interposed which could reach behind the date of the judgment. Hence, its execution or consideration could not be questioned after breach; for the reason, that the bond, by operation of the statute, is transformed into, or is merged in the judgment, which becomes, thenceforward, the evidence of what the bond before imported. For defects, relating to the execution or consideration of the bond, after breach the party could have no other relief than a resort to a court of equity. See as to this, *Reardon ex parte* and *Ruddell vs. Magruder*, as above.

Wherefore, holding as we have done, that the first plea of the appellants set up a good defence to the appellees' action upon the bond in question, it is clearly our opinion that the Circuit Court of Hot Spring county erred in disregarding the finding and verdict of the jury, upon the issue to that plea, and rendering judgment, *non obstante*, for the appellees, the law being in such case, that judgment, *non obstante verdicto*, can only be given where the plea of the defendant confesses the action, and does not sufficiently avoid it; in which case judgment shall be given for the plaintiff, on the confession, without regard to the verdict, in favor of the defendant. See 2 *Tidd's Practice, p.* 920; *Dickinson vs. Morrison*, 1 *Eng. Rep.* 266, 267.

For the above error, let the judgment of the Hot Spring Circuit Court be, and the same is hereby reversed; and let it be certified to said Circuit Court, that it is hereby directed and required to render judgment upon the verdict of the jury returned in this cause for the appellants at the trial.

Mr. Chief Justice ENGLISH did not sit in this case.

DAVIS VS. CALVERT.

Before the owner of an animal posted as an estray, can maintain replevin therefor, he must appear within the time prescribed, prove his claim to the property before a justice, and pay or tender to the person posting, the cost thereof. *Phelen vs. Bonham*, 4 *Eng.* 389.

A plea, to an action of replevin for an animal, that the defendant took it up as an estray, and regularly posted it as such, as required by law, and that the plaintiff did not prove property in said estray, and pay or tender the necessary fees as required by law, is sufficient, without setting forth a compliance in detail, with all the steps required by the statute in posting a stray animal.

A plea in bar is sufficiently certain, if it sets forth the subject matter of the defence relied upon, so that it may be fully understood by the adverse party, the counsel, the jury, and the court.

A plea setting up a defence under a public and general law, need not recite the provisions of the statute, if the allegations are sufficient to advise the plaintiff of the grounds and nature of the defence, and tender matter responsive to the declaration and susceptible of an issue.

The plea of *non detinet* is inappropriate in an action of replevin in the *cepit;* and, upon motion, should be stricken out.

Where the defendant pleads the general issue; and, also, interposes a special plea, amounting to no more than the general issue, or setting up matter that might be given in evidence under some other plea interposed, the proper mode of raising the objection to the pleading is not by demurrer, but by application to the court to compel him to elect upon which plea he will rely.

Writ of Error to the Circuit Court of Phillips County.

Hon. CHARLES W. ADAMS, Circuit Judge.

WATKINS & GALLAGHER, for the plaintiff. The plea is not objectionable, because it amounted to the general issue; or because the matter relied on, could have been given in evidence under the general issue. In detinue, at the common law, to which our

statutory remedy of replevin in the detinet is analogous, a lien must always have been pleaded specially. 1 *Ch. Pl.* 488; 4 *Bing.* 106; 1 *Dana* 578, as to special property in a sheriff, 1 *Ch. Pl.* 124.

The plea was sufficiently certain, as it fully apprised the plaintiff that the defendant claimed the right to hold the property because he had a lien upon it, and of the nature of that lien; and the plaintiff might well have so replied as to form an issue as to the fact, whether the animal was legally posted as an estray, or whether he had not paid or tendered, upon proof of property, the cost of posting it.

As to the degree of certainty necessary in special pleas, see *Spencer vs. Southwick*, 9 *John.* 316, and that the general mode of pleading in this case was sufficient. 1 *Ch. Pl.* 585, *and note U.*

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

William H. Calvert brought an action of replevin, in the *cepit*, against William M. Davis, in the Phillips Circuit Court, for a bay mare.

The defendant pleaded:

1. *Non cepit.*

2. *Non Detinet.*

3. Property in the defendant, traversing title in the plaintiff.

4. Property in a third person.

5. A special plea as follows: "*Actio. non,* because he says, that the said bay mare, in the plaintiff's declaration mentioned, was taken up by him, the said defendant, as an estray, and regularly posted as such, as required by the laws of said State of Arkansas, about three months previous to the service of the writ in this behalf upon him; and he held the said property as an estray, at the time the same was replevied out of his hands; and that the said plaintiff did not prove property in said estray, and pay, or tender to the defendant, the necessary fees as required by law to authorize this defendant to deliver the said bay mare up to him;

without this, that the said bay mare was, or is the property of the said plaintiff; and this he is ready to verify, wherefore, &c."

The plaintiff took issue to the first and second pleas, and filed replications to the 3d and 4th, to which defendant took issue.

To the 5th plea, the plaintiff demurred, on the grounds: 1st. "That the plea does not set up how said bay mare was taken up and posted as an estray, as prescribed by the statute."

2. The plea is not responsive to the declaration.

3. The plea is, in other respects, insufficient and imperfect, &c.

The court sustained the demurrer. The parties then submitted issues to the other pleas to a jury, and the plaintiff obtained verdict and judgment for the mare.

The defendant brought error, and seeks to reverse the judgment, upon the ground alone, that the court erred in sustaining the demurrer to his *fifth* plea.

Before the owner of an animal, posted as an estray, can maintain replevin therefor, against the person posting the animal, he must appear within the time prescribed, prove his claim to the property before a justice, and pay, or tender to the taker up, the costs of posting. *Dig., ch.* 65, *secs.* 21, 25, 26, 27, 28, 29; *Phelan vs. Bonham*, 4 *Eng. Rep.* 389; *Garabrant vs. Vaughen*, 2 *B. Mon.* 328.

The matter set up in the plea, was, therefore, a good defence to the action. Was it pleaded in proper form, or with sufficient certainty?

As a general rule, it is said to be sufficient for a plea in bar to be certain to a *common intent*, while in a declaration, certainty to a *certain intent in general*, is required. *Gould's Pl., ch.* 3, *sec.* 53, *p.* 82. It is difficult to get a practical understanding of what is meant by the different degrees of certainty in pleading, as defined by Lord COKE, and followed by commentators on the subect. Mr. GOULD, in treating of the certainty required in a declaration in describing the subject matter of the action, says: "No greater certainty is required than the subject will conveniently admit; or, in other words, that if the averments are so made, that the ad-

verse party, the counsel, the jury, and the judges can fully *understand* the subject matter, the declaration is sufficient." *Gould Plead., chap.* 4, *sec.* 26, *p.* 182.

Though it seems, that pleas in bar admit of a less degree of certainty than declarations, yet, we think the plea in this case sets forth the subject matter of the defence relied upon, so that it may be fully understood by the adverse party, the counsel, the jury, and the court.

The counsel who interposed the demurrer, seemed to suppose that the defendant should set forth in his plea a compliance by him, in detail, with all the steps required by the statute to be taken in posting a stray animal, from the time it is taken up, until the proceedings are complete. But this would serve rather to complicate the plea, than to answer any useful purpose in pleading. The statute in relation to estrays, is a public and general law, and its provisions need not be recited in a plea based upon them. We think the allegations of the plea were sufficient to advise the plaintiff of the grounds and nature of the defence relied upon, so that he might prepare to meet it, and tendered matter not only responsive to the declaration, but susceptible of an issue.

Had the plaintiff replied to the plea, that the defendant did not take up the animal, sued for as an entray, and cause it regularly to be posted as such, as required by the laws of the State, &c., in manner and form as alleged in the plea, the defendant would have been required to prove upon a trial of this issue, a *substantial* compliance with the provisions of the statute on his part, in taking up and posting the animal. *Harryman vs. Titus*, 3 *Mo. Rep.* 302.

Or the plaintiff might have replied that he did prove property in the animal, and pay, or tender to the defendant, as the case might have been, the necessary fees as required by law, &c., &c., and thus have formed an issue upon negative allegations of the plea.

Or, upon leave of the court, he might have interposed two re-

plications, one to the affirmative, and the other to the negative allegations of the plea.

It may be supposed that the defendant might have had the benefit of the matter of defence set up in the plea, upon the trial of the other issues; and that, therefore, the judgment should be affirmed. The action being in the *cepit*, the plea of *non detinet* was inappropriate; and, upon motion, should have been stricken out. *Dig.*, *chap.* 136, *sec.* 33, 34.

If it be conceded, that under the issue to the plea of *non cepit*, had it appeared upon the trial that the defendant did not take the animal wrongfully, but that it strayed from the owner, and he lawfully took it up as such, &c., the plaintiff would have failed: (*Nelson vs. Merrian*, 4 *Pick.* 249,) or if it be conceded, that under the issue to the plea of property in the defendant, if it had been proven upon the trial, that the defendant lawfully posted the animal, as an estray, and that the costs due him on that account had not been paid or tendered, and he thereby had a special property in the animal, the plaintiff would have failed in the action; yet, it would not follow that the judgment of the court, sustaining the demurrer to the special plea, should be affirmed.

Because: *first*, the defendant had the right to plead as many several matters as he might think necessary for his defence, (*Dig.*, *chap.* 126, *sec.* 69; *Ib. chap.* 136, *sec.* 32): and *secondly*, even if the special plea interposed by him, amounted to no more than the general issue, or set up matter that might have been given in evidence under some other plea interposed, yet, the proper mode of raising the objection, was to apply to the court to compel him to elect upon which plea he would rely, and strike out the other, and not to demur. *Lincoln vs. Wilamowicz*, 2 *Eng. Rep.* 378; *Lawson et al. vs. The State*, 5 *Eng. Rep.* 28; *Gould Plead.*, *chap.* 6, *part* 2, *secs.* 86, 87, 89.

The practice, perhaps, is to plead specially matter of defence of the character set up in the plea in question. *Cromwell vs. Clay*, 1 *Dana* 578; *Garabrant vs. Vaughn*, 2 *B. Monroe* 327;

Phelan vs. Bonham, 4 *Eng. Rep.* 389. The plaintiff could have but little ground to complain, that it was specially pleaded, as he was thereby advised of the defence relied on, and not subject to surprise, as he might be, if introduced under some more general plea.

Holding the plea to be substantially good, the court below erred in sustaining the demurrer thereto. The judgment is therefore reversed, and the cause remanded, with instructions to overrule the demurrer, permit the plaintiff to respond to the plea, and to grant the defendant a new trial.

Hon. T. B. HANLY, J., not sitting in this case.

PIKE & CUMMINS VS. GALLOWAY.

It is error to permit a demurrer to the declaration to be filed, while an issue of fact of a plea in bar is standing in the record.

The defendant executed his sealed note payable "to the order of George S. Bernie, to Messrs. Byrne & Burnside:" Bernie endorsed the note to the plaintiffs: HELD, That the endorsement vested in the plaintiffs a legal right to sue upon the note.

Writ of Error to the Circuit Court of Pulaski County.

Hon. WILLIAM H. FEILD, Circuit Judge.

CUMMINS, for the plaintiffs. There is no difference in the form, or construction, or effect of notes and bonds made under our law. *Story Prom. Notes, sec.* 3, 4, 33, 34, 35; *Walker et al. vs. Johnson et al.*, 13 *Ark. Rep.* 528.

No contract is to be construed as a surrender of a legal right—as to assign contracts generally—especially as against a party who does not execute the contract. *Chit. on Con.* 663, *&c.*

Naming the *usee* in a bill does not affect the legal title, but simply operates as notice of the equity to first indorsee. *Chit. on Bills* 199, 200.

CURRAN & GALLAGHER, contra. Plaintiffs do not show a complete title in themselves to the instrument sued on. *Block vs. Walker*, 2 *Ark.* 4; *Buckner vs. Greenwood*, 1 *Eng.* 206.

Byrne & Burnside were the legal owners of the note, and not George S. Bernie, the assignor. 1 *Chit. Pl.* 7; *Potter vs. Yale College*, 8 *Cow.* 60; *Bogert vs. DeBussey*, 6 *John. Rep.* 94; *Hershy et al. vs. Hichox*, 7 *Eng.* 125.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of debt upon an instrument of writing, a copy of which, together with the endorsement under which the plaintiffs made title, is as follows, *to wit:*

"$237 50.

FORT WASHITA, CHICKASAW NATION, }
February 5th, 1848. }

Eleven months after date, I promise to pay, to the order of George S. Bernie, to Messrs. Byrne & Burnside, Chartre street, New Orleans, two hundred and thirty seven dollars and fifty cents, value received, without defalcation, as witness my hand and seal.

R. L. GALLOWAY." [SEAL.]

Endorsed:

"Pay to Messrs. Pike & Cummins, of Little Rock.

GEORGE S. BERNIE."

The declaration was in the usual form, setting out the writing obligatory and the assignment, and making profert of each. At the return term, oyer was craved, and copies, as we have set them out, were accepted as a sufficient grant thereof. Whereupon, the defendant entered his plea of payment, and the plaintiffs joined issue; and, on motion, the court ordered that both parties have leave to take depositions to be read conditionally upon the trial, and continued the cause.

At the next following term, no order appearing to allow a withdrawal of the plea, the defendant filed a demurrer to the declaration, assigning for cause:

1*st.* That plaintiffs failed to show a legal title to the instrument sued on. The legal title is in *Byrne & Burnside.* Plaintiffs' assignor had no right to assign.

2*d.* The declaration shows no cause of action.

3*d.* That the instrument given on oyer, varies from the one described in the declaration.

The plaintiffs joining in the demurrer, upon argument, the court sustained it, and the plaintiffs declining to proceed farther, final judgment was rendered for the defendant, and the plaintiffs brought error.

No question has been made by counsel, as to the irregularity of allowing the demurrer to be filed after the plea of payment and issue thereon, and when that was still standing in the record; and none as to the alleged variance. It is only the questions raised on the other two assignments in the demurrer, that are insisted upon in this court. To solve them, we must necessarily interpret the contract between the parties.

From the face of the instrument, it seems manifest, that Bernie and Galloway were the original contracting parties. The consideration of their contract has not been questioned, and its sufficiency must, therefore, be taken for granted. It is alleged, that they contracted within this jurisdiction; and, therefore, they must be taken to have contracted with reference to our laws. The same is to be said of the contract of assignment between Bernie, and Pike & Cummins.

By these laws, in analogy to the law merchant, its rules respecting the rights and remedies of the makers, endorsers, and holders of bills, notes, and writings obligatory, indiscriminately, when for the payment of money absolutely ; the manner of making the assignment and its effect, and the mode of presentment and notice, have been, by the current of our decisions, enforced. See the cases cited to this effect, in *Worthington vs. Curd*, 15 *Ark. Rep.* 504. By one of these rules, when a note is made payable, "to the order of A," it is valid, and in contemplation of law, is payable to A, while he remains holder. *Story on Prom. Notes, p.* 40, *sec.* 36, *and authorities there cited.* By another one of these rules, he may, by his endorsement upon the note, thus making his order, transfer his right to receive the money to another person, to whom, in that case, in contemplation of law, the maker's promise is as emphatic to pay the money to the endorsee, as it was before the endorsement, to pay it to the payee himself. By another rule, it is solely at. the payee's election, with which the maker has no concern, whether he will retain the note himself, or pass it to another person. All these rules are to promote the negotiability of the paper, and to facilitate the payee in passing it off like currency in the course of trade. And there are other rules, all tending the same way, like that which construes any equivalent words in a note, as "*assigns*," to mean "*order*," or "bearer," as the case may be, in favor of negotiability. *Story on Prom. Notes, p.* 47, *sec*, 44. Until such a note shall have been passed off, the right to receive the money, and the consequent right of action, upon its non-payment, remains with the payee. Afterwards, both are in the indorsee, who stands in the shoes of the payee.

In the sealed note before us, on which we are to determine the questions raised by the demurrer, when the words "to Messrs. Byrne & Burnside" are left out, we have a perfect instrument, about which no question could arise. If, when considered as it is, and Bernie had indorsed it to Byrne & Burnside, the rights, either of the maker, or of the indorsees, would, in no respect,

have been different, had the words "to Messrs. Byrne and Burnside" been left out; because, in the general undertaking, "to pay to the order of George S. Bernie," the maker had, in contemplation of law, obliged himself to pay to whomsoever Bernie might indorse the note; and had, therefore, already embraced Byrne & Burnside, if they should have happened to become the indorsees.

The only matter of difficulty then, is, in determining whether or not the special undertaking to pay Byrne and Burnside, upon the condition that the payee should indorse the note to them, should be held to be an inhibition upon Bernie, to indorse it to any one else.

The negotiability of notes, as we have seen, is to be favored. In contemplation of law the maker had no concern with this. He is supposed to owe the money, else he would not have given his note for it; and, therefore, it is a matter of no consequence to him, to whom he pays it. And hence, no presumption arises that he is injured, whether the note remains in the hands of the payee, or is passed off by him. Any construction, therefore, of the phraseology of a note in favor of its negotiability, cannot be supposed to injure the maker, and any construction against it cannot be supposed to benefit him. Until the contrary, then, should expressly appear upon the face of the note, any thing therein, which might relate to its negotiability, ought to be taken to have been inserted for the benefit of the payee. This is what the law does, when it construes "assigns" to be equivalent to "order." With this understanding of the law, what figure do the words "to Byrne & Burnside" cut in the note before us? Just none at all, in our opinion, since it can have no effect to enhance the negotiability of the note, and cannot be supposed to have been designed to restrict it, otherwise than by vague inference, having no foundation to rest upon in any thing upon the face of the note going to repel the presumption, that the payee alone was interested in its negotiable qualities.

There is another point of view in which this note may be regarded, in which the legal result in this case will be the same.

That is to say, it is probable, from its face, that the money, which the maker promised to pay to the order of Bernie, was for the use and benefit of Byrne & Burnside. In that case Bernie was, in contemplation of law, a trustee for that firm; and, in that capacity contracted with the maker for their use. In this view, Bernie's endorsement was sufficient for the plaintiffs to sustain their declaration; because, "in the case of a note payable, or indorsed to a trustee for the use of a third person, the trustee alone is competent to convey the legal title to the note, by a transfer or indorsement." *Story on Prom. Notes, chap.* 4, *p.* 130, *sec.* 125, *and authorities cited in note* 3.

The consequence is, that we think the plaintiffs showed, by their declaration and the note and assignment exhibited on oyer, not only a title to sue, but ample cause of action. Hence, the court below, in our opinion, not only erred in suffering the demurrer to be filed, while an issue of fact, on a plea in bar, was standing in the record, but in sustaining the demurrer for the causes assigned. The judgment rendered, will, therefore, be reversed, and the cause remanded, to be proceeded with according to law, and not inconsistent with this opinion.

KIRKPATRICK VS. WOLFE & BISHOP.

Where a party moves for a new trial, he waives all prior exceptions not incorporated in his motion for a new trial. *Nevill vs. Hancock & Ewing*, 15 *Ark.* 511, *and previous adjudications.*

A written endorsement on a note, signed by the payee, and directing payment thereof to be made to a third person, is not sufficient evidence of an assignment of the note, without proof of delivery.

A party will not be entitled to a new trial on account of newly discovered evidence, where it is merely cumulative; nor unless he shows that he has used due diligence to procure it at the former trial.

Writ of Error to the Circuit Court of Ashley County.

The Hon. THEODORIC F. SORRELLS, Circuit Judge.

FOWLER, for the plaintiff. The judgment in this case was clearly wrong. The proof of the assignment in full was uncontradicted; and there was no pretence that the note was either reassigned, or the assignment stricken out. The plea was a proper one in bar, and judgment ought to have been rendered in Kirkpatrick's favor. *Gamblin et al. vs. Walker*, 1 *Ark. Rep.* 222; *Block vs. Walker*, 2 *ib.* 10; *Roane et al. vs. Lafferty et al.*, 5 *ib.* 467; *Lafferty vs. Rutherford*, *ib.* 650; *Dickinson et al. vs. Burr*, 7 *ib.* 41; *Leavitt vs. Cowles et al.*, 2 *McLean's Rep.* 492.

PIKE & CUMMINS, for defendants. By moving for a new trial the party waived all prior exceptions.

As well in regard to that point, as to the other, and only one supposed to be relied on, that is, as to the assignment of the note, the case of *Worthington vs. Curd & Co.*, 16 *Ark. Rep.*, is conclusive.

The newly discovered evidence is no ground for a new trial: 1*st.* Because the party shows no diligence to get the evidence before the trial. 2*d.* Because it merely attempts to impeach a witness. 2 *Ark. Rep.* 33, 133, 346.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of debt, commenced in the Ashley Circuit Court on the 4th October, 1853, founded on a promissory note, made by the plaintiff in error and others, not proceeded against for want of service, payable to the defendants as co-partners, dated 11th August, 1847, and payable at nine months from date.

Several pleas were interposed by the plaintiff, Kirkpatrick, *to wit:* 1*st. Nil debet.* 2*d.* That on the 11th August, 1847, Wolfe & Bishop endorsed, assigned, transferred and delivered said note, for value received, to Wilson & Duprey, and averring that they were the owners thereof. 3*d.* Payment of principal and interest to Wolfe & Bishop, on the 11th May, 1848. 4*th.* Statute limitations of five years.

The defendants in error joined issue to the first plea; demurred to the second, for technical objection, which was sustained, and an amended one filed, of same import, which was replied to, and issue made up thereon. Replication denying payment and issue thereon, and replication and issue to the 4th plea.

It appears from the transcript, that neither party required a jury, and the several issues, as above, were submitted to the court by consent. Verdict and finding for the defendants in error, for the amount of the note sued on, and interest, on the following testimony, *to wit:* The note sued on, and an endorsement thereon in these words: "Pay to the order of Wilson & Duprey," signed "Wolfe & Bishop," which manifested no marks of obliteration, and which was read without objection by the plaintiff in error; and the following oral testimony, *to wit: Samuel J. Cook,* a witness for the defendant in error, testified: "That he received said note from Wolfe & Bishop, by letter, for collection, and

wrote back to them for their christian names, and they sent them, and that he brought suit, and had no knowledge of any one else having anything to do with it:" and also, the testimony of *John B. Savage*, who swore, "That he was former clerk of said court; that on the 4th October, 1853, he filed the original declaration in this cause, as its endorsement shows; (which he produced and read as stated); that by leave of the court the defendants in error had leave to withdraw their declaration, filed on the 4th October, 1853, and to file a new one in its stead, which they did on the 25th March, 1854, which is the one now in court. (The witness read the orders from the record, which sustained his statement.) This was all the evidence adduced by the parties, at the trial below. Court gave final judgment for the defendants in error, on the verdict as above stated.

Plaintiff moved the court in writing for a new trial, setting out therein the following causes: 1*st*. That the verdict was against the law and evidence. 2*d*. Because of newly discovered evidence since the trial; and with the motion, the affidavit of plaintiff in error was filed, stating, in substance, "That since the trial he had learned he could prove by one *Wiggins*, that *Wilson & Duprey*, *to whom* the note sued on purports to be assigned, placed the same in the hands of the witness, Cook, to be sued on; that he did not know of the existence of this evidence at the time of the trial had in this cause." Which motion was overruled, and plaintiff in error excepted, setting out in his bill all of the above facts.

He now brings error, assigning several causes, wherefore, said judgment should be reversed, which we will proceed to consider.

It is insisted by the defendants in error, that the plaintiff, in consequence of his having moved for a new trial in the court below, waived all prior exceptions, and must stand on the intrinsic justice of his case. This is undoubtedly correct, with this qualification: *Provided*, the party does not incorporate in his motion for a new trial, the antecedent decisions of the court of which he complains as grounds for a new trial. See *Nevill vs. Huncock &*

Ewing, 15 *Ark. Rep.* 511, and the former adjudications of this court to the like effect.

It does not appear from the transcript in this cause, that any exceptions were taken to the ruling of the court, by the plaintiff in error, at any stage of the proceeding, until his motion for a new trial was overruled. It follows as a consequence, that no complaint can be heard or considered in this court, except upon what may appear from the exceptions taken, on the overruling the motion for a new trial, and on the grounds therein set forth. See *Dickinson et al. vs. Burr*, 15 *Ark. Rep.* 374.

It is maintained, that the finding of the court, was not authorized by the facts and the law.

There was no evidence whatever introduced by the plaintiff in error to support the issue upon his second plea. It was incumbent upon him, from the pleading in the cause, to prove an assignment of the note sued on to Wilson & Duprey; this he did not do. His only evidence upon this point was the evidence of the endorsement upon the note, which did not prove the issue on his part. He should have gone farther, and proved that the assignment to Wilson & Duprey was rendered complete and perfect by proof; that after endorsement in writing, the note sued on was delivered to them. This was essential as held in the case of *May vs. Cassidy*, 2 *Eng. Rep.* 376; *Feimster vs. Smith*, 5 *Eng. Rep.* 496; *Mitchell vs. Conly*, 13 *Ark. Rep.* 416. So far from a delivery to *Wilson & Duprey* being proved, the reverse was conclusively shown by the testimony of the witness Cook. He testifies that he received the note in question directly from the defendants in error. The court was warranted in finding upon this issue for the defendants in error. The truth is, we are at a loss to conceive how it could have found otherwise from the law and evidence.

As to the other issues, there is no question made by the plaintiff in error in regard to the propriety of the finding of the court upon them. The evidence is conclusive for the defendants in error upon these issues. We find no error, therefore, in the verdict of the court in respect to them.

The only remaining point to be determined, is, the one made in respect to the newly discovered evidence; and as to this, too, we hold that the court below ruled properly: because the plaintiff in error does not show any diligence whatever on his part, whereby to obtain the newly discovered evidence, and for the additional reason, that it was cumulative of the evidence produced at the trial, and as to these, see the case of *Burriss vs. Hurd & Wise*, 2 *Ark. Rep.* 33.

Finding no error, therefore, in the record and judgment of the Circuit Court of Ashley county, they are in all things affirmed. Let the judgment be affirmed.

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ARRINGTON VS. CONREY ET AL.

The Circuit Court may, under its high equity powers, cause its record to be amended at a subsequent term, in whatever may be necessary to make it speak the truth, whenever the ends of justice require such amendment. (*King & Houston vs. State Bank*, 4 *Eng.* 188.)

Though such amendments may sometimes be made by interlineation, the more regular mode after the judgment term, is, by an order of court reversing the defective entry, followed by a new one, *nunc pro tunc*, such as should have been made in the first instance. *Ib.* But the entry of the new judgment is, virtually, a reversal of the first one.

Where it is clearly made to appear that there is an omission or error in the entry of the judgment, as to the amount recovered, caused by the misprision of the clerk of the court, such judgment should be amended.

Appeal from the Circuit Court of Ouachita County.

Hon. THOMAS HUBBARD, Circuit Judge.

WATKINS & GALLAGHER, for the appellant.

CUMMINS, for the appellee.

Mr. Justice HANLY delivered the opinion of the Court.

It appears from the transcript in this cause, that on the 24th August, 1854, the appellees caused notice in writing to be served on the appellant, to the effect, that they would apply to the Ouachita Circuit Court, at the term thereof to be holden in October next thereafter, for judgment against him, (appellant,) *nunc pro tunc*, in their (appellees') favor, as of the 7th October, A. D. 1851, for the sum of $424 66 cents damages, with 8 per cent. interest until paid, instead of the sum of $142 66, with eight per cent. till paid, as rendered by said Circuit Court of Ouachita county, on the 7th day of October, A. D. 1851, in favor of the appellees, and against appellant. It further appears from the transcript, that the notice aforesaid was filed in the office of the clerk of the Circuit Court of said county of Ouachita, on the 29th August, 1854; that at the October term of such court, for 1854, the appellees came and filed their motion in writing, verified by affidavit, in effect, that, at the October term of said court, for 1851, they recovered a judgment against the appellant in a suit founded on a promissory note, for $281 60 cents, bearing interest at eight per cent. per annum from maturity: the same being dated 3d December, 1844, and due six months from date, payable to the order of appellees, and signed "Taylor & Arrington:" the said Arrington being alone sued in the action; that at the time at which such judgment was so rendered, the appellant rested his defence upon two pleas of the statute of limitations of five years, and two pleas of the statute of limitations of three years; that said appel-

lees took issue upon each of said pleas; said issues were submitted by consent, to the court sitting as a jury, on no other evidence than the note sued on; that said note was still of record, and ready to be shown to the court; that the court upon the submission of said cause, found in favor of the appellees upon the issues to the two pleas of the statute of limitations of five years, and in favor of the appellant upon those to the statute of three years, but gave judgment for the appellees *non obstante veredicto*, thus rendering judgment, on all the issues for the appellees, for the amount of said note, with 8 per cent. interest, from its maturity, until judgment; that according to the finding and judgment of the court as aforesaid, the judgment now of record should be for the sum of $424 26 cents, damages, with interest at eight per cent. till paid; but that, by a mistake or misprision of the clerk of said court, said judgment was recorded as being only for the sum of $142 66 cents, with interest at eight per cent. till paid; that the records of said court still remaining, clearly show the error of said clerk in the recording of said judgment, and asking that the court would amend the said record by entering judgment, *nunc pro tunc*, as of the 7th October, 1851, for the sum of four hundred and twenty-four dollars, and twenty-six cents, the amount for which the judgment of the court was really rendered, and would then have been on the record, but for the misprision of the clerk as aforesaid.

The consideration of this motion, both parties appearing, was continued by consent, from October term, 1854, to the succeeding term in April, 1855.

At the April term, 1855, both parties again appeared, and the motion to amend as above, was called up, and in support thereof, the appellees read to the court the original record, including the declaration, pleas, replications and note sued on, and the various entries made in respect to said cause, from its commencement to its result. He furthermore read the written statement, made under oath in open court, of one *Thompson*, who stated, in substance, that at the time the proceedings were had in the cause aforesaid, he was the assistant as deputy of the clerk of the Cir-

cuit Court of Ouachita county; and, as such, attended mostly to the business of the court, and entering upon the records the proceedings thereof; that he recollected distinctly all that occurred at the time the final judgment in this cause was rendered, at the October term, 1851, of this court, and by his statement sustained the facts set forth in the motion of the appellees above stated; stating further that the note in question, the foundation of the final judgment in this cause, was handed, at the request of the court, (made at the time said judgment was rendered, 7th October, 1851,) to the counsel of the appellee, to compute the interest, with directions that the principal thereof, and the interest which had accrued, should be added together as the damages, and that judgment should be entered for that amount; that said note was returned to said Thompson, with a calculation endorsed thereon, in pencil, showing as the result $142 66, which he, Thompson, took to be the amount of damages claimed, but on subsequent examination he discovered was only the amount of interest due on said note from its maturity to that time, and that through mistake and inadvertence, he, as such deputy clerk, entered up said judgment for the amount of said interest, $142 66, as the damages, omitting to add thereto the principal of said note, $281 60.

To the reading of which statement, the appellant at the time objected, and his objections being overruled, he excepted. The appellant also objected to the reading of the original record, the pleas, replications, entries, and the note sued on in the original cause, at the time they were respectively offered, but his objections were overruled by the court, and he excepted.

The above was all the evidence introduced in support of the motion, by the appellees.

The appellant then proceeded to prove, by the original files or records of said court, that, at the October term, 1851, he prayed for and obtained an appeal, from the judgment then rendered in this cause, to the Supreme Court, and this was all the evidence introduced by him.

On this state of case, the court below, on the 5th April, 1855,

sustained the motion of the appellees, and in pursuance thereof, proceeded to amend the record in conformity therewith, by entering judgment, then, as of the 7th October, 1851, for the sum of $424 26 cents, in lieu of the sum of $142 66, as entered of that date by mistake.

To the opinion of the court, sustaining said motion of the appellee, and the entry of the judgment, *nunc pro tunc*, the appellant excepted, and embodied the evidence aforesaid therein.

The cause is brought here by appeal and supersedeas; the appellant having entered into recognizance in the court below with that view.

Some six errors are assigned by the appellant, why the judgment of the Ouachita Circuit Court should be reversed.

We will not pretend to notice the various errors assigned, conceiving, as we do, that the view that we shall take of the case, will dispense with a detailed notice of the points arising upon the assignment.

The record of the proceedings of the original suit does not come up, and is not presented in our present inquiry, further than as they are presented by the bill of exceptions, shown in the transcript in the present proceedings. We will not look to that to determine whether there was or was not error in the original suit, and the proceedings thereunder, holding, as we do, that they are not involved in the present inquiry.

The question under consideration is therefore narrowed down to the simple enquiry whether the court below did or did not err in permitting the amendment at the April term, 1855, of the Ouachita Circuit Court.

That "the authority of a court to amend in such cases" (as the one for instance, presented for our consideration) "does not arise from the statute of *amendments and jeofails*, but from the high equity powers of the court, which enable it to amend in whatever may be necessary to make the record speak the truth, whenever the ends of justice require such amendment," is to us, a self-evident proposition, and does not admit of controversy, at

this late day. See *King & Houston vs. State Bank*, 4 *Eng. Rep.* 188. We, therefore, hold that the court below possessed, both the *power* and *authority*, to allow the amendment made in the case at bar.

Our next inquiry will be, did the court permit the amendment *in the manner* and *mode* authorized by law? And as to this, we conceive the case of *King & Houston vs. State Bank*, above cited, is conclusive; for, say the court in that case, "although many amendments may be appropriately made by interlineation, especially when the order of the court granting them, specifies and describes the particular amendment allowed to be made, * * * still the more regular mode of making these amendments, after the judgment term, is, by an order of court, *reversing the defective entry, followed* by a new one, *nunc pro tunc*, such as should have been made in the first instance: which was the precise *mode* and *manner* pursued in the case now being considered; except, that the court in the *last order* did not *reverse the first*, in *express words*, but which we hold to have been virtually done by the last order.

The only remaining inquiry for us is, did the court *discreetly* exercise the *power* and *authority* inherent in it, in allowing the amendment from the facts developed by the transcript?

We are at a loss to conceive of a case which could be more strongly made out and more conclusively established by the facts, than the one at hand. Every circumstance and fact point unerringly to the conclusion, that there was an *omission* or *error* in the first judgment, and that it was caused by the misprision of a person other than the court or judge. The error is purely an error of fact and not of law; one proceeding from an officer or person acting in a ministerial capacity; and, therefore, to prevent the *real* and *true* judgment of the court from being defeated, should have been amended.

We, therefore, affirm the judgment of the Ouachita Circuit Court in all things touching this proceeding.

JORDAN VS. BRADSHAW ET AL.

A sheriff's deed is evidence, under the statute (*sec.* 60, *chap.* 67, *Digest,*) of the facts recited in it; but if such deed fail to recite all the facts required by the statute—as where it fails to recite the judgment under which the property was sold—it can furnish no evidence of the existence of such facts: and the party claiming under the deed, must prove them aliundé.

It is not necessary that an execution should issue within a year and a day to keep the judgment alive. (*Hanly vs. Carneal*, 14 *Ark.* 527.)

The issuance of an execution by a justice of the peace, upon a judgment rendered by him, and a return of *nulla bona* thereon, are pre-requisites to the filing of a transcript of such judgment in the Circuit Court and the issuance of execution therefrom: but a failure to comply with such pre-requisites, cannot affect the rights of strangers when brought up in a collateral proceeding, and can be taken advantage of by the defendant, only, in a direct proceeding.

A sheriff's deed for land sold under a judgment of a justice, need not recite the issuance of an execution by the justice and a return of *nulla bona* before the filing of the transcript of the judgment in the Circuit Court. Such facts may be proved by the certificate of the justice, to that effect, accompanying the transcript without the production of the original execution and return, or a certified copy thereof.

A sheriff's deed to the purchaser of land sold under execution, together with the Auditor's deed to the judgment debtor for the same land conveying a tax-title, sufficient evidence of the right of possession to maintain ejectment.

Appeal from the Circuit Court of Pulaski County.

This was an action of ejectment brought by Jordan against Bradshaw and Manuel, and determined in the Pulaski Circuit Court before the Hon. WILLIAM H. FEILD.

The plaintiff, to sustain the issue to the plea of *not guilty*, read in evidence a deed from the Auditor to James Mills for the land in controversy, which had been forfeited for non-payment of taxes; and a deed from the sheriff of Pulaski county to him, reciting an execution against said Mills in favor of Asa G. Baker, but

omitting to recite the judgment, on which the execution issued, or its date, or where, or by whom rendered. The sheriff, however, in his acknowledgment of the deed, stated that the land was levied upon and sold under an execution issued from the office of the clerk of the Circuit Court upon a judgment rendered before a justice of the peace in favor of Asa G. Baker against James Mills.

The plaintiff also read in evidence, from the docket of judgments and decrees of the Circuit Court, the entry of a judgment therein between said parties, and a transcript of the proceedings and judgment in the case, before the justice of the peace, filed in the office of the clerk; in which transcript it appeared to have been noted on the justice's docket, that execution had been issued on the judgment, and returned *nulla bona* by the constable.

He then read the execution from the Circuit Court, under which the sale was made, reciting the judgment before the justice, the issuance of execution and the return of *nulla bona*, and the filing of the transcript in the Circuit Court, together with the return of the sheriff showing the levy, &c., and sale to the plaintiff.

On motion of the defendants, the Circuit Court excluded from the jury the transcript of the proceedings and judgment of the justice; filed in the Circuit Court, the execution that issued thereon and the return; and, also, the sheriff's deed to the plaintiff; and, thereupon, instructed the jury, in effect, that to entitle the plaintiff to recover, he must read in evidence either the original execution issued by the justice with the return of *nulla bona* thereon, or a certified copy of such execution and return.

The verdict and judgment being for the defendants, the plaintiff moved for a new trial, which was overruled, and he excepted and appealed to this court.

JORDAN, for the appellant.

BERTRAND and S. H. HEMPSTEAD, for the appellees.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

The first assignment of errors questions the propriety of the decision of the court below, in requiring the plaintiff to produce the judgment and execution, under which the land in controversy was sold, before he could read the sheriff's deed in evidence. The *60th section of chapter 67, of the Digest*, provides that "The officer who shall sell any real estate, or lease of lands for more than three years, shall make the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order or decree and other particulars recited in the execution; also, a description of the time, place and manner of sale, which recital shall be received in evidence of the facts therein stated." There can be no question but that the sheriff's deed is evidence of the facts recited in it; for the statute is plain and positive upon the subject, and if the deed shall have recited all the facts required by the statute to constitute a complete transfer of all the right, title and interest, which the debtor had in and to the property sold, it is equally clear, that it should have been received as evidence of its recitals, and that too, without the introduction of the judgment and execution upon which it was founded. This court, in the case of *Newton vs. The State Bank*, 14 *Ark. Rep.* 10, said: "The act of the Legislature which requires the sheriff to recite the names of the parties, the date of the writ and of the judgment, together with a description of the time, place and manner of the sale, and which makes such recitals evidence of the facts so recited, was intended by the Legislature to supercede the necessity for producing the record from which such recitals were made as a matter of convenience and to furnish evidence of the authority under which the officer acted, as well as the manner in which he had executed his authority, in the deed itself. Not that the recitals should be conclusive evidence of the facts recited; for that would exclude all inquiry into the au-

thority under which the sheriff acted; but that it should be legal, competent evidence until falsified by evidence of a higher and more authentic character. The statute requires the deed to recite the names of the parties to the execution, the date when issued, the date of the judgment, order or decree, and other particulars recited in the execution, and, also, a description of the time, place, and manner of the sale." The deed exhibited in this case falls short of the requirements of the law, and that too in an essential particular; and, consequently, could not, of itself, and unsupported by other proof, have made such a case as would have entitled the plaintiff to recover. The deed is wholly silent as to the judgment; and, consequently, can furnish no evidence even of its existence, and much less of its date and filing in the Circuit Court. Without the provision of law already referred to, there can be no doubt of the necessity of laying a foundation for the introduction of the sheriff's deed by first producing the judgment or execution upon which it is founded; and, as a necessary consequence, the deed, to supersede the necessity of such a foundation, must show a full compliance with the statute. The Circuit Court, therefore, did not err in requiring the plaintiff in this case, to produce the judgment and execution before he could be permitted to read the deed in evidence. The plaintiff, in obedience to the order of the court, read in evidence the docket entry in respect of the transcript of the justice's judgment, the transcript of said judgment itself; and, also, the original execution issued to the sheriff of Pulaski county upon said transcript, and under which the plaintiff purchased the property in dispute, and also the deed from the sheriff to the plaintiff for said property. The defendants then moved to exclude each of the documents as evidence. The motion to exclude the transcript of the judgment of the justice was put upon the ground, that said judgment was dead before the transcript thereof was filed in the clerk's office, as it did not appear from said transcript that an execution had been issued thereon within a year and a day from the time of its rendition; also, upon the ground that the judgment was void, and further, that

the plaintiff had failed to show that an execution had issued on said judgment by the justice, and had been returned "no property found," before the transcript was filed in the clerk's office, and execution issued thereon by the clerk, which the defendant's counsel contended could only be shown by a transcript of such execution and return, or by producing the original; and thereupon, the court announced that inasmuch as said transcript of the justice did not embrace a transcript of such execution and return, he would sustain said motion, unless the plaintiff would produce and read in evidence such original execution and return thereon, or a certified copy thereof. The plaintiff having failed to produce either the original execution and return, or a certified copy thereof, the court excluded the transcript of the justice's judgment filed in the clerk's office, and the execution issued by the clerk, and the return of the sheriff thereon, and also the said deed executed by the sheriff to the plaintiff for the land in question. The first ground of the motion to exclude, was clearly untenable. It was not necessary under the law, that an execution should have been issued within a year and a day in order to keep the judgment alive, as the lapse of that period of time did not even raise a presumption of payment. This court in the case of *Hanly vs. Carneal*, 14 *Ark. Rep.* 527, said, that "by the *Revised Statutes of* 1839, *Title*, LIMITATION, *sec.* 30, judgments and decrees thereafter rendered, are presumed to be paid and satisfied, after the expiration of ten years from their rendition, and by the act of December, 1844, repealing the 30th section referred to, the like period was adopted as a limitation of actions upon judgments. It is manifest that under our statute of limitations, fixing the period of ten years, as the life time of a judgment no conclusive presumption in law of payment can arise within that space of time, and that consequently there can be no necessity to issue executions from time to time to keep it alive. True it is, that the judgment of a justice of the peace is not a lien, *per se*, upon the property of the defendant, before it is filed in the Circuit Court: and, in that respect differs from that of the Circuit

Court, yet, inasmuch as no presumption of payment can arise from an omission to issue execution within a year and a day, we can see no good reason for taking a distinction between them in regard to the necessity of taking steps to keep them in life. We consider this the inevitable result of the doctrine laid down by this Court, in the case of *Hanly vs. Carneal*, already referred to. There is nothing appearing to show that the judgment is void, as contended by the defendants. The amount was within the jurisdiction of the justice, and the record shows upon its face that the justice had jurisdiction of the person of the defendant, as it purports to be by confession. The third and last reason assigned why the transcript of the justice's judgment ought to be excluded, was also badly taken. It is true, that an execution to be issued by the justice, and a return of *nulla bona*, are pre-requisites to the filing of the transcript of a judgment of a justice in the Circuit Court, and the issuance of execution therefrom, yet, it is not even necessary that the execution from the Circuit Court on such judgment, should recite the fact of such issuance and return of execution. See *Massey vs. Gardenhire*, 7 *Eng. R.* 638. So that the execution issued in this case by the clerk of the Circuit Court, and under which, the plaintiff purchased the property in dispute, need not have recited the facts of the issu[illegible]nce of the execution by the justice and return of *nulla bona* [illegible] he constable, but having so recited them, and such recital [illegible] supported by the certificate of the justice accompanying [illegible] transcript of the judgment, most assuredly made a *prima* [illegible] case of their existence; and, consequently, the Circuit C[illegible]red in excluding the justice's judgment upon that grou[illegible] authorizing a justice's judgment to be filed in the [illegible]ourt, and making it a lien on the real estate of the defe[illegible] the time of the filing the transcript thereof, (*see M*[illegible] *Robins, Ex*[illegible], 14 *Ark. R.* 602), does not require the [illegible] execution, or even a copy thereof to be filed with the ju[illegible]e it is, that it declares no execution shall be issued [illegible]ircuit Court thereon until an execution shall have l[illegible] a justice, and returned that

the defendant has no goods or chattels, whereof to levy the same. The statute, in requiring the plaintiff, in a judgment rendered by a justice of the peace, to take out an execution and to have a return of *nulla bona* upon it before he can claim to have a transcript of such judgment filed in the Circuit Court, was designed alone for the benefit of the defendant, in order that his real estate should not be charged or sold, so long as he had personal property to satisfy such judgment. Such being the reason of that requirement of the statute, it is clear that an utter failure to comply with it, cannot affect the rights of strangers, when brought up in a collateral proceeding, but in no event could amount to any thing more than an irregularity, and as such to be taken advantage of alone by the defendant in the judgment, in a direct proceeding interposed for the purpose of quashing the process issued upon such judgment. We are clear, therefore, that the court below erred in excluding the transcript of the justice's judgment, the execution issued to the sheriff thereon, and the deed executed by the sheriff to the plaintiff. There can be no doubt or question in regard to the sufficiency of the evidence offered by the plaintiff to show, at least, a right of possession to the premises in controversy. It is not deemed necessary to decide, in the present attitude of the case, how far the showing made by the plaintiff, went to establish his title to the property, as he was entitled to recover, either upon his title or his right of possession. See *Dig.*, *ch.* 60, *sec.* 11. This is believed to cover all the ground occupied by the bill of exceptions, and to dispose of all the points properly presented by the record. The judgment of the Circuit Court of Pulaski county herein rendered, is therefore reversed, and the cause remanded, to be proceeded in, according to law, and not inconsistent with this opinion.

Mr. Chief Justice ENGLISH not sitting in this case.

ROSS ET AL. AS EXRS. VS. DAVIS.

DAVIS VS. ROSS ET AL. AS EXRS.

To render the title of a legatee to a specific legacy, complete and perfect, previous to the time allowed for the settlement of the estate of the testator, the assent of the executor is indispensably necessary. (*Refeld et al. Exrs. vs. Bellette et al.*, 14 *Ark.* 15; *Carter et al. vs. Cantrell*, 16 *Ark.*)

If the executor voluntarily assents to a legacy, he cannot, afterwards, retract or withdraw such assent, nor can he, *generally*, pursue the property in the hands of the legatee, even though there may be a deficiency of assets to liquidate the outstanding liabilities of the estate.

Where an executor has delivered to the legatee, a specific legacy, within the period of distribution prescribed by the statute, and taken a refunding bond (*Digest, chap.* 4, *secs.* 130, 131) his remedy, upon ascertaining that there is a deficiency of assets to pay debts, is at law upon the bond, or he may proceed, *generally*, in chancery to compel the legatee to refund.

In such case the extent of the right of recovery by the executor, is the value of the specific legacy—where it consists of property—at the time of delivery, with interest thereon: and not—as where the legacy is of a slave—of the increased value and the hire.

It is a rule of chancery practice, that where there is a prayer for specific relief and also for general relief, and the state of the case, as presented by the bill, is not sustained by the evidence, or the court, upon principles of equity, denies the special relief, to grant the complainant, under his general prayer, any relief warranted by the facts set up in his bill, provided the defendant be not surprised on account of such facts not being put in evidence. (*Cook vs. Bronaugh et al.*, 13 *Ark.* 188.)

Cross Appeals from the Clark Circuit Court in Chancery.

Hon. THOMAS HUBBARD, Circuit Judge.

FLANAGIN, for Ross et al.

CUMMINS, for Davis.

Mr. Justice HANLY delivered the opinion of the Court.

On the 7th day of February, 1854, Ross et al. filed their ori-

ginal bill on the chancery side of the Clark Circuit Court, against Henry Davis, his wife, Mary T. Davis, and William Davis, charging in substance therein, that, on the 9th January, 1848, their testator, Wiley Newberry, made and published his will, in which they are appointed the executors thereof: that a short time thereafter the testator departed this life: that said will was proven up according to law, and is duly recorded in said county; that they applied for letters testamentary, which were granted them, and that they were then proceeding to execute said will, and administer the estate thereunder; that, by the said will, their testator bequeathed a certain negro slave named Lucy, to the defendant William, in trust for the defendant Mary T. and her children; that by the same will, their testator specifically devised two houses and lots in the town of Arkadelphia, in said county of Clark, to the corporate authorities of said town for the use thereof; that for some time after the decease of their testator, they supposed his estate solvent, independent of, and beyond said slave, and said houses and lots; that, within this time, the defendant William, applied to them for the negro Lucy, bequeathed to him in trust for the said defendant Mary T. and her children; that they, supposing said estate solvent, delivered the said slave to the said William, on or about the 1st March, 1848; that since then they have ascertained said estate to be insolvent; that the houses and lots devised to the corporate authorities of the town of Arkadelphia, have been sold, to pay debts, under an order of the Probate Court of said county, for the sum of $2.175 05; that notwithstanding this sum has been added to the assets already in hand, there is a large deficit of assets to pay the debts of said estate; that, at the July term, 1851, of the Probate Court of said county, they made a settlement, in which they were charged with assets amounting to $3.666 00, including the sum of $400, being the appraised value of the negro Lucy, delivered to the defendant William, under the will as aforesaid, as well as the amount for which the houses and lots sold; that allowances had been made against said estate to the amount of $5.300 00, which

they aver was outstanding against the estate at the time of filing their bill, showing, as they aver, a deficiency of assets to pay the debts allowed against said estate of $2000, independent of the bad debts due said estate, which they aver are included in the estimate of assets. It is charged in said bill, that the slave Lucy was worth $800, and that her hire per annum was worth $100; that she has been in the possession of one or the other of the defendants, since the 1st March, 1848. The prayer of the bill is, that, the slave Lucy may be restored to complainants, and be made subject to the payment of the debts of the estate, and for general relief, &c. The will and the letters testamentary granted to the complainants, are exhibited with the bill in due form.

At the hearing, the bill was dismissed as to the defendants William and Mary T., and retained as to the other defendant for the decree rendered.

The defendant, Henry Davis, answered, and admitted the delivery of the slave Lucy at the time charged, 1st March, 1848, and likewise his possession of her from that time to the filing of his answer: charges that the slave Lucy was sorely diseased at the time she came to his possession, and was worth nothing in the way of hire for two years afterwards: charges that he paid out for medical aid on account of said slave, $150; denies that she was worth over $500, and her hire for the four years preceding not more than $40 per annum; denies knowledge of the settlement with the Probate Court charged in the bill. Demurs to the whole bill for want of equity, and reserves, his demurrer for the hearing; and charges that, when he received the slave Lucy from the complainants, they required of him, and he gave them, a bond of indemnity with security, *to save them harmless*, on account of the delivery of said slave to him.

Complainants filed their replication to the answer of the defendant, and the cause being thus at issue, it was set down for hearing, on the bill, answer, replication, exhibits and proof, which was in substance, as follows:

Hardy, a witness for the complainants, testified that, in the years

1847, and 1848, the slave Lucy was worth $700, and her hire per annum $100.

Kirby, a medical witness for the defendant, testified that the slave Lucy, at the time she came to the possession of defendant, was much diseased: possibly, incurably so; that from his knowledge of her condition, he thought she was not worth more than half as much as she would have been if sound; and so as to her hire.

It appears that the parties admitted as evidence, that the complainants had only assets in hand to the value of $2.372 28, and that the liabilities of the estate amounted to the sum of $4.509 65. It was furthermore admitted, that defendant had paid medical bills on account of said slave to the amount of $40, and that there was a bond of indemnity given by the defendant to the complainants, at the time said slave was delivered up in the manner charged in defendant's answer.

Before the final hearing upon the bill, answer, &c., the demurrer of the defendant to the bill of complainants, was taken up and overruled, for which defendant excepted.

At the hearing, the court decreed said slave Lucy to be given up to the complainants, and in default thereof, that defendant should pay them $550 as her value, and the further sum of $312 as her hire, and that each party should pay his own costs.

From this decree complainants appealed in the court below, and on application to this court, within the time prescribed by law, the defendant was allowed to appeal. So that the cause now stands in this court upon the appeal of both parties from the final decree as rendered by the court below.

It is insisted, on the part of the defendant, that the decree of the court below must be reversed for the reason, that the pleading and proof show that the complainants were entitled to no relief as against him. We will proceed to determine this point, as in our view its adjudication must dispose of the entire cause as to both parties.

The bequest to William Davis, in trust for the wife of the de-

fendant, Henry Davis, was, to all intents and purposes, a specific bequest. But, by the will itself, the devisee only took, and had conferred on him an inchoate or incomplete title to the slave in question. To render this title to the slave complete and perfect under the will, previous to the time allowed for the settlement of the estate, (See *Refeld et al., Exrs. vs. Bellette et al.*, 14 *Ark. Rep.* 158; *Carter et al. vs. Cantrell*, 16 *Ark.*) the *assent* of the complainants, as executors thereof, was absolutely and indispensibly necessary. See *Wilson vs. Rine*, 1 *Harr. & Johns. Rep.* 139; *Harrison vs. Hale*, 3 *Call Rep.* 188; 2 *Blacks. Com.* 512; *Farrington vs. Knighly*, 1 *Pr. Wm. Rep.* 554; *Burnett vs. Whitehead*, 2 *Ib.* 645; *Toller on Executors* 306.

After the grant of letters testamentary to the complainants, as executors, under the will in this case, all the testator's personalty devolved upon, and became vested in them, to be applied to the payment of the debts of the estate. Before disposing of, or giving their assent to the taking of specific bequests under the will, it was certainly their business, if not their duty, to look to the whole estate, and see whether a fund had been left sufficient for the payment of the demands of creditors. It seems from the bill in this case, that the complainants, within a very short time after the demise of their testator, *voluntarily*, upon the application of the defendant, delivered the slave Lucy to him in right of his wife under the will. We have said this surrender was voluntarily made by the complainants, for the reason, that our statute provides, that executors and administrators shall not be compelled, even by order of the probate court, to pay legacies or make distribution of estates under their charge, until after one year from the date of their letters, except in case the property bequeathed is of a perishable nature, and would become worthless by being retained, and may absolutely retain such legacies for two years, unless otherwise ordered by the probate court; but when ordered to pay over, *they may not do so*, until bond with security is given by the distributee, or legatee, to refund in proportion to the value of the property given him, in case any debt should be afterwards

established against such estate, &c. *Digest, chapter* 4 *sec*, 130, 113.

The defendant would have had no right or authority to have taken the slave Lucy without the *assent* of the complainants. But as soon as they *assented* to the taking of the slave by the defendant, under the will, from that time, the property, which was before, as we have before observed, inchoate in the defendant in right of his wife under the will, became complete and perfect and altogether valid and indefeasible, as between complainants and defendant. See (in addition to the above authorities) *McPaxton adm. vs. Dickson et al.*, 15 *Ark. Rep.* 42.

We have said the *assent* of the complainants was necessary to make this change in the property, as between them and the defendants, and it may be well to recur to the law to determine what acts shall constitute such *assent*. The law for this purpose has prescribed no specific form in which the assent shall be given or made: a very slight assent is held sufficient. See *Noel vs. Robinson*, 1 *Verm.* 94; 4 *Bacon's Abr.* 445; and this assent may be, either express or implied, absolute or conditional. See *Tollers' Exrs.* 307. An executor may not only in direct terms authorize a legatee to take possession of a legacy; but his concurrence may be inferred either from indirect expressions, or particular acts, and such constructive permission shall be equally available. See *Andrews vs. Hurneman*, 6 *Pick. Rep.* 126. The *assent* of the executors shall have relation to the time of the testator's death. See *Tollers Exrs.* 309.

There can be no question as to the assent of the complainants, that the defendant should have and take the slave Lucy: That fact is manifest from the bill, and is rendered doubly certain from the agreed facts in the case, from which it appears, that there was an absolute consideration from the defendant to the complainants inducing them to agree that defendant should have the slave under the will, *i. e.*, the execution of the bond of indemnity by the defendant and his sureties to them. This is not only a good, but a valuable and sufficient consideration, not only to up-

hold a promise on their part, but likewise to support and maintain their *assent* to the taking of the slave, if a consideration were required in such cases.

We have now but to look to the consequences of the assent on the part of the complainants, that the defendant should take the slave under the will in right of his wife, so far as they and he are concerned; for the question in relation to the rights of creditors, is not involved in the present inquiry.

And as to this, we find it laid down that, if an executor once *assents* to a legacy, he can never afterwards retract. And notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy. See 4 *Bacon's Abr.* 445; *Mead vs. Lord Oweny*, 3 *Atk. Rep.* 238; *Toller on Exrs.* 311; *Doe vs. Guy*, 3 *East.* 120; and has a lien on the assets for that specific part, and may follow them. See *Toller's Exrs.* 311. As to this, we presume the lien only exists as between the legatee and executor, and does not extend to them as against creditors. *Doe vs. Guy*, *ubi sup.*

We hold, therefore, in the case under consideration, as it appears from the bill, answer and proof, that the surrender to the defendant of the slave in question, was not only voluntary on the part of the complainants, but was made advisedly under the will, and that they cannot pursue the property, even though there may be a deficiency of assets to liquidate the outstanding liabilities of the estate, without other averments than those contained in the bill of the complainants; see *Lion vs. Vick et al.*, 6 *Yerg. Rep.* 42, for there are circumstances under which property specifically bequeathed, may be followed up in the hands of legatees by executors, even where it has been surrendered under the will. But no such case is made out by the complainants in their bill in the present instance.

It seems, from the proof and admissions in this cause, that the complainants took from the defendant a refunding bond, such, we suppose, as is provided for by law in such cases. If there should be really a deficiency of assets to meet the debts, they unques-

tionably have their remedy over against the defendant and his sureties on this bond of indemnity, or they may proceed, *generally*, against the defendant in chancery, to compel him to refund the value of the specific legacy given up, that it may be applied by the court of probate to the payment of the outstanding debts of the estate. But, as we have before remarked, the complainants cannot follow the specific property bequeathed and given up by them, for the reason, that the title to the slave has absolutely passed to, and vested in the defendant, under the will and the *assent* of the complainants, with the implied obligation in law, that he will refund—not the slave, but her value at the time of her delivery—out of his general means or estate. See *Dooley et al. Exrs. vs. Dooley et al.*, 14 *Ark. Rep.* 123.

Entertaining the view above expressed, we are clearly of the opinion that the decree of the Clark Circuit Court in chancery, in favor of the complainants, is erroneous, in this: 1*st*. In directing the slave to be given up. 2*d*. In estimating her value beyond what it was when she was delivered to defendant, and 3*d*. In decreeing a sum of money in the way of hire for said slave, from the time of her delivery to the defendant.

It is an unquestionable rule of chancery practice, that where there is a prayer for *specific* relief, and also a prayer for *general* relief, if the state of the case, as presented by the bill, should not be sustained by the evidence, or the court should, upon principles of equity, refuse or deny the *special* relief, it may, nevertheless, give the complainant, under his general prayer, any relief warranted by the facts set up in his bill; provided it be so framed, as that the defendant would not be surprised by the other relief granted, on account of the facts entitling him to it not having been put in issue. See *Story's Eq. Pl.* 42; *Colton vs. Ross*, 2 *Paige Rep.* 296; *Moon vs. Madden*, 2 *Eng. Rep.* 535; *Cook vs. Bronaugh and Bronaugh vs. Cook*, 13 *Ark. Rep.* 188.

It is provided by our statute that, upon appeals in chancery causes, when the decree appealed from is reversed, this court shall proceed to make such decision or decree, as the Circuit Court

ought to have made. See *Digest, section* 138, *chapter* 28, *page* 244.

Conceiving that the court below, under the rule of chancery practice stated above, ought to have decreed to the complainants, under the prayer for general relief and the particular facts shown by the bill and supported by the answer and other proof, we will, therefore, reverse the decree of the Clark Circuit Court in Chancery rendered in this cause, and proceed to render such decree as we consider the complainants entitled to from the bill, the answer, exhibits and proof shown by the transcript in this cause; that is to say: That the defendant refund to the complainants the sum of $400, the value of the slave Lucy, at the time she was delivered by complainants to defendant, *to wit:* the 1st March, 1848; that he pay to the complainants interest on said sum of $400, at the rate of six per cent. per annum from said time, (1st March, 1848,) to the time when said amount shall be refunded hereunder: that unless said payment is made to complainants within 60 days from the time the decree herein to be rendered is entered up in the Clark Circuit Court, as the decree of said court, the same be proceeded in as in other decrees for the payment of money: that the complainants pay all the costs of this court on both appeals, and the defendant the costs of the court below, up to the date of the decree below.

Let the decree of the Clark Circuit Court in Chancery be reversed, and the decree of this court certified, &c.

BARASIEN VS. ODUM.

Under the peculiar system of administration laws of this State, it is inconsistent with the tenor and policy of those laws to hold that any one can make himself, of his own wrong, the executor of another—where one intermeddles with the estate of a deceased person, he is responsible to the rightful executor or administrator, and not to a creditor, as an executor *de son tort.*

According to the common law it is error to render judgment *de bonis propriis* against an executor, in the first instance, except where by failing to plead, or by pleading, he had admitted waste.

Appeal from the Circuit Court of Independence County.

Hon. BEAUFORT H. NEELY, Circuit Judge.

FAIRCHILD, WATKINS & GALLAGHER, for the appellant. It is a serious question whether under our comprehensive administration system, as regulated by statute, there can or ought to be such a thing in this State as an executor *de son tort.* The courts of Probate are, in the first instance, the custodian of all estates. The policy of the administration law, is to have a speedy administration of all estates. Every facility is afforded for having letters of administration taken out by the heir, creditor, any indifferent person, or the sheriff; and the estate should be preserved, *as a trust fund*, for the payment of debts without preference, and for distribution. This entire policy would be defeated, if any person could, by obtaining possession of the assets, subject himself to an action as executor *de son tort.*

Mr. Justice HANLY delivered the opinion of the Court.

The appellee sued the appellant as executrix *de son tort* of her late husband, before a justice of the peace of Independence county, on an account made by the decedent in his life time.

Judgment was rendered by the justice against the appellant, *de bonis propriis*, from which she appealed to the Circuit Court of Independence county, and upon a trial *de novo* in that court, judgment was again rendered against the appellant *de bonis propriis*. Having made a motion for a new trial in the court below, and her motion overruled, she excepted, setting out, in her bill of exceptions, all the testimony adduced at the trial, but which we do not deem it necessary further to notice or state. The cause is brought to this court by appeal, and sundry errors are assigned, for which it is insisted the judgment of the Circuit Court must be reversed. As we have omitted to state the facts, and as several of the errors assigned pertain to them exclusively, we will not consider them, but at once proceed to determine the points upon which the cause must therefore rest.

It is submitted to this court, by the counsel for the appellant, to determine whether, under the peculiar system of administration laws of this State, it is not inconsistent with the tenor and policy of those laws, to hold that any one can make himself, of his own wrong, the executor of another.

We must confess that we approach this question, not without embarrassment and difficulty, on account of its intrinsic importance and utter novelty; for we are not aware that the question proposed has ever been the subject of investigation or enquiry in any of the courts of this State, up to the present time; and from our researches into the adjudications of the courts of other States, we find but few instances in which the question has been looked into or passed upon.

It would have been more agreeable, if the parties to the record in this cause had both been represented by counsel in this court, to the end that we might have had the benefit of a full argument of the question on both sides, so that we could have availed ourselves of their researches and reasoning, acknowledging, as we are ever happy to do, the advantage that we are accustomed to derive from such sources, particularly in those cases where the question to be determined is new, and where there are no, or few precedents to be found bearing on the subject.

But the question has been presented, and we do not feel ourselves at liberty to waive it. We will, therefore, at once proceed to its solution.

It is an unquestionable fact that the subject of administration, and the management of estates of deceased persons in this State, is one of vast moment and the first importance to every department of society.

It is likewise true, that the legislative department of the State, under an express power conferred upon it by the constitution, has prescribed a system of administration laws, designed evidently to protect the entire interests connected with the subject, and which must, to subserve the purposes of its establishment, be executed as an entirety; for otherwise, in that, as in every other work composed of dependent parts, the destruction of one member or part must disturb or destroy the harmony and operation of the whole.

The constitution has ordained courts of Probate throughout the State, and has conferred upon them jurisdiction in matters relative to the estates of deceased persons, executors, administrators and guardians, thereby restricting the Legislature only so far as to take from it the power to inhibit the exercise of such jurisdiction, expressly conferred upon those courts, but conferring upon this department the express authority to prescribe the mode and manner in which the general jurisdiction, thus bestowed upon the courts of probate, should be exercised and executed. See *Constitution of Arkansas, sec.* 10, *art.* 6.

By reference to the various acts of the General Asssembly passed on this subject, it will be perceived how well and thoroughly the Legislature has carried out the intent and meaning of the constitution in this respect. Auxiliary powers, such as the Legislature, in its wisdom, conceived necessary to enable the Probate Courts to exercise effectively the general jurisdiction conferred upon them by the constitution, have been superadded, so that no p ower is wanting on the part of the Probate Courts to enable hem to exercise both the general and special jurisdictions inher-

ent therein, derived from the constitution and the legislative grants made in conformity therewith. We say, then, that the Legislature has done every thing, that was proper and necessary, in this connection. The object and design, which it had in view, are sufficiently manifest from the several acts which have been passed on the subject. The success of the system devised in reference to the jurisdiction of courts of probate, "relative to the estates of deceased persons, executors, administrators and guardians," must depend, therefore, in a great measure, upon the judiciary, to whom has been confided the power to construe and interpret the laws, as they find them, in pursuance of known and fixed rules ordained for that purpose by the wisdom of ages long past, and maintained by the acquiescence of the great minds that have adorned the world in later times.

Before proceeding to the consideration of our several statutory provisions in reference to the administration of estates, and to an analysis of them, with the view of elucidating the subject under notice, it may not be unprofitable to refer (by way of introduction to the main subject) to a portion of the common law bearing on the subject, that we may contrast the consequences which would result from a maintenance of the remedy sought in this instance, with the one prescribed by our statutes.

An executor *de son tort* is defined to be a person who, without authority from the deceased, or the law, does such acts as belong to the office of an executor or administrator. See 4 *Bacon's Abr.*, *Title* EXECUTORS AND ADMINISTRATORS, (*B.*) 3.

An executor of his own wrong at common law was, in general, only liable to the amount and value of the assets which really came to his hands, and in such cases, when a recovery was had against him, the judgment was *de bonis testatoris.* See *Toller on Exers.* 473; *Dyer* 166, *C. Note* 11.

And this judgment, being rendered at the suit of a creditor of the decedent, was executed for *his* benefit, to the exclusion of the other creditors, however numerous, and never so meritorious. See *Whitehall vs. Squire*, *Carthen* 104; *Toller's Exers.* 472, *text and note* 1.

This, then, was the effect and consequence of a proceeding at the suit of a creditor of a decedent, against an executor *de son tort*, for a debt due by the decedent debtor, according to the course of the common law; and the remedy attempted to be pursued in the case at bar. But such is not in accordance with the letter or spirit of our law, as it evidently cannot be with its policy. In our "system, two capital objects seem plainly in view, from the various provisions for their attainment; *first*, that the estate of every deceased person, after death, shall *immediately pass to the custody of the law*, to be administered for the benefit of creditors; and after the satisfaction of all claims against it, * * * * * the residue shall be passed to the heir or distributee," &c. See *Walker adm. vs. Byers*, 14 *Ark. Rep.* 252. Says this court in the same case: "The Probate Court is intrusted with the custody of estates; and that tribunal proceeds, *in rem*, to adjust the rights of all persons interested in an estate, and disposes of it, in accordance with the provisions of the statute; having, for these purposes, the most summary and plenary powers, within the scope of its jurisdiction, conferred by the constitution and statutes, administering both law and equity within this scope according to the exigency of the rights to be adjudicated upon," &c.

Our statute has provided for the authentication and exhibition of claims against the estate of a deceased person, and has prescribed a particular mode in which this shall be done. It has also established the order in which claims thus authenticated and exhibited shall be paid. It has directed in what mode personal and real estate may be sold for the payment of debts, and the purposes of administration generally. It has prohibited the payment of debts due by the decedent, except in the order prescribed, and under the especial direction and order of the Probate Courts. It has restricted the liability of executors and administrators to the actual value of the effects which may be administered by them, and has exempted them from liability in consequence of false pleading, and, as a greater security for the ad-

ministration of estates, has required executors and administrators to take an oath that they will faithfully administer the effects of the decedent; and, in addition to this, has required each to enter into bond with security, for the faithful execution of the trusts.

We have already seen what the common law provisions are in respect to a proceeding against an executor *de son tort*, the kind of judgment to be rendered in such case, the mode of its execution, and finally, for whose benefit executed.

We think there can be no doubt, but that the provisions of our statute are so thoroughly inconsistent with the provisions of the common law, in respect to the remedy sought in this case, that we may safely say, that such a proceeding is unknown to our law, and we are sustained in this view by an adjudication of the Supreme Court of Ohio, where similar statutory provisions to our own exist. See *Dixon vs. Cassell*, 5 *Ohio Rep.* 341, 342.

Independent of the foregoing considerations, we would say that there is no necessity for such a remedy in this State. The *46th, 47th and 48th sections of the 4th chapter of the Digest*, provide a remedy against all persons who may conceal or embezzle effects belonging to the estates of deceased persons, at the instance of any one interested, which is more effective and simple than the remedy existing by the common law against executors *de son tort*, and by pursuing the statutory course the property recovered or reclaimed is appropriated, as assets of the estate, to the payment of debts or distribution. Not so, in proceeding against an executor *de son tort*. If the proceeding is at the suit of a creditor of the decedent, and a recovery is had, his judgment, as we have before shown, is *de bonis testatoris*, and when executed, it must be executed *de bonis testatoris*, and that too, to the exclusion of all other creditors, less vigilant, but equally meritorious, and for the benefit of the person in whose favor the judgment was rendered.

The *40th and 41st sections of the 4th chapter, and the 70th section of the 126th chapter of the Digest*, would seem to militate against our views above expressed; but, by reference to those sec-

tions, it will be perceived, that the executors of their own wrong referred to in those sections, are only such in a particular sense, the denomination being used by the statute, without retaining the incidents usually appurtenant to the denomination. Besides this, by reference to those sections, taken in connection with the context, it is evident that in the instances proposed, in which a person might make himself an executor of his own wrong under our statute, the remedy provided against him is evidently intended to be at the suit of the rightful executor or administrator. In which event, the judgment recovered against him would at once become assets in the hands of the representative of the estate for the payment of debts, or distribution to heirs, and thus carry out the general scope and meaning of the whole act, making each part consistent with itself, and not inconsistent with the whole.

Entertaining these views, we are constrained to hold the judgment of the Independence Circuit Court, rendered in this cause, erroneous.

But there is another reason why the judgment of the court below should be reversed. It will be observed that it is rendered *de bonis propriis.* To authorize such a judgment there should have been a judgment *de bonis testatoris*, first rendered, and upon the return of an execution issued upon this judgment, *nulla bona*, a *sci. fa.* could have been issued, and on inquiry of waste, if found against the defendant, judgment would follow, as a matter of course, *de bonis propriis.* This was the uniform course at the common law, except when the party in the original suit would, by failing to plead, or by pleading, admit waste, in which case it was usual to have judgment *de bonis propriis.* See *Markham's Ex. vs. Allen*, 8 *B. Mon. R.* 418; *Carroll, etc. vs. Connet*, 2 *J. J. Marshall's Rep.* 208; *Toller's Exrs.* 472, *note* 1, *citing Stockton vs. Wilson*, 3 *Penn. Rep.* 129; *Howell's adm. vs. Smith*, 2 *McCord's Rep.* 517; *Norfolk's Exr. vs. Gantt*, 2 *Harr. & Johns. Rep.* 435.

Wherefore, the judgment of the Circuit Court of Independence county, for the errors aforesaid, is reversed, and the cause remanded, with instructions to said court to proceed according to law, and not inconsistent with this opinion.

RUST EXR. VS. WITHERINGTON.

Under our administration system, an executor *de son tort*, as at common law, is unknown. (*Barasien vs. Odum.*)

Appeal from the Circuit Court of Union County.

Hon. SHELTON WATSON, Circuit Judge.

QUILLIN and S. H. HEMPSTEAD, for the appellant.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of assumpsit, brought by the appellee against the appellant as executor *de son tort* of Alfred Rust, deceased, in the Union Circuit Court, on a promissory note averred to have been made by the decedent to the appellee.

The appellant interposed his three pleas in bar to the appellee's action in the court below, *to wit: non assumpsit, ne unques executor* and *plene administravit*, to which issues were taken, and a trial of those issues was had before a jury, who returned a verdict for the appellee for the amount of the note declared on, and interest by way of damages. The court proceeded to render judgment on said verdict against appellant, *de bonis testatoris, si non, de bonis propriis.* A motion for a new trial was made in the court below by the appellant, and on its being overruled, he excepted, setting out all the evidence given at the trial, and saving several exceptions reserved during its progress. We do not, however, deem it essential to make a further statement of the case. The cause is brought to this court by appeal.

Several errors are assigned and insisted upon, why said judgment should be reversed, and among them the same question is

presented, as the one we have just determined in the case of *Barasien vs. Odum.* We, therefore, reverse this cause for the reasons assigned for reversing that one.

The judgment in this cause as rendered by the Circuit Court differs from the judgment rendered in the case of *Barasien vs. Odum.*

The party attempted to proceed in this action according to the practice of the common law. There was an issue formed upon the plea of *ne unques executor*, and this issue was found for the appellee. In such case, it was the practice in a proceeding against an executor *de son tort*, to render judgment *de bonis propriis.* See *Toller's Exrs.* 473. But as we have held in the case of *Barasien vs. Odum*, our statute has changed the common law in this particular. With us, persons sued as executors or administrators, are not made personally liable in any action; nor shall persons sued as executors of their own wrong, be made liable to a greater extent than they would otherwise be by reason of any such person having pleaded any false plea. See *Dig.*, *sec.* 70, *chap.* 125, *p.* 807. Viewing this judgment, either according to the principles of the common law, or in reference to our statute, it is erroneous for the reason of its particular structure.

For these causes, the judgment of the Union Circuit Court is reversed, and the cause remanded thereto with instructions to that court to proceed therein, according to law, and not inconsistent herewith.

RECTOR ET AL. VS. MOREHOUSE.

To a *scire facias* to revive a judgment, a plea, that the judgment was rendered more than ten years, and that no execution, or other process for its satisfaction, or *scire facias* to revive it, had issued within ten years, may be stricken out on motion.

After the lapse of ten years from the date of a judgment, the law presumes that it is paid, (*Woodruff vs. Sanders, ad.*, 15 *Ark.* 143;) and this presumption is conclusive unless the plaintiff, in the absence of any effort to enforce payment of the judgment, shall show such facts and circumstances as will satisfy the minds of the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment.

Writ of Error to the Pulaski Circuit Court.

Hon. WILLAM H. FEILD, Circuit Judge.

PIKE & CUMMINS, for the plaintiffs. The court below erred in refusing the 1st, 2d, and 5th instructions moved by defendant below; and in charging the jury that no presumption of payment arose within twenty years from date of judgment.

This latter instruction was erroneous upon another ground. Where there was mere partial insolvency, and a total inaction of plaintiff for 10 or 15, or 18 years, it would warrant the jury, in their sound discretion, in finding payment.

But the provisions of our statute do not stand upon the same grounds as the mere *presumption* indulged by the common law. These provisions taken in connection with the *only means allowed* to destroy the presumption of payment, *to wit: partial payment* or a *written acknowledgment*, constitute *peremptory bars*. They are, in every sense, and to all purposes, statutes of limitation. The very same and no other acts displace the bar. See *sections* 14, 15, 29, 30, 31 *and* 32, *Old Code; sections*, 18, 19, 32 *and* 33, *New Code*. See, also, *Woodruff vs. Sanders*, 15 *Ark.* 143.

Under special circumstances, the presumption of payment may attach within a shorter period than twenty years. It is a presumption of facts to be passed upon by the jury. 9 *Watts.* 441; 5 *Yerg.* 97; 2 *Speers* 357; 9 *Yerg.* 424; *Peck.* 60; 3 *McCord* 340.

The court therefore erred in giving the instruction given on its own motion—that no presumption could arise short of twenty years.

A still greater error was committed in refusing 1st and 4th instructions—even if we were mistaken wholly in supposing a written acknowledgment or partial payment were necessary to overturn the presumption of payment arising from the lapse of ten years.

Insolvency of one of several debtors does not destroy presumption. Absence from State, unless *permanent*, will not remove presumption, nor partial payment on discharge in bankruptcy. 5 *Conn. Rep.* 1.

Mere poverty of debtor will not destroy presumption. 5 *Verm.* 236.

Mere poverty, or temporary insolvency—nothing but absolute and permanent inability to pay—destroys the presumption. 2 *Barr* 225; 1 *Campb.* 227; 5 *Verm.* 236; 14 *Sergt. and R.* 22; 7 *Watts and S.* 75; 2 *Watts* 213, 215, 217; 1 *Yeates* 344; 4 *Whart.* 298.

FOWLER, for defendant. At common law, twenty years was the period fixed, from which payment might be presumed, without direct evidence. *Cope vs. Humphreys*, 14 *Serg. & Rawle* 19; *Herndon vs. Bartlett*, 7 *Mon. Rep.* 451; *Reardon vs. Searcy*, 3 *A. K. Marsh. Rep.* 544; *Gratwick vs. Simpson & Moore*, 2 *Atk. Rep.* 144; and our statute, (*Rev. Stat.*, *p.* 531, *sec.* 29; *Dig.*, *p.* 701, *sec.* 32,) enacts that "the presumption of payment shall apply to all judgments of any courts of record in this State, rendered prior to the passage of this act, in the same manner as such presumption applies to sealed instruments."

The plaintiff offered evidence to rebut the presumption of pay-

ment, which was passed upon by the jury whose peculiar province it was, and its sufficiency cannot be here enquired into.

Mr. Justice SCOTT delivered the opinion of the Court.

This was a *scire facias* to revive a judgment rendered in Pulaski county on the 12th of May, A. D., 1834. The writ was sued out the 25th of August, 1853. The pleas were:

1*st*. *Nul tiel record.*

2*d*. That the judgment was rendered more than ten years before the writ issued, and no execution, or other process for its satisfaction, or *scire facias*, was issued or pending, or any judgment, or order of revivor had within ten years next before the suing out of this writ.

3*d*. Payment.

4*th*. Same plea as the second, except that five years was substituted for ten.

On motion, the court struck out the second and fourth pleas, and properly so.

Issues were taken and trial had on the other two; the court finding the first, and the jury the second, in favor of the plaintiff below, judgment was given accordingly, from which Rector sued out a writ of error.

No question was made in regard to the plea of *nul tiel record.* Upon the trial of the issue on the plea of payment, considerable oral and documentary evidence was introduced on the part of the plaintiff, going to show that Rector had been most generally greatly embarrassed; that frequent executions against him had been returned, no property found; that from time to time, however, his property had been sold under execution; that he always had had property in posseesion, but generally it was reputed to be secured to his wife; that he had been United States Marshal, and had money, and control of means, and at one time had a large stock of goods in partnership with others, but afterwards that firm failed. It was also proven by the clerk of the court, that, upon examination of the records of his office, he had not been

able to find that any process of execution, or *scire facias* had ever issued upon the judgment in question, prior to this *scire facias*. And that, after the rendition of the judgment, Rector had moved from Pulaski and settled in another part of the State, where he had ever since resided. The defendant moved the court for the following instructions to the jury, to wit:

1*st*. From the lapse of time, from the rendition of this judgment to the suing out of the writ in this case, if the jury believed no execution, or other process ever issued thereon, or *scire facias* in the meantime, the presumption of law is, that the judgment has been paid, and the jury shall so find, unless the delay has been satisfactorily accounted for; and mere partial insolvency, or embarrassment by debt, is no excuse for the delay, and the presumption of law will attach.

2*d*. That by law, if the jury believe, no execution or other process, or *scire facias* to revive, issued on said judgment from the 20th of March, 1839, for ten years thereafter, said judgment is presumed to be paid, and the jury should so find.

3*d*. That by law, any action of debt on said judgment was barred by the lapse of five years after the 20th of March, 1839, without execution or other process, or *scire facias* to revive, issued thereon; and if the jury believe, no such process did issue for five years after the 20th of March, 1839, or was pending, the jury are authorized and should find the judgment paid.

4*th*. That mere partial insolvency or embarrassment of Rector, if they believe from the use of the process of the law any thing could have been made on this debt, will not displace the presumption of payment, before stated in the foregoing instructions, and the jury are bound upon such presumption as conclusive proof of payment, if they believe any part of said debt might have been made by process, within the period alluded to in any of said instructions.

5*th*. That if the jury believe, no execution issued on said judgment, or any process to revive the same issued on said judgment, or was pending, for ten years next after the 20th of March, 1839,

the jury are bound to find the judgment paid, on the presumption of law, and nothing can displace such presumption but a partial payment by Rector, or a written acknowledgment of the debt, which must have been proven by plaintiff.

6th. That if the jury believe, no process of execution, or *scire facias* to revive was issued or pending, within five years next after 20th of March, 1839, they should find for defendants, unless plaintiff has proven that Rector, since 20th of March, 1839, has paid something on said judgment, or has, by writing, acknowledged the debt just.

All of which the court refused to give, and upon its own motion, charged the jury, that, in respect to the judgment in controversy, no presumption of payment did or could arise until 20 years had elapsed from the date of its rendition. To all of which doings of the court Rector excepted by bill, at the time.

The instruction which the court gave to the jury was erroneous. After the lapse of ten years from the date of the rendition of the judgment in question, the law presumed that it was paid. (*Woodruff vs. Sanders, adm.* 15 *Ark. R.* 143). And this presumption of the law, of the fact of payment, is conclusive in the absence of rebutting testimony, going to explain satisfactorily why an earlier demand has not been made. Within the ten years, the *onus* of proving payment lies on the defendant; after that time, it devolves on the plaintiff to show the contrary, by such facts and circumstances as will satisfy the minds of the jury, that there were other reasons for the delay of the prosecution of the claim than the alleged payment. If these are sufficient satisfactorily to account for the delay, then the presumption of payment, not being necessary for this purpose, is no longer entertained, because fully repelled. In the case at bar, the ten years having elapsed, the burthen was on the plaintiff to produce evidence from which the contrary presumption of non-payment might be inferred by the jury. Thus, he had to prove a negative, and this he attempted to do, by means of the testimony adduced, upon which the defendant, in his first and fourth instructions, asked

the court to instruct the jury to the effect that, unless this evidence should satisfy their minds that no part of the debt could have been made by process of law during the ten years, they were bound to find for the defendant, proceeding upon the proposition that partial insolvency was no excuse at all for the delay, which it was incumbent upon the plaintiff to account for.

Supposing this to be a sound proposition of law, it is to say that the law regards it as unreasonable that a plaintiff should stay his hand, when any part of the debt can be made, however inconsiderable in amount, or however hazardous the experiment is to be, that is to test whether or not anything can be made. In other words, the plaintiff is to be held to the highest and utmost possible diligence. If this be so, then the rule should not be as we have laid it down, upon authority to be found everywhere in the books, that the rebutting proof will be sufficient, if it be such as will satisfy the minds of the jury that the delay in prosecuting the claim arose from some other cause than the presumed payment; but it should be, that it will be insufficient unless it be absolutely and conclusively shown, that the payment has not been made. The case of *Taylor vs. Megorgee*, 2 *Barr, Penn. Rep.* 225, seems to have gone this length. But the weight of authority seems to occupy the more reasonable ground, in consonance with the ordinary conduct of men, that the negative proof will be sufficient if it affords for the jury a reasonable ground of inference, that the debt has not in fact been paid. Hence, such a verdict, against the presumption of payment, has been sustained upon proof of the obligor's inability to pay, as from his poverty; so also, upon proof of his insolvency, or of a state approaching to it. (See *Cowen & Hill's notes to Phil. Ev., part* 3, *note* 301, *p.* 506, 512, 513, and the cases there cited). Every case of this kind must of course depend greatly upon the particular facts and circumstances shown in evidence, and which the jury are to consider all together. In the case at bar there were other facts and circumstances in proof, besides those going to show pecuniary embarrassment and insolvency, whether partial or entire, and the

jury should have determined upon them all, whether or not there was a reasonable ground upon which they could infer the presumption in fact, that the judgment in question *had not* been paid, as the law presumed it had, from lapse of time, unless the contrary was made to appear in a manner satisfactory to the minds of the jury.

In the light of these views, we think there was no error in the refusal of the court to give the two instructions in question.

The second instruction would have misled the jury unless it had been qualified to the effect, that the presumption could be repelled as we have indicated. And the fifth was erroneous for a like reason, and also for as much as the qualification contained in it was too narrow and did not go to the extent of allowing the presumption to be repelled by all the other means indicated. The third and sixth were wholly inapplicable and irrelevant.

The court did not, therefore, err in refusing the instructions asked for by the defendant below. But for the error in giving the instructions that it did give, the judgment must be reversed and the cause remanded to be proceeded with.

AMBLER VS. RUDDELL.

The defence of usury cannot be interposed, by the statutes of this State, under the plea of the general issue, in actions of debt or assumpsit founded on contracts in writing, (*Howell vs. Vansant*, 2 *Eng.* 146), but if the action is founded on a promise not in writing, the defence, of usury, may be set up under the general issue, whether in debt or assumpsit.

The plaintiff and defendant entered into a usurious contract for the loan of money, for which the defendant gave his writing obligatory; the plaintiff sued upon the written instrument, embracing in his declaration the common money counts; pending the suit, the writing obligatory was declared void by a court of chancery, and the plaintiff injoined from proceeding upon it: HELD, That he could not recover the money actually loaned, under the money counts.

Writ of Error to the Independence Circuit Court.

Hon. BEAUFORT H. NEELY, Circuit Judge.

FOWLER, for the plaintiff. That the writing obligatory for which the money advanced was the sole consideration, was void for usury, was settled by the decree of the chancellor. And the law clearly fixes usury upon the transaction. *Digest, p.* 614; *sec.* 5 *to* 8; *Weatherhead vs. Boyers*, 7 *Yerg. Rep.* 562; *Andrews vs. Pond et al.*, 13 *Pet. Rep.* 75; 3 *Stark.* 1524; *Levy vs. Brown & Fenno*, 11 *Ark. Rep.* 22.

The defence in this case was well set up under the general issue, as it is not embraced in our statute requiring pleas, in certain cases, to be sworn to. See 2 *Saund. Pl. and Ev.* 576; 8 *Black. Rep.* 116.

In contracts of this sort, which are void, or made in violation of law, the court will not enable a party, equally guilty of such violation, to recover back his money advanced; because the illegal condition has not been performed. *Black et al. vs. Oliver*, 1

Ala. Rep. (*N. S.*) 450; 2 *Story's Eq. Juris.*, *sec.* 697; 2 *Greenl. Ev.*, *sec.* 111; *Smith on Con.* (3 *Am. Ed.*) 187, 188, 189; *Viser vs. Bertrand*, 14 *Ark. Rep.* 276; *Story on Con.*, *sec.* 138, 153, 187, 226.

Mr. Justice HANLY delivered the opinion of the Court.

Ruddell sued Ambler in debt, counting first on a writing obligatory, and secondly on the common money counts, and for services, &c. And pending the suit, Ruddell was enjoined, at the suit of Ambler, from proceeding on the writing obligatory, charging that it was usurious and void.

Ambler prayed for a bill of particulars of the residue of the demand, which was filed, disclosing an advance to, or payment of, money for Ambler to the amount of $513 40, and *no more*. And upon an issue on the plea of *nil debet*, the cause was submitted to a jury, which found for the plaintiff below $510 97 and debt, $4 67 damages, and judgment was rendered accordingly.

On the trial it was proven that the writing obligatory, described in the first count, had by a competent court been declared to be void, and Ruddell enjoined from further proceeding thereon, on the ground that it was usurious, &c. And it was further proven, that the said sum of $510 97, had been advanced by Ruddell to and for Ambler as a loan, and that the same constituted the sole consideration of said writing obligatory, which was dated March 1st, 1854, for $600, at four months, and to bear ten per cent. interest after maturity. Upon this evidence Ambler, moved the following instructions, *to wit:*

"That if the jury should believe, from the evidence, that the said sum of $510 97, was given at the time, and part advanced then, and the other part afterwards, with intent to take, directly or indirectly, or to receive more than ten per cent. interest per annum, on a loan, or for the forbearance of the said sum of $510-97, and took and received such writing obligatory for that purpose, that they might find the whole contract void for usury; and if so void for usury, that said Ruddell was not entitled to recover

back his said money in this action," which the court refused to give, and Ambler excepted; but the court instructed the jury that, "although the writing obligatory was void for usury, yet that said plaintiff was, in law, entitled to recover back the money he actually advanced to and paid out for the defendant." To the giving of which, Ambler also excepted.

Ambler sued out a writ of error to the court below, upon which the cause is now pending in this court. Several errors have been assigned and insisted on, why said judgment should be reversed. We will proceed to consider them in the order in which they are presented.

The same defences are usually admitted under the general issue in debt, where the action is founded on a *parol contract* not in writing, that are allowed under the general issue in assumpsit on the same kind of contract. See 2 *Greenl. Ev., page* 291, *section* 281.

Under the general issue in assumpsit in England, until the new rules in pleading were adopted, (4 *W. IV.* 1834) and in most of the United States to this day, the defendant may give in evidence any matter showing that the plaintiff never had any cause of action, such as that the contract was void by statute, or by the policy of the law. See 2 *Greenl. Ev., p.* 123, *sec.* 135. Usury was provable under this issue as a defence. See *Levy vs. Gadsby*, 3 *Cranch Rep.* 180, per MARSHALL, C. J.; *Fulton Bank vs. Staffard*, 2 *Wend. Rep.* 486; *Colton vs. Lake*, 2 *Mass. Rep.* 540; *Jackson & wife vs. Stetson*, 15 *same* 54; *Colm vs. Cooper*, 8 *Blackf. Rep.* 116.

But the common law in this respect has been changed by our statutes, both in actions of debt and assumpsit, founded on contracts in writing. With us, the defence of usury cannot be interposed in such cases under the plea of the general issue. It must be specially pleaded and the plea sworn to. See *Howell vs. Vansant*, 2 *Eng. Rep.* 146.

Where the action is founded on a promise or contract not in writing, the defence of usury may be set up under the general

issue, whether in debt or assumpsit, in this State, as fully and thoroughly as at the common law, or in those States whose adjudications we have given. We, therefore, hold in the case under consideration, that the defence of usury was properly admitted in the court below under the plea of *nil debet* to the money counts.

There can be no doubt but that the writing obligatory, described in the plaintiff's declaration, was void for usury. The evidence of the witness sworn in the court below, conclusively shows this fact. Besides this, the decree of the Independence Circuit Court in Chancery places the matter beyond enquiry. It is *res adjudicata* as far as the parties, or their privies, are concerned. It is also manifest, from the evidence adduced, that the money specified in the plaintiff's bill of particulars, given as the particulars of the demand claimed under the common counts, under which the trial was had in the court below, was the *sole* and *only* consideration for which the writing obligatory, described in the first count, was executed. It is further manifest from the testimony, that the execution of the writing obligatory, and the corrupt agreement in relation to the advance, as a loan, of the sum of $510 97, were contemporaneous acts—the $600 writing obligatory being given by the defendant for the loan and forbearance of the amount advanced ($510 97,) for four months under such contract, and at the time it was made. The writing obligatory was not canceled by the contract of the parties after its execution, nor was there any agreement made by the defendant, as far as the evidence shows, with the plaintiff, after the writing obligatory was declared void for usury by the Circuit Court of Independence county, in chancery, whereby he promised the plaintiff, in consideration of the amount actually loaned, and the fact of the destruction and cancelment of his obligation by the decree of the court, that he would pay the amount borrowed with lawful interest. If such proof as this had been introduced on the part of the plaintiff, the case might have been different with him. But, as the case stands, the simple question presented by the assignment of errors, is this: If a contract is made in writing, whether under

seal or not, and the instrument is declared by a court of competent jurisdiction, *void*, on account of usury, whether the party can recover at law, on the common counts upon the original consideration, without a new promise?

It is an unquestionable proposition of law, that after usurious securities have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest, is founded on a sufficient consideration, and is binding See *Barnes vs. Hadley*, 2 *Taunt. Rep.* 184; *Kilbourne vs. Bradley*, 3 *Day* 356; *Scott vs. Lewis*, 2 *Conn.* 132; *Church vs. Tomlinson*, 2 *Ib.* 134; *Botsford vs. Sanford*, 2 *Ib.* 276; *Bank of Monroe vs. Strong*, 1 *Clark Rep.* 76; *Hammond vs. Hopping*, 13 *Wend. Rep.* 505.

But as we have before remarked, there was no evidence offered at the trial below, tending to prove that the original contract was destroyed by the mutual agreement of the parties, or that the defendant promised the plaintiff, after the decree in chancery declaring the writing obligatory executed *void*, that he would pay him the sum actually loaned. The plaintiff, therefore, has not brought himself within either the letter or spirit of the law we have quoted; but must rest his demand upon the law, as it is under the circumstances, and facts shown by the proof to exist in his case now under consideration: for the reason of the rule, as laid down by the various adjudications which we have referred to, seems to be this: that inasmuch as an actual agreement between the borrower and lender, on the one part, to pay, and the other part, to receive, more than the legal rate of interest, is necessary to constitute usury; so an actual agreement between the same parties or their legal representatives, to cleanse the transaction, is also necessary to render any subsequent promise for the payment of the original principal, valid. And the legality of the subsequent promise of the borrower rests on the offer of the lender, *to expel every particle of the original virus from the transaction, and to deliver up all the securities therefor, however remote and multiplied:* and not, as has been sometimes said, upon the moral obligation of the borrower to pay the original sum received,

for without such proffer by the lender, any subsequent promise of the borrower is equally void as the first. See *Blydenburgh on Usury, p.* 96, *et seqr.*

In the case of *Hammond vs. Hopping*, 13 *Wend. Rep.* 505, before referred to, it was held, that "Where a usurious security is given in part for a *pre-existing valid debt*, such debt is not destroyed by the illegal security. But though a usurious contract contains a good consideration in fact, as when money is actually lent and received by the borrower, yet, the security being absolutely void, no action can be maintained upon it, nor is it evidence of indebtedness, upon the strength of which the law will *imply* a promise on the part of the borrower to pay the amount actually received by him." And in *Rice vs. Willing et al.* 5 *Wend. Rep.* 595, it was held that "when the agreement between the parties is usurious, (although such agreement is founded on a good consideration) it is *void.*" In the case of *Johnson vs. Johnson*, 11 *Mass. Rep.* 359, it was decided that when a debt was due from the defendant to the plaintiff, free from usurious taint, and a note given for that debt, together with usurious interest upon it, the new note was held void on account of the usurious interest exacted; yet, the plaintiff might recover the original debt upon the money counts. This, however, was put and made to turn upon the express ground, that there was no corrupt or illegal contract, out of which the original debt arose.

But in the case of *Rice vs. Willing*, 5 *Wend. Rep.* 578, *before cited*, SUTHERLAND, Judge, said: "In every usurious loan of money, there is good consideration in part for the promise to pay. The borrower actually receives the money from the lender, yet the security given being absolutely void, the sum actually loaned cannot be recovered upon the implied assumpsit, although it will be a good consideration for a subsequent promise to pay it, as held in *Easly vs. Mahon*, 19 *Johns. Rep.* 150. Usury infects and avoids the whole of every contract, agreement or transaction, into which it enters."

The case of *Lowell vs. Johnson*, 14 *Maine Rep.* 240, was simi-

lar, in its facts, to the one we are considering. In that case, the suit was brought on a note. There was a special count on the note, and the money counts. The plea of the general issue was interposed with notice of special defence under the statute of that State. The note was declared void on account of usury, and an attempt was made to recover on the consideration of the actual loan, on the common counts; and SHEPLEY, Judge, in delivering the opinion of the court, said: "In this case the money was originally loaned upon the corrupt bargain to receive more than lawful interest, and it cannot therefore be recovered back. Nor was there any after contract or debt free from the contamination of usury."

There is another view in which the case we are considering presents itself to our minds, under the structure of our statute of usury, taken in connection with the adjudications upon the statutes of England, and the other States of this confederacy on the same subject. It will be borne in mind, that some of those statutes, besides declaring the contract infected with usury absolutely *void*, prescribe a penalty in addition thereto, for a violation of their provisions. Our statute affixes no distinct penalty beyond the provision by which the contract itself is made *void*, which, under the law, accrues to the party with whom it is made, and who is supposed to be the sufferer by its breach. If the usurer could recover upon the money counts, after the usurious security had been declared *void* on account of the usurious *taint*, the penalty which the statute seems to contemplate would be defeated and avoided, and the act itself be shorn of that which must make it effective of the ends evidently designed by the Legislature in its enactment, judging from its tenor, and scope of its provisions, independent of the mischief which it was evidently designed to remedy and correct.

We have been unable to find a single adjudicated case which militates against the views we have expressed, except in those States where the usury statutes affix no penalty to the act constituting their violation, other than the forfeiture of the excess of interest

over the statutory rate. In such States, the courts, both law and equity, do nothing more than purge the contract of the usury and give judgment for, or decree the sum actually loaned with legal interest. Such statutes do not destroy or annihilate the security, as does ours, but simply interpose between the necessitous borrower and rapacious lender; staying the exactions of the latter, whilst they require the former to restore that which he had gotten under the pressure of necessity, with what the law considers just compensation for its use, the statutory rate of interest.

We have nothing to do with the policy of our statute, when contrasted with others. Such considerations as these, belong to another department.

From a careful review and patient consideration of the authorities, there can be no doubt, we think, that under the particular facts of this case, the plaintiff was not entitled to recover, upon the common counts, the amount of money actually loaned by him to the defendant.

We hold, therefore, that the court below erred in instructing the jury as stated, and also in refusing to give the instruction, asked for by the defendant, Ambler.

For these errors, we reverse the judgment of the Circuit Court of Independence county, and remand the cause to that court to be proceeded in according to law, and not inconsistent with this opinion.

SPLAWN VS. MARTIN.

The jurisdiction of the court, in a suit by attachment, as between the interpleaders, arises by virtue of the writ of attachment and a valid service thereof. (*Gibson et al. vs. Wilson et al.*, 5 *Ark.* 422.)

Where the transcript of the record of the Circuit Court, filed in this court, fails to show the issuance and legal service of such writ, this court would, for the purpose of affirmance, if there were no other error in the record, issue a special writ of *certiorari* to the clerk of the Circuit Court to certify such writ and service to this court. (15 *Ark.* 396; 13 *Ib.* 745.

An interpleader, in a suit by attachment, levied upon land and cotton, proved that the defendant, who was her son, had executed to her, a deed for the land, purporting to be for a valuable consideration, several months before the attachment issued, and possession of the land from the date of the deed; also that the cotton was the produce of the land and of the labor of her slaves, and was in her sole possession: HELD, That these facts, in the absence of any proof of fraud, render it clear that the title to the property was in the interpleader: that the mere fact of the indebtedness of the defendant to the plaintiff, at the time of the execution of the deed to the interpleader was no evidence of fraud; nor was the fact that the defendant was the son of the interpleader.

It is the intent that makes a conveyance of property fraudulent as to creditors; and this intent must be participated in by both parties; by the grantee as well as the grantor.

A party offering a deed, purporting to have been executed for a valuable consideration, as evidence of title, may prove the actual payment of the consideration, although such proof is cumulative of that *prima facie* established by the deed itself.

Appeal from Bradley Circuit Court.

Hon. THEODORIC F. SORRELLS, Circuit Judge.

YELL, for the appellant.

WILLIAMS & WILLIAMS, for the appellee.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of assumpsit commenced by attachment, as it irregularly appears from the transcript, at the suit of the appellee against one John Splawn, on the common counts. An affidavit is appended to the declaration, such as is usual to warrant the issuance of an attachment, when the bond prescribed by the statute is filed. No bond, writ of attachment or return, is copied in the record sent up to this court. The appellant seems, however, to have appeared in the court below, and on leave granted, filed her interplea, by which she claims "the land and cotton attached," (specifying both) as her separate property. Issue was taken upon this plea. The defendant in the attachment suit, not being served with process, did not appear to the action at the first term after the suit was commenced. The transcript shows, that at the next term he appeared by attorney, but interposed no defence to the action. Neither judgment by *default* nor *nil dicet* is noted on the transcript as having been taken against the defendant, but at the term at which the appearance of the defendant was entered, as before stated, the following order of the court appears to have been entered, *to wit:* "It is ordered that the rights of the plaintiff and the interpleader, be submitted to a jury, and thereupon came a jury of good and lawful men, &c., * * * * * who being duly elected, empanneled and sworn, well and truly to try the issue joined between the said plaintiff, and said John Splawn, (defendant, with whom there was no issue pending,) and the issue between said plaintiff, and Elizabeth Splawn, (appellant) &." At the trial in the court below, in pursuance of the above order, evidence was introduced by the parties, substantially as follows:

The appellee proved by several witnesses, that the appellant was the mother of the defendant; that defendant was a married man; that he and his family, and the appellant, resided together at the time the debt sued for was contracted, and from thence up and until about the 1st August, 1852. He proved by the ori-

ginal papers that this cause was commenced on the 21st December, 1852. A portion of the items of his demand was proved; and he furthermore proved, that the defendant was in the habit of dealing with him as a merchant, during the time within which his account purports to have been made.

Appellant showed title in herself to the lands attached, by producing, and reading to the jury, a deed duly executed, acknowledged and recorded, made by the defendant to her, dated 23d April, 1852, filed for record same day, and recorded on the 27th May, 1852. he furthermore proved by oral testimony, that the cotton attached, though produced on the lands attached, was the produce of the labor of her slaves, and that she was the owner of several; that the defendant was in the habit of attending to her business, and particularly the labor of her said slaves, and that defendant quit the county and moved to Texas about the 1st August, 1852, and had never been back to the county since.

The deed from the defendant to the appellant, purports to have been made for the consideration of $1200 cash. Appellant at the trial, proposed to prove by witnesses produced, that this consideration was absolutely paid by appellant to defendant, which was objected to, and the objection sustained by the court, and the appellant excepted.

The appellant further proved by oral testimony, that she had been in possession of the land attached ever since the date of the deed from the defendant, and had possession of the cotton at the time it was attached.

This was all the testimony given at the trial. After the evidence was concluded, the appellee moved the court to instruct the jury, that "If they believed, from the evidence, that the sale of the land attached was made by the *defendant* to Elizabeth Splawn, appellant, with the intent to hinder, delay or defraud creditors, they will find the land and cotton to be subject to the attachment; provided, the jury believe, from the evidence, that the defendant was indebted to the plaintiff," appellee; which instruction was given, and the appellant excepted.

The appellant then moved the court to instruct the jury, among others, "that if they believed, from the evidence, that John Splawn, defendant, sold the land named in the attachment, to Elizabeth Splawn, appellant, by deed, *that deed* conveys the legal title of said land to her," which the court refused to give and for which appellant also excepted at the time.

The jury on the above state of facts, returned a verdict in damages in favor of the appellee, against the defendant, for $232 77, and found the property attached to have been the property of the defendant, and subject to the attachment.

The court proceeded to, and did render judgment in accordance with said verdict and gave judgment for the costs (under the statute) on the interplea against the appellant; who, thereupon, moved the court for a new trial, setting out informally and irregularly, the following grounds. 1*st*: Because the verdict was contrary to the evidence. 2*d*: Because the court erred in giving the instruction asked for by the appellee. 3*d*: Because the court erred in refusing the instruction asked for by appellant, and 4*th*: because the court refused to permit the appellant to prove the payment of the consideration expressed in the deed, to the defendant. All the evidence, as above, was set out in the appellant's motion for a new trial. On consideration of which the motion for a new trial was overruled, and the appellant excepted, setting out therein his motion, and the facts aforesaid. The appellant filed the usual affidavit, and prayed an appeal from the judgment in this behalf rendered against her, which was granted by the court.

Several errors are assigned why said judgment should be reversed, which we will proceed to notice in the order in which they are presented, after we shall have disposed of a preliminary question which presents itself to our minds from the transcript before us, and which we think it well to remark upon.

In the case of *Gibson et al. vs. Wilson et al.*, 5 *Ark. Rep.* 422, it was held by this court, that in a suit by attachment, when an interplea is filed, the jurisdiction of the court, as between the in-

terpleaders, arises by virtue of the writ of attachment; and if there be no valid service of the writ, there is no suit between the parties to the interplea. In the case at bar, there is neither *writ* nor *service*, so as to enable us to determine the jurisdiction of the court from the return and service of the writ of attachment in this case. We are led to believe, from many facts apparent upon the face of the transcript, that there was a writ of attachment issued in this cause, and that it was served in some form or manner upon "land and cotton," and upon the express authority of *Bixby vs. The State*, 15 *Ark. Rep.* 396, and the implication in the case of *Stewart vs. The State*, 13 *Ark. Rep.* 745, if it were possible for us to affirm the judgment below, and for the purpose of affirmance alone, we would *ex-officio* award a special *certiorari* to the clerk of the Bradley Circuit Court, to supply the supposed omission in the transcript, in reference to the *writ* and *return*, for the reason that we entertain no doubt but that the writ and return both remain upon the files of the court below, and are not copied in the transcript by the misprision of the clerk.

We are fully aware of the existence of the maxims that, "all acts of an inferior court are presumed to be rightly done in a superior court," (See *Smith vs. Burry*, 1 *S. & M. Mi. Rep.* 321,) and "that the decisions of a court of competent jurisdiction, are presumed to be well founded, and their judgments regular." (Per BAYLEY, Judge, 3 *B. & C.* 327.) Yet we do not hold these maxims to extend beyond this, that when it appears upon the face of the proceedings, that the inferior court has jurisdiction, it will be intended that the proceedings are regular; but that unless it so appears, that is, if it appears affirmatively that the inferior court has no jurisdiction, or if it be left in doubt, whether it has jurisdiction or not, no such intendment will be made. See *Taylor vs. Clemson*, 11 *Cl. & Fin. Rep.* 610, per Lord BROUGHAM; *Dempster vs. Purnell*, 4 *Scott N. R.* 39, per TINDAL, Chief Justice, *citing Maravia vs. Slater*, *Willes* 30, *and Litley vs. Foxall*, *Ib.* 688. But for the lone cause that no jurisdiction appears affirmatively upon the face of the transcript, as held in the case of

Gibson et al. vs. Wilson et al., we would not reverse the judgment until we had awarded a special *certiorari*, *ex-officio*, under the rule as laid down in the case of *Bixby vs. The State.* In view of the law as laid down upon the authority of Lord BROUGHAM, and TINDAL, Chief Justice, and the other errors apparent upon the transcript in this cause, we are compelled to reverse the judgment of the court below, for the reason that no valid writ of attachment and return thereon are shown, so as to give the court below jurisdiction to try the cause upon the interplea.

Having disposed of this question, we proceed to adjudicate the points presented by the assignment of errors.

The title of the appellant to the land and cotton attached in the court below, was resisted by the appellee upon the ground that he was a creditor of the defendant under the attachment law, and in contemplation of our statute of frauds; and that the conveyance of the land in question was made by the defendant to to delay, hinder and defraud his creditors. the appellant,

The appellant proved beyond all question or doubt, by her deed, that the legal title to the land described therein, being the same land supposed to be attached, was in her for months prior to the attachment, and that she was then and had been, from the date of the deed, in the possession and enjoyment of said lands thereunder. It was also as conclusively proved on the trial, that the cotton attached was the produce of said land, and the labor of the slaves of the appellant; and that it was also in her *sole possession* at the time of the levy of the attachment. We think these facts render it clear, beyond controversy, that the property both in the land and cotton, was in the appellant at the time of the issuance of the supposed attachment, and at the time of the trial upon the interplea in the court below. There was not a solitary fact developed by the evidence, from which the jury could have legitimately inferred fraud in the transaction, if it had been competent for them to have made any such inference in such a proceeding, for we hold the law to be "that whilst fraud may be presumed, from circumstances, in a court of equity, it as a fact,

must be proved like any other fact in a court of law." See *Gallatian vs. Cunningham*, 8 *Cow. Rep.* 361; 1 *S. & M.* (*Mi.*) *Chan. Rep.* 135; *Dardenne vs. Hardwick*, 4 *Eng. Rep.* 482.

It certainly will not be seriously insisted that the defendant had not a perfect right to make a sale of the land in question, at the time it seems the sale was made in this case. No fraud could have been inferred, even against defendant from that act. No fraud is patent from the deed to the appellant; none could be drawn from that source. The fact of the defendant's indebtedness to the appellee, is not a fact, coupled with any other fact proved on the trial, which would raise even a presumption of fraud against the defendant. The fact of the conveyance being made by a son to a mother does not of itself, or when coupled with any other fact proved on the trial, throw the slightest suspicion upon the transaction; and the remaining fact that the defendant continued to live with his mother on the land conveyed, after the date of the the deed up to the 1st August, 1852, in our opinion should not have weighed a feather, either with the court or jury, imputting fraud to the defendant. We therefore, hold, that the instruction given by the court to the jury, was wholly an abstract one, and had no connection with the case, as made out by the facts, and as such was calculated to mislead the jury, as it clearly must have done.

But this instruction is erroneous for another reason. It seems to assume that the sale from the defendant to appellant could be fraudulent as to the appellant without her concurrence in the fraudulent designs of the defendant in respect to his creditors. Now it is the *intent* that makes a conveyance fraudulent as to creditors, and this *intent* must be *participated* in by *both* parties. See *Peck vs. Carmichael*, 9 *Yerg. Rep.* 327, 328; *Trotter vs. Watson*, 6 *Hump. Rep.* 509; *Jones vs. Read*, 1 *Ib.* 345; *Farmers Bank et al. vs. Douglass et al.*, 11 *S. & M.* (*Mi.*) *Rep.* 469; *Dardenne vs. Hardwick*, 4 *Eng. Rep.* 486.

We think it also clear that the court below erred in not giving the instruction asked for by the appellant, for her deed coupled

with possession invested her with all the title which was in her grantor, and until it was overturned and destroyed by fraud, entitled her to recover in the trial below.

We are further of the opinion, that the court below erred in not permitting the appellant to prove that she had actually paid the consideration set forth in her deed. See *Farmers Bank et al. vs. Douglass et al., above cited.* It is true, that such evidence would have been only cumulative of her evidence, the fact of the payment of that amount having been *prima facie* established by the deed itself. But courts have no right to exclude evidence solely on the ground that it is cumulative, without the judge should discover that the party or his counsel, is unnecessarily cumulating evidence to the hinderance of business in court, and the unnecessary annoyance and expense of his adversary. In which case, we apprehend, his power would be unquestionable. In the case at bar, we discover no such circumstances manifested by the transcript.

Wherefore, for these several errors, the judgment of the Bradley Circuit Court is reversed, and the cause remanded to be proceeded in according to law, and not inconsistent with this opinion.

Mr. Chief Justice ENGLISH did not sit in this cause.

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McNeill vs. Arnold et al.

The Circuit Court has power to amend its record, so as to make it speak the truth, &c. (*King & Houston vs. State Bank*, 4 *Eng.* 185; *Arrington vs. Conrey*, *ante*, 100.)

Slaves are conveyed to a trustee for the separate use of the wife, and upon her death to be divided among her heirs; upon the death of the wife, the trust is executed, and an action for the recovery of the slaves must be brought in the name of the heirs, and not of the trustee.

A trustee, after the trust is executed and his interest in the trust property is terminated, is a competent witness in a suit affecting the title.

The statute law of another State can be proved only by the production of the statute, and not by parol; but the unwritten laws, custom, usage, practice, &c., of other States, may be proved by the testimony of witnesses skilled therein.

A deed executed in another State, in the absence of any testimony that the laws of the State authorized its registration, is not admissible in evidence, merely upon certificates of its acknowldgement and registration, without other proof of its execution.

If a deed be duly executed, &c., in another State, according to the laws thereof, it is unnecessary, to protect the rights of the grantee, that it should be recorded in this State, upon the removal of the parties and the property. (*O'Neill vs. Henderson*, 15 *Ark.* 235.)

Where a deed or instrument of writing is read in evidence, without competent proof of its execution, and such proof is afterwards made, though it was irregular to permit it to be read, the irregularity is cured by the proof afterwards made.

When the question propounded to a witness, indicates the answer it is desired he should make, or furnishes him with one favorable to the point sought to be established by the examiner, it is leading. (*Clark ad. vs. Moss et al.*, 6 *Eng.* 741; *Pleasant vs. State*, 15 *Ath.* 624; *Rogers vs. Diamond*, 13 *Ib.* 473.)

Where property is in the possession of another, who has purchased and uses it as his own, the owner may bring replevin for it without a previous demand. (*Pater ad. vs. Frazier*, 6 *Eng.* 257; *O'Neill vs. Henderson*, 15 *Ark*, 235.)

Where the wife has a separate estate in slaves, and the husband and wife live together, the possession of the husband is the possession of the wife.

Where a party suing for a chattel proves that he purchased it from one in possession, he makes a *prima facie* case of title, and the *onus probandi* is shifted to the opposite party.

As a general rule the possession of the agent is the possession of the principal.

After the plaintiffs had proved, by the agent of the person under whom they claimed title to the personal property, that he, as agent, had purchased the property for his principal, the defendant, by the same witness, on cross-examination, proved that, at the time of the purchase, a bill of sale was taken: HELD, That the plaintiffs were not required to produce the bill of sale.

If the authority of the agent is shown to be in writing, the writing must be produced and proved, or its non-production accounted for, in order to admit of secondary evidence of the agency.

Where the husband and wife bring an action of replevin for the slaves of the wife, and they are taken under the writ and delivered by the sheriff to the husband, this is such a reduction into possession by the husband as, for the purposes of the suit, will perfect his title to the slaves, in the event of the wife's death after the seizure and delivery, and before judgment.

The defendant cannot take advantage of a variance between the declaration and writ, after a plea in bar to the action.

Appeal from Dallas Circuit Court.

Hon. THEODORIC F. SORRELLS, Circuit Judge.

YELL & CARLTON, for the appellant. A demand was necessary before the institution of this suit, and the court clearly erred in refusing the instruction upon this point. 2 *Greenleaf, chap. on Trover, page* 532; *Beebe vs. DeBaun*, 3 *Eng.* The case of *Prater and wife vs. Frazier and wife*, 6 *Eng.* 249, does not overrule the case of *Beebe vs. DeBaun*, nor is there any inconsistency between the two; because, in the former case, the defendant had acknowledged the plaintiff's title, and yet made a sale of the property, which was an act of conversion. In this case, the defendant was a purchaser, acting in good faith, and believing the property to be his own.

The court erred in permitting the deed of trust to be read to the jury, upon the parol evidence of the witness as to the laws of Mississippi; and as the deed was not of such a nature as was required by law to be recorded, the record is incompetent to prove the existence or execution of the original. *Brown vs. Hicks*, 1 *Ark.* 232.

The contents of a written instrument cannot be proved by a witness without accounting for the absence of the original, (*Dermont vs. McCracken*, 6 *Blackf.* 356,) and all the testimony of Glover, as to the purchase of the slaves by him for Burke, should have been rejected without the production of the bill of sale, which was the best evidence of the purchase; and also, of the authority of Glover to purchase for Burke, without the production of the letter of Burke constituting him his agent. *Mordecai vs. Beal*, 8 *Port.* 529; *Planters and Merchants Bank vs. Willis*, 5 *Ala.* 770; 4 *Blackf.* 164.

Glover was incompetent to testify, as a witness, and the suit should have been brought in his name.

WATKINS & GALLAGHER, and COMPTON, for appellee. The children of Mrs. Burke were the proper parties to bring this suit. Upon her death the title to the property passed out of the trustee, and vested in them, without any transfer on his part. *In re of the estate of Williams*, 1 *Maryland Chan.* 25; 1 *Kelley* 381.

A demand before suit brought was not necessary. *Beebe vs. DeBaun*, 3 *Eng.* 510; *Frazier and wife vs. Prater ad.*, 6 *Eng.* 249; 5 *Sanford Rep.* 157; 1 *Smedes Rep.* 304..

Where the rights and powers of a trustee have ceased, and he has no interest in the matter, he is a competent witness. *Main vs. Newman*, *Anthen* 11; *Johnson vs. Cunninghan*, 1 *Ala.* 249; *George vs. Kimball*, 24 *Pick.* 234; 4 *Dev. & Bat.* 442.

The bill of sale to Samuel Burke, and the agency of Glover constituted by letter were not necessary to be produced—the possession of the defendant, and the rights of the plaintiff being derived from the same source.

The possession of Burke was the possession of Glover as trustee, (*O'Neill vs. Henderson*, 15 *Ark.* 235,) so that no rights accrued by adverse possession.

The original deed was sufficiently proven without Glover's testimony. Stith proved that under the laws of Mississippi, where it was executed, it was entitled to be admitted to record; (*O'Neill*

zs. Henderson, ub. sup.); but Glover's testimony proves it beyond a doubt.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

A preliminary question is to be settled in this case.

The case was brought here, on appeal, at January Term, 1855, and after it was docketed and before joinder in error, the counsel of the appellees obtained a continuance, for the purpose of procuring an amendment of the record in the court below, and bringing up a transcript thereof by *certiorari*. At the July Term following, having, in the meantime, procured the amendment below, they moved for a *certiorari* in order to perfect the record here. Thereupon, a transcript of the amendment was filed, with an agreement of the counsel of the parties, that it should have like effect, as if brought here on *certiorari*.

The counsel for appellant insist that the court below had no power to make the amendment, after the lapse of the term at which the cause was tried, and that the matter contained in the transcript of the amendment, ought not to be treated as part of the record here.

The matter of the amendment is this: It seems that, on the trial of the cause, the appellees read in evidence the original trust deed from Samuel Burke to Nathan Glover, executed, acknowledged and recorded in Mississippi, under which they claimed title to the slaves sued for. After the trial, they obtained leave of the court to withdraw the original deed, on filing a copy, desiring to use the original in another suit pending in Ouachita county. They accordingly withdrew the original, substituting in lieu thereof, a certified copy of the deed, from the record thereof, in Mississippi. But the clerk omitted to enter of record the order of court, permitting the original deed to be withdrawn, &c., and failed to note the filing of the copy substituted. That, in consequence of these omissions of the clerk, and the copy of the deed from the Mississippi record, so substituted for the original, being transcribed in a bill of exceptions taken at the trial, and

brought up in the original transcript, it was made to appear that the appellees read in evidence, upon the trial, the record copy of said deed, instead of the original, &c.

The court below, in term, upon application of the appellees, on due notice to the appellant, and upon satisfactory proof of the facts stated above, ordered the original deed, and certificates attached thereto, to be re-filed and made part of the record, as of the date it was originally filed on the trial of the cause.

A transcript of the proceedings to amend the record, including the original deed, &c., so re-filed, was afterwards made out, and brought here, as upon *certiorari*, as above stated.

The power of the Circuit Court to amend its record, so as to make it speak the truth, and the mode of doing it, have been sufficiently discussed and settled in the case of *King & Houston vs. The State Bank*, 4 *Eng. Rep.* 185, and *Arrington vs. Conrey et al.*, decided at the present term. The proceedings to amend in this case, being substantially in conformity with these decisions, we shall treat the matter of the amendment, as part of the record in the cause here.

ON THE MERITS, &c.—In August, 1853, Rufus E. Arnold, (suing in right of his wife Mildred M.) and Mildred M. Arnold his wife, and the said Rufus E. Arnold suing as the guardian of Joel Burke, Samuel Burke, and Malcom McNeill Burke, minors, &c., brought an action of replevin, in the *detinet*, against Hector McNeill, in the Dallas Circuit Court, for the recovery of a negro woman named *Lizzy*, and her children called *Eliza*, *Aga*, *Ann*, *Phœbe* and an *infant child* without a name.

The declaration alleged that the defendant, on the 1st day of September, 1851, received the woman *Lizzy*, and her children *Eliza*, *Aga*, *Ann* and *Phœbe*, the property of the plaintiffs, from one Virgil J. Burke, to be delivered to the plaintiffs, with their increase, on request, &c., and that, after the reception by the defendant of the woman *Lizzg*, she gave birth to a child, the name and sex whereof were unknown to the plaintiffs, and which from its birth had been, and was still, in the possession of defendant,

&c.; and that the defendant, although often requested so to do, had not delivered said slaves, or any of them, or said increase, to the plaintiffs, &c.

The writ, reciting that the plaintiffs complained that the defendant unjustly detained from them the woman Lizzy, and her *four* children, Eliza, Aga, Ann, and Phœbe, commanded the sheriff, upon the plaintiffs' giving bond, &c., to replevy said "goods and chattels," and deliver them to the plaintiffs, &c.

The sheriff returned upon the writ, that on the 3d of August, 1853, the day it issued, he replevied and delivered to the said Rufus E. Arnold, the slaves Lizzy and her four children, Eliza, Aga, Ann, and Phœbe—no mention is made in the writ, or the return of the sheriff, of the unnamed infant child of the woman Lizzy, described in the declaration.

At the return term, (Sept. 853.) the defendant filed three pleas: 1*st. Non detinet;* 2*d. Non cepit* (?) and *third*, property in himself, to which issues were made up.

At the September Term, 1854, the death of Mrs. Arnold was suggested, and the cause was ordered to abate as to her, and progress in the names of the other plaintiffs. Whereupon, the cause was submitted to a jury, who returned a verdict that the slaves Lizzy, and her four children, Eliza, Aga, Ann and Phœbe, and also the unnamed child of Lizzy described in the declaration, were the property of the plaintiffs, and assessed damages by way of hire, at $116 66. The court rendered judgment, as follows, upon the verdict: "It is therefore considered by the court, that the plaintiffs, Rufus E. Arnold, in right of his wife, Mildred M. Arnold, and the said Rufus E. Arnold, as guardian of Samuel Burke, Joel Burke, and Malcom McNeill Burke, minors, do have and retain the possession of the negro slaves in said declaration mentioned, and that they recover of, and from said defendant, Hector McNeill, the sum of $116 66, for their damages sustained, besides all their costs," &c.

The defendant moved for a new trial, on the grounds that the verdict was contrary to law and evidence; and that the court

erred in its decisions upon a number of points raised pending the trial. The motion was overruled, and the defendant excepted, and appealed to this court.

There being no total want of evidence to sustain the verdict of the jury, upon any material matter in issue, the evidence need not be stated further than may be necessary to understand the several questions of law decided by the court, and complained of as erroneous by the appellant.

1. It is insisted by the appellant, that the suit should have been brought in the name of Nathaniel Glover, and not in the names of the appellees. The appellees claimed title to the slaves, under the following deed, purporting to have been executed by Samuel Burke, &c.

"This deed of bargain and sale, made and entered into, this, the 15th day of March, A. D., 1841, between Samuel Burke, of the county of Christian, and State of Kentucky, of the first part, and Nathaniel Glover, of the county of Lowndes, and State of Mississippi, of the second part, and Lucy Ann Burke, of the county of Noxube ,and of the State last aforesaid of the third part, *witnesseth:* That whereas, the said party of the third part, heretofore, *to wit:* on the — day of — A. D., 1834, intermarried with Virgil J. Burke, son of the said party of the first part; and whereas, the father of the party of the third part upon such marriage gave and conveyed to the said party of the third part, and her said husband, property of great value, which, by misfortune, and bad management of the husband of the party of the third part, has been squandered and spent; and whereas, the said party of the first part, being desirous and anxious to settle upon and convey to the said party of the third part, and the heirs now begotten, and the heirs to be begotten of her body by the said Virgil J. Burke, the property hereinafter mentioned, to be free from the control, interference, management or debts of the said Virgil J. Burke; therefore, be it known by this deed, that in consideration of love and affection towards my said daughter-in-law, the party of the third part, and the heirs of her body begotten and

to be begotten by the said Virgil J. Burke, and in the further consideration of the sum of ten dollars cash in hand paid the party of the first part, by the party of the second part, the receipt and payment of which is hereby acknowledged, *have*, the day of the date hereof, granted, bargained, sold and delivered unto the party of the second part, the following described property, *to wit:* One negro woman, *Lizzy*, aged twenty years; one boy, *Thomas*, aged twelve years; one girl, aged three years; one girl, *Louisa*, two years; one negro boy, *Nathaniel*, aged two months; one wagon, one barouche, one sorrel horse, two dark bay horses, and two feather beds and furniture, to have and to hold, unto the party of the second part in trust, and upon the conditions hereinafter mentioned; that is to say, the said party of the second part has the aforesaid property conveyed to him in trust for the party of the third part, and the heirs of her body to be begotten by the aforesaid Virgil J. Burke; the said party of the second part binds himself to hire out, at the end of each and every year, said property, and apply the proceeds thereof to the maintenance and education of the children of the party of the third part; or the said party of the second part, if he thinks proper, may permit the aforesaid property to remain in the possession of the party of the third part, and the labor thereof to be appropriated in the education and maintenance of the children of the party of the third part as aforesaid, the proceeds arising from the labor thereof to be kept distinct and separate from the property of the husband of the party of the third part, and free from any control or dominion by him; and upon the further trust also, that if the said party of the third part shall depart this life, before the heirs of her body aforesaid shall arrive to the age of twenty-one years, then the property aforesaid and all the income thereof, shall be absolutely vested in the said children by the party of the third part left as aforesaid; but if the party of the third part shall not depart this life, then, in that case, the property before mentioned, and its increase, shall remain in the trustee for the purposes aforesaid, until the youngest child shall become of age, and then an

absolute title shall vest in the said heirs to an equal portion of said property and its increase; and the party of the second part does hereby agree and consent with the other parties to this deed, to do and perform all and every act that may be necessary to carry into full effect this deed. The said party of the second part is hereby vested with full and complete power so to manage the property aforesaid, and the increase thereof, that the same may be subjected and applied as this deed directs.

In witness whereof, the parties to this deed have hereunto set their hands, and affixed their seals, this 15th day of March, A. D., 1841.

his
SAMUEL ⋈ BUKE, [SEAL.]
mark.
NATHANIEL GLOVER, [SEAL.]

The testimony introduced upon the trial, conduced to prove that the woman *Lizzy* sued for, is the same woman named in the above deed; that the other slaves described in the declaration are her children; that Mrs. Burke, wife of Virgil J. Burke, died in the year 1850, leaving four minor children, *Samuel*, *Malcom*, *Joel*, and *Mildred M.*, (who afterwards married Arnold,) and in whose behalf this suit was brought.

It is manifest that, by the terms of the deed, upon the death of Mrs. Burke, the title to the slaves therein mentioned, passed out of Glover, the trustee, and vested absolutely in the children of Mrs. Burke. Upon her death the trust became executed, and there remained nothing for the trustee to do. The action was therefore, properly brought in the names of the appellees. *Liptrot ad. vs. Holmes*, 1 *Kelly* 381; *Jones vs. Cole*, 2 *Bailey's Rep.* 330; *Bradley vs. Hughes*, 11 *Eng. Chan. Rep.* 368; *Tullet vs. Armstrong*, 17 *Eng. Chan. Rep.* 3.

It follows, also, that Nathaniel Glover, the trustee, was a competent witness in the cause, his interest having terminated upon the death of Mrs. Burke. Nor did the court err, in instructing the jury, at the instance of the appellees, against the objection

of the appellants, as follows. *3d.* That the right of possession to the negro slaves accrued to the said minor heirs, immediately upon the death of Lucy Ann Burke, by the operation of the deed read in evidence by said plaintiffs; and that all right and title to said negro slaves immediately vested in said heirs, upon the happening of said event."

2. Did the court err, in permitting the appellees to read in evidence, the original deed of trust, above copied, upon the proof produced by them of its execution?

To the deed were attached the following certificates:

"THE STATE OF MISSISSIPPI, }
LOWNDS COUNTY. }

Personally appeared before me, Hendley S. Bennett, Judge of the 6th Judicial District for said State, the above named Samuel Burke and Nathaniel Glover, and acknowledged that they signed, sealed and delivered the foregoing deed on the day and year therein mentioned, as their act and deed, and for the purposes therein expressed.

Given under my hand and seal, the 15th day of March, A. D., 1841.

HENDLEY S. BENNETT, [SEAL.]
Judge 6th Jud. Circuit, Miss."

"THE STATE OF MISSISSIPPI, }
NOXUBE COUNTY. }

I, John B. Roberts, clerk of the Probate Court of said county, do hereby certify that the foregoing annexed deed of trust was received in my office for record, the 25th day of May, A. D., 1841, and duly recorded in deed book D., pages 466, 467 and 468. This 8th June, 1841.

Given under my hand and seal of office, at Macon, this the 8th June, A. D., 1841.

JOHN B. ROBERTS, *Clerk.*"

To all who shall see these presents, greeting: Be it known, that John B. Roberts, whose name is subscribed to the annexed certificate, was, on the day of the date thereof, clerk of the Probate Court of *Noxubee* county, in the State of Mississippi; that his attestation to the annexed certificate is in due form of law, and made by the proper officer, and that full faith and credit are due to all his official acts.

In testimony whereof, I have caused the great seal of the State, to be hereunto affixed. Given under my hand at the city of Jackson, this 19th day of May, A. D., 1854.

By the Governor:

[L. S.] JOHN J. McRAE.

WM. H. MUSE, *Secretary of State.*"

Before the appellees offered to read the deed in evidence, they introduced Abner A. Stith, who, being sworn, stated that "he was a practicing attorney in the State of Mississippi, at the time of the date of said deed, and it was his opinion that the law of said State, at that time, required such instruments to be recorded. That he had heretofore examined a copy of said deed; thought it had been properly acknowledged and recorded; that laws of Mississippi in relation to recording of such deeds somewhat similar to laws of Arkansas."

Upon the certificates attached to the deed, and the testimony of Stith, the court permitted the appellees to read the deed to the jury, against the objection of appellant. Was it competent for the appellees to prove the registration statutes of Mississippi, by parol, without any showing that a higher grade of evidence could not be obtained?

In *Barkman vs. Hopkins et al.*, 6 *Eng. R.* 168, Mr. Justice WALKER, said: "The plaintiff offered the deposition of one skilled in the laws, and familiar with the practice of the State of Louisiana, and also the laws of the State of Louisiana, purporting to be pub-

lished under the authority of the State, which were objected to as incompetent. The particular grounds of the objection are not pointed out. The deposition appears to be regularly taken, and we think the evidence competent legal evidence for the purpose of proving the laws and practice of that State, which before the Circuit Court upon the trial of the case required to be proven as any other fact necessary to sustain the issue. *McRea vs. Malton*, 13 *Pick.* 49, is in support of this opinion. Upon this point we think there was no error."

We do not understand the court as intending to decide, in this case, that the *statute* or *written* laws of Louisiana, were properly proven by parol. The case of *McRea vs. Malton*, 13 *Pick.*, referred to in the opinion, does not so hold. In that case the court said: "The defendant has objected to the mode of proof, *viz:* by the evidence of witnesses, that the proceedings were according to the law of the State of North Carolina, and that by the law of that State, and *usage there*, the defendant was so far a party to the record against the principal, as to be bound to take notice of the proceedings against him, and also, of the subsequent proceedings against himself, as the bail. Now, we think it too clear for argument, that it was competent for the plaintiff to prove by witnesses that such was the law of North Carolina. *It was the only way to establish it here, for it was their common unwritten law*, proveable here as matters of fact are to be proven. And upon recurring to the evidence, it was very clearly established, not only by the opinion of witnesses, who were of the profession, and in the practice of the law, but by the judicial decisions of the court there, in *Woodfork vs. Broomfield*, 1 *Murphy* 187."

By referring to the transcript on file in this court, in the case of *Barkman vs. Hopkins et al.*, we find that the witness, who gave the deposition referred to in the opinion of the court, and who was a practicing attorney of Louisiana, stated that, by *law*, *usage*, *practice* and *decisions* of the courts of Louisiana, service of citation on one of the partners of a firm, authorizes proceedings and judgment against the members of the co-partnership, &c.

Messrs. *Watkins & Curran*, the counsel who argued the case in this court, in favor of the competency of the deposition, said:

"The unwritten *law*, *customs* and *usages* of a foreign country, or another State, may be proved by parol. 3 *Phil. Ev.* 1142, *and cases cited*, 6 *Cranch.* 274; 15 *Serg. & Rawle* 84; and it does not appear that the law, under which the service upon one partner is good service upon the firm, was in writing; and the laws of Louisiana were also proved by the printed statutes, under our statute."

In the case now before us, it must be understood that Stith testified as to the statutes of Mississippi, because, the registry system, both in England, and in the States of this Union, is statutory.

STORY, in his CONFLICT OF LAWS, *secs.* 640, 641, 642, 643, 644, says: "The general principle is, that the best testimony or proof shall be required which the nature of the thing admits of: or, in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it. And this applies to the proof of foreign laws, as well as of other facts. * * * *. Generally speaking, authenticated copies of written laws, &c., of a foreign government, are expected to be produced. For it is not to be presumed that any civilized nation will refuse to give such copies duly authenticated, which are usual and necessary for the purposes of administering justice. It cannot be presumed that an application to authenticate an edict or law will be refused; but the fact of refusal must be proved. But if such refusal is proved, then, inferior proofs may be admissible. *Church vs. Hubbart*, 2 *Cranch.* 237. * * * * The usual modes of authenticating foreign laws (as of foreign judgments) are, by an exemplification of a copy, under the great seal of the State; or by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be duly authenticated. * * * * But foreign *unwritten laws*, *customs and usages*, may be proved, and indeed must ordinarily be proved by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath." But, fin-

ally, adds the same author: "The mode, by which the laws, records, and judgments of the different States composing the American Union, are to be verified, has been prescribed by Congress, pursuant to an authority given in the Constitution of the United States," &c.

In *Robinson vs. Clifford*, 2 *Wash. C. C. Rep.* 2, the court, said: "The statute or written law of foreign countries, should be proved by the law itself, as written. The common, customary or unwritten law may be proved by witnesses acquainted with the law.

To the same effect are the following authorities. *Packard vs. Hill*, 2 *Wend.* 411; 4 *Hill & Cowen's Notes to Phil. Ev., part* 2, *page* 330, *and cases cited; Livingston vs. Mar. Ins. Co.*, 6 *Cranch* 274; *United States vs. Otega*, 4 *Wash. C. C. Rep.* 533, *Dougherty vs. Snyder*, 15 *Serg. & Rawle* 87; *Kinney vs. Clarkson et al.*, 1 *John. Rep.* 394; *Hemphill vs. The Bank of Alabama*, 6 *Sm. & Mar.* 50; 1 *Ib.* 177; *Camparret vs. Jarnegan*, 5 *Blackf.* 375; *Tyler vs. Trabune*, 7 *B. Mon.* 306; 7 *Monroe* 584; *Gardner vs. Lewis*, 7 *Gill Rep.* 379

Mr. GREENLEAF, in his work on EVIDENCE, *vol.* 1, *secs.* 486, 487, 488, 489, states the law on the subject to be as stated by Story in his *Conflict of Laws*, above copied, but in a note to *sec.* 487, he cites the case of *Baron De Bode vs. Reginam*, 10 *Jur.* 217, where it was held in an English Court, that it was competent for a learned French Advocate to prove a decree of the National Assembly of France, without an attempt to obtain a copy of the law itself.

Whatever respect may be due to this decision, it is well settled by the current of decisions in this country, that where it is necessary to prove the statutes of one State in the courts of another, they must be produced, but that the unwritten laws, custom, usage, practice, &c., may be proven by the testimony of witnesses skilled therein.

The 1*st section of the* 4*th article* of the Constitution of the United States, declares that "full faith and credit shall be given in each State, to the public *acts*, records and judicial proceedings of every other State; and the Congress may, by general laws,

prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The act of Congress of May 26th, 1790, passed in pursuance of this clause of the Constitution, declares, that "the acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto." *Digest ,page* 87. But this method of authentication is not regarded as exclusive of any other mode which the States may respectively adopt. 1 *Greenl. Ev., sec.* 489. Hence, our Legislature has provided, that "the printed statute books of the several States and Territories of the United States, purporting to have been printed under the authority of such States or Territories ,shall be evidence of the legislative acts of such States or Territories." *Digest, page* 490; *see Clark vs. Bank of Miss.*, 5 *Eng. Rep.* 516; *May vs. Jameson*, 6 *Eng. Rep.* 377; *Dixon vs. Thatcher*, 15 *Eng. Rep.* 141. And the Legislature has further provided, that "copies of any act, law or resolution, contained in the printed statute books of any of the States and Territories of the United States, purporting to have been printed by authority, and which are now, or may hereafter be, deposited in the office of the Secretary of this State, and required by law to be kept, certified under the seal of the Secretary of State, shall be admitted as evidence." *Digest, page* 490.

These several modes of procuring authenticated copies of the statutes of our sister States, when required as evidence in our courts, are so ample that there can be no necessity of resorting to parol testimony to prove them, the accuracy of which depends so much upon the memory, skill, &c., of the witness.

The court below, therefore, erred in permitting the deed of trust to be read in evidence to the jury, with no other proof of its execution than the certificates attached and the testimony of Stith. *Dixon vs. Thatcher et al.*, 14 *Ark. Rep.* 147; *Wilson vs. Royston*, 2 *Ark. Rep.* 327; *Stevens et al. vs. Bomar*, 9 *Humphreys's* 546; *Brown vs. Hicks*, 1 *Ark.* 233.

The court below did not err in refusing to sustain the motion of the appellant to exclude the deed, because it had not been re-

corded in this State. This was not necessary in order to protect the rights of Mrs. Burke and her children. *O'Neill vs. Henderson*, 15 *Ark. Rep.* 235

The *6th instruction* moved by the appellant, and refused by the court, relates also to the proof of the execution of the deed. The first clause of the instruction, that "the plaintiffs must introduce the best evidence to prove the deed of trust, that the nature of the case will admit of," was correct as a general principle of law, and applicable, as we have seen, to the mode of proving the registry acts of Mississippi.

The second clause of the instruction, is as follows: "That a certificate made by the Clerk and the Governor, and an acknowledgment of said deed in the State of Mississippi, is not the best evidence; but there must be *first direct proof of the original*, or the loss of the original, before the certificate of the Clerk and Governor will be admitted, as evidence in this case."

There being no competent evidence to prove that the laws of Mississippi authorized the registration of such deeds, the certificates attached to the deed in question amounted to no proof of its execution.

Had it been proven that the laws of Mississippi authorize the acknowledgment and recording of such deeds, and make the original deed with the certificates of acknowledgment and registration attached, or a certified copy from the record, admissible as evidence without further proof of execution, the original deed, with such certificates, or a copy from the record, when properly authenticated under the act of Congress, of March 27th, 1804, (*Digest, chap. on Authentication, sec.* 2,) would, by virtue of that act, have the same faith and credit, as evidence in our courts, as they have by law or usage in the courts of Mississippi. *Swift vs. Fitzhugh*, 9 *Porter* 39; *Smoot vs. Fitzhugh*, *Ib.* 72; *Mitchell vs. Mitchell*, 3 *Stew. & Port.* 81; *Tatum vs. Young*, 1 *Porter* 310; *Owings vs. Hull*, 9 *Peter's Rep.* 627; *Lee vs. Matthews*, 10 *Alabama* 62; *Rochester vs. Toler*, 4 *Bibb.* 106; *Pennel's Lessee vs. Weyant et al.*, 2 *Harrington* 505; *Henthorn vs. Doe*, 1 *Blackf.*

159; 1 *Greenl. Ev.*, *sec.* 484; *Buckmaster et al. vs. Job*, 15 *Illinois Rep.* 328.

It is insisted by the appellees, that the execution of the deed of trust was sufficiently proven by the testimony other than the certificates attached thereto. It is true, that after the deed was admitted in evidence by the court, upon the certificates of acknowledgment, registration and authentication thereto appended, Nathaniel Glover, the trustee in the deed, and the second witness introduced by the appellees, testified that Samuel Burke signed the deed, that he executed it, &c. That witness was present when he acknowledged it before Judge Bennett, &c. Though it was irregular and contrary to the usual practice for the court to permit the deed to be read to the jury, until some competent proof of its execution had been produced, yet, if it was sufficiently proven after its admission, the irregularity was cured, and no injury resulted to the appellant of which he could complain here.

It is insisted by the appellant, that the grantor in the deed, or Judge BENNETT, before whom it purports to have been acknowledged by him, was more competent to prove its execution than Glover. That his testimony was of an inferior grade. There is nothing in this objection. There being no subscribing witness to the deed, if Glover saw it executed, he was as competent to prove the fact as the grantor, or Bennett. It would be a question of credibility between the witnesses for the jury to determine, and not of competency. The question of superior and secondary evidence does not arise in this instance at all.

But there is another decision of the court that must be considered in connection with the proof of the execution of the deed. The appellant took the deposition of Samuel Burke, by interrogatories. There are five interrogatories and responses thereto; the 2d, 3d and 4th of which the court suppressed upon the motion of appellees, on the ground that the interrogatories were leading, &c., and appellant excepted. The deposition is as follows:

"1*st. Question:* Examine the paper marked A, and state if it is,

or not, a bill of sale executed by you to Hector McNeill, for certain slaves therein mentioned?

Answer: I believe it to be the same bill of sale, I executed to Hector McNeill."

(The bill of sale here] referred to is a quit claim bill of sale from the witness to McNeill, for the slaves Lizzy, and her children, Louisa, Aga, Eliza, Phœbe and Ann, dated 21st July, 1851, reciting that Virgil J. Burke had purchased Lizzy, the mother of the children, from one P. Allen, of Monroe county, Mississippi, and taken the bill of sale of Samuel Burke, dated 16th of October, 1840, and had of late sold the slaves to McNeill.)

"*2d Question:* State if you ever executed a deed of gift for the negroes mentioned in said bill of sale, or any of them to the heirs of Virgil J. Burke, or any other person?

Answer: I never did, to the best of my recollection.

3d Question: Did you, or not, ever have any interest in said slaves, except by a bill of sale executed to you by P. Allen, at the instance of Virgil J. Burke, and without your knowledge?

Answer: I never had any interest in them, other than the bill of sale, and that I have never seen, and know nothing of it only by hearsay.

4th Question: Did you or not ever pay any thing for said slaves?

Answer: I never did.

5th Question: Did or not Virgil J. Burke tell you he had bought said slaves, and had the bill of sale made to you to prevent his creditors from taking them?

Answer: He told me he took the bill of sale in my name, but did not state his object."

What constitutes a leading question was well enough defined in *Clark adx. vs. Moss et al.*, 6 *Eng.* 741. Where the question indicates to the witness the answer it is desired he should make, or furnishes him with one favorable to the point sought to be established by the examiner, it is leading. See, also, *Pleasant vs. The State*, 15 *Ark. Rep.* 624; *Rogers vs. Diamond*, 13 *Ark.* 473.

The *second* interrogatory was not leading. The *third* was. The *fourth* was not. The *fifth*, though not suppressed by the court, was clearly leading.

The *second* interrogatory and response, related to the execution of the deed of trust by Samuel Burke. He states that he never did execute it, to the best of his recollection. Glover testified that he did. The statement of both of them should have been submitted to the jury, and it was their province to pass upon the relative credibility of the witnesses, and to determine the truth of the matter, from all the testimony before them, relative to the execution of the deed.

3d. The next question arising upon the record is, whether the appellees should have demanded the slaves of appellant before suit.

The testimony conduces to prove, that Virgil J. Burke and wife removed from Mississippi to Arkansas, in the year 1849 or 1850, bringing the slaves with them. That on the 16th of April, 1851, and after the death of Mrs. Burke, Virgil J. Burke sold the woman Lizzy, and her children, Louisa, Aga, Eliza, Phœbe and Ann, to McNeill, the appellant, for $2050, executing to him a bill of sale therefor. That, from the time McNeill purchased the slaves until the bringing of this suit, he claimed, managed and controlled them as his own property, and that during the time, he offered to sell one of them to one of the witnesses. No demand was proved.

At the instance of the appellees, and against the objection of appellant, the court charged the jury as follows: *2d.* "If the jury believe, from the evidence, that the said defendant exercised such acts of ownership over the said negro slaves, at the time of, or before the institution of this suit, as to be inconsistent with plaintiffs' title to the same, it waives a necessity of a demand for the same."

On the same point the appellant moved the following instructions: *3d.* "If the defendant purchased the negroes for a valuable consideration, supposing that he was acquiring a good title, demand must be made before the action will lie."

8th. "If the jury believe, from the evidence, that the defendant was a *bona fide* purchaser of the slaves in controversy for a valuable consideration, and has exercised no acts of ownership over said slaves to defeat the plaintiffs in their claim, demand of the slaves is necessary before the action will lie, and without it the jury must find for the defendant"

Each of these instructions the court gave, with the following qualification: "Unless the defendant did acts inconsistent with the title of the plaintiffs, by selling or attempting to sell, or any other act not consistent with the plaintiffs' title, then no demand was necessary."

In the case of *Pirani vs. Barden*, 5 *Ark. R.* 81, it was doubted whether replevin in the detinet would lie, except in cases of bailment, actual or constructive, under our statute; and it was held that a demand must be averred and proven in this form of action.

In *Beebe vs. DeBaun*, 3 *Eng. Rep.* 562, the case of *Pirani vs. Barden*, was reviewed, and it was held that the action was not confined to cases of bailment, but that the right of immediate possesssion on the part of the plaintiff, and an unlawful withholding by the defendant were sufficient to maintain the action. It was furthermore held that, even in cases of bailment, demand was not always necessary; that proof of conversion on the part of defendant, or of acts amounting to conversion, would dispense with proof of demand. The doctrine of this case has been repeatedly approved by the subseqnent decisions of this court. See *Phelan vs. Bonham*, 4 *Eng. Rep.* 389; *Cox et al. vs. Morrow*, 14 *Ark. Rep.* 609.

In *Beebe vs. DeBaun*, Mr. Chief Justice JOHNSON remarked: "We think that under a fair construction of our statute, where a party innocently purchases property, supposing he should acquire a good title, he ought not to be subjected to an action, until he has an opportunity to restore the goods to the true owner," &c. This remark, however, was but an *obiter dictum.*

In *Prater adm. vs. Frazier & wife*, 6 *Eng. Rep.* 257, the de-

fendant moved the court to instruct the jury, "that when a party comes lawfully and peaceably into possession of property, which he treats as, and believes to be his own, he cannot be sued for the same, without a previous demand therefor," &c.

In commenting upon this instruction, this court, by Mr. Chief Justice JOHNSON, said: "The very reverse of the instruction would seem to be the law. Where a party comes lawfully and peaceably into the possession of property, which he treats and believes to be his own, instead of entitling himself to a demand before suit, he most clearly forfeits such right," &c.

In *O'Neill vs. Henderson*, 15 *Ark.* 235, the separate property of the wife was levied upon and sold for the husband's debts; and it was held that her trustee could bring detinue against the purchaser without demand.

In cases of bailment, the possession of the bailee is deemed in law the possession of the bailor, and in order to terminate the relation of bailor and bailee, and put the latter in the wrong so as to maintain an action against him for the goods bailed, there must be a demand and refusal, or a conversion of the goods by the bailee, which is equivalent to demand and refusal. *Liptrot adm. vs. Holmes*, 1 *Kelly* 391, and cases cited.

In the case before us, there was no bailment, actual or constructive, according to the evidence. The very act of purchasing the slaves by McNeill, was at war with any title the appellees may have had thereto, and his subsequent possession was adverse to their claim.

It is true, that the declaration alleges a bailment, but this, like the allegation of finding in trover, is not a material averment. *Beebe vs. DeBaun; Cox et al. vs. Morrow.*

If the demand was necessary in order that appellant might have had an opportunity of surrendering up the slaves, and avoiding costs of an action, demand would be necessary in most cases, where a cause of action accrues to one against another.

4th. The court refused to charge the jury, on the motion of appellant. 7th. that, "if the jury believe, from the evidence, that

Virgil J. Burke had peaceable possession of the negroes for five years previous to the sale to Hector McNeill, the law vested such a title in Burke as made his sale of said negroes to the defendant in this suit, a valid one."

Glover testified that, immediately after the execution of the deed, he delivered the slaves to Burke and wife, upon the instruction of Samuel Burke, to wait on them. That they remained in possession of the slaves, some eight years, when Virgil J. Burke moved to Arkansas, with the negroes in his possession, and afterwards sold them to McNeill, &c.

Where the wife has a separate estate in slaves, and the husband and wife live together, the possession of the husband is the possession of the wife. *Lee vs. Matthews*, 10 *Ala. Rep.* 682.

5. *Glover*, in his examination in chief, by the appellees, testified as follows: "Old Samuel Burke, after he had bought the negroes mentioned in the deed, sent them through me to Virgil J. Burke and his wife; the money with which I purchased said negroes, was sent to me by old Samuel Burke. I purchased said negroes under his orders, and after they were purchased, he being informed came down and executed the deed. Old Samuel Burke then resided in Kentucky; his son, Virgil J., lived in Lowndes county, Mississippi. The old man came to my house, got me to go to Judge Bennett, who wrote the deed, &c., &c. In the first place, after I bought the negroes mentioned in said deed, and took them home, Samuel Burke came a few days afterwards, and told me to give the negroes to Virgil J. Burke and his wife, to wait on them. I did so, after the deed was executed," &c.

On *cross-examination* by the appellant, Glover stated further: "I purchased said negroes, and took a bill sale for the same in said Samuel Burke's name." (Defendant thereupon moved to exclude all the parol testimony in relation to the purchase of said slaves, because said bill of sale was not offered in evidence, or its absence accounted for; which motion was overruled and defendant excepted.) "Old Samuel Burke sent me by Mrs. Virgil J. Burke, $1000, and wrote me a letter, telling me that he had

sent the money by Mrs. Burke, to buy as many negroes as the money would purchase. I gave $900 of the money for Lizzy, and her children, &c. When Samuel Burke wrote to me, I recognized his signature which was a mark different from other persons, being a kind of V turned up.

It seems also that appellant moved the court to exclude the evidence of Glover in reference to his agency for Samuel Burke, unless the letter which he referred to, was produced, or its non-production accounted for; but the court overruled the motion and appellant excepted.

The court, upon the motion of appellees, and against the objection of appellant, instructed the jury as follows: 1*st.* "If the jury believe, from the evidence, that Samuel Burke executed the said deed introduced by the plaintiffs for the negroes, and for the purpose therein mentioned, and that the negroes sued for are a portion of said negroes, or the increase of the same, and that, at the time of the execution of said deed, the said negroes were the property of the said Samuel Burke, they must find for the plaintiffs. And that the possession of said negro slaves by the said Samuel, either by himself or his agent, at the time of the execution of said deed, is *prima facie* evidence of the said Samuel being owner thereof, and that the burden of proof devolves upon the defendant to rebut the same."

No controversy arises in relation to the correctness of this instruction, except as to the last clause of it, and there can be no doubt of its being substantially correct.

Where a party suing for a chattel, proves that he purchased it from one in possession of it, he makes a *prima facie* case of title, and the *onus probandi* is shifted to the opposite party. And as a generul rule, the possession of the agent is the possession of the principal.

The appellant moved, also, the following instruction: 4*th.* "The best evidence must always be given to substantiate any fact that the nature of the case will admit of. If Glover acted as agent of Samuel Burke, and bought the negroes in the deed of

trust, and took a bill of sale for them at the time, in the name of Samuel Burke, the bill of sale is the best evidence and must be produced, or the loss or absence of it accounted for, before parol, or secondary evidence is introduced; and without such bill of sale or such accounting, the jury will not consider the parol proof as to the sale to Samuel Burke."

The court refused to give this instruction, remarking to the jury, that the court thought it not material whether Glover took any bill of sale to Samuel Burke or not, and that the bill of sale had nothing to do with plaintiff's claim of title.

Glover, in his examination in chief by appellees, swore that he purchased the slaves for Samuel Burke, but said nothing about taking a bill of sale for them. The appellant on cross-examination, called out the matter about the bill of sale. If, by showing that Glover took a bill of sale to Samuel Burke for the slaves, the appellant could compel the appellees to produce it, or account for its non-production, they might also have shown that the person of whom Glover purchased, had a bill of sale from some other person, and require that to be produced, &c., and so on without limit.

The appellant also moved the following instruction, which the court refused: *10th.* "The plaintiffs must prove that Samuel Burke had the negroes in his possession either by himself or agent; if by agent, that agency must be proved, and if that agency was by letter, or other writing, the writing or letter must be produced, or accounted for before parol proof of that agency will be admitted."

There can be no question but that, if the authority of an agent is shown to be in writing, the writing must be produced and proved, or its non-production accounted for, in order to admit secondary evidence of the agency. 2 *Greenlfs. Ev., sec.* 63.

6th. It is moreover assigned for error, that the court erred in rendering judgment in favor of Rufus E. Arnold in right of his wife.

When the suit was brought, Mrs. Arnold was in life, and the action being for the recovery of outstanding chattels, in which

she claimed an interest jointly with her brothers, it was proper to join her husband in the suit. *Cox et al. vs Morrow.*

Before her death, the return of the sheriff upon the writ shows that he delivered to Arnold the slaves *Lizzy*, and her four children, *Eliza*, *Aga*, *Ann and Phœbe*, and upon the trial, the sheriff testified, that he also took from the appellant, and delivered to Arnold at the same time, the unnamed infant child of Lizzy, described in the declaration. Thus, before the death of Mrs. Arnold her husband reduced the slaves into his possession, and thereby, we must hold for the purposes of this suit, perfected his title to his wife's interest in the slaves. *Cox et al. vs. Morrow.* The judgment was, therefore, in good form.

There was, it is true, a variance between the declaration and the writ, in reference to the number of negroes sued for, the writ omitting the unnamed infant, but the defendants pleaded in bar of the action, without attempting to take advantage of the defect in the writ.

But, for the errors of the court above indicated, the appellant was entitled to a new trial; and the cause is therefore reversed, &c.

ARNOLD ET AL. VS. MCNEILL.

Where a bill of sale of personal property, expressed to be for a money consideration, contains a special warranty of title, warranting and defending against all claims in, through or by the vendor, he is an incompetent witness, on account of his interest in the result, to sustain the title of his vendee, in a suit between him and others also claiming under the vendor.

The magnitude or degree of interest, nor the probability of the warranty being enforced, nor any supposed prejudice or bias on the mind of the vendor, is regarded in estimating the effect of the interest upon his mind; he is incompetent if his interest be direct, certain and vested, however small.

Where a person has executed a deed of trust, making a gift of property, but reciting, among others, a money consideration, and then executes a bill of sale with special warranty, he is not a competent witness to defeat the title under the deed of gift, in favor of the bill of sale, upon the principle that his interest is balanced.

The rule in England, that no party who has signed a deed, shall ever be permitted to give testimony to invalidate the instrument which he has so signed, has been overturned there, and our decisions favor the competency of the witness.

Appeal from the Circuit Court of Dallas County.

Hon. THEODORIC F. SORRELLS, Circuit Judge.

WATKINS & GALLAGHER, for the appellants. The court erred in overruling the objections to the introduction of the deposition of Samuel Burke, because the deposition itself showed that Burke was incompetent as a witness. *Greenlf. Ev., secs.* 390, 393, 395; and because a party cannot be introduced to impeach any instrument executed by him, or deny that he has any title in the property. *Greenl. on Ev., page* 30, *sec.* 24; *Randal vs. Phillips*, 3 *Mason* 378.

YELL & CARLTON, for appellee. We admit the general principle of law, that the warrantor of title to property, which is in controversy, is, generally, incompetent as a witness for his ven-

dee, in an action concerning the title, if the effect of the judgment is certainly to render him liable; but if it is only to render it more or less probable that he will be prosecuted, the objection goes only to his credibility. See 1 *Greenl., page* 505. And in this case it would be most improbable that McNeill would ever attempt to enforce the warranty. (*Martin vs. Kelly*, 1 *Stew. Ala. Rep.* 188.)

It is a familiar rule of law, that where the witness, though interested in the event of the cause, is so situated that the event is to him a matter of indifference, he is still a competent witness. In a pecuniary consideration alone, it seems to us the witness is doubly interested, on the side of the plaintiffs, if it is to be determined from the bill of sale, and deed of trust. But take the evidence of Glover, and no state of case could present stronger and greater pecuniary and parental considerations, than the one here presented, on the part of Sam. Burke for the plaintiffs in this suit. In elucidation of the principles above set forth, we refer your honors to 1 *Greenl.* 527; *Starkweather vs. Matthews*, 2 *Hill* 131; *Roberts vs. Whiting*, 16 *Mass*; *Rice vs. Austin*, 17 *Mass.* 197; *Prince vs. Shepherd*, 9 *Pick.* 176.

It will be found also upon examination of authorities, that the interest, that now disqualifies a witness, is an interest in the *event* of the suit, and not in the *question* involved. *Kinnie's Law Compendium* 348; *Pattingil vs. Broom*, 1 *Caine's Rep.* 171; *Baker vs. Arnold*, *Ib.* 276; *The People vs. Harrell*, 4 *Johns. Rep.* 302; *Stewart vs. Kip*, 5 *Johns. Rep.* 255; *Fairchild vs. Beach*, 1 *Bay* 266; *Buckley vs. Storer*, 2 *Day* 521; *Wakley vs. Hart et al.*, 6 *Binney* 316; *Farrell vs. Perry*, 1 *Hayw.* 2; *Porter vs. McClure*, *Ib.* 360; *Baring vs. Reeder*, 1 *Hen. & Munf.* 165, 168; *Miles vs. O'Hara*, 1 *Serg. & Rawle Rep.* 32, 36; *Phillips vs. Winchel*, 1 *Day* 570.

It will also be found that a grantor in a deed, is a good witness to invalidate it. *Knight vs. Packard*, 3 *McCord Rep.* 71; *McFerrer et al. vs. Powers et al.*, 1 *Serg. & R.* 102; *Boerring ass. of Cutting vs. Shipping*, 2 *Binn. Rep.* 165; *Simons vs. Parkins*; 1 *Bailey & Car. Rep.* 62.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

This was an action of replevin, in the detinet, brought by Rufus E. Arnold, and wife Mildred M. and by Arnold, as guardian of Joel, Samuel, and Malcom McNeill Burke, minors, in the Dallas Circuit Court, against Hector McNeill, for the recovery of a girl slave named *Louisa*. The writ was executed upon defendant, but returned not found as to the slave. The defendant pleaded *non detinet*, property in himself, and the statute of limitations, and issues were made up to the pleas. Afterwards, the death of Mrs. Arnold was suggested, the cause ordered to abate as to her, and to progress in the names of the other plaintiffs. The issues were submitted to the jury at the September term, 1855, and verdict and judgment for the defendant. The plaintiffs did not move for a new trial, but excepted to several decisions of the court made pending the trial, and set out the evidence in their bill of exceptions in order that the points reserved might be understood.

Louisa, was the daughter of *Lizzy*, and one of the same family of negroes in controversy in the case of *McNeill vs. Arnold et al.* The evidence relied upon by the respective parties, to show title to the property, was substantially the same in the case now before us, as in the one already decided, and need not be stated again. The plaintiffs claimed under the deed of trust purporting to have been executed by Samuel Burke to Nathaniel Glover, conveying a separate property in the slaves, to the use of Lucy Ann Burke, the wife of Virgil J. Burke, for life, &c., remainder to her children, the plaintiffs (except Arnold) being her children. The defendant claimed the slave under a purchase from Virgil J. Burke, &c.

The court permitted the plaintiffs to read in evidence the deed of trust, with the certificates attached, upon parol proof of the registry acts of Mississippi. This was an error in their favor; and, of course, they do not complain of it here.

Glover testified, about the same that he did in the other case,

stating in addition, that he had lost the letter written to him by Samuel Burke, making him an agent to purchase the slave, &c.

The defendant offered to read in evidence the following deposition of Samuel Burke:

Interrogatory 1st. "Are you acquainted with the parties to this suit?

Answer. I am acquainted with Mr. Hector McNeill, and have seen the children, except the youngest. I am not acquainted with Mr. Arnold.

Interrogatory 2d. Examine the exhibit marked A, and state whether it is, or not a bill of sale executed by you to Hector McNeill, of Dallas county, Arkansas?

Answer. Exhibit marked A, is a quit claim bill of sale made by me to Hector McNeill.

Interrogatory 3d. Examine exhibit B, hereto annexed, purporting to be a copy of a deed of trust executed by you to Nathaniel Glover as trustee for the use of Lucy Ann Burke and her children, purporting to bear date on the 15th day of March, 1841, and state whether or not you ever executed any deed of trust for any negroes to Nathaniel Glover for the use of Lucy Ann Burke, and if so, state when and where?

Answer. I have no recollection of making any deed of trust for negroes, or any other purpose, to Nathaniel Glover.

Interrogatory 4th. State whether or not you ever sent a $1000 to Nathaniel Glover in the State of Mississippi, and requested him by letter, or otherwise, to buy negroes with it, for you, about the year 1841, or any other time?

Answer. I have no recollection of it.

Interrogatory 5th. State whether or not, you ever paid any amount of money for the girl Lizzy, referred to in exhibits A and B. If so, to whom, and what amount.

Answer. I never paid any to my reoollection.

Interrogatory 6th. State whether or not, you ever had the girl Lizzy, in your possession? Or had any right to her? Or ever knew you had a right, except from what Virgil J. Burke told you?

Anewer. I never had any right to her, nor had her in my possession.

Interrogatory 7th. State whether or not, you ever wrote Nathaniel Glover a letter, requesting him to buy negroes for you?

Answer. I have no recollection of it.

Interrogatory 8th. State whether or not, you were in Noxube county, Mississippi, in March, 1841?

Answer, I have been in Noxube county, but don't recollect the date.

Interrogatory 9th. Are you or not, satisfied in your recollection as to whether you executed a deed of trust, or any other writing to Nathaniel Glover, while in Noxube county, or did you see him while there?

Answer. I have no recollection of seeing him while there, nor of executing any writing to Nathaniel Glover while there, or any other time."

Exhibit A, referred to in the deposition, is as follows:

"Know all men by these presents, that I, Samuel Burke, of the county of Christian, and State of Kentucky, for, and in consideration of the sum of *five dollars* to him in hand paid, the receipt of which is hereby acknowledged, *does* this day bargain, sell and convey unto Hector McNeill, of the county of Dallas, and State of Arkansas, all the right, title and interest he has, or may have, to the following described negroes: *i. e.*, woman Lizzy, about thirty three years of age; with her daughters, say *Louisa*, about eleven or twelve years old; *Aga*, about eight years old; *Eliza*, about six years old; *Phœbe*, about four years old; and *Ann*, about two years old; the said negroes, the said Hector McNeill purchased of Virgil J. Burke, of Arkansas, who purchased the mother of said family (Lizzy) of one P. Allen, of Monroe county, Mississippi; bill of sale given to me, Samuel Burke, dated 16th October, 1840, and sold of late by Virgil J. Burke (who had the equitable title of said negroes) to Hector McNeill, as before named: this, then, is to convey all the right and title that I have to said negroes, with all their increase, &c., from me, my

heirs, &c., unto him, said Hector McNeill, his heirs, assigns, &c. *Warranting and defending against all claims against said negroes, in, through or by me* in the nature of a quit claim. This 21st day of July, 1851.

his
SAMUEL BURKE, [SEAL.]
mark.

The plaintiffs objected to the reading of this deposition, on the grounds that Samuel Burke was an incompetent witness, &., but the court permitted it to be read in evidence, and plaintiffs excepted.

The first ground of objection to the competency of the witness, is, that he was interested in the result of the suit, by reason of the clause of warranty contained in the above bill of sale from him to McNeill. That he warranted the title to the slaves, against all claims in, through or by him; and that the deed of trust under which the plaintiffs claimed title, and the execution of which the deposition of the witness conduced to disprove, was embraced by the warranty, being a claim under him; and if the plaintiffs recovered in the action, the witness would be liable over to McNeill upon the warranty.

The purport of the bill of sale, is, that the grantor had the naked, legal title, which, for the consideration of *five* dollars, he conveyed to McNeill, with warranty against all claims under the grantor. There is no proof that the $5.00 was not really paid, but was nominal, and inserted as matter of form, nor is there any showing that McNeill had released the witness from liability upon the warranty.

The warrantor of title to the property which is in controversy, is generally incompetent as a witness for his vendee, in an action concerning the title. And it makes no difference in what manner the liability arises, nor whether the property is real, or personal estate. If the title is in controversy, the person who is bound to make it good to one of the litigating parties, against the claim of the other, is identified in interest with that party; and;

therefore, cannot testify in his favor. 1 *Greenl. Ev.*, *sec.* 397; 1 *Phil. Ev.* 108; *Cowen & Hill's notes, part* 1, *note* 96.

The *magnitude* or *degree* of the *interest* is not regarded in estimating its effect on the mind of the witness, for it is impossible to measure the influence which any given interest may exert. It is enough that the interest which he has in the subject, is direct, certain, and vested, however small may be its amount; for interest being admitted as a disqualifying circumstance in any case, it must, of necessity, be so in every case, whatever be the character, rank or fortune of the party interested. 1 *Greenl. Ev.*, *sec.* 391.

Where the vendor sells without warranty, express or implied, he is competent; or where his covenant of warranty is restricted to claims set up under himself alone, he is a competent witness for his vendee, in a contest between his vendee, and one not claiming under the vendor. *Twambly vs. Henley*, 4 *Mass.* 441; *Bendelman vs. Foulk*, 5 *Watts* 308; *Adams vs. Cuddy*, 13 *Pick.* 460; *Bridge vs. Eggleston*, 14 *Mass.* 245; *Davis vs. Spooner*, 3 *Pick.* 284; *Lathrop vs. Muzzy*, 5 *Greenl.* 450.

But, in the case before us, both parties claim under the witness.

Mr. GREENLEAF further remarks, in *sec.* 397, from which we have quoted above, that: "If the effect of the judgment is certainly to render him liable, though it be only for costs, he is incompetent; *but, if it is only to render it more or less probable that he will be prosecuted, the objection goes only to his credibility*," *&c.*

The counsel of McNeill, availing themselves of this latter remark of Mr. GREENLEAF, say: "That it would be a most improbable and preposterous idea to suppose that defendant would ever attempt, upon the plaintiff's recovery, to go from Arkansas to Kentucky, to recover the consideration mentioned in the bill of sale, *to wit:* the sum of *five dollars*," from the witness.

Mr. GREENLEAF cites no authorities in support of the above remark, which we have copied in *italics*, nor do we understand to what character of cases, he intended it to apply; but it has been

held in adjudicated cases entitled to respect, that, "the uncertainty whether the judgment *will be* used against the witness, will not make him competent. His competency does not depend on the certainty of using the evidence against him hereafter, but on the certainty that it may be used if wanting." *Lampton vs. Lampton's Exrs.*, 6 *Mon.* 619; *Wallace's Exrs. vs. Twyman*, 3 *J. J. Marsh.* 461; *Collett vs. Wiley's heirs*, 2 *Bibb* 467. For, remarked the court, in the case last cited, as it is not in the power of the court to estimate the degree of interest a witness is capable of resisting, the law wisely rejects every one, whose right may be immediately affected by the determination.

We have no means of determining what consequence McNeill may attach to the warranty, nor to what extent the liability of the witness thereon may have biased his testimony. The law, which does not regard the magnitude of the interest, has fixed a standard which we can follow, but if we depart from this, we are upon an open sea, without any certain guide.

It is moreover insisted by the counsel of McNeill, that the interest of the witness was balanced. They say: "It appears from the deed of trust that the witness received *ten dollars*, as one of the considerations for executing the deed. There is no covenant of warranty, it is true, in the deed, but on the sale of personal property, the law raises an implied warranty, that the vendor had the right to sell the property mentioned in the deed; and, therefore, in this case, the beneficiaries in the deed would have the right to recover back from the witness, the $10 acknowledged to have been paid in the deed."

It may be remarked in reference to this argument, that it is based upon the assumption that the witness did really execute the deed of trust, which is the very matter the defendant is seeking to disprove by the deposition of the witness. But aside from this, though it may be true, that a vendor of goods having possession, and selling them as his own, is held bound in law, to warrant the title to the vendee; (1 *Greenl. Ev.*, *sec.* 398,) yet, there is no pretence that the witness sold the slaves to the beneficiaries

in the deed; on the contrary, it is manifest from the face of the deed, and the testimony of Glover, (if he is to be believed) that the witness made a gift of the slaves to his son's wife and her children. The $10 purports, on the face of the deed, to have been paid by Glover, the trustee, and not by Mrs. Burke, and was, perhaps, inserted as matter of form.

It is moreover insisted by the counsel of McNeill, that the plaintiffs being the grand-children of the witness, his prejudice in their favor, by reason of natural affection, would more than counterbalance any bias upon his mind in favor of the defendant because of the warranty.

But it seems, also, from the testimony, that the defendant was related to the witness, likewise, perhaps a nephew, and we have no mode of determining with any certainty, which he had the stronger affection for, the plaintiffs or the defendant. We might conjecture that his attachment was stronger for those most nearly related to him, but this would not do to rely on as a rule, for it is not always true. The only safe rule, as above remarked, is to exclude the witness where he is interested in the result of the suit, without regard to the magnitude of the interest.

The second objection taken by the plaintiffs to the deposition of Samuel Burke, is, that he was an incompetent witness to disprove the execution of a deed (the deed of trust) purporting to have been executed by him. There is nothing in this objection. It has been held, at one time, in England, that no party who has signed a deed shall ever be permitted to give testimony to invalidate the instrument which he has so signed. But this doctrine was overturned there, and our decisions favor the competency of the witness. See *Tucker vs. Wilamowicz*, 3 *Eng. Rep.* 157, and cases cited. *Caldwell Exr. vs. Mc Vicar*, 7 *Eng. R.* 750. See, also, *Knight vs. Packard*, 3 *McCord R.* 71; 1 *Serg. & R.* 102; 2 *Binn.* 168, on the same subject.

On the grounds of interest, however, as we have above seen, the deposition of Samuel Burke should have been excluded.

It may be well enough to remark that the case of *McNeill vs.*

Arnold was reversed mainly upon the ground that such portions of Samuel Burke's deposition, taken in that case, as were responsive to interrogatories which were not leading, were erroneously suppressed and excluded from the jury by the court. In that case, the competency of Burke was not questioned in the court below, nor in the argument here. His deposition was objected to, and suppressed on the ground that the interrogatories were leading. We could not consider the question of incompetency here, because it was not made in the court below. *Scott vs. Jester*, 13 *Ark. Rep. p.* 442, and cases there cited. *Gunter vs. Ashley*, 15 *Ark.* 415; 1 *Greenl. Ev., sec.* 421. Had the objection, that the witness was incompetent on account of interest, been raised when the motion to suppress was made, McNeill would have had it in his power, if he had thought proper, to release the witness from liability upon the warranty, and retake his deposition. But had we affirmed the judgment upon the ground that the witness was incompetent; and, therefore, the deposition properly suppressed, though not for that reason, he would have been cut off from the privilege of executing a release, and retaking the deposition.

But, in the case now before us, the motion to exclude was expressly made upon the grounds of incompetency and in proper time.

The court below gave all the instructions asked by the plaintiffs, and refused to give those moved by the defendant, except the 3d, 5th, 8th and 9th.

The instructions given at the instance of the defendant, against the objection of the plaintiffs, so far as they differ from those given on the motion of the plaintiffs, were perhaps, based upon the testimony of Burke. As we have held that his testimony should have been excluded, it is unnecessary to consider the instructions based upon it.

The judgment is reversed, and the cause remanded, with instructions to grant the plaintiffs a new trial.

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DOBBIN & WIFE VS. HUBBARD.

At common law, the legal existence of the wife is merged in that of the husband by the marriage, and as a general rule, her contracts are void, and cannot be enforced against her in a court of law.

But it is a rule in equity that a *feme covert*, in regard to her separate property, is considered a *feme sole*, and may, by her contracts, bind her separate estate.

Where a married woman has created a charge upon her separate estate, as by executing a bond, bill, note, &c., the creditor has, as a general rule, no remedy, in a court of law, against her, but he must proceed in equity: and even in equity, she is not personally responsible.

In order to charge the separate property of the wife, it is not necessary that she should execute an instrument expressly referring to it. It is sufficient that she professes to act as a *feme sole:* and shows an intention to charge her separate estate.

A bond executed by a *feme covert*, where the authority to do so is reserved by marriage contract, being void at law during the lifetime of the husband, is equally void upon his death, and enforcible only in equity against the separate estate of the wife upon the faith of which the bond was executed: and so upon the second marriage of the wife.

Appeal from the Circuit Court of Phillips County, in Equity

Hon. CHARLES W. ADAMS, Circuit Judge.

FOWLER & STILLWELL, for the appellants. The appellees had a complete remedy at law. The husband was liable. When the writing obligatory was executed, Mrs. Dobbin had full power and authority to do it. It was expressly reserved to her by the contract with her former husband, Pillow. During her widowhood, she might have been sued at law; and after her marriage with Dobbin, he became liable for all her debts then existing. There is nothing in the agreement between them, exempting him from liability for such or after contracted debts. 1 *Bac. Abr. p.* 307, *Title Baron & Feme.*

A *feme covert*, with respect to her separate property, is to be considered a *feme sole*, *sub modo* only; or to the extent clearly given by the marriage settlement. 2 *Kent's Com.* 138.

It is a general rule, that upon marriage the husband becomes entitled to all the goods and chattels of the wife, and the rents and profits of the lands. 2 *Kent's Com.* 113, 122, 123.

We contend that the appellee could enforce his demand in a court of law only; and that he had no right to come into a court of equity for relief. Upon the marriage of the appellants, the legal existence of the wife became merged in her husband, and the title to the slaves in question vested absolutely in him.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

This was a bill filed by John M. Hubbard, in the Phillips Circuit Court, against Wilson D. Dobbin and wife, Levisa, to enforce the payment of a debt out of the separate property of the latter. The case made by the bill is as follows:

That on the 12th of December, 1850, the defendant, Levisa, of Phillips county, Arkansas, and Napoleon B. Pillow, of Memphis, Tennessee, being about to intermarry, executed a marriage contract, with the view that the property owned by them respectively, might not be encumbered or charged, in consequence of the marriage, with any of the consequences incident thereto, either by the common law, or the laws of Arkansas; by which contract, it was agreed between them, after expressing the intention aforesaid, that notwithstanding the marriage, Pillow should hold and retain all his real and personal property, free from any claim of alimony or dower therein, on the part of the said Levisa, with power to sell and dispose of the same without her consent, &c. That the said Levisa should have free and absolute right, power and authority, to grant, bargain, sell, alien, enfeoff and deliver, any and all kinds of property which she then owned, or might thereafter acquire by gift, grant, purchase, devise or descent, whether the same be lands, goods, chattels, credits, bonds, bills, notes, or negroes, without the consent or assent of

the said Pillow, and without his joining her in the sale, conveyance or delivery thereof, or in the execution of the title or deed therefor; it being the express understanding, between the parties to the contract, that none of the property, which either of them then owned, or might thereafter acquire, should be taken or held subject to the payment of the debts of the other, whether contracted prior or subsequent to their marriage. That said Levisa should have the full right and liberty, after the marriage, to contract debts, and execute in her own name, evidences or notes for the payment thereof, without the consent or assent of the said Pillow: and by last will to devise to such persons as she might choose, any or all of her estate, real, personal or mixed, including slaves, &c., without advice, consent or approval of Pillow: and, in a word, to do all and every act or acts, in reference to her said property, while married, that she might or could lawfully do, if sole and unmarried. That during the marriage, Pillow was to have and exercise the sole dominion over all property which might be owned by said Levisa, so far as to receive the rents, profits, and annual products of the same, to the end, that it might be applied to the mutual support and enjoyment of the parties, &c., with this restriction, that the debts which the said Levisa then owed, were first to be paid out of the said income and profits.

That this marriage contract was duly proven and recorded in Phillips county; and, after its execution, the said Levisa and the said Pillow intermarried.

That on the 24th day of May, 1851, and during her coverture with Pillow, the said Levisa executed and delivered to the complainant, Hubbard, her separate obligation for $701. 53, bearing that date, due and payable on the day it was executed. That it was her intention, in the execution of said writing obligatory, to bind her separate property thereby, and that she did so bind the same.

That afterwards, on the —— day of ——, 1852, Pillow departed this life, and on the 24th day of January, 1853, the said Levisa

intermarried with the defendant, Wilson D. Dobbin. That prior to their marriage, she and Dobbin also entered into a marriage contract, by which it was agreed between them as follows:

That notwithstanding their contemplated marriage, the joint property of the two should be used and controlled by them mutually during their coverture; and that, in prospect of death, the said Levisa reserved to herself the right, power and privilege of disposing of any or all of her property, which she may then own, by will or devise, to such person or persons as she may choose, without the advice or consent of the said Wilson D.: and in case of dissolution of their marriage, otherwise than by death, the property of each shall be returned to the one who may have brought the same with marriage. It is further agreed, that the annual proceeds of the mutual property of the parties should be applied, first, during their cohabitation, to their mutual support, and the residue, during that time, to such objects and uses as the said Wilson D. might desire or wish. This contract was also proven and recorded in Phillips county.

The bill further alleges, that at the time of the marriage of the said Levisa and Pillow, and at the time of the execution of the marriage contract between them, and since that time, and now, the said Levisa was and is possessed of a large amount of property, as of her own, and to her sole and separate use: and among which property were, and are certain slaves, five in number, which are described.

That the said obligation has not been paid by the said Levisa, or any one for her.

The marriage contracts and the obligation are exhibited.

The bill prays that the separate property of the said Levisa, including that above described, might be decreed to have been bound by the execution of said writing obligatory. That defendants be required to discover all of the separate property owned by the said Levisa at the time said obligation was executed, or at any time since. That complainant have judgment for his debt and interest; and that he have execution for the same against

the separate property of the said Levisa, above described, or that a commissioner might be appointed to sell so much of said separate property as might be necessary for the payment of the debt and interest, at such time and place as the court might deem right and proper; and for general relief.

The defendants filed separate answers to the bill. So much of the answer of Mrs. Dobbin as is deemed material to be stated, is as follows:

She admits the execution of the marriage contract between her and Pillow: their intermarriage, and that while she was his wife, she executed and delivered to complainant the obligation exhibited with the bill, as alleged by the complainant. That Pillow died some time prior to the 24th January, 1853, but at what precise time, she was uninformed or advised. That she intermarried with Wilson D. Dobbin on the day and year last named, and was still living with him as his wife. That at the time of her marriage with Pillow, and at the time when they entered into said marriage contract, and since then, and until her said marriage with Dobbin, she was possessed of a large amount of property, as of her own, and to her sole and separate use, and among which were the slaves described in the bill. She submits, that by her marriage with Dobbin, the slaves described in the bill, and all her other personal property passed to, and vested in him, subject only to the restrictions and reservations in her favor, contained in the marriage contract between them. She states that it is not true, as alleged in the bill, that it was her intention, at the time she executed the said writing obligatory to complainant, to bind her separate property. That all she intended to do was, simply, to comply with the request made to her by the complainant, and that was to execute and deliver said instrument; and she was willing that it might have just such effect as the law of the land would give to it, and she submits to the court whether, under the state of the case, the said instrument had the effect charged in the bill. She admits the marriage contract between herself and Dobbin, as alleged in the bill; and that the writing obliga-

tory, executed by her to the complainant, had not been paid by her, or by any one for her.

The answer of Dobbin is substantially the same as that of his wife.

The case was heard upon bill, answers, replications and exhibits, and the court decreed that the writing obligatory, executed by the defendant, Levisa, to complainant, was a charge upon her separate property; that he have judgment for the principal and interest due thereon, and satisfaction thereof, out of her separate property described in the bill, and that a commissioner be appointed to execute the decree, &c. The defendants appealed to this court.

1. It is a well settled doctrine of the common law, that by the marriage, the legal existence of the wife is merged in that of her husband, and that, as a general rule, contracts made by her are void, and cannot be enforced against her in a court of law. *Reeve's Domestic Relations*, 98, 170; *Chitty on Bills* 21; 2 *Kent Com.* 150; 2 *Bright's Husband and Wife* 249. The special exceptions to this general rule are to be found in the books referred to, but having no application to the case before us, need not be mentioned.

2. But it is an equally well settled rule in equity, that a *feme covert*, in regard to her separate property, is considered a *feme sole*, and may, by her contracts, bind such separate estate. 2 *Kent Com.* 164; 2 *Bright's H. & W.* 254; *Adams' Equity* 45; *Reeve's Domestic Relations* 164; *Fire Ins. Co. of A. vs. Bay*, 4 *Barb. Sup. C. Rep.* 407; *Wylly et al. vs. Collins & Co.*, 9 *Geo. Rep.* 223. In some of the States, the English doctrine, that a *feme covert*, unless restrained by the instrument creating the separate estate, has the same power of disposition over it, if personalty, as a *feme sole*, is followed. In others, however, the feme is held to have only such power as is expressly given her. See *Note to Adam's Equity*, *p.* 46, where the cases *pro* and *con* are cited. But in this case, we are under no necessity of taking sides in this controversy, because the power to dispose of or

charge by contracts, her separate estate, reserved by the defendant, Levisa, in her marriage contract with Pillow, was ample and general. Nor need the effect of our "*married woman's law*," (*Digest*, *chap.* 104,) upon the power of a *feme covert* to dispose of, or charge her separate estate, be considered, because there is no feature of the case brought within its provisions.

3. Where a married woman has created a charge upon her separate estate, as by executing a bond, bill, or note, &c., the creditor has, as a general rule, no remedy in a court of law against her, for, as above remarked, her contracts are void at law; but he must proceed by bill in equity.

Mr. REEVE says, *p.* 164, the separate property of the wife is liable for her contracts made during the coverture, and, by process in equity, such property may be reached. But she is not liable to a judgment, on which execution issues; for, in this way, her person might be subjected to execution, and thus, the husband's right to her person would be violated.

Mr. ADAMS says, *p.* 45, in the absence of any fetter on anticipation, the wife has the same power over her separate property as if she were unmarried. Her disability to bind her general property is left untouched; but she may pledge or bind her separate property, and the court of chancery may proceed *in rem* against it, though not *in personam* against herself.

Mr. BRIGHT says, *vol.* 2, *page* 254, 255, the wife being considered as a *feme sole* in respect of her separate property, her contracts, for valuable consideration, with reference to such property, will, in equity, be enforced. But in all cases, the court must proceed against the property, as, although she may become entitled to the property for her separate use, she is no more capable of contracting than before. But when she is a defendant in a court of chancery, the suit being to establish a claim upon her separate estate, she is so far considered as a single woman as to make it necessary to serve her personally with process. Since the wife is liable only to the extent of her separate property, &c., the court merely operates upon *it*, and not against her personally.

Her husband is a mere formal party, &c. See, also, 2 *Kent Com.* 164.

It is manifest from these authorities, that the woman is not personally liable, even in equity, as upon a valid contract, but that the debt is regarded as a charge upon her separate estate, which the creditor is to enforce against it, by bill, in the nature of a proceeding *in rem.* The remedy of the complainant, therefore, against the separate property of the defendant, Levisa, in the lifetime of her husband, Pillow, was plain enough, if the debt was really a charge upon such property.

4. In order that the separate property may be thus bound, it is not necessary that she should execute an instrument expressly referring to it, or purporting to exercise a power over it. It is sufficient that she professes to act as a *feme sole.* For the Court of Chancery, in giving her the capacity to hold separate property, gives also the capacity, incident to property in general, of incurring debts to be paid out of it; and enforces payment of such debts when contracted, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied. *Adams' Equity* 46.

It is sufficient that there is an intention to charge her separate estate, and the contract of a debt by her during coverture, as by executing a bond, bill or note, &c., is a presumption of that intention; and it has been held that her separate estate was responsible without showing any promise. 2 *Kent Com.* (*8th Ed.*) *p.* 164; *Reeves' Domestic Relations*, 169; *Vanderheyden vs. Mallory*, 1 *Comstock Rep.* 443; 2 *Story's Eq. Juris., sec.* 1400; *Coats et al. vs. Robinson et al.*, 10 *Mo. Rep.* 760; *Bradford & wife vs. Greenway et al.*, 17 *Ala. Rep.* 279; *Collins vs. Lavenburg & Co.*, 19 *Ala. Rep.* 683; *Jarman & Co. vs. Wilkerson*, 7 *B. Mon.* 293; *Coleman vs. Wooley's Exr.*, 10 *B. Mon.* 320; *Leaycraft vs. Hadden*, 3 *Green's Ch. Rep.* 512; *Bright's Husband & wife, p.* 252, 253, 517, 518, *et seq*; *Viser vs. Bertrand*, 14 *Ark.* 267; *Collins vs. Randolph*, 19 *Ala. Rep.* 616; *Boarman vs. Groves*, 23 *Miss.* (1 *Cushman*) 280; 6 *U. S. An. D.* 342.

No doubt the presumption that a married woman intended to charge her separate estate, arising from the execution of a bond, bill or note, &c., by her, would be stronger or weaker according to the character of surrounding circumstances; and, without intending to declare a rule as applicable to all cases, we think it sufficiently manifest, from the facts in this case, that the defendant, Levisa, by executing her bond to complainant, intended thereby to charge her separate estate, and the mode of denial in her answer is not sufficiently positive and direct to overturn the presumption, and put the complainant to additional proof. By her marriage contract with Pillow, she reserved her entire estate, with full power to dispose of the same in any mode she might think proper, with the right to make contracts, execute notes, and other evidences of debt, and generally to act as a *feme sole* in reference to her separate estate; her husband's property not to be liable for her contracts, &c. And this marriage contract was put upon the public records of the county where she and the complainant resided. If, when she executed the bond to complainant, she did not intend to charge her separate property thereby, it was a mere mockery to make and deliver to him the instrument, and he was guilty of folly and nonsense in taking it, because, as we have seen, unless it operated to charge her separate estate, it could have no valid operation whatever, and was a null and void act, as she was not personally bound thereby.

5. The bond being void at law when it was executed, by reason of the coverture of the defendant, Levisa, it remained equally void after the death of Pillow, and could not have been enforced by an action at law, as a personal obligation against her, unless she made a new promise after she became discovert. *Vance vs. Wells & Co.*, 6 *Ala. Rep.* 737; *Same case*, 8 *Ala. Rep.* 399; *Lee vs. Muggeridge et al.*, 5 *Taunton* 36; 1 *Eng. Com. L. Rep.* 32; *Chitty on Bills* 22; *Viser vs. Bertrand*, 14 *Ark. Rep.* 267.

There being no right of action at law against Mrs. Pillow, no personal liability resting upon her for the debt, Dobbin did not assume, by his marriage with her, any legal or personal responsi-

bility to discharge the debt; and hence, the complainant had no remedy at law against him, or against him and her jointly, as he would have had upon a debt made by her after the death of Pillow, and before she married Dobbin. The remedy of complainant remained in equity to charge the separate property of Mrs. Dobbin, upon the faith of which the bond was executed. And by the marriage, Dobbin took her property, if he took it at all under their marriage contract, charged with an equitable incumbrance in favor of the complainant

The court below rendered no personal decree against defendants, not even for costs, but the decree is strictly *in rem*, to be satisfied out of the separate property of the wife charged, and a commissioner appointed to execute the decree by a sale of the slaves.

The decree is affirmed; but as the time fixed by the court for the sale of the property, the 28th day of May, 1855, has passed, the court below, on the remanding of the cause, must, at once, make suitable directions for its execution.

Hon. T. B. HANLEY, Judge, not sitting in this case.

DOBBIN & WIFE VS. WRIGHT ET AL.

Mr. Chief Justice ENGLISH: The facts, pleadings and decree in this case are, substantially the same, so far as they are material to the questions of law involved, as in *Dobbin & Wife vs. Hubbard;* and the decree is affirmed, and the cause remanded with like instructions to the court to make suitable directions for the execution of the decree, &c.

Hon. T. B. HANLEY, not sitting in this case.

MACHIN VS. THOMPSON.

The act of limitation of 19th December, 1846, (*Digest, page* 943,) makes no reservation in favor of non-residents or *femes covert*, and the courts can make none. (*Pryor & wife vs. Ryburn.*)

Where a slave is taken off and sold, without the knowledge or consent of the owner; and the vendee purchases in good faith, for a fair price, without any knowledge of the adverse claim of another, the fraud of his vendor does not attach to him and prevent the operation of the statute.

Appeal from the Circuit Court of Arkansas County in Chancery.

Hon. THEODORIC F. SORRELLS, Circuit Judge.

YELL and WILLIAMS & WILLIAMS, for the appellant.

CUMMINS, for appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

On the 21st of December, 1853, Leah Machin, by her husband John Machin, as her next friend, filed a bill on the chancery side of the Arkansas Circuit Court, against Henry J. Thompson, for the recovery of a negro woman named *Celia*, and her children, with hire, &c. The cause was heard upon bill, answer, replication and an agreed state of facts.

The facts agreed upon by the counsel of the parties are, that on the 4th of October, 1819, Nancy Renwick, a resident of South Carolina, and the mother of Mrs. Machin, by deed of that date, conveyed to the separate use, &c., of Mrs. Machin for her life, and then to her children, a negro woman named *Sarah*, and her children, *Spencer* and *Young*, with the future increase of the wo-

man. That at the time of the conveyance, Mrs. Machin was a married woman, and has since continued covert, the wife of John Machin. That afterwards Mrs. Machin and her husband removed to the State of Georgia, and from thence to Alabama, taking said slaves with them. That while they were in Georgia, about the year 1828 or 1829, the girl *Celia* was born of the woman Sarah. Complainant and her husband resided in Randolph county, Alabama, from the time they removed there until the filing of the bill. In the year 1843, one Isaac B. Payne got possession of the girl *Celia*, and without the consent or knowledge of Mrs. Machin, took her to Memphis, Tennessee, where he sold her openly, as stated below, Mrs. Machin knowing nothing of her being taken to Memphis, or where she was taken from thence. *Celia* was offered for sale by Payne, at Memphis, and was bought by the defendant and his partner, Shanks, in good faith, without notice of any adverse claim or title to the negro, at her reasonable cash value in the market; and they took from Payne a bill of sale with warranty of title. Shanks immediately sold his interest in the girl to Thompson and endorsed a release thereof, upon the bill of sale to him. She was delivered to him about the 1st of October, 1843, and in about three months thereafter he brought her to Arkansas, and held her in peaceable and uninterrupted possession from that time to the commencement of this suit, in Arkansas county, openly and adversely to all the world. Since defendant purchased her, she has had two children, *Elizabeth* and *Jim*. The value and hire of the mother and children, are also agreed upon. The defendant, in his answer, relied upon the limitation act of 19th December, 1846, as a bar to the relief sought by the bill.

The court dismissed the bill for want of equity, and the complainant appealed to this court.

More than five years had elapsed from the 19th December, 1846, the date of the limitation act relied on, (*Digest, page* 943) to the time when this suit was commenced, during all which period, the defendant held the peaceable adverse possession of the

slaves, under his purchase of the woman in the market; and the statute declares, that such possession shall vest in the possessor the right of property thereto, as against all persons, and may be relied on as a complete bar to any suit in law or equity.

During all this time, Mrs. Machin was a married woman, and a non-resident of the State, but we have held in *Pryor & wife vs. Ryburn*, at the present term, that inasmuch as the statute makes no reservation in favor of such persons, the courts can make none.

The counsel of complainant have referred to the case of *Michan & wife vs. Wyatt*, 21 *Alabama Rep.* 813, as an authority to show that a court of equity will exempt a *feme covert* from the operation of the statute. The real complainant in that case, though there called *Mrs. Michan*, is doubtless, from the facts of the case, the same woman who is complaining here, under the name of *Machin*. From the report of that case, it appears that some of the same family of negroes, the descendants of Sarah, were levied upon and sold for the debts of the husband of the complainant. After the lapse of six years, she and her husband brought a bill against the purchaser, who relied upon the Alabama act of limitation as a bar; and the court held that the suit was not barred, expressly upon the ground that there was, upon the face of the act, a reservation in favor of married women.

It is moreover insisted by the counsel of the complainant, that the slave having been taken from her possession by Payne, and carried off, it was a fraud upon her rights, and that the statute would not run against her, until she ascertained where, and in whose hands the slave was.

How the slave got into the possession of Payne, does not appear, but it is agreed that she was taken off and sold, without the knowledge or consent of complainant. The bill alleges that she did not ascertain where the woman *Celia* was, until a short time before bringing this suit, and the agreement of facts is understood to admit this to be true. The answer denies that defendant had any knowledge of complainant, or her right to the slave, until

about the time the bill was filed. The case, therefore, stands briefly, thus: Payne, in fraud of complainant's rights, took the negro to Memphis and sold her openly in the market; the defendant purchased her in good faith, for a fair price, without any knowledge of the adverse title of the complainant, and afterwards held her as his own property, under the title thus acquired, until after the period of limitation ran out. Under this state of facts, does the fraud of Payne attach to the defendant, and prevent the operation of the statute?

If this suit were between Mrs. Machin and Payne—if, after fraudulently running off the negro, he had retained her, and kept his locality concealed from Mrs. Machin, or sold her to another with a full knowledge of the fraud, there are not wanting authorities to sustain the position in reference to general acts of limitation, that Mrs. Machin would be allowed the full period of limitation, in a court of equity, to bring her suit after obtaining the information upon which to base it. See the remarks of Mr. ANGELL on this subject, in his work on *Limitation*, *chap.* 18, *page* 188, *et seq.*, and the cases collected and reviewed by him. But how far the courts should apply this doctrine to the statute under consideration, or whether at all, it being a statute of title, as well as of limitation, we are not called upon now to decide, because the suit in this case is not against the party committing the fraud, or privy to it, but against one purchasing in good faith, without notice, &c.

We find no authority to sustain the position, that the statute would not run in favor of defendant, because his vendor obtained the slave by fraud.

It may be a hard case for Mrs. Machin to lose the slave, but it would be equally a hardship, for the defendant to surrender her and her children, with an account of hire for more than ten years after purchasing the woman in the market at her full value, and in good faith. Upon whom the loss should fall in such cases, was a question of public policy, to be settled by the Legislature, and they have determined it, we think, by the form in which the

statute was passed. Scarcely any general law can be devised, by the imperfect wisdom of man, that will not operate hardly in some cases, however much it may tend to promote the public good.

The decree of the court below is affirmed.

TRAMMELL ET AL. VS. THURMOND ET AL.

A decree is conclusive, only between the parties, or their privies, and in relation to the same subject matter of litigation.

Where a statute, providing for the recording of a deed (not acknowledged by the grantor) upon its being proved by the witnesses, makes no provision for reading such deed, or a copy from the record, in evidence, a certified copy thereof may be read, if not as primary, at least as secondary evidence, on a showing that the original is lost, or not within the control of the party.

When a deed or bill of sale (not acknowledged) is attempted to be proved, so as to authorize its being admitted to record, it is not sufficient for the officer to certify, in general terms, that it was proven: it should appear from the certificate that the witness was sworn, and that he stated that the party, whose name appears to the deed, signed it, or executed it, or acknowledged that he had done so, or some such language, amounting to proof of the execution of the deed. And it must appear that such proof was made by one of the attesting witnesses; unless it is made to appear that the subscribing witnesses are dead or cannot be had.

It is a general rule, that a record not made in accordance with the law relating to the recording of instruments, is incompetent evidence to prove the original: and so, a *fortiori*, as to a copy thereof.

The rule making deeds admissible in evidence in consequence of their antiquity, is understood to apply to the original deed, and not to the copies. But where the original deed is lost and the subscribing witnesses dead, after the lapse of many years, an

exemplification of an unauthorized record has been admitted as a link in a chain of corroborating circumstances tending to prove the execution of the original.

By an arrangement entered into between Richard Thurmond and Oakley, in the absence and without the consent or knowledge of Thomas Thurmond, for the purpose of putting his slaves out of the reach of his creditors, executions are issued on certain judgments against him, which have been paid, the slaves levied upon, sold, and bought in at nominal prices by Oakley, who conveys them to Richard Thurmond: HELD, That these proceedings were a fraud upon Thomas, and void.

Appeal from the Circuit Court of Ashley County in Chancery.

Hon. JOHN C. MURRAY, Circuit Judge.

PIKE & CUMMINS, for appellants.

YELL, for appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

On the 2d of October, 1850, Henry Trammell and wife, Julia Ann, late Thurmond, James B. Wooldridge and wife, Celia, late Thurmond, William Thurmond, and James Hutchinson and wife, Juda, late Thurmond, filed their bill on the Chancery side of the Ashley Circuit Court, against Thomas J. Thurmond, and Rufus K. Denson and wife, Rebecca, late Thurmond, for the recovery of certain slaves and their hire.

The bill charges, in substance, that on the 8th December, 1826, Richard Thurmond, of the county of Hempstead, in the Territory of Arkansas, made and published his last will, &c., in due form of law; and after his death, which occurred in the year 1827, the will was duly probated and admitted to record, on the 10th March, 1828, before the proper court of said county, where he died. A certified copy of the will, and probate, is exhibited. That by said will, he devised as follows:

1*st.* "I will and bequeath to my wife, Judith Thurmond, all my negroes, young and old, male and female, during her natural lifetime, and as the negroes are now hired out to Allen M. Oak-

ley, I will and bequeath that my wife, Judith, have all the profits arising from the hire of said negroes."

Thirdly: At the death of my wife, Judith, I will and bequeath, that all my negroes as before mentioned, and their increase, be enjoyed and go to the proper heirs of my son, Thomas J. Thurmond forever, to be equally divided amongst all the children that he now has, or may have by his wife, Rebecca."

That Judith Thurmond survived her husband, and departed this life about the —— day of ——, 1833 or 1834, having, during her life, held and enjoyed the property given to her by said will.

That the defendant, Thomas J. Thurmond, is the same person mentioned in the will, and that complainants, Julia Ann, Celia, Juda, William Thurmond and the defendant, Rebecca Denson, are all the children which said Thomas J. Thurmond ever had by his wife, Rebecca, who departed this life many years since, &c.

That the following are slaves, or their descendants, owned and possessed by Richard Thurmond at the time of making said will, and at his death, and bequeathed as aforesaid:

Anthony, a man, aged about 35 years; *Lona*, a woman, aged about 22 years, and her children, *Dave*, *John* and *Dinah; Violet*, a girl, aged about 14 years. The value of the several slaves is alleged.

That the complainants, William, Juda, Celia and Julia Ann, at the time of the death of their grand-mother, Judith Thurmond, were infants of tender years, and totally unable to attend to their affairs, or protect their own interest; and said females intermarried with the parties respectively above mentioned, during their minority, and since their majority have never been discovert.

That immediately after the death of Judith Thurmond, said Thomas J. Thurmond, in violation of the rights of complainants, took possession of the negroes aforesaid, which were then in being, and has, ever since, held them and used the same as his own, with those born since, appropriating to himself their labor, hire,

&c., worth in gross, to the time of filing the bill, $4,000 or $5,000. That said Thomas J. is insolvent, &c., and threatens to run off the slaves, &c. That he had refused to surrender the slaves to complainants, on demand, claiming them as his own property, &c. That Denson and wife were colluding with him to deprive complainants of their interest in the slaves, &c.

Prayer for injunction, Receiver, that an account be taken of the hire of the slaves, and defendant, Thomas J., be required to pay the same, and for partition of the slaves, &c., among the parties entitled thereto, &c.

On the filing of the bill, a temporary injunction was granted, and Receiver appointed, &c.

Thomas J. Thurmond answered the bill at the April term, 1851. He admits that his father, Richard Thurmond, died in Hempstead county about the time stated in the bill. Does not know whether he made his will, as alleged, or not, but if he did, it was without the knowledge or consent of respondent. It was publicly said that he had made such a will, and that it was recorded in the county of Hempstead, but whether the copy attached to the bill, as an exhibit, is a true copy of the will said to have been made by him, respondent does not know. He admits that it purports to be a copy from the record of a will made by his father, but denies the validity of the bequests therein made as against the rights of respondent, or that it was his father's intention, by said will, that the slaves therein referred to, should go to the complainants against the rights of respondent. Admits that his mother, Judith, survived his father, and died about October, 1853. That Wm. Thurmond, the female complainants, and Mrs. Denson are his children, by his wife, Rebecca, and all she ever had, and that she is dead. He denies that after the death of his mother, Judith, he took possession of the negroes mentioned in the will, and avers that he had possession of them, in his own right, long before her death. Admits the ages, and value of the slaves as alleged, and that they are of a stock of negroes that once belonged to his father, Richard Thurmond. Admits that

complainants, William, Juda, Celia and Julia Ann, were infants of tender years, at the time of the death of his mother, Judith, and not capable of attending to their interest, and that the female complainants intermarried as alleged in the bill. That he has had possession of the older slaves ever since, and long before the death of his mother and father, and of the younger ones since their birth, claiming them as his own property, and appropriating their labor to his own use. Admits that he is in debt, but denies that he is insolvent, or intends to run off the slaves. Admits that he had refused to deliver them up to complainants, and claims them as his own property. Denies collusion between himself and Denson and wife, &c. Does not know whether said will was the real last will of his father or not, but avers that he had no slaves to devise. That his mother had frequently said that his father had made such a will, but that it was done for respondent's benefit, to protect the slaves against his creditors.

That on the 29th of March, 810, while respondent lived with his father and mother in Jackson county, in the State of Georgia, and was a minor, his father, the said Richard Thurmond, being possessed of a considerable number of slaves, and out of debt, by deed of gift of that date, in consideration of natural love and affection, conveyed to respondent the following slaves: *Nancy*, and her four children, named *Rhoda*, *Reuben*, *Lida* and *Queen;* also four children of *Dinah*, called *Molly*, *Lew*, *Elijah* and *Levi;* and the second and third daughters of *Tabbs*, named *Jenny* and *Fanny*, making eleven in number: which deed of gift was attested by two subscribing witnesses, and recorded in said county of Jackson, on the 24th May, 1810. A copy is exhibited.

That by deed of gift, bearing date 1st July, 1810, his father also conveyed to respondent, the following slaves: *Old Polly*, *Dave*, (blacksmith,) *Dinah*, *Mark* and *Damond;* and about the same time gave the remainder of his slaves to his other son, Roland.

That about the year 1812, Richard Thurmond, with his wife,

and respondent, removed from Georgia, to the county of St. Jenevieve, in the Territory of Missouri, taking with them the slaves conveyed to respondent as above: and on the 8th January, 1814, said Richard duly acknowledged the last mentioned deed of gift before a justice of the peace of said county, and caused the same to be there duly recorded. A copy is exhibited.

That in the year 1818 or 1819, respondent being about 18 years of age, his father and mother removed with him and the slaves aforesaid—all constituting one family—to Arkansas, and located in that portion of it, which afterwards became Hempstead county, where respondent purchased a farm, and settled thereon, with the slaves, his father and mother living with him.

Shortly afterwards, respondent being young, thoughtless and spoiled by his parents, he became reckless, extravagant, got largely in debt, and in bad health, so that by the year 1824, he had mortgaged some of said negroes, and sold others. In the fall of that year, being in bad health, &c., he employed and empowered his friend Bartlett Zachary, to take charge of his estate, manage his negroes, and pay his debts; and in the winter of 1825, respondent went to Pennington's settlement, on the Saline river, (now in Bradley county,) taking but one negro with him.

After respondent left, his debts, amounting to over $3,000, pressing upon Zachary, his property was levied upon, and Zachary, finding it difficult to get along with the debts, in the year 1826, persuaded respondent's father and mother to claim the property as their own, and to take the slaves, and hire them to Oakley and Poston. His father being old, blind and childish, consented, laid claim to the slaves, and on the 8th of December of that year, leased the plantation and all the slaves to Oakley and Poston, for five years and twenty-two days, upon the agreement that they were to cultivate the plantation with the slaves, and out of the proceeds thereof, support respondent's father and mother, pay his debts as fast as the proceeds would admit of, and to prevent the slaves from being sold therefor.

That among the claims that were pressing against the property

of respondent, in the year 1826, were four judgments recovered against him by William Hickman, before a justice of the peace: executions issued thereon to a constable, returned, no property found, and transcripts of the judgments filed in the office of the Clerk of the Circuit Court of Hempstead county. That Oakley and Poston, after entering into the agreement aforesaid, paid off said judgments: but afterwards, upon consultation with Zachary, Oakley, who was Clerk of the Court, concluded that, inasmuch as the expenses would be small, he would issue executions upon the judgments, and by colluding with the sheriff, have all the slaves of respondent levied upon and sold, and by conducting the sale privately, and preventing competition, purchase them in for the amount of the judgments, then convey them to respondent's father and mother, and let them devise them to the children of respondent. Accordingly, on the 20th March, 1827, executions were issued upon the judgments, levied upon the slaves and their increase, then worth between $10,000 and $15,000, which were sold in a secret and fraudulent way, for small sums, purchased by Oakley, and conveyed by him, on the 4th May, 1827, to Richard Thurmond and wife, according to said agreement, (except one slave which Oakley charged for his services,) but still retained possession of the slaves. That the whole proceedings were designed to defraud the creditors of respondent, were null and void, and the slaves, continued, in law, to be his property, notwithstanding such sales, &c. Transcripts of the judgments, executions, conveyances, &c., are exhibited.

That on the 8th December, 1826, in pursuance of said agreement, at the instance of Oakley, and to make the fraud more complete, and in order to quiet the feelings of respondent, when the same should come to his knowledge, Richard Thurmond made the will, if he made it at all, exhibited with the bill.

That all the above transactions occurred while respondent was in Pennington's settlement, on the Saline, without his knowledge. That the country between the place where he was, and Hempstead, was a wilderness, without mail communications, and in

going from one place to the other, persons had to camp out. Respondent being in very bad health, and having left Zachary to manage his affairs, &c., he supposed that all would be done to his satisfaction; but in the spring of 1828, learning that his father was dead, and that his plantation and slaves were in the hands of Oakley, many of his debts unpaid, and every thing badly managed, he returned to Hempstead, &c. Oakley refusing to give up the slaves, &c., respondent went to Louisiana, and got his friend, William Mc D. Pettit, to come, and with him, assume the payment of all his debts, and they had to pay Oakley $2,000, in order to get the slaves, &c., out of his hands. That but for the interposition of Pettit, all the negroes would have been sold to pay respondent's debts, the whole community having become satisfied, that said sales, will &c., were fraudulent. That when respondent got possession of the slaves as aforesaid, he took them to Louisiana, and hired them out.

So, respondent alleges that the slaves in controversy, (being of the stock above referred to,) have always been in his legal possession, except when they were unlawfully held by Oakley, as aforesaid. Respondent always intending to pay his debts, never did recognize or give countenance to the fraudulent sales, &c., so caused by Oakley, &c., and knew nothing of the sales by the sheriff, until long after they had been made.

That while complainants were minors, they, by their next friend, Pennington, brought suit against Mc D. Pettit, in the Chicot Circuit Court, for a portion of the slaves, supposed to have been bequeathed to them in said will, which suit abated by the death of Pennington.

Whereupon, said Mc D. Pettit, in order to quiet the title to the portion of said slaves held by him, on the 12th of November, 1845, filed a bill in said Chicot Circuit Court, against all the complainants and defendants in this bill, and on the 12th of May, 1848, the court decreed, that the sales made by the sheriff of Hempstead county to Oakley, and the said will were fraudulent and void. A transcript of the suit is exhibited. That Zachary

gave his deposition in that case, and has since died, and respondent insists that his deposition, as well as the other depositions, decree, &c., shall be read in evidence in this case.

The cause was heard upon bill, answer, replication, exhibits, depositions, &c., &c., and the court being of the opinion, that the slaves mentioned in the bill, (or their ancestors,) belonged to the defendant, Thomas J. Thurmond, when, before and since Richard Thurmond made his will, dissolved the injunction, ordered the slaves to be restored to him, and dismissed the bill for want of equity, and complainants appealed.

So much of the evidence as is deemed material, will be stated in connection with the points discussed, &c.

It is insisted by the counsel of Thomas J. Thurmond, that the decree rendered by the Chicot Circuit Court, quieting the title of Mc D. Pettit, to a portion of the same stock of slaves now in controversy, is conclusive against the rights of the complainants in this suit.

Pettit's bill, to which the parties to this suit are made defendants, makes, substantially, the same statements that are made in the answer of Thomas J. Thurmond to the bill now before us: and then proceeds to allege, that after Thomas J. Thurmond got the slaves out of the hands of Oakley, and removed them to Louisiana, he and Pettit afterwards removed to Chicot county, in this State, where, in process of time, Thomas J. Thurmond became much embarrassed; judgments were obtained against him, executions issued, levied upon the larger portion of the slaves, which were sold, and Pettit became the purchaser; and the bill prays that his title be quieted, &c. The court decreed that the slaves belonged to Thomas J. Thurmond, under the deeds of gift from his father. That the sale of the slaves, under Hickman's executions, the purchase of them by Oakley, and the transfer of them by him to Richard Thurmond and wife, were fraudulent and void, &c., and that Pettit's title be quieted, &c. It is conceded that the slaves now in controversy in this suit, though of the same stock, are not the same slaves embraced in Pettit's bill

and decree. Thomas J. Thurmond, in his answer to Pettit's bill, admitted the allegations therein made to be true. The answers of the other defendants, if they made any, do not appear in the transcript before us.

The decree in the Chicot Circuit Court, was not between the the same parties, or their privies, that are contesting here, nor were the same slaves the subject matter of litigation in that case, which are in controversy in this; and, therefore, it is well settled, that the decree in Pettit's case, is not conclusive upon the rights of the complainants in this case. 1 *Greenl. Ev., sec.* 522 *to* 539; *Harvey vs. Richards*, 2 *Gallison* 216; *Baring et al. vs. Fanning et al.*, 1 *Paine's C. C. Rep.* 549; *Hibsham vs. Dulleban*, 4 *Watts* 183; *Duchess of Kingstons's case*, 11 *State Tr.* 261, *opinion by* Chief Justice DEGREY; *Preston vs. Harvey*, 2 *Hen. & Munf.* 55; *Chapman vs. Chapman*, 1 *Munf.* 395; *Bank of the State vs. Robinson et al.*, 13 *Ark. Rep.* 214; *Johnson vs. Emmons*, 2 *Pennington* 747; 4 *Phil. Ev.* (*C. & H.*) 165.

Upon a careful examination of all the competent testimony in the cause, which is voluminous, and somewhat in conflict, there can be but little doubt but that Richard Thurmond, about the year 1810, in the State of Georgia, divided his slaves between his two sons, Roland and Thomas J., giving to the latter, the stock from which those in controversy in this suit have descended, or are a part. Independent of the copies of the deeds of gift exhibited with the answer of Thomas J. Thurmond, which are not authenticated so as to be regarded as evidence, the repeated declarations of Richard Thurmond, that he had given the slaves to Thomas J. about the time above stated, and that they belonged to him, are proven by a number of witnesses. These declarations, made prior to the time when his son became embarrassed, and when it does not appear that he had any motive to misrepresent, are of more weight than acts and representations of his, after his son had become largely indebted, and his creditors were seeking to subject the slaves to the payment of his debts. Without, therefore, deeming it necessary to state the

testimony of the several witnesses, we shall assume, as a starting point, that the slaves belonged to Thomas J. Thurmond, prior to the year 1820.

The complainants, for the purpose of proving that Richard Thurmond acquired title to the slaves again, and was the owner of them, when he made his will, and at his death, after filing affidavits, &c., that search had been made for the originals, and they could not be found, &c., read in evidence, transcripts from the records of the Recorder's office of Hempstead county, of the following instruments, subject to objections, as to competency, &c.:

1. A bill of sale, purporting to have been executed by Thomas J. to Richard Thurmond, on the 25th November, 1820, with the certificates attached.

2. A bill of sale, purporting to have been made by Thomas J. to Judith Thurmond, wife to Richard, on the 17th January, 1825, with the certificates attached.

3. Hickman's judgments against Thomas J. Thurmond, the executions that issued thereon, and the returns, the deed from the sheriff to Oakley, and the bill of sale from him to Richard Thurmond and wife, of the slaves purchased by him under the executions, as the property of Thomas J. Thurmond, with the certificates attached.

Other documents were introduced, having some relation to the subject, but the above are the leading instruments upon which complainants have to rely to show title in Richard Thurmond, under whom they claim; and if they fail, their case falls.

No testimony was introduced upon the hearing, to prove the execution of the bills of sale purporting to have been made by Thomas J. Thurmond to Richard and Judith Thurmond. No witness deposed that he ever saw the originals, or knew of their existence. The complainants relied entirely upon the certificates attached to the copies from the record read in evidence. If the copies of the bills of sale, with the certificates attached to them, were competent evidence, they become so by virtue of the *act*

of 19*th December*, 1846, *Digest*, *p.* 943, and not otherwise. The provisions of the act are as follows:

SEC. 1. "Deeds and instruments of writing for the sale of slaves, or concerning any interest in slaves, may be acknowledged and recorded in the same manner, as conveyances of real estate, and shall have the like effect as evidence in all judicial tribunals in this State."

SEC 2. "All deeds and instruments of writing relating to slaves as aforesaid, heretofore *acknowledged* and recorded, may be used as evidence, with like effect as conveyances of real estate, *duly acknowledged* and recorded."

It does not appear from the certificates attached thereto, that either of the bills of sale was ever acknowledged at all by Thomas J. Thurmond, before any officer whatever.

But let us suppose, without meaning to decide the point, that the Legislature intended to say, in the above act, that deeds *acknowledged or proven*, and recorded in the same manner as conveyances for real estate, shall have like effect, as evidence, &c.

Let us see how deeds for real estate are to be proven, in order to be admitted to record.

It is provided by the *chapter* on CONVEYANCES, contained in *Steel & McCampbell's Digest* of the Laws of the Territory of Arkansas, *page* 132, 133, which was in force, when the attempt appears to have been made to prove the execution of the bills of sale in question, that deeds and conveyances of lands within the Territory, in order to be recorded, shall be proven by one or more of the subscribing witnesses to such deed, before a judge, &c., justice of the Peace, or Clerk, &c. It is further provided, that where the grantors and witnesses of any such deed are deceased, or cannot be had, it shall be lawful for such Judge, Justice, &c., to take the examination of any witness, or witnesses, on oath or affirmation, to prove the handwriting of such deceased witness or witnesses: or where such proof cannot be had, then to prove the handwriting of the grantor or grantors, which shall be certified by the judge or justice before whom such proof shall be made, and such deed or conveyance, being so proved, shall be recorded, &c.

Where the deed is proven by an attesting witness, no provision is made by this statute, as to the form in which the proof shall be taken or certified. Nor is any provision made for reading in evidence a deed proven and recorded under the provisions of the act, without further proof of execution. Nor for reading a certified copy from the record, when the original is lost, or not within the control of the party desiring to use the deed as evidence.

It is usual for the statute which authorizes the recording of deeds, to define their effect as evidence, and prescribe the limitations under which they shall be received, as does our present statute relating to registration, &c. See *Digest, chap.* 37 *secs.* 26, 27, 28. Where this is not done, as it is not in the territorial statute in question, if the deed is duly acknowledged by the grantor, or proven and recorded, a copy from the record may be read, if not as primary, at least as secondary evidence, on a showing that the original is lost, or not within the control of the party desiring to use it. 4 *Cowen & Hill's notes, Phil. Ev. part* 2, *note* 254, *p.* 460; *Brooks vs. Maybury*, 11 *Wheat.* 78; *Dick et al. vs. Balch et al.*, 8 *Peters Rep.* 31; *Ben et al. vs. Peete*, 2 *Rand.* 539; 11 *Ala. Rep.* 239; 2 *Ib.* 144; 3 *Stewart* 271.

We will now enquire, whether the bills of sale in question were duly proven and admitted to record.

The bill of sale of 25th November, 1820, purports to be a conveyance from Thomas J. to Richard Thurmond, of eight slaves, but naming twenty-eight, for the consideration of $5,000. It is attested by *John M. Bradley* and James Byrneside, as subscribing witnesses. To it is attached the following certificate:

"HEMPSTEAD COUNTY, }
Township of Rum. }

This bill of sale, proven and acknowledged by John M. Bradley, before me, on the 16th day of March, 1826.

SILAS RAWLS,
A Justice of the Peace."

Also the certificate of J. B. Gorden, Deputy Clerk (not disclosing the name of his principal,) of the Circuit Court, and *Ex officio* Recorder of Hempstead county, that the instrument was, on the 1st of October, 1826, produced in his office and recorded, &c.

The transcript from the record is authenticated, by the present Clerk, in proper form.

As before remarked, the territorial statute in question does not prescribe the form in which the justice shall certify the probate of a deed when proven before him by one of the subscribing witnesses, as does our present statute. (See *Digest. chap.* 37, *sec.* 19.)

Under a similar statute of Connecticut, it was held that an acknowledgment, &c., should be in writing. That it could not be proven by parol, but must be certified by the officer taking it. *Staunton vs. Button*, 2 *Conn. Rep.* 537; *Hayden vs. Wiscott*, 11 *Ib.* 129; *Pendleton vs. Butt*, 3 *Ib.* 406; 4 *Cowen & Hill's notes, Phil. Ev. part* 2, *p.* 461, *note* 254.

It does not appear from the certificate in this case, that the witness was sworn, nor does it appear what he stated about the execution of the bill of sale. But it is stated in general terms, that the bill of sale was *proven*, &c.

In *Ross vs. McLung*, 6 *Peter's Rep.* 283, the sufficiency of a similar certificate, made under a like statute of North Carolina, was adjudicated upon, and it was held insufficient. In that case, the certificate was in these words: "December Session, 1783. This deed was proven in open court, and ordered to be recorded."

In this case, Chief Justice MARSHALL said, the Clerk had certified to a legal conclusion, in stating that the deed was *proven*, instead of stating the fact, to which the witness testified.

Upon the authority of this case, and cases there cited, we think it but reasonable that it should appear from the certificate, that the witness was sworn, and that he stated that the party, whose name appears to the deed, signed it, or executed it, or acknow-

ledged that he had done so, or some such language, amounting to proof of the execution of the deed. The case of *Ross vs. McLung*, was a stronger one than this, for there, the deed was proven before a court of record; and here, it was done before a justice of the peace, acting in a ministerial capacity, and doing an *ex parte* act *in pais*. In such case, a substantial compliance with what the law requires to be done, ought, we think, affirmatively to appear from the certificate.

While great strictness, in such matters, is not to be required on the one hand, if too much latitude and informality were indulged on the other, it might open a door for fraud, and the admission, to record and in evidence, of deeds never really executed by persons whose names appear to them.

The bill of sale from Thomas J., to his mother Judith Thurmond, purporting to convey to her, for the consideration of $5,000, a portion of the same slaves named in the bill of sale to Richard Thurmond, judging from the similarity of the names, bears date on the 17th day of January, 1825, and is attested by BURRILL *Zachary* and *John Cocks*, as subscribing witnesses. To it is attached the following certificate:

"TERRITORY OF ARKANSAS, }
Hempstead County. }

Bartlett Zachary, being duly sworn, upon his oath, deposeth and sayeth, that he *seen* Thomas J. Thurmond sign the within and foregoing bill of sale, and heard him acknowledge it to be his hand and seal, act and deed, for the purposes and uses therein mentioned.

BARTLETT ZACHARY.

Sworn to and subscribed before me, this 30th day of June, 1825.

ALLEN M. OAKLEY,

Justice of the Peace."

Also, a certificate of registration of the same date; and an authentication of the transcript by the present clerk, &c.

The above certificate of probate is clearly bad; because the proof was made by a person, other than one of the subscribing witnesses, and there is no showing that they were dead, or could not be had, as expressly required by the statute. See *Gillett vs. Stanley*, 1 *Hill N. Y.* 121; *Jackson ex dem. Kellogg vs. Vickary*, 1 *Wend.* 406; *Jackson ex dem. Wood vs. Harrow*, 11 *John.* 143; *Wilson vs. Ryston* 2 *Ark. Rep.* 315.

It is a general rule, that a record not made in accordance with the law relating to the recording of instruments, is incompetent evidence to prove the original; and so, *a fortiori* as to a copy thereof; for, in such cases, the record amounts to no more than a mere unofficial entry of the officer. 4 *Cowen & Hill's notes, Phil. Ev. part* 2, *p.* 458; *Kerns vs. Swoope*, 2 *Watts* 75; *Pidge vs. Tylor*, 4 *Mass.* 541; *Morgan vs. Bealle*, 1 *Marsh.* 310; *Womack vs, Wilson, Litt. Sel. Ca.* 292; 1 *Taylor's Rep.* 25; *Miller's Lessee vs. Holt*, 1 *Tenn. Rep.* 111; 7 *Harr. & John.* 124; *Turner. vs. Stip*, 1 *Wash.* 319; 3 *Harr. & McH.* 390; *Mitchell vs. Mitchell.* 3 *Stew. & Port.* 81, 83; *Maxwell vs. Light*, 1 *Call* 117.

The probate of the bills of sale in question being defective, and they not having been acknowledged by the grantor, (*Rowletts vs. Daniel*, 4 *Munf.* 473; *Ben et al. vs. Peete*, 2 *Rand.* 539,) and the complainants having introduced no proof of the execution of the originals, or that the copies introduced had been compared with the originals, (4 *Cowen & Hill's notes, Phil. Ev. part* 2, *p.* 459,) the copies cannot be regarded as competent evidence, though the complainants proved that search had been made for the originals, and they could not be found, &c.

It is insisted by the counsel for the complainants, that the bills of sale were admissible as evidence, in consequence of their antiquity, &c.

Where instruments are more than thirty years old, and are unblemished by any alterations, they are said to prove them-

selves: the bare production thereof is sufficient; the subscribing witnesses being presumed to be dead, &c. But it must appear that the instrument comes from such custody, as to afford a reasonable presumption in favor of its genuineness, and that it is otherwise free from just grounds of suspicion, &c. 1 *Greenl. Ev., sec.* 21, 142, 570.

But one of the bills of sale, that from Thomas J. to Richard Thurmond, of 25th November, 1820, was thirty years old when it was produced as evidence; and moreover, the above rule is understood to apply to the production of the original deeds, and not to copies.

In some instances, where the original deed is lost, and the subscribing witnesses dead, &c., as they perhaps were in this case, after the lapse of many years, an exemplification of an unauthorized record, has been admitted as a link in a chain of corroborating circumstances, tending to prove the execution of the original. See the cases cited in 4 *Cowen & Hill's notes, Phil. Ev., part* 2, *p.* 459.

But in the case before us, the corroborating circumstances are wanting, and the surrounding circumstances tend rather to overturn than to sustain the execution and validity of the originals. It appears from the deposition of F. C. Berry, that Thomas J. Thurmond was under the age of twenty-one years, when the bill of sale of 25th November, 1820, purports to have been made. The bill of sale to Judith Thurmond, purporting to have been made in the year 1825, is for a portion of the same slaves embraced in the former bill of sale. The evidence conduces to show, that after the date of both bills of sale, Thomas J. Thurmond placed the slaves in charge of Bartlett Zachary, to manage for him and pay his debts, and went to Pennington's settlement upon the Saline; and in his absence, Richard Thurmond and Oakley caused the slaves to be sold as the property of Thomas J. Thurmond, under executions; Oakley purchased them, and transferred them to Richard Thurmond and his wife. That when Thomas J. Thurmond returned, he arranged his debts, by the

assistance of Pettit, obtained possession of the slaves, and took them to Louisiana, and from thenceforward held possession of them, except such as he disposed of, or were sold for his debts.

Under all the circumstances in proof, we think that the copies of the bills of sale relied upon by the complainants, cannot be regarded as evidence.

The remaining evidence of title in Richard Thurmond, relied upon by complainants, is the transfer to him and wife, by Oakley, under his purchase at the sheriff's sale.

The testimony proves, beyond a reasonable doubt, that after Thomas J. Thurmond left home, and went to Pennington's settlement, leaving the slaves in the charge of Zachary, being much in debt, and his creditor's pressing their claims, Richard Thurmond and wife claimed the slaves, took them out of the possession of Zachary, leased them to Poston and Oakley; and afterwards, by an arrangement between Oakley and Richard Thurmond and wife, for the purpose of putting the slaves out of the reach of the creditors of Thomas J. Thurmond, the slaves were levied upon by the sheriff, under executions issued upon judgments of Hickman, which had been paid by Oakley, the slaves were all sold for nominal sums, in a private manner, purchased by Oakley, and then transferred to Richard Thurmond and wife. That after this, Oakley retained possession of them under the lease, until Thomas J. Thurmond returned, and by the aid of Pettit, arranged his debts with the creditors, obtained possession of the slaves from Oakley, after the death of Richard Thurmond, and took them to Louisiana, as above stated. The sheriff's sale, &c., occurred in the absence of Thomas J. Thurmond, and the evidence fails to show that he sanctioned the sale, or was a party to the arrangement to defraud his creditors. Under these circumstances, the title thus obtained by Richard Thurmond in fraud of the rights of the creditors of Thomas J. Thurmond, would be invalid, not only as to him, but as to the complainants, who claim under his will. *Digest, chap.* 73. These proceedings were not only a fraud upon the creditors of Thomas J. Thurmond, but upon him,

and were void for that reason also. It is needless to cite adjudications to sustain propositions like these, based upon familiar principles of the law, to be found in all the books treating of the subject of fraud.

The complainants proved some declarations of Thomas J. Thurmond, made about the year 1837, to the effect, that the slaves belonged to his children; but these declarations were made at a time, it seems, when he was embarrassed, and perhaps, when executions were out against him. Such declarations do not amount to an estoppel, as held in *Prater adm. vs. Frazier & wife*, 6 *Eng. Rep.* 249.

Upon the whole record, we think the complainants have failed to show title to the slaves in Richard Thurmond, under whose will they claim, as alleged by the bill, and denied by the answer.

There are other questions discussed by the counsel in the cause, but they are of no great magnitude, and the view we have taken of the case, renders it unnecessary to decide them.

The decree of the court below is affirmed.

CRABTREE ET AL. VS. MCDANIEL.

A continuous, peaceable, adverse possession of slaves for the period of five years, vests title in the possessor. *Pryor & wife vs. Ryburn*, (at the present term.)

Appeal from Lafayette Circuit Court in Chancery.

Hon. SHELTON WATSON, Circuit Judge.

FOWLER, for appellants.

WATKINS & GALLAGHER and HEMPSTEAD, for the appellee.

Mr. Justice SCOTT delivered the opinion of the Court.

Crabtree and wife, and Mary Nelson Penn, Sarah Ann Cook, Priscilla Cook and Zachariah Cook, minors, by Crabtree their next friend, in behalf of themselves, and all other heirs of Nancy McGhirt, alias Nancy McDaniel, exhibited their bill in the Lafayettee Circuit Court, on the 25th day of January, 1853, against James McDaniel; and afterwards filed an amendment thereto, alleging alltogether, substantially, as follows, *to wit:* That one Sarah McGhirt, otherwise called Sarah Ann McDaniel, had lately died intestate, in that county, leaving the said Nancy McGhirt her only child and heir surviving; that before, and at the death of Sarah, she owned in her own separate right, certain slaves who are described, the exclusive right to which vested in Nancy, as sole heir. That Nancy died afterwards, in that county, in infancy, intestate and without issue. That the father and mother of Sarah died in her lifetime. That the next of kin of Nancy are the sisters of her mother and their descendants, *to wit:* Priscilla, wife of Crabtree, Eliza, who married James, Elizabeth, who

married Jolly, and the minor complainants who are children of Hannah, another sister of Sarah, who first married Penn, after his death married Cook, and afterwards departed this life, leaving her surviving the four minor complainants, her only heirs and distributees. That James and Jolly and their wives had removed from the Creek Indian Nation, where they had long resided, to parts unknown, nor was it known to complainants, whether any of them were dead or alive. That Sarah, and all her sisters, were women of, and belonging to the Creek Nation of Indians. That by the customs, laws and usages of that tribe, a man who did not belong to that Nation, could not lawfully marry a woman of that Nation, without first obtaining a license from the Chief of the Town or Council of the Nation. That the defendant McDaniel, is a white man, and not a Creek Indian, and never obtained any such license to marry the said Sarah Ann. That by said laws of the Creeks, a *feme covert* of that tribe, holds the sole and exclusive right of property in slaves, whether acquired by gift, descent, purchase or distribution, before or after coverture, to her sole and separate use, and the husband acquires, by marriage, no estate whatever, in his wife's property, owned by her at the time of the marriage, or afterwards acquired by her; and on her death all such property descends to her children, and in default thereof to the next of kin of her own blood. That there had been no administration on the estate either of the said Sarah Ann, or of her daughter Nancy. That the slaves in controversy had come into the possession of the defendant McDaniel, who holds them without authority of law and as a *trustee* for the complainants, and the other heirs and legal representatives of the said Nancy, who are the rightful owners, and entitled to the possession of them. That the defendant intends removing them to parts unknown, beyond the limits of the State of Arkansas, pretending title thereto. And praying for answer, injunction, receiver, process of seizure and account of the hire, and for partition, distribution, and for general relief. The bill was verified by Crabtree's affidavit, and upon bond and security given, process of injunction and of seizure was awarded, and the slaves taken and hired out.

McDaniel answered, admitting that Sarah Ann, her father and mother, and her daughter Nancy, had died as alleged; that Nancy was the only child of Sarah Ann; the relationship of complainants, Priscilla and the minors, and James and Jolly's wives, as alleged; that there had been no administration of the estates of either Sarah Ann or Nancy, and that he was about to remove to Texas, and carry the slaves in question with him; but denying that Sarah Ann had any sole or separate estate at the time of her death, or that Nancy ever had any whatsoever, denying the mode of marriage alleged, and that Crabtree was ever married to Priscilla, but admitting she is now living with him as his wife; denying that Nancy was ever known by the name of Nancy McGhirt, or by any other than Nancy McDaniel, and also that the slaves in controversy, were ever wrongfully withheld by him from complainants, or any one else, or ever were held by him as trustee And averring the truth to be, that two of the slaves in controversy, from which the others have issued since the former came lawfully in the defendant's possession, were originally owned by one Zachariah McGhirt, a resident of the Creek Nation of Indians, whose wife was a woman of that tribe. That the said Zachariah and his said wife, were the father and mother of the said Sarah Ann, and of her before mentioned sisters. That these Indians have no written code of laws for their government, but that their local and domestic affairs were entirely governed by their established usages and customs. That by one of these, whenever a person, who was not held as a slave in said nation, desired to contract a marriage with a woman belonging to said tribe, all that was necessary to consummate such marriage was for the parties to live together as man and wife, in an open and public manner; and that he, the defendant, lived with the aforesaid Sarah Ann, and co-habited with her, as his wife, from about the year 1838 until the year 1846 or 1847, when she died. That he had several children by her, none of whom survived her, except the aforesaid Nancy. That after his marriage as aforesaid, his wife's father died in the Creek Nation, leaving considerable property.

That by other usages and customs of said tribe of Indians, after a sufficiency of the property of the deceased was applied to the payment of his debts, the residue was divided equally among his children. That in accordance thereto, two of the slaves of the said Zachariah were sold for the payment of his debts and the proceeds proving to be sufficient for that purpose, the residue was equally divided among his children and their representatives. That by that division the defendant, in right of his wife Sarah Ann aforesaid, received for his share the aforesaid two slaves, which, together with their issue since, are now in controversy. That by the customs and usages of said Creek Nation of Indians, the husband of any Creek woman could take, have and use, as his absolute property, whatever might descend or be distributed to her after coverture, and that in pursuance thereof the defendant, as the husband of the said Sarah Ann, reduced said slaves to his own possession, whereby they became his absolute property and that from that time he has held quiet, peaceable and absolute possession of them and of their increase, as his own exclusive property, until taken from him by the order of the Chancellor under the prayer of this bill. And insists that under said customs and usages, they have been ever since the aforesaid division, and are still, his absolute property. And again averring that he legally and properly acquired the possession and control of said slaves, under the customs and usages of the aforesaid tribe of Indians, and that he so held the same afterwards, as long as he continued to reside in said Indian country, and removing them therefrom to the State of Arkansas as his absolute property, he has ever since continued so to hold them, he insists that, from his original lawful title and "long continued, peaceable and quiet possession, he is entitled to hold said slaves, as his absolute property, free from any pretended claim or demand of said claimants, or any one else, as the supposed heirs of the said Nancy." And alleging a want of equity in the bill, prays full benefit at the hearing, as if a demurrer had been interposed.

The answer was sworn to, and issue taken; and the cause hav-

ing been previously set down for final hearing, was heard at the May term, 1854, of the Lafayette Circuit Court, upon the bill, answer, and replication and a mass of evidence by deposition, when the court found the slaves in controversy to be the absolute property of the defendant McDaniel, and that the complainants were entitled to no relief, dismissed their bill, with costs, and vacating the injunction and all other restaining orders previously made, decreed also, that the defendant should recover against the complainants all such damages as he had sustained by reason of the injunction and restraining orders aforesaid; but because the amount of damage was unknown, and there was not sufficient time to ascertain it, at that term of the court, by the inquiry of a jury, ordered a writ of enquiry therefor, returnable unto the next term in course; from which decree the complainant appealed to this court.

The larger portion of the testimony in the record, relates to the usages, customs and laws of the Creek Indians, set up in the pleadings. It is conflicting to a degree beyond reconciliation, and it would be, therefore, only by discarding some of it altogether, that any conclusion could be arrived at on the points contested. But, however these points might be found, they would not be decisive of the case, because it must unavoidably go for the defendant below, upon the ground of his long continued, peaceable, quiet and adverse possession. It will, therefore, be necessary only to set out the substance of the testimony relating to this ground of the defence.

It appears that Zachariah McGhirt departed this life in the Creek Nation sometime in the year 1840 or 1841, and his wife, also, died about the same time. That soon afterwards, there was a distribution of the property left by them, among their children and their representatives. That by means of this distribution, the negroes in controversy came to the possession of McDaniel, his alleged wife Sarah Ann being one of the distributees. Sarah Ann died, leaving her surviving one child named Nancy McDaniel, who died in the month of March, 1846. In the year 1842,

McDaniel settled in Lafayette county, Arkansas, where he has ever since resided, and where Sarah Ann and her daughters departed this life. When he came there, he brought with him the aforesaid Sarah Ann and her daughter, and also the slaves in controversy, and held the latter from thenceforward, in his continuous peaceable possession, as his own property up to the time when, on the 26th of January, 1853, they were taken from his possession by the sheriff of Lafayette county, by virtue of process of seizure, ordered by the Circuit Judge in vacation.

There is no evidence that there ever was any adverse claim to the slaves in controversy, on the part of the complainants or any one else, against McDaniel, until the filing of the bill in this case, which was the 25th of January, 1853, a period of more than five years after the death of the girl Nancy McDaniel, under whom the complainants set up title—Crabtree and his wife, living all the time in the neighborhood of McDaniel—of about twelve years from the time the negroes went into the possession of McDaniel, upon the distribution of the estate of McGhirt and wife, and of upwards of six years and one month after the approval of the statute of limitation and title in relation to slaves, expounded in the case of *Pryor et al. vs. Ryburn et al.*, decided at the present term.

Upon this ground then, the decree of the Circuit Court of Lafayette county, must be affirmed.

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DESHA'S EXRS. VS. ROBINSON ADMR.

Each party's pleading is to be taken most strongly against himself; but pleas in bar are not to be construed with the severity which is applied when testing dilatory pleas, and will be deemed sufficient, if by rational intendment they meet the cause of action in matter of substance.

To an action upon a note payable to the Real Estate Bank and assigned to the plaintiff, the defendant pleaded that the consideration of the note was the transfer and assignment of the control and management of an execution, then in the hands of the sheriff, and of all executions to be issued thereafter, on a judgment in favor of the Bank against S. and R.; that the execution was returned unsatisfied, except as to a partial payment made out of the property of one of the defendants; that another execution was issued upon the judgment, of which the Bank, subsequently, while it was in the hands of the sheriff, took the control and direction, and caused it to be returned, while it was unsatisfied and the money still due and unpaid, without the consent and against the will of defendant, whereby the consideration of the note sued on had failed—in all which the plaintiff, as agent of the Bank, participated:

HELD, 1st. That as the plea did not negative the fact, that the money made on the execution was paid to the defendant, the rule, that all pleadings will be construed most strongly against the party pleading, will so intend.

2. That the facts set up in the plea did not show a total failure, nor a total want of consideration; nor do they constitute a bar to the action, upon the principle of rescision of contracts; but as the assignee was entitled to a cross action for damages for the breach of the contract on the part of the Bank, in taking control of the execution and causing it to be returned, the defendant might recoup such damages.

A party to a contract will not be allowed to repudiate or rescind it, where the failure of performance by the opposite party was but partial and without fraud, leaving in his hands a subsisting and executed part performance; nor where it is impossible for both parties to be restored to the condition in which they were before the contract was made.

And even in cases of fraud, the party seeking to rescind a contract, must, within a reasonable time after the fraud comes to light, make his election and proceed to rescind by a return or offer to return whatever he may have received under the contract of any value whatever to either party.

In all that class of cases, commonly called failure of consideration, whether involving bad faith or not, or where fraud has intervened, or there has been a breach of war-

ranty, fraudulent or not, or of any other stipulation of the contract sued upon, entitling the defendant to a cross action against the plaintiff to recover damages for such failure, fraud or breach, he may, instead of resorting to such cross action, recoup the damages sustained by him.

The cases of *Wheat et al. vs. Dotson*, 7 *Eng.* 699; *Smith vs. Capers*, 13 *Ark.* 9: and *Robinson vs. Mace*, 16 *Ib.* 97, as to recoupment, approved; also the cases of *Clark vs. Moss et al.*, 6 *Eng.* 736, and *Ware & Miller vs. Pennington et al.*, *Ib.* 745, as to the assignment of judgments by parol.

Where a part of the plaintiff's declaration is unanswered by the plea, he may take judgment therefor, but if he fails to do so, it is his own laches, and this court will not reverse the judgment for that cause.

Appeal from the Circuit Court of Independence County.

Hon. WILLIAM C. BEVENS, Special Circuit Judge.

FOWLER, for the appellant.

WM. BYERS, for the appellee.

Mr. Justice SCOTT delivered the opinion of the Court.

For the understanding of all the questions arising in this case, it will be sufficient to state, that this was an action of debt: That the plaintiffs below declared as assignee of the Real Estate Bank, upon a promissory note for $800, dated the 8th day of July, 1841, at six months. *Nil debet* was pleaded; to which issue was taken, and also a special plea, of which the following is a copy, to wit:

Actio non, because, he says that, at or some time prior to 8th of July, 1841, the Real Estate Bank of the State of Arkansas had issued an execution against John Robinson and Rufus Stone, on a judgment obtained by said bank against them, in the Circuit Court of Pulaski county, on the 14th of November, 1840; the said John and Rufus had been made liable to said bank for having before then become bound to said bank, as securities for one Robert T. Dunbar, by a note for $800 given to the bank, which execution was in the hands of the sheriff of Jackson county, on the 8th of July, 1841, the said John and Rufus then residing

in said county, and said execution was so in the hands of the sheriff of Jackson county, for the purpose of being made out of said John and Rufus.

"And this defendant further says, that this defendant's testator, William Robinson, deceased, James J. Waddell, Alexander Robinson and Samuel Robinson, had prior to said 8th July, 1841, signed a note in blank, to the said Real Estate Bank, which was afterwards filled up with the sum of $800, which note was by them signed in blank, on or about the 21st of June, 1841, and is the note now sued on, which note in blank of said Waddell, Alexander Robinson, Samuel Robinson and this defendant's testator, was by them sent to Little Rock; that by the delivery of it to said Real Estate Bank, after being filled up in such sum as should be demanded by said Real Estate Bank, the control of said execution could be purchased, and obtained from said bank by this defendant's testator and one Nathan Haggard, and such proceedings and negotiations were had, by and between said Real Estate Bank, and said Waddell, Alexander Robinson, Samuel Robinson and this defendant's testator, by their agent duly authorized to act for them in that behalf, that on or about said day, to wit: 8th July, 1841, it was agreed between the said parties, that said blank note should be filled up with the sum of $800, and should be delivered to said Real Estate Bank, and that the said Waddell, Alexander Robinson, Samuel Robinson and William Robinson should, in addition, pay to said bank, certain sums that were due on said judgment and execution, as interest due, costs of protest, and costs on said execution, and advance interest, all of such sums amounting to a large sum of money, to wit: the sum of $148 47, and for said note and money it was agreed by and between the said Real Estate Bank, and the said Waddell, Alexander Robinson, Samuel Robinson and this defendant's testator, that said William Robinson and Nathan Haggard should have control of said execution, and have a right to direct what should be done therewith, and thereupon, and the right, upon the return of said execution unsatisfied, to direct and control the further is-

suance and use of any execution and executions upon said judgment, till the same should be satisfied according to law.

And pursuant to such agreement, the said William Robinson and the defendant's testator, Alexander Robinson, Samuel Robinson and James J. Waddell, had the said blank filled up in the sum of $800, and then, to wit: on 8th July, 1841, which is the note here sued on, and delivered the same to said Real Estate Bank, and also in other respects, complied with their said agreement by paying the said sum of money, and the Real Estate Bank, for said note and money, then gave the control and direction of the said execution that was then in the hands of the sheriff of Jackson county to said Nathan Haggard, and this defendant's testator, for the use and benefit aforesaid, and also promised to, and contracted with the said Waddell, Alexander Robinson and William Robinson, this defendant's testator, that said Haggard and William Robinson should have the control, direction and use of all further executions issued on said judgment, and the right to direct the issuance and return of executions on said judgments according to law, till the same was satisfied, and that the rights and interest of the Real Estate Bank in and to said execution, and all further execution that might be issued thereon, should be transferred to the said Nathan Haggard and William Robinson, which said agreement of the said Real Estate Bank was the only consideration of the note sued upon.

And this defendant says, that on the making and consummating of this agreement, contract and purchase of the control and direction of said execution, and the right to issue and control further executions in the collection of said judgment, John Robinson acted as agent for, and on behalf of said Waddell, Alexander Robinson, Samuel Robinson and this defendant's testator, William Robinson.

And this defendant further says, that the said execution, which was then, to wit: 8th July, 1841, in the hands of the sheriff of Jackson county, was not satisfied so that the sum of——expressed in it, still remained due and unpaid, till the time hereafter men-

tioned (except the sum of two hundred and twenty-six dollars that were collected out of the property of John Robinson), to wit: on the 8th July, 1842, when another execution was issued to make the same money that was represented by the execution that was out on the 8th of July, 1841, issued from the office of clerk of the Circuit Court of Pulaski county, which last execution was returnable to the March term, 1843, of said court.

And before the return of said execution, which had come to hands of James Robinson, sheriff of Jackson county, and before any portion of the consideration for which said note had been given was paid the said Real Estate Bank, notwithstanding its said agreements and contracts with said Waddell, Alexander Robinson, Samuel Robinson and William Robinson, took the control and direction of said execution, issued for the purpose of making the sum expressed to be due in the execution issued, and in hand of the sheriff on the 8th July, 1841, away from said Nathan Haggard aud William Robinson, and through William F. Denton, their agent in that behalf, directed the said sheriff to return said execution, which was done on the 14th of November, 1842, and while the said execution was unsatisfied, and while the money in it was still due and unpaid, which order was obeyed by the said sheriff, which direction of the Real Estate Bank and act of the sheriff of Jackson county, in obedience thereto, was made without and against the will and consent of Nathan Haggard and William Robinson. Wherefore, this defendant says, that the whole consideration for the giving and delivery and existence of said note, which is the note sued, has wholly failed by the said wrongful and illegal act of the Real Estate Bank in relation thereto, in which the said William F. Denton, who is the plaintiff's testator, participated, and all of which he knew and all this said defendant is ready to verify. Wherefore, he prays judgment, if the plaintiffs ought to have or maintain their said action against him as aforesaid.

This plea was verified by affidavit, and filed the 19th day of March, 1855.

The opposite party interposed a demurrer, assigning for cause, that the facts detailed did not show any failure of consideration, otherwise than by a mere deduction of law, and that, after the transfer of the judgment and execution, as set up in the plea, the bank could take no such control over the process of execution, or of the sheriff in regard thereto, as could oust the control of appellee, or deprive him of the proceeds of the execution and judgment. But the court overruled the demurrer, and the plaintiff below saying nothing further, and electing to stand on his demurrer, the court rendered final judgment, and the plaintiffs below appealed to this court.

The ruling of the court below upon the demurrer is the only matter insisted upon in this court as error by the counsel for the appellants.

Proceeding, then, to determine this point, we must necessarily scrutinize the plea, and ascertain, if we can, the legal effect of the matters therein set up upon the appellants' alleged right of recovery upon the contract on which their suit is founded. If they be not an absolute bar to any right of recovery upon this contract, they may, by possibility, be of sufficiency to mitigate or diminish the amount which would otherwise be recoverable.

Doubtless, pleas in bar are never construed with the severity which is applied in testing pleas which are merely dilatory; and are always to be taken according to their entire subject matter, and will be sustained accordingly, as taken altogether; and are not to be determined by a disjointing of their members, or by laying stress on what may be immaterial, or upon the prayer for judgment, or conclusion of such pleas. If, therefore, by rational intendment, they meet the cause of action in matter of substance, they will be deemed sufficient.

This, however, in no way displaces the rule, that each party's pleading is to be taken most strongly against himself, and most favorably to his adversary. A rule founded not only upon the presumption, that each party's statement is the most favorable to himself of which his case will admit; but, also, upon the obviously rea-

sonable principle, that it is incumbent on each pleader, in stating his ground of action or defence, to explain himself fully and clearly. Any ambiguity, uncertainty, or omission in the pleadings, must, therefore, be at the peril of the party in whose allegations it occurs. *Gould's Plead., chap.* 3, *sec.* 169.

Among the examples given by the author, for the application of this rule, is that of a defendant in trespass pleading a general release, without stating the time of the execution, which he says, in such case, shall be intended to have been made before the trespass was committed. So, also, the case of a defendant's pleading, to debt on bond payable on a given day, payment or tender, without alleging the time, the legal intendment must be that it was made after the day appointed for payment.

This would seem to be sufficient authority for an intendment, as to the plea before us, against the pleader, that the two hundred and twenty-six dollars, alleged to have been made on the execution out of John Robinson, was made out of him at some point of time between the day when the control of that process was yielded to appellee's intestate and Haggard, and the day when the bank wrongfully resumed control of the alias process, as alleged in the plea.

When this is done, then a rational construction of the plea presents substantially this case—*that is to say:* That in July, 1841, the bank having a judgment against John Robinson and Rufus Stone, recovered in 1840 on a note for $800, and having sued out process of execution thereon, which was then in the hands of the sheriff of Jackson county, to be levied, in consideration of the execution of the note here sued on, and its delivery to the bank, and the additional consideration of $148 47, which was paid to the bank in cash, in pursuance of an agreement to that effect, "then gave the control and direction of said execution, which was then in the hands of the sheriff of Jackson county, to the said Nathan Haggard and this defendant's testator, for the use and benefit aforesaid; and also, promised to, and contracted with the said Waddell, Alexander Robinson, Samuel Robinson

and William Robinson, this defendant's testator, that said Haggard and William Robinson should have the control, direction and use of all further executions issued on said judgment according to law, till the same was satisfied; and that the rights and interest of the Real Estate Bank, in and to said execution, and all further executions that might be issued thereon, should be ransferred to the said Nathan Haggard and William Robinson."

That while Robinson and Haggard, for the use aforesaid, were in the enjoyment of the control of this particular execution, which the bank gave them in part performance of her side of the agreement, $226 were collected (by means of the execution) out of the property of John Robinson. That, afterwards, on the 8th of July, 1842, an alias execution was issued upon the same judgment, returnable to March term 1843, which came to the hands of the sheriff of Jackson county to be levied. That, before the return day, and while said alias execution was wholly unsatisfied, *to wit:* in November, 1842, the bank, in disregard of her aforesaid contract, took the control and direction of this alias execution, and by her agent in that behalf, directed the sheriff to return it, which direction he obeyed. And that the said control, and said direction, and the said act of the sheriff in obedience thereto, were all without the consent, and against the will, of both the said Haggard and William Robinson, the said appellants' testator participating in these wrongful and illegal interferences on the part of the bank.

If the matters set up in this plea be considered as matters to show either a want, or a failure of the consideration for which the contract sued upon was based, it would seem clear enough, that they would neither show a total want, nor a total failure of that consideration; because, without any special regard to the ambiguous allegation as to the $226, it is distinctly stated in the plea that the "control and direction" of the execution, that was in the sheriff's hands at the time the contract was made, was "then" in pursuance of that contract for said note and money, given to Haggard and Robinson. And in the absence of any al-

legations of interference, on the part of the bank, prior to November, 1842, it must be intended that Robinson and Haggard, also, enjoyed under the contract, the like control and direction of the alias execution, from the time of its issuance in July, 1842, up to the time of the bank's wrongful interference in the following November. Hence, if these parties purchased with their note and money, the control and direction of these executions simply for idle grandeur, from their own showing, they enjoyed it from July, 1841, until November, 1842; if for the more sensible purpose of securing the means of realizing the amount due upon the judgment, upon which they were issued, then, also, upon their own showing, they enjoyed this means and opportunity for a like period of time; and in the third place, they seem actually to have realized the sum of $226, by means of the control and direction of the executions so purchased by them.

It would seem equally clear, that these matters do not constitute any bar to a recovery upon this contract, as predicated upon any supposed repudiation or rescision of it, on the part of the defendant below, for several reasons.

First. They could not treat it as rescinded, upon the failure of the bank as set up in the plea, because, that failure of performance, for which an action would lay, was but partial and not entire, necessarily leaving in the hands of the defendant below a subsisting and executed part consideration for the note in suit, and: "It is a clearly recognized principle, that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." (Per LITTLEDALE, Judge, in *Miller vs. Franklin*, 4 *Add. & Ell.* 599.) And to the like effect is the law, on this point, stated by Judge PARSONS, in his work on Contracts (2 *Pars. Contract, page* 191,) in the remark that: "Generally, where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded. But not if he has been guilty of a default in his engagements, for he cannot take advantage of his own wrong

to defeat the contract. Nor, if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed." And in the further remark, that: "Generally, no contract can be rescinded by one of the parties, unless both can be restored to the condition in which they were before the contract was made. If, therefore, one of the parties has derived an advantage from a partial performance, he cannot hold this, and consider the contract as rescinded, because of the non performance of the other: but must do all that the contract obliges him to do, and seek his remedy in damages."

In the next place, supposing the failure on the part of the bank, to have been a mere failure, without any ingredient of fraud, not only is the case made by the plea, one where the opposite party could not treat the contract as rescinded, but it is also a case where the law does not allow of a rescision at all, even by an act of the injured party, without the consent of the other party, either express or implied; not merely for the lack of entire failure of consideration received, and of fraud, but also, because, from the nature of the transaction detailed in the plea, it is not possible that both parties could be restored to the condition in which they were before the contract was made. The cases of *Hunt vs. Silk*, 5 *East* 449, and *Beed vs. Blandford*, 2 *Y. & Jer.* 278, are the leading ones on this point, and in some of their main features, they are not unlike the case made by the plea, in the aspect in which we are now considering it. Both were cases of part occupation under the contract—one of a house, and the other of a ship. In the latter case, the master and part owner of a vessel agreed to purchase the moiety of his partner, and having paid the purchase money, and received the title deeds, which he deposited as security with a third person, had the entire possession of the vessel given up to him, but his partner afterwards refused to execute a bill of sale or refund the money. It was held, that an action for money had and received, would not lie to recover

the purchase money, as the parties could not be restored to their original situation. VAUGHAN, B., remarked: "The decision in *Hunt vs. Silk*, lays down a very clear and just rule in these cases; if the circumstances be such, that, by rescinding the contract, the rights of neither party are injured, in that case, if one contracting party will not fulfil his part of the engagement, the other may rescind the contract and maintain his action for money had and received, to recover back what he may have paid upon the faith of it." And ALEXANDER, C. B., said: "In order to sustain an action in this form, it is necessary that the parties should, by the plaintiff recovering the verdict, be placed in the same situation in which they originally were before the contract was entered into. The plaintiff has, by his intermediate occupation, derived the profits of the vessel; if he has not, he might have done so; and it is impossible to say what the defendant might have made, had he, during the time, had any control over it. Under these circumstances it cannot be said, that the situation of the parties has not been altered and that, by the plaintiff's recovery in this action, their original position may be restored." And after remarking upon the situation of the title deeds, as interposing a further obstacle to the placing of the parties *in statu quo*, he concludes by saying: "I think the objection is unanswerable, and that the rule for a non-suit must be made absolute."

Upon the authority of these cases, the Supreme Court of Alabama lay down the rule, in *Barnett vs. Staunton & Pollard*, 2 *Ala. Rep.* 189: "That a contract cannot be rescinded without mutual consent, when circumstances have been so altered, by part execution, that the parties cannot be put *in statu quo*, for if it be rescinded at all, it must be rescinded *in toto*."

And Judge COWEN remarks, of the same cases, in *Voorhees vs. Young*, 2 *Hill's Rep.* 298; "they certainly prove the general rule very clearly, that, where one party is desirous of rescinding a contract by reason of the other's default, he must do so *in toto*, and cannot hold on to part. He must put the other *in statu quo* by an entire surrender of possession, and of everything he has

obtained under the contract, or he cannot recover the consideration in an action for money had and received."

The remark of the chief BARON, above quoted, in reference to the intermediate occupancy and control of the ship, is pointedly applicable to the control and direction of the executions which the defendant below enjoyed. They, by this intermediate occupation, derived the profits of the writs; if they did not, they might have done so; and it is impossible to say what the bank might have made had she, during the time, had the control and direction of them. Under these circumstances it cannot be said, that the situation of the parties has not been altered; and that, by the defendant's barring a recovery in this action, their original position may be restored. Nor could this have been said, if a judgment had been rendered for the plaintiffs below, for the difference between $226, and 148 47, with interest; because, besides this being but damages for a wrong, and not the restoration of a right, the difficulty as to the intermediate control and direction of the executions, would have remained as invincible as the recall of time gone by.

This rule, making the placing of the parties *in statu quo* a prerequisite of rescision, is not applied with so much stringency in cases, where, from the ingredient of *fraud* entering into contracts, they are made vicious. Indeed, to a certain extent, they are excepted out of the rule. That is to say, the party not in default, having a legal right to rescind, springing out of the fraud, "does not lose this right, because the contract has been partly executed and the parties cannot be fully restored to their former position." 2 *Parsons on Cont., page* 277. In such cases, where the party, who has practiced the fraud, has entangled and complicated the subject of the contract in such a manner as to render it impossible that he should be restored to his former condition, the party injured, upon restoring, or offering to restore what he has received, and doing whatever is in his power, to undo what has been done in the execution of the contract, may rescind it, and recover what he has advanced. *Masson vs. Bovet*, 1 *Denio Rep.* 69.

This right to rescind, however, arising from the ingredient of fraud in the contract, is not an unqualified one, but "a conditional right," as was said by Chief Justice SHAW, in the case of *Thayer vs. Turner*, 8 *Metc. Rep.* 554. And these conditions are, that within a reasonable time after the fraud comes to light, he must make his election to rescind, (if he designs to do so,) and proceed to rescind by a return or an offer to return whatever he may have received under the contract of any value whatever to either party. *Masson vs. Bovet*, 1 *Denio Rep.* 69; *Barnett vs. Staunton & Pollard*, 2 *Ala. Rep.* 181; *Carter & Hardin vs. Mary Walker*, 2 *Richardson Rep.* 40; *Kimball vs. Cunningham*, 4 *Mass. Rep.* 502; *Baker vs. Robbins*, 2 *Denio Rep.* 136; *Norton vs. Young*, 3 *Mass. Rep.* 29; *Connor vs. Henderson*, 15 *Mass. Rep.* 320; *Perley vs. Balch*, 23 *Pick. Rep.* 283; *Minor vs. Kelly*, 5 *Monroe Rep.* 272; *Steward vs. Daugherty*, 3 *Dana Rep.* 479.

The necessity for this overt action, on the part of the injured party, arises from the double consideration, that the contract is not, *ipso facto*, rendered void by the *fraud*, but voidable merely; and of the duty incumbent upon the injured party to restore whatever he may have received. "A sale made under a false representation, is not, *ipso facto*, void, but is voidable merely, at the election of the party defrauded," says Chief Justice SHAW, in *Thayer vs. Turner*.

"The contract, although fraudulent, was not *ipso facto* void; it was only voidable by a prompt return of whatever had been received upon it," said BEARDSLEY, Judge, in *Baker vs. Robins*.

But when the party elects to rescind and proceeds to do so, he can keep back nothing that he received under the contract, whether it be money, goods or securities. "But if he elects to rescind the sale, he must return and restore to the other party, the whole of the consideration, whether money, goods or securities, received by way of consideration for the sale, which may be of any value to either party," said SHAW, Chief Justice, in *Thayer vs. Turner*. "If, in the exchange, he received money in boot, he ought to return, not only the unsound house, but also, the money

he received," said PARSONS, Chief Justice, in *Kimball vs. Cunningham.*

As an action for money had and received will not lie for the consideration, until the contract has been rescinded, so where fraud has entered into a sale, the purchaser cannot plead it as in disaffirmance of the contract, in bar of an action for the consideration, unless there has been a rescision by a tender, or its equivalent, of the thing purchased, within a reasonable time. *Bain vs. Wilson*, 1 *J. J. Marsh.* 202.

If the thing purchased, is of no value to either party, no tender is necessary. And if by the sickness, or the death, or the destruction of the chattel, a tender is rendered impossible, the actual tender will be excused. *Morehead vs. Gayle*, 2 *Stew. & Port.* 224. And to the same effect are other cases; among them, those of South Carolina, of which, EVANS, Judge, says, in *Carter & Hardin vs. Walker*, 2 *Richardson Rep.* 46: "In all of them it is recognized as settled law, that assumpsit for money had and received will not lie until the contract has been rescinded. This cannot be done without the consent of the seller, unless in those cases where the purchaser has the legal right to rescind, in which he may rescind by a tender back: or, in case this is rendered impossible by the death or destruction of the chattels, he may rescind by notice, without tender. *Fowler vs. Williams*, 2 *Brev.* 304; *Seibles vs. Blackwell*, 1 *McMullen* 56; *Bryant vs. Bostick*, 2 *Mills Rep.* 75; *Wilson vs. Ferguson*, *Chevis Rep.* 193, as cited by Judge EVANS.

"No defence can be made to an action for the purchase money, when the facts relied upon to make it, would not, if the parties were changed, and the money had been paid, enable the vendee to recover it back." Per HOPKINS, Judge, in *Ogburn vs. Ogburn*, 3 *Porter Rep.* 130.

When, therefore, a party defendant undertakes to make such facts available to him by a special plea instead of relying upon them under the general issue, he must set them out by proper averments in his plea; otherwise it will be bad on demurrer, as

any other plea would be, when the facts of the plea may all be admitted, and yet it does not follow, that the plaintiff has no right to recover. Per McLEAN, Judge, in *White vs. Howard et al.*, 3 *McLean Rep.* 294.

In the case of *Minor vs. Kelly*, 5 *Monroe Rep.* 273, the defendant plead: "That the slaves, at the time of the sale, were unsound, and affected with consumption, with which, (since the last continuance of the cause,) they had died; which unsoundness, the plaintiff had fraudulently concealed at the sale, so that the consideration had utterly failed." Upon which, the court, by WILLS, Judge, say: "The second plea was equally bad. If the slaves were unsound at the sale, and that unsoundness was not disclosed, it was necessary to aver that the plaintiff knew of it. Besides, it was indispensable that the defendant, on discovering that unsoundness, if he was defrauded by the concealment thereof, should have disaffirmed the contract, and tendered back the slaves, and to have shown that matter in his plea, or have set up some good excuse for not having done so, by showing that they were too ill to be thus restored, or the like."

To the same point is the case of *Christy vs. Cummins*, 3 *McLean Rep.* 386, where the court say: "This is an action on a note. The defendant pleaded, that the note was given for merchandize, which was represented to be sound, but was unsound and damaged." To this plea, the defendant demurred, on the ground that there was no offer to return the goods.

"A vendee of a chattel cannot rescind the sale without offering to return it, unless it is worthless to both parties." *Perley vs. Balch*, 23 *Pick.* 283. To render a rescision of a contract valid the rescinding party must place the other party *in statu quo. Holbrook vs. Burt*, 22 *Pick.* 546; *Conner vs. Henderson*, 15 *Mass.* 319.

"The plea avers: 'that the goods were unsound and damaged so as to be of no value to defendant.' But there is no averment that they were of no value. For the purposes of the defendants, they may have been to them of no value; but it does not appear that,

if returned to the plaintiffs, they would have been of no value to them. The demurrer to the plea is sustained."

Thus, it would seem that, whether the failure of further performance on the part of the bank should be regarded as a mere failure to perform her contract, or, as a failure superinduced by fraud, the plea in question is equally bad, when taken as seeking to interpose a per-emptory bar to the action, predicated either upon a total failure of consideration, or any supposed rescision of the contract.

And it would seem to be unnecessary to scrutinize it further in this aspect, as there could seem to be no plausible pretence, from the facts detailed in the plea, that any right of rescision was secured to the defendant below by any stipulation of the contract; and if any such might be imagined, it would seem that it could not be available, for the reason, that a right of rescision, thus derived, like that which springs to the party not in default, out of fraud, is—like that right—but a right at election and upon condition, to be made available by diligence, or lost by laches, like that right, unless otherwise expressly provided by the stipulations which create it.

The consequence is, that according to what may be called the old "*hard shell law*," if we consider that this contract was not tainted with fraud, it would have to stand, and the defendants below would have to fulfil it, and seek their remedy in a cross action against the bank, for the recovery of compensation in damages for the failure of further performance on the part of that party to the contract. If, however, we should consider that the contract was, in fact, tainted with fraud, then it could not be made the foundation of a recovery to any extent whatever, but must be disregarded *in toto*. Both of these doctrines of the old law, however, have been long since exploded, as we have abundantly seen, as to the latter, by the authorities already cited, (see, also, remark on this particular point in *Wheat vs. Dotson*, *p.* 704;) and as to the former, by the practical common sense of more modern times, with an idea, german to that kind of sense,

that it would be as absurd to yield to "straight jacket" pleading, the power to "crush out" common justice and common convenience, for the mere sake of the preservation of the beauty and harmony of that science, as it would be to yield to the commander of the outworks of a citadel, the power to turn in upon it the guns fixed upon those works to guard its approaches.

The same general proposition, which we consider that we have now laid down and sustained upon this rather extended examination of the plea before us, is far more briefly expressed by Mr. CHITTY, in the following extract from his work on contracts, *page* 703.

"A contract cannot, in general, be rescinded *in toto*, by one of the parties, where both of them cannot be placed in the identical situation which they occupied, and cannot stand upon the same terms as those which existed when the contract was made. The most obvious instance of this rule is, where one party, by having had possession, &c., has received a partial benefit from the contract. It would be unjust to destroy a contract *in toto*, where one party has derived some advantage by the other having, to some extent, performed the agreement; in such cases the agreement shall stand; the defendant must perform his part thereof, and seek in a cross action a compensation in damages for the plaintiff's default. Of late, however, the courts, to prevent unnecessary litigation, have, in many instances, allowed a defendant, in case of a partial failure of consideration, * * * * instead of bringing a cross action, to reduce the damages by setting up such partial failure of consideration."

And this, we think, was precisely what the learned pleaders designed to set up by their plea in the case before us; and which they had a clear right to do, and insist upon as in mitigation, or reduction of the amount of the recovery sought upon the contract, on which the action is based; not only in accordance with what is now a great current of decisions in the English, the Federal, and in several of the State courts—daily increasing in volume and force, and covering deeper and deeper below the sur-

face, the now obsolete doctrines of the old law, to which we have alluded—but, also, with like doctrines distinctly declared in this court heretofore, and administered in the cases of *Wheat et al. vs. Dotson*, 7 *Eng. Rep.* 699; *Smith vs. Capers*, 13 *Ark. Rep.* 9, and *Robinson vs. Mace*, 16 *Ark. Rep.* 97.

In these cases, this court, recognizing the doctrines of the law thus administered under the name of recoupment, received that term and the doctrine it expresses, in the modern signification and acceptance of both: wherein it is understood, that the matter which is to be the foundation of the mitigation or diminution of the plaintiff's recovery, to be within the doctrine, must arise out of the transaction, only, in which the suit is founded, and cannot come out of a different contract. But when this is the case, it is immaterial whether this cross demand, (in the nature of a cross action,) is liquidated, or is unliquidated. Nor is the defendant necessarily bound to recoup; if he thinks proper, he may not do so, but may bring his cross action. But, of course, if he should elect to recoup, it would bar the cross action. *McLane vs. Miller*, 12 *Ala. Rep.* 643. The general principle, then, under which recoupment in this sense is allowed, is that, where one brings an action for a breach of contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated, then the defendant may, if he choose, instead of bringing a cross action, recoup his damages arising from the breach committed by the plaintiff, whether these damages be liquidated or not. The idea being that all cross claims arising out of the same contract, shall compensate each other, and the balance only be recoverable by the plaintiffs.

This is a material modification of the original common law idea of recoupment, if that is to be inferred solely from the few ancient traces of it remaining in the old books. It is by no means certain, however, that these traces of it present fairly its true character; but they at least vindicate it, as a genuine common law doctrine.

Warred against, by Lord COKE, doubtless, because of its equitable texture, in his common warfare against equity law, so ably vindicated by BACON, his great rival, to the continued annoyance of the former, and a stumbling block to the special pleaders; it is not at all remarkable that it should have been driven away, for a time, from the common law courts, or that the lineaments of its features should be found imperfectly traced, when the practical good sense of modern times, in recovering its equilibrium on this subject, had gotten the better of both.

Mr. SEDGWICK, in his work on *Damages*, after entering upon this subject, evidently with a wry face and a disposition to cavil, concludes, at last, after examining most of the cases then accessible to him, (July 1852:) "I cannot here omit to say, that the doctrine of recoupment, as generally adopted in the United States, appears to me settled on just and philosophical principles, while, at the same time, there is no doubt, it works a serious innovation in the ancient rules which seek to produce singleness of issues. Those rules are, however, so far modified by the practice of double pleading, sett-off, and lastly of recoupment, that it becomes a grave question, whether they are now of any very considerable practical value; and it is, at least, quite doubtful, whether the forms of action are of any great utility, so far as they are supposed, or were originally intended to produce singleness of issue." *Sedgwick on Dam.*, *2d ed.*, *p.* 452.

According to these doctrines, there can be no doubt but that, in all that class of cases commonly called partial failure of consideration, whether involving bad faith or not, or where fraud has intervened, whether in the obtaining, or in the performance of contracts, or there has been a breach of warranty, fraudulent or not, or of any other stipulation of the contract sued upon, entitling the defendant to a cross action against the plaintiff to recover damages for such failure, fraud or breach, he may, if he elects to do so, instead of resorting to such cross action, plead the matter by special sworn plea, under the provisions of our statute, or if, upon a verbal contract, plead the general issue, and

give notice of the matter relied upon, and claim a reduction of the amount the plaintiff would otherwise recover, corresponding with the injury he has sustained. Besides the cases cited in the case of *Wheat et al. vs. Dotson*, there are a number of other cases to the same general effect, collected by Mr. SEDGWICK, in his chapter on recoupment; and a number of others are to be found in the current reports, out since the publication of the second edition of that work, which we deem it unnecessary to collect and cite, in order to decide upon the sufficiency of the plea in this case, as a plea of recoupment. The case of *Hatchett & Brother vs. Gibson*, 13 *Ala. Rep.* 587, may be mentioned, however, where a very learned and elaborate opinion of the Alabama court (collecting the cases up to that time,) was delivered by the late Chief Justice COLLIER, who, eighteen years before, delivered the opinion of that court, in the case of *Pedan vs. Moore*, (1 *Stew. & Port*, 71,) which has ever since been a leading one, and has been cited with approbation, both in the Supreme Court at Washington, and in several of the State courts. In this latter case (*of Hatchett & Bro. vs. Gibson*,) that court adopt the doctrine of recoupment by *that name* and apply it to the case, which was, that "Pursuant to a contract between the plaintiff and defendant, the latter deposited his cotton in the ware-house of the former, where it was destroyed by fire. The former having brought an action against the latter, to recover for advances made on the deposit of the cotton—held that, "if the defendant could recover damages from the plaintiff for the loss sustained in the destruction of the cotton, he could *recoup* such damages in this action."

In the case of *Wheat et al. vs. Dotson*, in this court, we applied the doctrine to a partial failure in quantity, where the subject of the sale was real estate, and held that it would also apply if the failure was in the quality of the estate, but would not apply if the failure related to the title of the estate. The case of *Smith vs. Capers*, 13 *Ark. Rep.* 9, which was, that to an action on a note, defendant pleaded that the consideration for the note was certain lots and the improvements thereon, and that the

payee would add certain other improvements, which he failed to do, was also held by this court to be within the doctrine.

And so, also, in the case of *Robinson vs. Mace*, 16 *Ark. Rep.* 97, which was, that "where a party enters into a contract to make and burn brick, he will be held to skill and diligence in the execution of his undertaking, and upon failure to make and burn the brick in a workmanlike manner, the damages may be recouped in an action by him for the value of the work and labor."

As to the matter set up in the plea before us, it was held by the court, in the case of *Clark adx. vs. Moss et al.*, 6 *Eng. Rep.* 736, that a judgment may be transferred by *parol*, so as to confer upon the transferee the equitable right to control its collection, to use the name of the plaintiff in the judgment for that purpose, and to receive the money when collected: and to the same effect is the case of *Wier & Miller vs. Pennington et al.*, *Ib.* 745, with the addition that, "no greater right can be conferred by a *written* assignment, because judgments are not within the provisions of the statute of assignments."

It would seem to be clear, therefore, that upon the interference of the bank, set up in the plea, the defendants below might have had redress by a specific performance upon a proper application to the courts; or could have brought an action against the bank for damages, for the breach of the contract on her part; but they were not compelled to take either remedy. But, having the right to a cross action upon this breach, on the part of the bank, of the contract sued upon, they thereby acquired the right, under the influence of the doctrines we have been considering, to set up that matter in their plea, as they have done, and insist upon it, as in the nature of a cross action for damages for that breach, and recoup the amount of such damages, when ascertained, in diminution of what the plaintiffs below would have been otherwise authorized to recover. The amount of such damages, the jury, of course, would have to ascertain from the proofs, precisely as if a cross action, in form, had been brought to recover damages for

this breach of the contract; and if found by them to be *less in amount* than what they would have otherwise found for the plaintiff below, then deduct the one amount from the other, and find their verdict in favor of the plaintiff below, for the balance thus ascertained. If, however, these damages should be found of equal amount to what the plaintiff would have been otherwise entitled to recover, then they would find their verdict for the defendant below.

It but remains for us to say, that in the light of these views, we hold the plea good, as one setting up matter for recoupment; and it was, therefore, such a one as required a reply from the plaintiffs below.

Although the plaintiffs below could have taken a default for so much of the declaration as was not answered by the plea, *to wit:* for the sum of the difference between the $148 47 paid out, and that of $226 received, subject to the final judgment upon the whole case; that is not an error for which this case should be reversed, because it was his own laches that he did not do so. The judgment of the court will, therefore, be affirmed with costs.

Mr. Justice HANLY: In 1848, the executors of Denton impleaded William Robinson in debt, on a note made by himself and others, to the late Real Estate Bank of the State of Arkansas, which had been regularly transferred to the testator by assignment. The defendant, William Robinson, died, and the cause was revived against his executors, who filed several pleas in bar, on part of which, issues were taken, and the remaining ones stricken out. The executors of William Robinson also died, and the suit was revived against the appellee as administrator *de bonis non.* The appellee, on leave of the court, filed an amended or substituted plea of failure of consideration, after he was made party thereto, alleging substantially therein, that at, or before the 8th July, 1841, the Real Estate Bank, the original payee in the note sued on, caused an execution to be issued on a judg-

ment, which she had before that time obtained against John Robinson and Rufus Stone, rendered in the Pulaski Circuit Court, on the 14th November, 1840, on a note for $800, in which they were bound as sureties for one Dunbar, which execution was in the hands of the sheriff of Jackson county, *to wit:* on the 8th July, 1841, where Stone and John Robinson, the defendants therein, were then residing, for the purpose of collection from them, and that the appellee's testator, prior to said 8th July, signed a note in blank, to the said Real Estate Bank, which is the same sued on, which said note was filled up with the sum of $800, and delivered to the bank, and at the same time the sum of $148 47 in cash, by way of interest on said execution debt, was likewise paid, and, in consideration thereof, the said bank transferred to the appellee's testator, and one Nathan Haggard, in parol, the control and direction of the said execution, and to control and direct such further executions, and the issuance and use thereof upon such judgment, until the same should be fully paid off and satisfied according to law: that said execution, then in the hands of the sheriff, was returned unsatisfied, except as to the sum of $226 made *out of* John Robinson, and that, on the 8th July, 1842, another execution was issued to the same sheriff, returnable to the March term, 1843, of the same court, and after it had been in, and come to the hands of the said sheriff, but before any money had been made on the same, the bank, disregarding her said contract, so transferring the control of such execution, *took control* of said last mentioned execution, and withdrew the same away from the testator of the said appellee, and the said Haggard, and through the said appellant's testator, their agent in that behalf, directed the said sheriff of Jackson county, to return said execution without further proceeding thereunder, which he did on the 14th November, 1842, wholly unsatisfied as for said balance, as against the will, express or implied, of the said Haggard, and the testator of appellee, to whom the control thereof had been so transferred, &c.; averring that, in consideration of the premises, the whole of the consideration had failed.

To this plea the appellants demurred, upon the ground, that it did not detail such a state of facts as to show a failure of consideration, but merely an illegal act of the sheriff, and of the bank, temporarily delaying the collection, and that the alleged failure was a mere deduction of law as alleged, without facts for its foundation, &c. And because, after such transfer of the judgment and execution, the control of the bank over the same ceased, and the control thereof was absolutely vested in Haggard and appellee's testator, &c., &c.

But the court overruled the demurrer to the said plea, and the appellants resting thereon, final judgment was rendered against them, from which the appellants appealed to this court, and have filed herein their assignment setting up the above causes, among others, why such judgment should be reversed by this court.

It is insisted by the appellants, that the arrangement made by the bank and Haggard and the testator of the appellee, in respect to the control of the execution and judgment in favor of the bank against John Robinson and Rufus Stone, was, in law and equity, an assignment of both judgment and execution, so as to divest the bank or her agent of all power or authority to control them further, and various authorities and adjudications are cited in support of this position. We have given the authorities and adjudications referred to by the counsel for the appellants, the most careful and patient examination, and do not think they will be found to sustain their position further than this: that such negotiations, as the one set out in the plea, are so far protected and respected by courts of law, after notice to the judgment or execution debtor, as not to allow or permit him to suffer the equitable assignor to deal with him, in respect to the debt or chose in action, thus equitably assigned or transferred, so as to prejudice or molest the interests of the assignee thereunder; and we think this is the correct doctrine, and that it will not be found that the authorities to which this court has been referred, will go beyond this. Let us examine the plea of the appellee, and see what is the purport of the matter relied on in this cause. The bar set

up in the plea, is, that the bank, the original payee of the note, was the owner of the execution and judgment against John Robinson and Rufus Stone for $800, and the interest and costs due thereon, and agreed with the testator of appellant and Haggard, for the note in suit, and the sum of $148 47 in cash, that they might have, use and control both execution and judgment, until the full amount thereof should be made and recovered to them: but, that after the execution of the note in question, and the payment in cash, the bank, in utter disregard of her contract so made, took from Haggard and the testator of appellee, all control of the execution, and had it returned unsatisfied by the sheriff of Jackson county, in whose hands it had been caused to be placed by those whom we have holden to have been the equitable assignees thereof. There can be no doubt, if the testator of the appellee and Haggard had elected to enforce their contract with the bank, specifically, instead of considering it at an end, as they seem to have done by their pleading in this cause, that by appealing to a court of law or a court of equity, their rights would have been protected and enforced, both as to the execution debtor and the bank, under which they claim. But we know of no principle of law which would require them to take this course. As soon as the terms of the contract were violated by the bank, they had a perfect right to treat it as dissolved, and if the consideration inducing it had been absolutely paid, to have brought debt or assumpsit for its recovery, and if not paid, but remaining, as in this instance, to set up a failure of consideration, as is done by the plea now being considered. See *Walworth vs. Pool*, 4 *Eng. Rep.* 395; *Prince, Chase & Co. vs. Thomas*, 15 *Ark. Rep.* 380; *Lafferty vs. Day, Williams & Co.*, 2 *Eng. Rep.* 258; *Comyn on Cont.* 38, 322; *Dutch vs. Warren*, cited by Lord MANSFIELD, in 2 *Burr.* 1010.

As we have said, in case of the breach of the contract made by appellee's testator and Haggard, with the bank, in respect to the execution and judgment against John Robinson and Rufus Stone, they had the alternative, to treat the contract at an end, as

it seems they did, or to appeal to a court of law or equity, to have their rights protected thereunder. A court of chancery would have, doubtlessly, given them relief by compelling a specific performance of the contract, and enjoining and restraining the bank from further intermeddling with their rights, touching the subject matter of the contract; for, as far as Haggard and appellee's testator were concerned, the contract was executed; but, in respect to the bank, it was *in fieri*, or in process of execution, both as to its *consideration* and its *substance.*

The appellants might have noted the default of the appellee for so much of the demand claimed by the declaration, as was not answered by the plea, and taken judgment final for that amount, when he refused to answer over upon the overruling his demurrer, But not having done so, it was his own laches, and judgment will not be reversed on that account.

We are, therefore, clearly of the opinion, that the Circuit Court of Independence did not err in overruling the demurrer of the appellants to the plea of the appellee; and, we, therefore, affirm the final judgment of that court rendered for the appellee, on the refusal of the appellants to answer over, on the overruling said demurrer.

KEY ET AL. VS. HENSON AS AD.

A defendant may recoup the damages sustained by failure of consideration, as well where the action is brought upon an instrument given to secure the payment of the purchase money, on a contract of bargain and sale, as where it is brought upon the original contract.

A court of law can properly afford no relief, upon the principle *of recoupment*, where the failure of consideration is not of the quantity or quality of land purchased and sold, but of the title, unless amounting to an entire failure of the whole consideration—the party's remedy is in equity. (*Wheat vs. Dotson*, 7 *Eng. Rep.* 699; *McDaniel vs. Grace*, 15 *Ark.* 487.)

In an action upon a promissory note, the defendants pleaded that the consideration of the note was the purchase money of a tract of land bought of W. & T., by consent of plaintiff's intestate, who held an incumbrance on the land: that by consent of all the parties, the note sued on (being for part of the consideration,) was given to plaintiff's intestate, he promising to release his incumbrance, which he, and his administrator since his death, had refused to do: HELD, That the plea is not good by way of recoupment; nor in bar of the action—the contracts to release the incumbrance and to pay the purchase money being independent covenants, and the former not a condition precedent.

Appeal from Dallas Circuit Court.

The Hon. THEODORIC F. SORRELLS, Circuit Judge.

WATKINS & GALLAGHER, for the appellants.

COMPTON & SMITH, contra.

Mr. Justice SCOTT, delivered the opinion of the Court.

This was an action of debt, on a promissory note, dated the 16th December, 1852, and payable to James Hudson, on the 25th day of December, 1853. The plaintiff sued as administrator of

Hudson. The defendant interposed a special plea, of which the following is a copy, *to wit:*

"Comes the said defendant by attorney, and says *actio non*, &c., because he says that the consideration of the note sued on herein has entirely failed, in this, *to wit*: On the 11th day of March, A. D. 1851, John Hutchinson and James Hudson sold to Benjamin W. Winstead and James Tate, the south-west qr. of the west qr. of section 3, township 9 south, range 17 west, in Dallas county, on which a saw-mill is erected, for the ——: this defendant further avers that the said Benjamin W. and James Tate, in order to secure the payment of the purchase money due for said tract, and for certain other purposes, executed a certain deed of trust to one A. H. Phillips, in and upon said tract of land, for the benefit of the said John Hutchinson and James Hudson, and the defendant avers, that afterwards, *to wit:* on the 16th December, A. D. 1852, the said defendants, by and with the consent of the said James Hudson, purchased of the said Winstead and Tate, said tract of land, for the sum of $1100, and executed their said notes in payment therefor, one of which was the note herein sued, and which was, by consent of all the parties, taken in the name of James Hudson, the said James Hudson then and there agreeing with the said defendants, that if they should give their said notes for said tract of land, he would immediately assign to said defendants, all his interest, right and title to the property so conveyed in said deed of trust: and these defendants aver that they have paid all of the consideration money (or note given for the said consideration money,) for said certain tract of land, with the exception of the note herein sued on, and two other small notes, one for $100, and the other for $48; and this defendant avers that the said James Hudson, previous to his death, would not, and did not execute to these defendants, or to either, any release or assignment of said James Hudson's interest in the property conveyed in said deed of trust, but so to do, wholly neglected and refused, although these defendants aver that the same was a part of the consideration of all the said notes, amounting to said sum of eleven hun-

dred dollars, and that the plaintiff in this suit, as administrator of said James, has, since his death, refused to assign the interest of the said James Hudson, in said property so conveyed in said deed of trust, and still refuses so to do: and these defendants aver that, on account of such refusal of the said James, during *in* his lifetime, and of the said G. W. Henson, as administrator, to make such assignment, and the still existing incumbrance on the same, in the favor of said administrator, diminishes the value of the title to said tract of land of the said defendants, and in part payment whereof, the note herein sued on was given as aforesaid, to at least the full amount of said note, and said other two notes, wherefore this defendant avers that he is entitled to recoup the amount of said notes, and that the consideration thereof has entirely failed, and this he is ready to verify, wherefore he prays judgment, &c.

This plea was regularly verified by the affidavit of one of the defendants, filed with the plea. The court sustained the demurrer, and the defendant declining to plead further, the court rendered final judgment for the plaintiff, and the defendant appealed to this court.

The only question is, as to the sufficiency of the plea.

We shall first endeavor to ascertain, from a scrutiny of the plea, what was the consideration of the note, upon which the action is based. The pleader, after premising that Hutchinson and Hudson had sold to Winstead and Tate, a certain quarter section of land, on which a saw-mill was erected, and that the latter, to secure the purchase money therefor, and for other purposes, had executed a deed in trust for said tract of land, to one Phillips, for the benefit of the former, proceeds to aver that, "afterwards, *to wit:* on the 16th of December, A. D. 1852, the said defendants, by and with the consent of the said James Hudson, purchased of the said Winstead and Tate, said tract of land for the sum of $1100, and executed their said notes in payment therefor, one of which was the note herein sued, and which was, by consent of all the parties, taken in the name of James

Hudson; the said James Hudson then and there agreeing with said defendants, that if they should give their said notes for said tract of land, he would immediately assign to said defendants, all his right, interest and title to the property so conveyed in said deed of trust.

In the first place, it is to be remarked, that, in the averment that "the said defendants, by and with the consent of the said James Hudson, purchased of the said Winstead and Tate, said tract of land, for the sum of $1100, and executed their said notes in payment therefor, one of which was the note herein sued, and which was, by consent of all the parties, taken in the name of James Hudson," there is a distinct statement, that the note sued on was one of those that were executed in part payment of the $1100 for which the defendants purchased the land in question, from Winstead and Tate. In the next place, it is to be remarked, that upon the grammatical construction, there is a ground of inference that *all of the notes* executed by the defendants in payment of the $1100, were not executed in the name of James Hudson, but only the one in suit, or some number of them less than the whole. 2 *Parsons on Cont.* 25.

In the next place, the averment that, "the said James Hudson, then and there agreeing with the said defendants, that, if they should give their said notes for said tract of land, he would immediately assign to said defendants all his right, interest and title to the property so conveyed in said deed of trust," there is a distinct allegation, that the promise of Hudson equally related to all the notes that were to be given, and not to the one in suit exclusively; and that his promise related to notes that should be given by the defendant for the tract of land so purchased by them of Winstead and Tate.

The pleader then proceeds to aver that the defendants had paid all the consideration money or notes therefor, "with the exception of the note herein sued on," &c.; and that Hudson, previous to his death, did not execute any "*release* or *assignment* of his

interest" in the trust property, but refused to do so, "although these defendants aver that the same was a part of the consideration of all the said notes, amounting to said sum of eleven hundred dollars," and that, since his death, his administrator had not done so, but refused and still refuses, and finally avers that, on account of said refusals to "make such assignment and the still existing incumbrance on the same, in favor of the administrator, diminishes the title to said tract of land of the said defendants, and in part payment whereof, the note herein sued on was given as aforesaid, to at least the full amount of said note," &c.

When all these averments are considered together, it would seem impossible to avoid the conclusion, if the plea is to be taken as its own exponent, that the consideration of the note in suit was two-fold: one which moved from Winstead and Tate, which was executed; and the other, which moved from Hudson, which was executory. That which moved from Winstead and Tate, was the sale, conveyance of title to, and possession of the quarter section of land described; the pleader expressly averring that the failure on the part of Hudson and his representative, "diminishes the title to said tract of land of said defendants;" and it must be intended that they are in possession of it, as there is no averment of their eviction from it. That which moved from Hudson was his promise that he would, immediately, upon the execution of the notes by the defendants, for the purchase money of the land bought by them from Winstead and Tate, assign to them all his interest, right and title to the property conveyed in the deed of trust.

And, if the plea is to be taken as its own exponent, it would seem to be equally clear, that it affords no ground of any plausible inference, that the sole consideration of the note in suit was the promise of Hudson. And such an inference would be repugnant to the whole drift of the plea as it now stands. Hence, if, in addition to what it now contains, there was an express averment to that effect, the plea would fall for repugnancy in matter

of substance in thus neutralizing allegations touching the vital question in the case made by the plea. *Gould's Plead., ch.* 3, *secs.* 172, 173.

With this understanding as to the consideration of the note sued on, we shall, in the first place, consider the plea as one setting up matter for recoupment. And such it was evidently designed to be by the pleader.

In the first place, then, it may be remarked, that it is no objection to the defence, in this aspect, that the suit is not upon the original contract of sale, but upon a note given for the purchase money thereof. The promise of the defendants to pay the purchase money has but undergone the modification of being put into the form of a written promise, the basis of which latter was wide enough to include the contemporaneous mutual stipulation in the same contract of sale, on the part of Hudson, that he would release and assign to the promissors, his incumbrance upon the subject of the purchase, in part consideration of which purchase the written promise was made. Hence, the attempt to enforce this written promise, is, in effect, but an effort to enforce the original contract of sale and purchase, and the questions arising are to be settled in the same manner as if this action was in form upon that contract.

The breach complained of, for which recoupment was sought by the defendants, was that of the stipulation, on the part of Hudson, that he would release and assign his incumbrance to them.

It is undoubtedly true, that there can be no recoupment, by setting up the breach of an independent contract, on the part of the complainant, or any other person. But this is not the case here. Here, there were contemporaneons mutual stipulations between these parties, all relating to the same subject matter and all uniting in one contract of sale and purchase. And there can be no difference, in principle, whether the whole transactions were included in one written instrument setting forth the cross-stipulations of each party for himself, or whether it takes the

form of a separate and distinct undertaking of each party, or that the undertaking of one or more parties has been reduced to writing, while the engagement of the other remains in parol. In either case, the substance of the matter remains the same.

Here, although each of these three parties stipulated but for himself, Hudson was a party as well as Winstead and Tate, and, as an inducement for the vendees to make the purchase and execute their notes for the purchase money, he stipulated, on his part, that, if they should do so, he would release to them his incumbrance upon the land. And, although this he did with the consent of Winstead and Tate, they became no further responsible for his stipulation, than, in so far as they have necessarily become so by having been made, by the terms of the sale of contract and purchase, the substantial promisees of the purchase money for the whole sale—the consideration for which, so far as the promissors are concerned, was, as well the land sold to them by Winstead and Tate, as the stipulation on the part of Hudson, that he would release his incumbrance upon it. And they were such substantial promises for the *whole consideration money*, although, in point of fact, one of the notes for a part of the same was, by consent of all the parties, made payable to James Hudson. And in this character, and to the extent of the value of Hudson's incumbrance, they were liable to the vendees, through the legal right of these vendees to set up the failure of Hudson to comply with his stipulation, as a partial failure of consideration of their own promises to pay the purchase money. Thus, the stipulations on the part of Hudson, so far as the contract between Winstead and Tate and their vendees is concerned, were not an independent contract, but one of the stipulations of the contract of sale and purchase, by which one party sold, and the other bought the land in question.

So long as this incumbrance remained unremoved, it continued a blemish upon the defendants' title to the land, derived by them from Winstead and Tate, and under the facts set up in the plea, constituted a failure of so much of the consideration of the note

in suit, as was based upon Hudson's stipulation to release and assign to the defendant his incumbrance. But the nature of this failure was not that of a failure of the quantity, or of the quality of the lands purchased and sold, but of the title to it.

When this is the case, whatever may be the extent of the value of the failure, unless amounting to an entire failure of the whole consideration, it has been settled in this court, that a court of law can properly afford no relief at all. *Wheat vs. Dotson* 7 *Eng. Rep.* 699. And that where a party has gone into possession under his purchase, it can never amount to that without eviction therefrom, or its legal equivalent. *McDaniel vs. Grace*, 15 *Ark. Rep.* 487.

This limit to the scope for recoupment, in courts of law, is placed upon it, by the principles upon which they proceed, when undertaking to administer this equitable remedy. That is to say, the prevention of circuity and multiplicity of action in all those cases, where a fair opportunity can be afforded by a single action to do final and complete justice between the parties litigant, as to all matters arising out of, and connected with the contract, on which the suit is brought, by making cross demands arising thereout—whether liquidated or not—compensate each other, the balance only, if any, to be recoverable by the plaintiff.

When, however, this fair opportunity for complete adjustment of cross demands, cannot be afforded by courts of law, by reason of any inherent incapacity in these courts to administer complete justice in the premises, they have no authority to proceed at all, upon the very ground upon which they do proceed in the cases where this can be done. Hence, the denial of the jurisdiction in cases where the failure of consideration of the contract sued upon, relates to the title to real estate, and does not amount to the total failure of the entire consideration of the contract.

In such cases, courts of equity, by means of their exclusive and peculiar jurisdiction over the title to real estate, to compel its transfer to the party to whom, upon principles of equity, it

may rightfully belong, after the adjustment and removal of incumbrances upon it, are alone competent, by their constitution, to administer complete justice between the parties, and terminate all further litigation.

The case at bar is no indifferent illustration of the wisdom of this rule; since, if recoupment were allowed, under the circumstances of this case, it is certain that thereby, neither the title of the defendants would be perfected, nor litigation in the premises ended; while it is by no means certain, but that injustice would be done. Whereas, if these parties were called before a court of equity, that court could get a view of the incumbrance upon the title, ascertain its character and extent, adjust it upon principles of equity, and compel the parties to do justice to each other, as well in this adjustment, as in the transfer of title, if necessary.

But, although the plea cannot be allowed as one setting up matter of recoupment, it may not be unworty of inquiry, whether or not the matters set up in the plea may be insisted upon as a bar to the action in interposing the promise of Hudson to release and assign his incumbrance as a condition precedent to the recovery on the note in suit.

It would seem not, under the operation of a principle of law relating to the construction of covenants, as to whether they shall be held to be dependent or independent, which is usually stated thus: "Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration." 2 *Parsons on Cont.*, *p.* 41, *note L:* where this, and other rules are stated, and many of the cases under them are collected.

The leading case on this rule, is *Boon vs. Eyre*, 1 *H. Blackstone* 273, *note a.* The plaintiff, in that case, conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in considera-

tion of £500, and an annuity of £160 per annum, for life: and covenanted that he had good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and every thing on his part to be performed, he, the defendant, would pay the annuity. The action was brought for the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes, and so had not a good title to convey. Demurrer general to the plea. Lord MANSFIELD: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea be allowed, any one negro not being the property of the plaintiff would bar the action."

Upon this case, SERGEANT WILLIAMS remarks as follows: "The whole consideration of the covenant on the part of B., the purchaser, to pay the money, was the conveyance by A., the seller, to him of the equity of redemption of the plantation, and also the stock of negroes thereon. The excuse for non-payment of the money was, that A. had broke his covenant as to *part* of the consideration, namely: the stock of negroes. But, as it appeared that A. had conveyed the equity of redemption to B., and so, had, in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment, because A. had not good title to the negroes." Per ASHURST J., 6 *T. R.* 573: "Besides, the damages sustained by the parties would be unequal if A.'s covenant were held to be a condition precedent. *Duke of St. Albans vs. Shore*, 1 *H. Black.* 279. For A., on the one side, would lose the consideration money of the sale, but B.'s damage, on the other side, might consist, perhaps, in the loss only of a few negroes."

Premising, that as to the case presented in the plea, there can

be no difference, in the application of the principle of law cited, that there were two parties standing in the attitude of vendors, instead of one; the one selling the land, and the other, as part of the same contract of sale, stipulating to release an incumbrance; instead of one selling the land, and also, himself, in the same contract of sale, stipulating to remove an incumbrance upon it:

The mutual covenants or promises of the parties in the contract set up in the plea, may be thus stated: *that is to say*—on the one side, that Winstead and Tate would sell and convey the land, and Hudson would release his incumbrance upon it. On the other side, that Winstead and Tate and Hudson, well and truly performing all and every thing on their part to be performed, the defendants would pay the purchase money. This action is brought for the non-payment of part of the purchase money. The plea is, that Hudson has not released his incumbrance. Demurrer.

Applying the remarks of Sergeant WILLIAMS, and the judgment of Lord MANSFIELD, the result would be as follows—that is to say: The whole consideration of the promise of the defendant to pay the purchase money was the sale and conveyance of the land, and the stipulation to release the incumbrance upon it. The excuse for the non-payment of the money is, that the promise of the vendors as to part of the consideration, namely, the release of the incumbrance, has been broken. But as it appears that Winstead and Tate have conveyed the land, and so have done in part execution of the promise on the one side, it would be unreasonable that the defendants should keep the land, and yet refuse to pay the purchase money, because the incumbrance upon the land has not been released.

Besides, the damages sustained by the parties would be unequal, if Hudson's promise should be held to be a condition precedent: because Winstead and Tate and Hudson, on the one side, would lose the consideration money of the sale, but the defendant's damage on the other side might, perhaps, amount to but a small sum.

Hence, as the breach complained of goes only to a part of the consideration of the defendants promise to pay, and this breach may be paid for in damages, the measure of which would be the sum of money requisite to remove the incumbrance, the defendants have a remedy by action at law for this breach, "and shall not plead it as a condition precedent."

The same principle of law is applicable to the construction of a contract, when it may be necessary to ascertain, whether or not it contains a condition, the breach of which by one party permits the other to throw it up, and consider it as altogether null; the doctrine as to which point being generally expressed thus: "Where the clause in question goes to the whole consideration, it shall be read as a condition." "The meaning of this," (says Judge PARSONS, in his work on CONTRACTS, 2d *vol.*, *page* 39,) "must be, that if the supposed condition covers the whole ground of the contract, and cannot be severed from it, or from any part of it, a breach of the condition is a breach of the whole contract, which gives to the other party, the right of avoiding or rescinding it altogether. But where the condition is distinctly separable, so that much of the contract may be performed on both sides, as though the condition were not there, it will be read as a stipulation, the breach of which gives an action to the injured party."

Hence, the defendants, in the case at bar, acquired no right to rescind the contract for the failure on the part of Hudson, because that failure did not cover the whole ground of their promise to pay the money; and if it had done so, and thus a legal right of rescision had arisen to them, they could not have availed themselves of it, but upon the terms prescribed by the law, for the exercise of that right; that is to say, the putting the opposite party in *statu quo*, by a return of whatever had been received under the contract.

The learned author proceeds: "But it is not safe to assert that which is sometimes said to be law, that where, in case of a breach, the party cannot have his action for damages, then the doubtful

clause must be read as a condition; because, otherwise, the party injured would be without remedy. For, 'if the reason and sense of the thing,' or the rational and fair construction of the contract leads to the rational conclusion that the parties did not agree nor intend that there should be this condition, then, there is none: and if a party be, in this way, injured and remediless, it is his own fault; in that, he neither inserted in his contract a condition, the breach of which would discharge him from all obligation, nor a stipulation, for the breach of which he might have his action."

The same remarks are, in the main, equally pertinent to the application of the principle of law in question, to covenants or promises, in determining whether they are dependent or independent.

Indeed, the learned author, in the opening paragraph of the next succeeding section, remarks: "It is a similar question—sometimes, indeed, the same question—whether covenants are mutual in such sense that each is a condition precedent to the other." *Sec.* 7, *p.* 40.

But, without any controlling reference to the principle of law in question, which has been very generally adopted in this country, although, doubtless, often misapplied, as in cases where the consideration of the defendants' promise was not clearly divisible and separable, presenting no definite and distinct standard for compensating the defendant for its breach, as in the case at bar, it is by no means easy to say, when we go back to the contract as presented in the plea, and look rationally at all its parts, that these contracting parties ever did actually agree, that the performance of the undertaking of Hudson, should be a condition precedent to the payment of the purchase money.

Latterly, the more enlightened courts, in deciding questions like this, incline more to good sense and common justice, than to severe and technical rules. Thus giving fuller and freer sway to a general rule, expressed in the case of *Atkinson vs. Ritchie*, 10 *East.* 530, to this effect, that is to say, "that whether a thing be a condition precedent, depends on the reason and sense of the

thing, as it must have been understood by the parties, and it is to be collected from the whole contract."

Looking, then, to the contract set up in the plea in this view, it may be in the first place remarked, that it is nowhere alleged in the plea, either in terms, nor by necessary implication, that the performance of Hudson was, by the terms of the contract, to be a condition precedent to the payment of the purchase money for the land, or any part of it. And waiving any question as to whether, under such circumstances, proof to that effect could be received under the plea, it may be in the next place remarked, that if there had been such an agreement, it would have been out of the usual course of sensible contracts by men of ordinary prudence.

It is stated in the plea, that the defendants, with the consent of Hudson, bought the land for $1100, "and executed their said notes in payment therefor, one of which was the note herein sued, and which was, by consent of all the parties, taken in the name of James Hudson, the said James Hudson then and there agreeing with the said defendants, that, if they should give their said notes for said tract of land, he would, immediately, assign to said defendants," &c.

The undertaking of Hudson, then, to assign, &c., was, in terms, to the defendants, and was not limited to the note in suit, but equally extended to all the notes. If, therefore, an inference is to be drawn from what he undertook, that an agreement was made by these contracting parties, that his performance was to be a condition precedent to the payment of the purchase money, then it would seem that this agreement, also, must extend to *all* the notes. If that is done, then Winstead and Tate have conveyed away a tract of land and taken notes for the purchase money, payable upon a condition that they themselves cannot perform, nor compel Hudson to perform, from anything that appears in the plea, otherwise than by indirection.

If it could be inferred that Hudson's performance was to be a condition precedent to the payment of that note only, which, by

agreement of all the parties, was made payable to him, such an undertaking would present no unusual feature, because parting with nothing of value, in exchange for the note, and the condition being one, which he, himself, could perform, and which he would be stimulated to perform in order to get the money on the note, it would be a rational one. But, to draw such an inference, it would be necessary to go beyond the plea, and imagine things from which to draw such a conclusion.

The demurrer admits the facts stated in the plea, but it does not go beyond it to imagine other facts, and confess them also.

But, without proceeding any further with this train of investigation, it may be said, with perfect safety, that the improbability is as great, that Winstead and Tate should have agreed that the performance of Hudson should be a condition precedent to the payment of the purchase money, as that the defendants should have agreed that it should be paid before the assignment of Hudson. Winstead and Tate might well have agreed that Hudson might stipulate, as he did, without necessarily agreeing, also, that Hudson's said stipulation should be a condition precedent to the payment of the purchase money.

When that is the case, it cannot be said that it has been collected from the whole contract as set out in this plea, that according to the reason and sense of the thing, as it must have been understood by the contracting parties here, the performance of Hudson was a condition precedent to the payment of the purchase money.

Under such circumstances, not the slightest violence is done to sound sense or common justice, in giving full sway to the principle of law which we have discussed, which regards it as unjust, that the defendants should keep the land, and refuse to pay the purchase money, because the incumbrance has not been removed, when, as in this case, the consideration for the promise to pay is clearly divisible and separable, and presents a definite and plain standard for an admeasurement of damages for them. Clearly, under other circumstances than these, under which these

defendants present themselves, instead of being turned round to a cross action, they might recoup their damages, as was allowed in the case of *Todd vs. Summers*, 2 *Grattan Rep.* 167, where Summers, in April, 1838, having agreed to sell Todd his interest in a tract of land, with the improvements thereon, for which Todd agreed to make for him 50,000 good staves by the following Christmas, (Summers to saw the timber to Todd's hand,) 25,000 more good staves by the 1st May, 1839, and 25,000 by the 1st of the following November. It appeared in evidence, that Todd had been put in possession of the land, and continued to hold it; that in 1838 and 1839, he had made from 18 to 25,000 staves, out of timber sawed by Summers, but Summers had not sawed the balance of the timber, which, by his agreement, he was bound to saw for Todd to work up. The action was assumpsit, by Summers against Todd, to recover damages for failing to make the balance of the staves. Todd insisted upon Summers' failure to saw the timber. But, the court, to "prevent a failure of justice," refused to hold the agreement of Summers (to saw the timber,) a *condition precedent*, but treated it as an independent agreement: but that Todd might mitigate Summers' recovery, by any just cross-demand of his, arising from the failure of Summers to saw the timber.

Doubtless, if the pleader had designed to set up any other defence than that of recoupment, the frame of his plea would have been different, but the counsel in this court, seeing it bad, in that view, has endeavored to sustain it in the second one that we have taken of it. We think it equally bad in either view.

The judgment will be affirmed.

BRUNSON VS. MARTIN.

Where a defendant elects to use his claim against the plaintiff for damages, by way of recoupment, he cannot have a balance found in his favor, as in case of set-off.

To an action by an overseer and manager of a plantation and negroes for his wages as such, the employer may recoup any damages he may have sustained by an imperfect performance of the contract on the part of the overseer—as where he has violated the contract in its terms and spirit.

In such action the claim for damages being on account of the killing of one of the slaves of the employer by the overseer, to authorize recoupment for such damages, it must appear, from the evidence, that the killing arose from the overseer's mismanagement—that he killed the slave negligently and without necessity.

At common law, a party could not maintain an action for damages arising out of a felony, until after a trial upon a criminal prosecution; but our Legislature has changed this rule. (*Dig.*, *p.* 428.)

Appeal from Hempstead Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

CURRAN & GALLAGHER, for appellant.

S. H. HEMPSTEAD, for appellee.

Mr. Justice SCOTT delivered the opinion of the Court.

Martin sued Brunson, in the Hempstead Circuit Court, to recover, in assumpsit, the value of services rendered as overseer, in the year 1853. The latter pleaded *non-assumpsit*, and with his plea, filed a notice to the plaintiff, as follows, *to wit:*

"Take notice, that at, and upon the trial of this cause, I shall introduce testimony, and prove that you did not keep and perform the contract between us, in said suit specified, but on the

contrary, did break and violate the same, in this; that you, without necessity, and contrary and against your duty, as my overseer, and manager upon my farm, did wrongfully kill and destroy my property, then under your care and control, as my overseer and manager, by virtue of the contract in said suit specified, *to wit:* a negro slave named *Nathan*, of great value, *to wit:* of the value of fifteen hundred dollars, and that I shall cut-off, and keep back, the entire sum claimed by you in the suit aforesaid, for the damages by me sustained in this behalf, *and take judgment against you for the balance to which I am entitled on account of the same*, when and where you can controvert my claim to damages in this behalf, if you think proper.

ROBERT A. BRUNSON."

Although there is no question upon the record as to this notice, it may be remarked, in response to observations about it by the counsel on both sides, that it seems proper that it should be filed at the same time that the plea of *non-assumpsit*, which it accompanies, is filed; as it appears was done in this case. If the plaintiff should, in fact, be surprised by the notice, it would, of course, be a ground upon which he might apply to the court for a continuance, to enable him to prepare to repel the defence.

With regard to so much of the notice as we have marked in italics, it may be further remarked, that it has been held in New York, (*Batterman vs. Price*, 3 *Hill's Rep.* 171,) that, where a defendant elects to use his claim by way of *recoupment*, he cannot have a balance certified in his favor, as in case of set-off; but he must be content to have it go in abatement, in whole or in part of the plaintiff's demand: And in Alabama, (*McLane vs. Miller*, 12 *Ala. Rep.* 643,) and New Hampshire, (*Britton ve. Turner*, 6 *N. H. Rep.* 481,) that after making such election, he cannot afterwards bring his cross-action for damages.

The cause was tried by a jury, who, after having heard the evidence, and receiving the instructions of the court, rendered a

verdict for the plaintiff, Martin, and judgment was given accordingly.

Brunson moved for a new trial upon the ground, that the instructions given on the motion of the plaintiff, were improper, and that the finding of the jury was contrary to law, and to the instructions, and to the evidence, and was without evidence to support it. The court overruled his motion, and taking a bill of exceptions, in which all the instructions given to the jury, and all the evidence produced before them, are contained, appealed to this court.

The matter of the instructions may be as well considered, under the circumstances of this case, before the evidence is stated, as afterwards. There were but three given to the jury; two of them upon the motion of the plaintiff, and the other upon the motion of the defendant. The former were both excepted to, and it is upon them that the only question of law, as to the instructions, arises in the cause. They were as follows, *to wit:*

1*st.* "That to enable the defendant to recoup, it must appear to the jury that the death of the negro was the result of the plaintiff's mismanagement, as overseer for the defendant.

2*d.* In order to enable the defendant to recoup, it must appear from the testimony, that plaintiff, negligently and without necessity, killed the defendant's slave."

The instruction given on the defendant's motion was, "if the jury believe, from the evidence, that Martin did not perform his contract to oversee and manage for Brunson the slaves and farm of Brunson, but did break and violate the same in its terms and spirit, they should recoup the damage sustained by Brunson in that behalf, from the amount of the plaintiff's claim against Brunson, for overseeing."

These instructions distinctly informed the jury, when they are all taken together: 1*st.* That, if from the evidence, they should believe, that the plaintiff violated his contract with the defendant, in its terms and spirit, the former was liable to the latter, and that

the latter was entitled to recoup the damages arising from such breach of the plaintiff's undertaking: 2*d.* That in reference to the alleged violation of the contract, as connected with the killing of the slave, in order to authorize them to find the contract so violated, it must appear from the evidence that that arose from the plaintiff's mismanagement as overseer. And 3*d.* That unless it did appear from the evidence that the plaintiff, negligently and without necessity, killed the slave, the defendant was not entitled to recoup.

Thus, the jury were not only instructed that a negligent killing of the slave authorized recoupment, but they were instructed strongly inferentially, that a killing without necessity would constitute such negligent killing.

We think it clear enough, that there is nothing in these instructions of which the appellant can complain; because, so far as they may be considered erroneous at all, that error is in his favor. And we can but find it very difficult to say that they are erroneous at all, in view of the just protection of the slave, which the common law of slavery, as it has grown up in the slave States of this Union, humanely affords to him. And yet, while we cannot see that we can safely displace that word "*necessity*," as it appears in the charge of the court, with any other word, the stern mandates of that same common law of slavery, does, in truth, mitigate it in that connection, of some of its absoluteness of signification, in the absolute right it recognizes, not only of the master or his representative, but also of a stranger, as against the slave, to overcome by proper means, graduated upon principles of humanity and law, the slave's rebellion against the lawful authority of his master. See *Austin vs. The State*, 14 *Ark. Rep.* 567, as to the last point considered in that case. And in that sense, doubtless, the court and jury understood the word, or the verdict and the judgment could not have been rendered, nor the tion for a new trial have been overruled.

To determine from the evidence, whether the means used for overcoming the rebellion in this case, were graduated upon the

principles of humanity, was the appropriate province of the jury, as matter of fact and law, of which latter, *necessity* in the slayer, as thus understood, was given them by the court as a standard.

And although we cannot but say that we would be loath to subscribe to the verdict, it is still more difficult to say, that it is totally unsupported by the evidence, when we regard the legitimate province of the jury to judge exclusively of its weight.

In support of the verdict and judgment, the facts, which the evidence in the record conduces to prove, may be thus stated: 1*st*. Those preceding the killing of the slave. The slaves of the defendant "were a hard set to manage," and often found idle, in the absence of the overseer. The overseer of the previous year had found it necessary to flog some of them for idleness and other faults common to negroes, and he also had found them "harder to manage than some negroes he had managed."

In the morning of the day of the killing (which occurred in the afternoon of that day) the plaintiff said, at a store in the neighborhood of the plantation, in a conversation about the management of negroes on a farm, that he "had a rough and saucy set of hands to manage, and that, after that, if he ever overseed again, he would make the negroes obey him, or he would kill them." This was about 11 o'clock, and he appeared perfectly calm and in no way excited. Another witness stated that he remained at the store until two or three o'clock, and "was drinking," but "seemed to be in a good humor, and laughed and talked a good deal," and among other things, said, he was going to prove a mule for his employer, which had been taken up as an estray. Another witness, however, proved that, at three o'clock, the plaintiff showed no signs of being intoxicated.

The killing seems to have occurred about, or soon after this hour, and the facts attendant are, 2*d*. about, in substance, these: The plaintiff, having his whip in his hand, went into the field where the hands were picking cotton, and when approaching near to them, said to *Nath*, the slain, that he had "come for his shirt;" to which, *Nath* replied, that he "had pulled off his shirt

to the last overseer." The plaintiff, drawing a revolver, repeated to him that he "had come for his shirt, and intended to have it or hurt him." To which *Nath* replied, "*shoot and be damned*," the plaintiff simultaneously exploding a cap in his first effort to shoot, and at the same moment Nath commenced advancing upon the plaintiff, with some cotton in one hand, and nothing in the other, the plaintiff firing his pistol upon him, three or four times; until, at the last fire, *Nath* was near enough to knock the pistol up—*Nath* at the same moment himself falling down. The physician, who was called in, states, that there were upon the person of *Nath*, the wounds of three balls. "One, passing near his privates, lodged in his right thigh, on its way slightly wounding the penis. Another hit him near the left hip joint, but a little above and behind it; and the third struck him on the left side of the abdomen, and ranged rather down. This latter ball produced his death." And the same witness further states as his opinion, formed from the examination of the person of *Nath*, that "all the shots were made by some one, on the left side of the negro. The wounds could not have been made upon one who advanced directly to the shooter; if at all, while advancing, it must have been done while advancing with his left side to the shooter.

It was also proven, that Nath was a stout negro, weighing about 200 pounds, "with bodily strength enough to crush the plaintiff down," while the latter, it seems, was at the time "a cripple," and that it was the general custom of overseers to carry weapons.

In other respects the testimony makes out, fully, the case for the plaintiff, and that for the defendant—showing the plaintiff to have rendered services as an overseer for the defendant, from the spring of the year, from about the first of March, until he was discharged by the defendant, upon the killing of *Nath*, which was about the 15th of October: That they were worth from two hundred and fifty, to four hundred and fifty dollars; and that the value of Nath, at the time when he was killed, was from twelve to fifteen hundred dollars.

Brunson also read in evidence, without objection, a paper which was admitted by the plaintiff to have been signed by himself, which was in words and figures, as follows, *to wit:* "This is to certify, that I only claim of R. A. Brunson, two hundred and fifty dollars, as my wages for overseeing for him in the year 1853. This 15th day of May, 1854.

JAMES MARTIN."

There was also evidence to the effect, that Brunson's crop was, in the year 1853, a tolerably good one, although it did not turn out as well as the crops upon the adjoining farms. There was no testimony, otherwise, conducing to show that Martin had been negligent, or had otherwise imperfectly discharged his duties as overseer.

Under such a state of proof, we do not feel authorized to disturb the verdict, upon the ground that it is not supported by the evidence, in view of the province of the jury to judge exclusively of the weight of that adduced before them without exceptions to its competency; no question as to which latter was made on the motion for new trial.

As to the validity of the defence attempted to be sustained on the part of the defendant, it could not have been maintained upon the principles of the common law, until after the slayer had been first tried upon an indictment for the *homicide;* the excellent policy of that law preventing the person injured by the trespass, from seeking his own redress, until it should be first ascertained and determined by the proper tribunal what the justice of the State requires of the accused for the deed. If the law were otherwise, the common law supposed that persons injured would often obtain compensation for such trespasses, upon an agreement not to complain of the public wrong; and reparation would be made for the civil injury, to escape the justice of the country. *Morgan vs. Rhodes*, 1 *Stew. Ala. Rep.* 70; *Middleton vs. Holmes*, 3 *Porter's Rep.* 424. But our Legislature has changed this rule, and the civil injury is no longer merged in the felony. Our sta-

tute provides, that "in no case shall the right of action of any party, injured by the commission of a felony, be deemed or adjudged to be merged in such felony; but damages sustained thereby may be recovered in an action brought for that purpose. *Dig., chap.* 53, *sec.* 269, *page* 428.

The only remaining doubt would be, whether, although the owner could maintain his action for the value of his slave, he could insist upon it by way of recoupment. And as to this, there can be no doubt, we think, but that the principle upon which recoupment proceeds, is amply broad enough to sustain the defence. The latter was unquestionably based upon a supposed breach of one of the stipulations of the contract, upon which the plaintiff sought to recover. *Van Buren vs. Diggs*, 11 *How. U. S. Rep.* 475. And it has been frequently held in other courts, that where an overseer sues for his wages, the employer may recoup any damages he may have sustained by an imperfect performance of the contract on the part of the overseer. *Hunter vs. Waldron*, 7 *Ala.* 753; *McLane vs. Miller*, 12 *Ala. Rep.* 643; *Jones vs. Deyer*, 16 *Ib.* 221. And in Pennsylvania it was held, in the case of *Hicks vs. Shener*, 4 *Serg. & Raw.* 249, that, in an action to recover compensation for services as house-keeper, evidence that the plaintiff had been guilty of the malfeasance of embezzling the goods of the defendant, might be given to defeat the action: Chief Justice TILGHMAN remarking, in that case: "whatever be the nature of the services for which the plaintiff demands compensation, I may show that those services were ill performed; for by such evidence, I do no more than meet the plaintiff in his own allegation. I prove that he did badly, what he ought to have done well.

"The plaintiff claimed compensation for services as a house-keeper. It is the duty of the house keeper to take care of the house-hold goods. The defendant offered to prove that the plaintiff did not take care of his goods, and to show the particular manner in which she violated her trust, *viz:* that she sent sundry articles to her daughter's house, and suffered her to make use of

them. How is neglect of duty to be shown, but by showing the particular acts of negligence or malfeasance?" And Mr. Justice GIBSON, said: "I grant that a mere tort, unconnected with the plaintiff's conduct as house-keeper, could not have any effect on her claim in that character. But the evidence rejected went to show, that, during the time she was in the defendant's service, she gave away various articles belonging to him, without his knowledge, &c. This was a breach, on her part, of the contract implied by the law, that she would behave herself in the execution of her office or trust with integrity and fidelity. 3 *Com.* 163. It, therefore, appears unjust that he should be compelled to treat her in the first instance as a person having faithfully executed her trust, and be turned round to an action against her, for a breach of her part of the agreement. This unnecessary circuity ought to be avoided. The merits of the defence can be tried in this form with as much convenience to the parties, as in a separate suit, and the judgment, if pleaded with proper averments, would be a bar to another action for the same cause." See, also, *Crowninshield vs. Robinson et al.*, 1 *Mason* 93; *Austin vs. Foster*, 9 *Pick.* 342; *The Allair Works vs. Guion*, 10 *Barb. Sup. Ct. Rep.* 55.

Upon the whole record, then, we find no error of law, for which the judgment ought to be reversed; and sustaining the verdict of the jury as we have done, there was no error in the court below, in refusing the motion for a new trial. Affirmed.

DUNCAN ET AL. VS. CLEMENTS.

To an action upon a promissory note, the defendant pleaded that it was given for the purchase money of a tract of land; and that, by agreement, a deed was to be made for the land, on payment of the note, averring that the payee had not made or offered to make such deed: upon demurrer, *held*, that the contract, or agreement, set out in the plea, must be taken to be an obligatory one, and being within the statute of frauds, and not averred to be in parol, must be intended, against the pleader, to be in writing, and it ought to have been so alleged with profert.

Such plea, as it impeaches the consideration, in the allegation that the party had failed to make the deed, should be sworn to.

Writ of Error to Clark Circuit Court.

Hon. THOMAS HUBBARD, Circuit Judge.

FLANAGIN, for the plaintiffs. The only point in this case is, whether the demurrer should have been sustained to the amended plea. The question is decided, that the plea is good, by this court, in *Smith vs. Henry*, 2 *Eng.* 207.

CUMMINS, for defendant. Where a party pleads a contract required by the statute of frauds to be in writing, the presumption is that it is so, and the party is bound so to plead it and make profert. 1 *Ch. Pl.* 566, 254, 332; and the omission of profert is cause of demurrer. *Sec.* 66, *ch.* 126, *Rev. Stat.*; 1 *Ch. Pl.* 464, 465; 3 *Ark.* 339, 478, 592; 6 *ib.* 402, 529.

Mr. Justice SCOTT delivered the opinion of the court.

This was an action of assumpsit upon a promissory note. The defendants pleaded in an amended plea, "that the said promissory note in writing, was given in consideration of the purchase

by the defendant of a tract of land described, which was the property of the said Josephine, then Josephine Buckner: and he avers, that by agreement, a deed was to be made upon the payment of the said promissory note; and he avers that the said Josephine, while single, did not, nor has she and the said Robert, since their marriage, made or offered to make deed for said land to this defendant, and this he is ready to verify," &c.

The plea was not verified by affidavit.

The plaintiffs first moved to strike it out, which the court overruled. They then demurred to it, and assigned for cause:

1st. That it does not set forth and state the terms of the alleged contract of sale, or make profert of such contract, so as to enable the court to pass upon the true construction thereof.

2d. It does not show any bar or defence to the action.

3d. It is uncertain and insufficient in other respects.

The court sustained the demurrer, and the defendants saying nothing further, the court rendered final judgment for the plaintiffs, and the defendants brought error, and assign here, only the ruling of the court upon the demurrer, as error. The single question raised then, is as to the sufficiency of the plea.

The contract set up in the plea, must, of course, be taken to be an obligatory one, and, as it is not averred to be in parol, and is within the statute of frauds, it will be intended against the pleader to have been in writing.

At common law, a contract, not under seal, but within the statute of frauds, was not required to be declared upon, as in writing. Because, although in writing, the action was not considered as *based* upon a *written contract*, but upon a mere parol one, of which the writing was but evidence. And it is not necessary in pleading, to state that which is merely matter of evidence. *Tucker's Pleading* 168, 174. Or, as expressed by Mr. GOULD: "The writing required by the statute, is not regarded as an *instrument creating* the right asserted in the declaration; but as a mere evidence of a parol contract." *Gould's Plead., ch.* 4, *sec.* 43, *p.* 191. "But, (proceeds the same author,) if any agree-

ment within the statute of *frauds*, be pleaded *in bar* of an action, the plea, it is held, must show that the agreement, or some note or memorandum of it, is in writing." *Ib. sec.* 46. Because, as the plea confesses the cause of action alleged in the declaration, it can only avoid it by a substituted claim, which is, itself, shown to be such as will support an action. *Ib. sec.* 41.

So, at the common law, a *profert* is required of no other instrument than deeds. These being the only private writings, which, by the original principles of the common law, are considered as *instruments*, on which an action or defence can be *directly founded.* And, consequently, he who pleads a writing not under seal, is not bound to make profert of it. For, written contracts, not under seal, are regarded by the common law, not as instruments on which actions are founded, but merely as *simple* contracts, or as evidence of parol contracts. *Ib. part* 2, *chap.* 8, *sec.* 39, *p.* 440.

Our statute, however, has obliterated this distinction as to sealed and unsealed written contracts, by raising the latter to the dignity of the former, and placing them both upon a basis of perfect equality, for all the purposes of maintaining an action, or making a defence upon them, by the several provisions:

1st. *Enacting* that, "When any declaration, petition, statement or other pleading, shall be founded upon any instrument or note in writing, whether the same be under seal or not, charged to have been executed by the other party, and not alleged therein to be lost or destroyed, such instrument shall be received in evidence, unless the party charged with having executed the same, deny the execution of such writing by plea, supported by the affidavit of the party pleading; which affidavit shall be filed with the plea." *Digest, chap.* 126, *p.* 812, *sec.* 103.

2d. *Enacting* that, "In all suits, founded upon any *instrument* or note in writing, under the seal of the person charged therewith, the defendant may, by special plea, impeach, or go into the consideration of such writing in the same manner as if such writing had not been sealed." *Ib. sec.* 75.

And, 3d. By the enactment that, "An action at law may be maintained on any instrument of writing, whether under seal or not, notwithstanding it may be lost or destroyed; and in every such action, no profert of such instrument, shall be required," &c.

The consequence is, that under our law, an action or defence, when setting up an unsealed written contract, is as much "directly founded" upon such unsealed contract as it would be upon a sealed contract, if setting that up. And, therefore, with us, a written unsealed contract is to be regarded as an instrument *creating the right* asserted in the declaration, or set up in the plea, in the same sense that the sealed contract is, and was so considered at the common law. Hence, our practice, long ago established, of requiring profert of unsealed written contracts, when counted upon, or when set up in a plea, precisely as profert would be required of a sealed contract.

Nor is profert, in such cases, an idle ceremony; because, what such a contract means, is a question of law. It is the court, therefore, that determines its construction, and gives it to the jury as matter of law. 2 *Parsons on Cont.* 4.

"The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words, in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art, as phrases used in commerce, and no surrounding circumstances to be ascertained; or, conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the *court* is the proper subject, by means of a bill of exceptions, of redress in a court of error, but a misconstruction by the *jury*, cannot be set right at all, effectually. Per PARKE. B., in *Nelson vs. Hartford*, 8 *M. & W.* 806, 823.

Such a contract, then, ought to be alleged as in writing, with

profert, that the court may have a view of it, pass upon its effect, and determine whether it furnishes the defence claimed for it.

The case of *Smith vs. Henry*, 2 *Eng. Rep.* 207, does not conflict with these views, because, in that case, the plea *expressly* set up a *parol* contract, under which, by intendment, the defendant was in the possession of the lots purchased, and the court, proceeding to construe that parol contract, held, that as "the promise to execute the deed was *not in writing*, that most clearly showed that it was the intention of the parties that the deed should be executed at the same time the money should be paid." *Ib. p.* 213.

We think the court erred in refusing to grant the motion to strike out the plea, because, according to the matter therein set up, the consideration of the note sued on, was *two-fold.* That is to say, *one*, the sale and purchase of the land, which was executed; and the *other*, the agreement to make title to it, upon the payment of the note, which was *executory;* and the plea alleged a failure as to the latter. Hence, *quoad* the latter, the plea impeached the consideration of the note.

Such a plea, under the provisions of our statute, must be verified by affidavit. *Digest, chap.* 126, *sec.* 76, *p.* 808. Of this error, however, the plaintiffs in error cannot avail themselves, because, not to their injury. But there was no error in sustaining the demurrer.

The judgment must, therefore, be affirmed.

HARVARD LAW SCHOOL LIBRARY.

BRANCH VS. BOLTON.

Error to Desha Circuit Court.

Hon. THEODORIC F. SORRELLS, Circuit Judge.

PIKE & CUMMINS, for the plaintiff.

YELL, contra.

Mr. Justice SCOTT: The only question in this case is determined by the point just decided, in the case of *Clements vs. Duncan et al.*

The judgment of the court below must, therefore, be affirmed.

EDMONDSON VS. CARNALL.

A plea in abatement, in an attachment suit, is not bad on demurrer, because it prays judgment both of the declaration and writ, the matter set up in the plea being to the entire proceedings, and not to so much as is a proceeding *in rem.*

A plea, that the affidavit filed by the creditor before the issuance of the writ of attachment, was not taken before any judge, justice of the peace, or clerk of any of the Circuit Courts within and for this State, is good on demurrer.

An affidavit taken within the county of Sebastian, and State of Arkansas, before "John F. Wheeler, Mayor," was taken before one utterly unknown to our laws.

Writ of Error to Sebastian Circuit Court.

Hon. FELIX J. BATSON, Circuit Judge.

FOWLER & STILLWELL, for the plaintiff.

S. H. HEMPSTEAD, contra. The utmost strictness is required pleas in abatement, and no intendment will be made in their favor. 2 *Saund* 209, *C.*; 1 *Eng.* 103; 4 *Eng.* 388.

The plea in this case, having prayed judgment of the writ and declaration, was bad, and the demurrer to it was properly sustained. 5 *Ark.* 460; 3 *Ark.* 502; 1 *Eng.* 460; 3 *T. R.* 185; 13 *Wend.* 495; 2 *Hen. & Munf.* 308.

Mr. Justice SCOTT delivered the opinion of the Court.

This was a proceeding by attachment in the Sebastian Circuit Court. The declaration was in debt on a promissory note for $132 40. The writ and return, as well as the bond and affidavit are copied in the transcript. The latter is in words and figure following, *to wit:*

"STATE OF ARKANSAS, }
COUNTY OF SEBASTIAN. } ss.

I, John Carnall, plaintiff in the above and foregoing declaration, do solemnly swear, that Samuel Edmondson, the defendant therein, is justly indebted to me in the sum of one hundred and thirty-two dollars and forty-four cents, and that the said Samue Edmondson is, as I verily believe, about to remove out of the State of Arkansas.

JOHN CARNALL.

Sworn to and subscribed, this 28th day of October, 1854, before me.

JOHN F. WHEELER, *Mayor.*"

The writ was levied upon lands, and served upon the defendant by reading it to him.

At the return term, the "defendant came by attorney and filed his plea in abatement," in words and figures, following, *to wit:*

STATE OF ARKANSAS, }
COUNTY OF SEBASTIAN. }

In the Circuit Court of said county, February Term, 1855.

SAMUEL EDMONDSON, } *Defendant.*
Advs. In debt. }
JOHN CARNALL, } *Plaintiff.*

And the said defendant by his attorney comes and prays judgment of the said writ of attachment, and the declaration on which the same issued in this behalf; because he says that the affidavit by the said plaintiff, filed with said declaration in this behalf in the office of the said clerk of the Circuit Court of Sebastian county, in the State of Arkansas, on the 28th day of October, 1854, was not taken before any judge, justice of the peace, or clerk of any of the Circuit Courts within and for the State of Arkansas. And so, the said defendant in fact says, that the said writ of attachment in this behalf, issued by the clerk of the Circuit Court of Sebastian county, was issued by him as such clerk, on the day and year aforesaid, without authority, and in papable violation of law, and this, he, the defendant, is ready to verify; wherefore, he prays judgment of said declaration and writ, and that said writ may be quashed.

SAMUEL EDMONDSON, *Defendant.*
By his attorney, W. D. REAGAN.

This plea was regularly verified by the affidavit of Edmondson before the judge.

The plaintiff filed his demurrer, in which the defendant joined. The court held the demurrer well taken; and the defendant refusing to answer over, and electing to rest on his plea, the court rendered final judgment in favor of the plaintiff, for the debt and damages, and the defendant appealed to this court, assigning for error the action of the court upon the demurrer, and insisting that the plea set up matter sufficient to abate the proceeding.

The appellee, by his counsel, insists that the plea was bad, because it prayed "judgment of the *declaration* and *writ*," instead of praying merely that "the attachment be quashed."

Conceding the principle of law contended for by appellee's counsel, as to the severe scrutiny to which pleas in abatement are to be subjected, it will nevertheless appear from the construction given by this court to our statute of attachments, in the case of *Childress vs. Fowler*, 4 *Eng. Rep.* 159, that the plea in question is not obnoxious to the objection thus taken to it.

That construction was: 1*st*. That the proceeding authorized, was, in its character of *one suit*, as an entirety, a compound proceeding, combining a proceeding *in rem*, with a proceeding *in personam*, each having a distinct identity, but liable to be transformed, before a final judgment, into a proceeding solely *in personam*. That, as a whole, it was constituted of "declaration, bond, affidavit and writ, in harmonious combination." That if, *as such*, it should "be defective, as it would be in case the affidavit, the bond, or the writ should not be in conformity with the statute, or either should vary, the one from the other, in so much as to disturb the harmony of the whole, as one suit, the *entire* proceedings, if *appropriately assailed*, would necessarily fall. Because, being unknown to the common law, and a mere creation of the statute, with prescribed pre-requisites and fixed limits, it must necessarily stand or fall upon its conformity or non-conformity with the terms, upon which, by the statute, it was permit-

ted to be set on foot." *page* 163. The statute in express terms enacting "on the requisites herein-before prescribed being complied with," &c. *Dig.*, *chap.* 17, *sec.* 6.

2*d.* That in this character, when viewed in this light, it was substantially a new *form* of action "set on foot by the Legislature not in a condition of isolation, but in harmonious connection with our entire system of jurisprudence, as a whole, of which it was itself to form a part." And hence, like the other remedies or forms of action already known to the law, its want of propriety or efficiency may be questioned, and made to appear by the regularly established course of pleading, applicable to other actions of law, unless in points where the statute, which gave it existence, otherwise provides. *Page* 165.

3*d.* That such of the provisions of this statute as establish or provide for means of *defence against this remedy*, ought to be liberally, and not strictly construed; because, "to apply the principles of strict construction, which are usually applied to the *enforcement* of remedies derogatory to the common law, to provisions of the statute for resistence to this class of remedies, would be *felo de se*, and an utter perversion of this conservative doctrine." *Page* 165.

4*th.* That this being understood and applied, "a defendant under the provision of *section* 15, without any aid from *section* 29, would have the undoubted right to plead any abateable matter within the time, and according to rules fixed by law for defending against *other actions* at law, and that such matter, pleaded in due form and apt time, would go to the *entire* proceedings." *Page* 166.

5*th.* That section 29 was not designed to impair, or take away any of these rights and privileges; but confers upon the defendant *new facility*, or means of abating, not the *entire* proceedings, but so much of them only as is a proceeding *in rem.* *Page* 166. This new means for abating so much of the proceedings only as is of the latter cast, being that of *summary* "*exceptions*" to the affi-

davit, whereby the defendant may insist upon abateable matter, in this *mode* and for this *purpose only*, under extraordinary circumstances: that is to say, extraordinary, in so much as that it may be used "in that condition of the case in its progress through the court, when, by the *ordinary* rules of law, dilatory pleas could be no longer made available," (*p*, 164, 165,) inasmuch as he can only avail himself of this *extraordinary* means of defence upon the condition precedent, that he makes his "common appearance" and "pleads to the plaintiff's action not a dilatory plea, but a plea to the merits." *Page* 167, 168, *of the statute*, *section* 29.

This construction of the statute of attachments, although it went beyond any construction that had been given to it by this court, in any decision previous to that of *Childress vs. Fowler*, did not, however, actually conflict with any such previous decisions; nor has there been any decision made since that time, conflicting with this construction. And maintaining this one, it follows that it was not improper for the plea before us to pray judgment both of the *declaration* and the *writ;* inasmuch as the matter set up in it, went to the entire proceedings, and not to so much of it, merely, as was a proceeding, *in rem;* the same having been presented by plea in abatement, verified by affidavit, interposed before common appearance to the action, and within the time allowed by the ordinary rules of law for interposing dilatory defences in every form of action.

No other question has been raised by counsel.

As to the sufficiency of the matter set up, the plea seems good upon its face. The statute declares that the affidavit "may be taken before any judge or justice of the peace within the State." *Dig.*, *chap.* 17, *sec.* 4. The plea alleges that the affidavit "was not taken before any judge or justice of the peace, or any clerk of any Circuit Court, within and for the State of Arkansas." The demurrer admits this to be true.

The affidavit, as it appears in the transcript, was taken before "*John F. Wheeler*, *Mayor*," and it also appears to have been

taken within the county of Sebastian, and State of Arkansas. If Wheeler was the *Mayor* of the municipality indicated by this caption, he is utterly unknown to our laws; if, of some other, there is no indication in the record, of what city, town or district, either within this State, or beyond its limits.

We think, then, that upon this record, the plea upon its face was good until avoided. The result is, that the court below erred in sustaining the demurrer, and for this, the judgment rendered must be reversed, and the cause remanded, &c.

BOND VS. THE STATE.

The issue to a plea of not guilty to an indictment for *assault and battery*, cannot, by consent of parties, be tried by the court. (*Wilson vs. The State*, 16 *Ark. Rep.*)

Apppeal from the Circuit Court of Scott County.

Hon. FELIX J. BATSON, Circuit Judge.

FOWLER & STILLWELL, for the appellant.

JORDAN, Attorney General, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an indictment for an assault and battery. The defen-

dant pleaded not guilty, and the State joined issue. By consent of the parties, this issue was tried by the court sitting as a jury. Upon hearing the testimony the court found the defendant guilty, and assessed a fine of ten dollars, rendering judgment accordingly.

The defendant moved in arrest of judgment, which, upon being overruled by the court, the defendant excepted, setting out all the evidence in his bill of exceptions, and appealed to this court.

The only point made by the appellant, is, that the issue joined can only, by the law of the land, be tried by a jury. The Attorney General makes no point in the case, conceding, as is true, that it is within the influence of the decision in the case of *Wilson vs. The State*, 16 *Ark. Rep.*, decided at the last term.

The judgment must be reversed, and the cause remanded to be proceeded with.

ABRAHAM VS. WILKINS.

Where another person signs the name of the testator to his will, thus: "A. B. by C. D., in his presence and at his request," without other signing as a witness to the will, it is a sufficient attestation, under *secs.* 4 *and* 5, *chap.* 170, *Digest*, though not a literal compliance with the statute.

The declarations of a deceased attesting witness, made after the probate of a will, may be given in evidence, on an issue to try the validity of the will, to disparage the weight to be attached to his affidavit in the Probate Court.

It is competent for witnesses to a will to give their opinions as to capacity or incapacity, when the facts or circumstances are disclosed, on which their opinions are founded. *Kelly's Heirs vs. McGuire et al.*, 15 *Ark. Rep.* 601.

The capacity to make a will, is such a degree of reason and judgment as enables the party to comprehend the subject; (*Kelly's case*, 15 *Ark.* 556,) but there may be incapacity without a total deprivation of reason and understanding.

The statute does not require that the witnesses to a will shall subscribe it in the presence, actual or constructive, of the testator, according to the construction in *Rogers vs. Diamond*, 13 *Ark.* 487.

Though the court may have erred in giving an instruction at the instance of one party, yet, if it be neutralized by one, at the instance of the other, it is not an error for which judgment will be reversed.

Where a motion for a new trial was filed in the court below, and overruled, and all the proceedings are put upon the record and brought before this court for review, the reversal or affirmance of the judgment does not depend upon the question, whether the court below did or did not err in some of its decisions; but upon the question, whether the decision of the court, overruling the motion for a new trial, was right.

Where the jury has found against the validity of a will, upon the ground of the mental incapacity of the testator, and it appears from the evidence, that he was laboring under delusion at the time—that he had lost the power of discriminating objects, and of combining and arranging ideas, &c., this court will not set aside the finding.

Appeal from Lafayette Circuit Court.

Hon. SHELTON WATSON, Circuit Court.

WATKINS & GALLAGHER, for the appellant.

PIKE & CUMMINS, for the appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

John Wilkins, of the State of Tennessee, filed a petition in the Lafayette Circuit Court, stating, that on the 9th day of November, 1851, his brother, Allen T. Wilkins, a resident of said county, died, seized of real and personal property, without having been married, and leaving no child lawfully begotten, father or mother, him surviving. That, after his death, James Abraham, who is made defendant, produced before the Probate Court of said county of Lafayette, a paper purporting to be the last will of said John Wilkins, which, on the 24th November, 1851, was probated and admitted to record, at the instance of said Abraham, a copy of which is exhibited. That by said paper, purporting to be such will, it appeared that said Allen T. had devised a considerable portion of his property to Abraham, and made him his executor, &c., and by virtue thereof, he was claiming the property, and acting as executor, &c. That petitioner was the brother, and one of the heirs at law of said Allen T., and interested in the probate of the pretended will: and he expressly charges that the said paper, so probated, is not the last will and testament of the said Allen T., the same being invalid. Wherefore, he prays the court to direct an issue to be formed, and submitted to a jury, according to the statute, &c., to try and determine the validity thereof, &c.

The will is as follows:

"In the name of God, Amen. I, Allen T. Wilkins, of the county of Lafayette, in the State of Arkansas, being now low in bodily health, and calling to mind the frailty and uncertainty of human life, and being desirous to direct how my worldly affairs shall be disposed of, after my death, do publish this to be my last will and testament, hereby revoking all others, by me, heretofore, at any time made.

And *first:* I hereby nominate and appoint James Abraham, of the county and State aforesaid, to be the sole executor of this my last will and testament.

Second: My will is, that all my just debts and funeral ex-

penses be fully paid by my said executor: and he is hereby required to ship all my present crop of cotton, and apply the nett proceeds to the payment of my debts as aforesaid.

Third: It is my will, that my negro woman, Sarah Jane, and her child, John, be emancipated and set free, as soon as John, the child of Sarah Jane, shall arrive to the age of twenty-one years; until which time, he shall be in the charge of the said James Abraham, and be taught some trade, so as to never become a charge upon the community; but the said Sarah Jane shall be free from the time my debts shall be paid; and I request my said executor to see that the said Sarah Jane and John, herein emancipated, shall be disposed of, and provided for, in a proper and suitable manner.

Fourth: After my debts, and funeral expenses are all fully paid, and discharged, and the negro slaves herein before named excepted, I give and bequeath unto my said executor, all my property, both personal and real, to him, his heirs and assigns, forever.

In testimony whereof, I have hereunto set my hand and seal, and do publish this my last will and testament, this 9th November, 1851.

ALLEN T. WILKINS. [SEAL.]

By MOREHEAD WRIGHT, in his presence, and at his request.

We, William H. Dillard and William Gant, have hereunto subscribed our names as witnesses, at the request, and in the presence of the said Allen T. Wilkins, and in the presence of each other, this 9th November, 1851.

WILLIAM GANT,

WIILLAM H. DILLARD."

Process having been served upon Abraham, the court directed an issue to be formed for the purpose of trying the validity of the will; whereupon, Abraham filed a plea alleging its validity, to which the petitioner took issue. See *Digest, chap.* 170, *sec.*

32. The issue was submitted to a jury, upon the following testimony, in substance:

ON THE PART OF ABRAHAM.—*William H. Dillard*—William Gant and myself signed the will at the request of Wilkins, and in the presence of each other. Saw Wright sign Wilkins' name to the will, and heard Wilkins request him to do so. Heard the will read over to him, by Byrne, twice. Heard him correct an error in relation to the name of a child, which was written *William* in the will, and Wilkins said his name was not *William*, but *John*, whereupon the correction was made. Wilkins requested me to send for Byrne, which I did, and when he came, Wilkins requested him to write his will, and proceeded to tell him what disposition he wanted made of his property. I am a farmer. Wilkins was sick seven or eight days. I was present when he died, which was about an hour after the execution of the will. The will was signed by Wright and witnesses, in presence of Wilkins. Heard him say nothing more about will, except probably, to request some one to take care of it. Think some one asked testator, after will was signed, what he wanted done with his property, and he made no satisfactory answer that I heard. Was present when Judge Fort, Parson Harris, and others, came into testator's room. His mind was wavering at times; heard him make no nonsensical remark. Abraham is not related to testator. It was two hours from time testator requested me to go for Byrne, until his death. I went to testator's room on the day he died, at 8 or 9 o'clock, A. M., and he lived some three or four hours after I went there. When I first entered the room, he seemed very sick, but knew me when I spoke to him, and I had a conversation with him. After the execution of the will, and near his death, he made some remarks which I cannot recollect. That morning, he seemed to see some person at the bed post, and would speak as though he was talking with some one. He appeared to know every one with whom he conversed, and seemed to know every thing when in conversation, but when not, talked a little at random. If he made any

flighty remarks while the will was being prepared, I did not hear them, and I was in the room all the time. He could write, but made a bad hand of it. When the will was presented to him, he tried to write his name, but said he could not. Byrne then said to him, any one else could sign it for him, and said, here is Major Wright, he can do it. Testator then requested Wright to sign his name. I did not hear testator ask the name of the clerk, at the time he was trying to write his name; was close enough to him, and if he had asked the question, would have heard him. His name was signed to will before witnesses. Byrne asked him who he wanted to sign his will, and he said myself and Gant; and we then asked him, if he wanted us to sign his will as witnesses, and he said, yes. We signed it in his presence, and in the presence of each other. Did not see the will handed to testator after it was signed; he saw it after it was executed. According to my best recollection, witnesses and Wright signed the will on testator's bed side. Believe testator was rational, when he signed the will, and was so in the morning when I went there. Thought he was at himself, and understood what he was doing when he dictated the will, and had it signed by Wright. Judged from his appearance, as to his rationality. He did not seem to think he would die, but was fearful he might, and asked me what I thought of his condition? I told him he was bad, but might get well. In a short time he requested me to go for Byrne; I did so, and when Byrne came, Wilkins asked him to write his will, and told him how he wanted his property disposed of. Byrne told him he had no ink and paper there. Testator told Byrne he wanted Abraham made his executor: wanted him to ship his cotton and pay his debts: and he wanted to emancipate Sarah Jane and child, servants belonging to him, and wanted Abraham to raise the child, until it was twenty-one years of age, and to learn it some trade, that it might not be any expense to the county; and that he gave Abraham all the balance of his property, but would have made a different will, if he had have had enough to be worth much. Byrne nor myself made any sugges-

tion to him as to the person to whom he should will his property. Abraham's name was suggested by no one. At the time he dictated the will, testator did not give any reason why he wanted Abraham to have his property; but during the court, at which he was taken sick, I heard him say, and frequently before, that he intended to give all his property to James Abraham. He said he was the best friend he had. From the manner of testator, and his correcting the mistake in relation to the name of the child, and his telling Byrne to be particular, and have it right: I am satisfied he was of sound mind, when he dictated and signed the will.

On cross-examination: Am not prejudiced or interested in this suit. Known testator since the year 1841: he was a blacksmith, and afterwards an overseer; was a bad scribe; had but three fingers on his right hand. On Friday, before the Sabbath on which he died, he requested me to tell his girl, Sarah Ann, at his place in Red River bottom, to send him some clean clothes, and a boy he had hired to wait on him: that Higg's negroes (at whose house he was sick in Lewisville,) were scarce. On Saturday morning, he repeated the request; and on Sunday morning, he asked me if I had been down to the bottom. I told him no, and he made the same request. He was a single man, and had no relations here, that I know of. Have frequently heard him say that James Abraham was the best friend he had on earth. A few days before he was taken sick, he asked me to sign a bond for him, saying, he only wanted me to stand a few days, until Abraham came out, and then he would get him to go on it. Heard him say during court, a short time before he was taken sick, and in the fall before, that he intended to give Abraham all he had. He seemed to have more confidence in him, in relation to the management and care of his girl, Sarah Jane, by whom, he said, he had a child, and another, that died, than any one else. I told him, if he thought it was his child, he ought to free it himself, while living, and he said he intended to do so one of these days. I told him these things were frequently neglected after a man's

death, and referred him to a number of cases in this county. He said there were men in this county who would attend to these things. I asked him, who? He said Abraham: that Thomas Edwards had given him his property, and that the overseers, generally, on Red River, had more confidence in Abraham than any one else on the river. When in conversation, testator always gave rational answers.

Morehead Wright.—Testator overseed for me five or six years. I signed his name to the will. Went into the room where he died, soon after the will was taken in—several persons around the bed side. Heard him say something about a mistake at the time the will was read to him: he said, the name is *John.* I went to the bed side. Something was said, about this time, about signing a will, and my name was mentioned. I asked testator if he wanted me to sign the will, holding it up in my hand before him; and he said he did. I did not see the witnesses sign the will. When I went into the room, testator was lying in bed. Was in his room some hour and a half before the will was signed. He seemed a little alarmed. I told him there was no danger; that if I had service for the time he would live, I would make a fortune, and he said, yes. I told him I had seen him much worse, which seemed to compose him. He alluded to certain land, which I had recently purchased of Stricklin, and said it was a good purchase, and I had done well. Said it was all good, except right along here, running his hand along by the bed side; a sign which I understood. I made the purchase referred to. The girl, Sarah Jane, was willed to testator by Lemay. I never had any conversation with him about her child. He seemed to have great confidence in Abraham, &c. Never heard him say anything about his relations, except a brother in Tennessee. Heard him say once, he was expecting his brother out, and wanted to get him on my upper plantation. Have seen testator sick frequently, and when fever was on him, as he was dozing, he would talk a little wild. I was on the gallery when the will was brought there (to Higg's house,) by Byrne; went

into the room soon after; testator was lying on his back. Was not in when he tried to sign the will. Was called by some one, who said testator wanted me. Walked up to the bed side, held the will up in my hand before testator, and asked him if he wanted me to sign it, and he said he did. I do not recollect of seeing any thing on the bed, but did not notice. I left in a few moments after the will was signed. The name of testator, together with my own name, subscribed to the will, are in my handwriting. I signed the will on a small table, on the opposite side of the room. Did not see witnesses sign it. I left, with Capt. Gant, soon after will was signed. Do not know whether will was taken to bed side after it was signed. Did not see it shown to testator after it was signed. It was at his bed side, when I was called on to sign it. He was lying on his back at the time I signed it, or was a moment before. My impression is, there was some alteration in the will, in relation to a child, by Byrne. I left before testator died. When I first went into the room, his condition was bad—seemed to be dying—seemed to be flighty at times in his mind, and said something about fire, and said blow it up, or something of that sort. Talked at random.

On cross-examination—Not more than two hours from time I first went into testator's room, until his death. Was in and out until I signed the will, and then, myself and Gant, walked up town. Was in the room some little time before, and about the time the will was signed. Occasionally, testator's mind seemed a little flighty, but when his attention was drawn to any particular subject or thing, he seemed to understand it, but would waver instantly. I did not think his mind strong enough to *organize* anything, but when his mind was drawn to anything, he understood it. At the time I was called on to sign the will, think was doubtful as to his ability to transact business. When I told him not to be alarmed, his voice was not as natural as a well man's, but he spoke ready and quick.

A. Byrne: I wrote the affidavits of the witnesses to the will in Probate Court: am clerk of said court. On the morning of

the day that testator died, J. B. Higgs came to me, and told me he wanted to see me. I started down to see him, and meeting Dillard, he also said testator wanted to see me. When I went into his room, after speaking to him, and asking him how he was, he said his friends said he was bad, and that he wanted to fix up his business. I asked him what disposition he wanted to make of his property? He said he wanted Abraham to take charge of his business—wanted a certain negro woman and child set free, naming the woman, I think. Wanted the child to stay with Abraham until it was twenty-one years old, and wanted him to learn it some trade, so that it might not fall an expense on the community, and to see that the woman and child should not suffer, and to attend to them. Spoke of his debts, and said he wanted Abraham to ship his cotton and pay them—said he had plenty to pay his debts, &c. Expressed a wish that his business might be managed by Abraham, without coming into the court house, or without law. The above is the substance of his request. I stood about some time, thinking he would forget it. While standing there, he told me two or three times to go and fix it up. I then went to my office and wrote the will. The name of the child, I thought he intended to emancipate, I got from the papers in a suit between testator, as executor of John Lemay, and Henry Lemay. When writing the will, I did not recollect of testator mentioning land particularly, but that he referred to all his property: I, therefore, inserted it with his other property. Then took the will to testator's room. Wright and Lungreen were sitting in the gallery: they asked me what I had, and I told them it was the outlines of testator's will. Parson Harris, and others, were holding religious service in the room. I laid the will on the table in the passage. While they were singing, I stood at the foot of the testator's bed, and he called, or beckoned to me, and asked what all this meant, and said he was not as bad as all that. When service was over, I went in with the will, and after reading a line or two, I asked him wha he wanted done with his land, and he said, let it all go together.

I then proceeded to read the will, until I came to the name of *William*, and testator said, his name is not *William*, but *John*. I doubted a little, and asked him if he was certain, and he said he was. I then made the correction of the name, wherever it occurred in the will: then read the whole will over to him a second time, as corrected, and he approved of it, and said it was right. I then went to the passage, and finding Wright, Lungreen and others there, told them testator was about to sign his will, and asked them to come in. We then went into testator's room, got a glass frame, testator was propped up in the bed, and I gave him a gold pen to write his name, and a piece of paper on the glass frame. He made two or three strokes with the pen, and said he never could write with those kind of pens: said he was weak—that he had eat nothing for two or three days. I told him he had better have a quill, and he called upon Capt. Gant to make a pen. I told him any one else could write his name for him. I think he then called upon Maj. Wright. Do not recollect whether I suggested his name or not—may have done so. Wright then came up to the bed side, took hold of the will, and asked testator if he wanted him to sign it for him, and he said, yes. Wright then signed the will. The witnesses then signed it—I do not recollect whether at the request of testator or not. Gant signed first, and turned off, and did not see Dillard sign his name, and Dillard then came back, and his name was strickon out, and he re-wrote it in the presence of Gant, the other subscribing witness. I then sealed the will, and handed it to one of the witnesses to take charge of. After will was read a second time and signed, it was not read again to testator. Abraham was not in the county at the time. I saw Capt. Gant sign the will.

On cross-examination—During the time I stood about, after testator requested me to write his will, his voice was unnatural—his appearance was bad—he called Lemay, Wright. When directing me about his property, do not recollect that he named his property specially, but did speak of it generally: but named

the negroes that were emancipated, and his cotton. About the time, or soon after, the will was signed Lungreen asked him what he had done with his property, and he said he had given it to Abraham; that he did not have much, or he would have made a different will. I was standing at the bed side when the remark was made. I have no recollection that testator said anything about a pencil when I handed him my pen to write his name. When no one was talking to him his mind seemed wavering, but when his mind was directed to any particular subject, he seemed to understand it. Heard him make no remark about Capt. Pike. Do not recollect whether the will, when signed by Wright, was on a table or bed. I am not positive where witnesses signed the will. My recollection is, that Dillard's name was erased at the bed side. My best recollection is, that the will was signed at the bed side. I am not positive whether Wright signed it at bed side, on glass frame or not, but think he did not. It was signed in the room of testator, and if it was signed on the table he could have seen it; believe the will was signed in his presence; cannot say positively that testator saw it; his eyes looked wild at the time. My attention, after the signing of the will, was directed to the sealing of it. I do not recollect positively where witness signed it. Do not recollect of any flighty remarks of testator about the time will was signed, except that mentioned above. He seemed to be dying from that morning. His appearance the whole time was bad. I cannot say what the condition of the testator's mind was, when the will was signed. Do not know. As soon as it was signed, or a short thereafter, I enveloped and sealed it up. Do not know whether it was shown to testator after it was signed or not. After it was read to him, he approved of it, and said it was right. Do not recollect of any other acknowledgment. I took down the testimony of the subscribing witnesses when the will was probated. Gant felt his dram at the time, but was not drunk, &c. I have no recollection of saying to Lungreen and Gant, when I came in with the will, that it was of no account. Do not recollect whether I suggested the name of witness to will

or not; may have done so. When testator saw Lemay, he seemed to know him. He knew me. When I had written the will and carried it down, after religious services were over, I suggested to testator that it was ready.

Abraham then read in evidence, the will with the probate affidavits of Dillard and Gant, attached, &c.

The affidavit of *Gant*, who had, in the meantime died, is as follows: I was called upon to subscribe to the instrument to me here shown, and Allen T. Wilkins acknowledged the same to be his last will and testament. His name was written by Morehead Wright, at his request, and in his presence. After the same being read to him twice, he declared it to be his last will and testament; and made certain corrections in regard to the name of a negro, whose name was written William, and changed to that of John, every time the name occurred in the will. This was previous to the time Wright was asked to sign the name. To the best of my recollection Wilkins called upon me to subscribe my name as a witness, to the will, and I subscribed the same in the presence of William H. Dillard, the other attesting witness. At the time Wilkins asked Wright to sign his name to the will, for a moment and a half or two minutes he appeared to be rational, after which time, he appeared not to be rational, but flighty.

ON BEHALF OF PETITION.—*Dr. Purdom*—Have been a practising physician about eight years. Attended testator in his last illness. He died of pneumonia, which had assumed a typhoid type, 9th November, 1851; called to see him on Friday, and he died following Sunday. He was taken sick on Wednesday night; I saw him on Thursday, but not as physician. Dr. Wilson was called to see him on Thursday morning; he was then laboring under pneumonia. Before he was taken with pneumonia, he had the influenza. When I was first called in, the disease was of rather an aggravated character, pulse weak and quick, some 140 beats to the minute, skin cold and clammy. He told me he had from seven to ten operations, from medicine he had taken the night before. Coughed considerably; some little blood in his ex-

pectorations; complained of a violent pain in his right side. Typhoid fever generally prostrates a patient very soon, and the mind is generally affected. When first called in, saw nothing unusual about his mind, except he was stupefied and drowsy, attended him until he died. Saw no decided change in his mind until Sunday, the day he died, at about 2 o'clock, A. M., at which time I was sent for hastily; found him sinking into a collapsed stage; hands cold and clammy; the feeling of a dead body; pulse low, and almost imperceptible; his mind giving way, but to no great extent. His mind continued to fail until his death, owing to his physical organs giving way. The first time I saw any change in his mind, was on Sunday morning, about 2 o'clock, A. M. It was but little affected at that time. Remained from that time until sunrise, at which time a considerable change had taken place in his mind. Appeared a little deranged, thoughts totally incoherent, but he at times recognized any one that was about him, but occasionally talked wildly, except when some one was talking to him. He at one time seemed to be talking to the bed post, and when he was told what it was, said, *yes*, he thought it was a man. Do not recollect whether this remark was made before or after breakfast, but it was made before the will was signed. Never saw a case of typhoid fever, but what patient was occasionally deranged in his mind, and would talk wildly. Left him at sun up, and was absent hour and half; when I returned, examined testator, and found him sinking, both mentally and physically; his mind still more unsettled. I think it was when I returned, he seemed to be talking to the bed post. I think this was the first time I had observed that he was losing his powers of distinguishing objects. It was at this time I told him it was a bed post, which he seemed to understand, and would then relapse off again I was off and on in his room till he died; while Judge Fort was in the room he called him *Willis*. About this time a negro boy of his came into the room, and he seemed not to know him. Some one asked him if he knew the boy, and he said not. He was then told it was his boy Brice, and he said yes; and asked

him what he was doing there? Wanted to know if he was run-off: spoke short. The boy said he was not run-off, but had come out to wait on him. Testator said he did not want him, that he would be down home to-morrow. Did not seem to be conscious of his condition. All this took place before the execution of the will—say some hour and half. Recollect nothing else said by testator before execution of the will. He was talking all the time wildly. I was present when the will was executed. Do not recollect of seeing witnesses, or Wright sign it. Think the name of Wright and witnesses were suggested by Byrne. There was a considerable crowd in the room at the time. I was not present when the will was read by Byrne. Saw testator attempt to sign will. It was handed to him on looking-glass frame. I paid but little attention to execution of the will. At the time, and for half an hour before he attempted to sign will, he was more calm and less nervous than before. Recollect no circumstance indicating any more mental derangement at the time of executing the will than before. His features were sharp; looked wild out of his eyes; had looked so from early in the morning; appearance indicating speedy approach of death. I was at bed side about the time will was signed. Do not recollect whether it was shown to him after it was signed or not. Did not hear him acknowledge will. About the time it was signed, heard Lungreen ask testator, what he was going to do with his property, and he said he had given it to a man in Tennessee. He was asked his name; and said he did not recollect his name then, but would tell directly. He was not in possession of his mental faculties at the time will was signed. Do not think his mind was entirely sound from 2 o'clock, A. M., that morning. At the time of the execution of the will, do not think he was conscious of what disposition he was making of his property. About day light, on the day of his death, myself and W. A. Higgs, were talking of certain persons on Red River, who kept their wills by them, and Higgs asked testator if had a will made? He replied not. Higgs then asked him if he did want to make one? Do not recollect his reply, if he made any. I then

remarked to Higgs, that he was not in a condition to make a will. I cannot give the reason why testator was more calm some half an hour before the execution of the will, than he had been since 2 o'clock that morning. Remarked the fact to Byrne at the time he was preparing to read the will to testator. At the time will was handed to testator, heard him make no incoherent remark.

On Cross-examination—In speaking of testator's mind, I do not mean to say he was entirely bereft of reason; but that his mind was considerably impaired from 2'clock, A. M., on the day of his death until the will was executed; but at the time the will was signed, I do not think he knew what he was doing. He would answer any question that was asked him. I was not in his room when he directed Byrne about his will. Did not hear it read. Byrne was writing on a small table when I went in. Did not know what he was writing. Testator was more calm for some half hour before the time of execution of the will than before, but cannot say that he was more rational. When the brain is affected, it is frequently the case that patients become more rational a short time before death than before. There is always fever in pneumonia. The brain is frequently affected from this disease. Never saw a person in his condition that brightened up before death. There was a general conjestion of the blood from the external to the internal organs. From 2 o'clock, A. M., gave him three doses of quinine, calomel and camphor. Gave him no morphene.

L. B. Fort: Was not present when will was executed. Visited testator about 11 o'clock, A. M., of the day he died, with Parson Harris. Went to his bed-side; some one asked him if he knew me, and he said yes, that it was Judge Fort. I asked him how he was, and he said he was very sick; seemed to be alarmed and looked bad: had a wild appearance. I told him Harris had come to pray for him, and asked him if he wanted him to pray? He said yes, he wanted all of us to pray for him. Harris sung and prayed. Testator seemed to be more composed during service than after; seemed interested; after service, I went to his bed-side,

and felt his pulse; he was restless; I thought he would die in a short time. Remained there some ten minutes, he said he was very bad. As I turned off, he said come back *Willis!* Some one said, it is not *Willis*, but Judge Fort. He then said he knew it was Judge Fort. At one time, while I was there, he pointed to the bed post, and asked who it was? When he was told, he said it had fooled him twenty times; which caused me to think his mind was wandering. There was nothing else said that I remember which showed absence of mind. He was frequently turning over, and muttered a great many things, which I could not understand.

On cross examination—When Parson Harris was engaged in religious services, testator seemed to understand what was going on, and to be engaged in the service; seemed more composed, than just before or afterwards. When asked a question, he seemed rational, and to understand.

John Brown: Saw testator two or three times during his illness. Was there on the day he died, some two hours before he died. William Higgs and Young were there when I went. Remained about an hour. Had some conversation; his mind seemed flighty; looked wild; spoke to the bed post, and called it McDaniel. Young asked him what he wanted done with his property? He said he wanted a brother in Tennessee to have most of it. This was about ten or eleven o'clock. May have been as late as eleven. Was there when preacher was sent for. Did not hear testator ask Young to write his will. Think it was Higgs that asked him to write it. Left before the minister came. If Byrne was there, do not recollect it.

H. R. Lungreen: Saw testator several times during his illness. Saw him the evening before his death. He talked flighty and nonsensical for a man in his situation. Hands cold and clammy; seemed to have great internal heat; wanted water constantly. His chief conversation was about shoeing Capt. Pike's horses. Pike had employed me to shoe his horses during court, and as I was not much in the habit of shoeing, I had asked testator to do it for me,

which he promised to do, but was prevented in consequence of his sickness. He also said something about Fort's negro boy Oliver being a good shoer. This was a boy that had once worked with him in a smithshop. Spoke of what he could have done with him, if he had remained with him. I remained but a short time. Returned next morning between day light and sun up. Met Lewis A. Fort, or Brown on gallery, asked how testator was, and he said, worse. Went into testator's room, no one in there. Spoke to him and he did not know me. He was talking at random. Said what pretty pipe stems the bed post would make. I thought he alluded to posts. Returned home, got breakfast, and went back again about seven or eight o'clock; absent hour and a half. Went into testator's room, but did not speak to him. Was in and out of room for hour and a half. Mind wandering; talked incoherently. Went up town, and returned again at ten. Had no conversation with him; several persons there. Soon after, Fort and Harris came. I went into gallery, and took a seat with Wright. Remained there probably an hour. While there, Byrne came along with a paper in his hand. I asked him what it was, and he said the out lines of Wilkins' will. In a short time, Byrne came out of testator's room, and said he was about to sign his will. I went in, and after Byrne had read a part, testator stopped him, and there seemed to be something wrong about some children; testator said something, which I did not understand, but think he said the name is *John*. Byrne told him he got the name from the papers in the Lemay suit, &c. Byrne then corrected the will on a table, and brought it back and read again. Byrne, or some one else, gave testator a picture frame, and piece of paper to write his name upon. I was standing behind Byrne; near enough to touch him, toward the foot of the bed, and by the bed side. Some one asked testator if he could write his name, and he said yes. He was then propped up, and some one gave him a pen made of a goose quill. He made some motions as though he was going to write; stopped and seemed to consider; asked the first name of the clerk? Dillard, I think, said, A. Byrne. Testator said yes,

that is it; then tried to write and could not; then turned his head towards the corner, and said, hand me down that pencil. Byrne then said that he could write his name if he would request it, or any one else. At that time, Maj. Wright entered the room, and Byrne said, here is Major Wright, he can do it; and then some one called Wright, and he came to the bed side, and held the will in his hand, and asked testator if he wanted him to sign it, and he said yes. Wright then took the will, I think, to a small table in the room to sign it. While Wright and others were near the table, I went up to the bed side, and asked testator if he should die, what he wanted done with his property? He said he wanted a man in Tennessee to have it. I asked his name, and he turned over, and said he would tell me directly. A short time afterwards, all left the room, except Dillard and myself, at which time a negro boy came into the room; I asked testator whose boy it was? He said he did not know. Dillard then asked boy who he belonged to, and he said Mr. Wilkins. I then asked testator, if it was not his boy, and he said yes, and asked the boy what he was doing out here, and said he was run off. Boy said no, he come to wait on him. Testator said no, he was not sick; for him to go back, and tell Irvin and them, he would be down there in the morning. About this time, Mrs. Higgs came into the room, and asked me to go to the store after some wafers. Testator turned over, raised up, and clambered towards the wall. I told Dillard to pull him down; this was about the last of him. I went up to the store after the wafers, and when I returned he was dead.

When Byrne brought the will to the bed side, I think it was the second time he asked testator who he wanted to have his property, and he replied he believed Jim Abraham was as near a neighbor as he had.

Byrne handed him the pen to sign his name. It was a goose quill; he tried to write and could not; then turned towards the corner, and looking towards the ceiling, said hand me down that pencil. Did not hear him say he could not write with such a pen. Was as close to him as one any except Byrne.

Byrne called on witnesses to sign will. Heard no one else. Knew both witnesses. Was standing by bed side from time will was read until a few minutes before testator died. Testator did not see witnesses sign will, and could not if had he tried. No recollection of hearing him acknowledge will. It was not brought to him after it was signed; heard him make no allusion to it afterwards. He was speechless when I left him to go after wafers.

(Against the objection of Abraham, the court permitted the witness to prove the following declarations of Gant, deceased, subscribing witness to the will.) I saw Gant a day or two after will was probated; asked him if he had proved up the will; that he had told me he would not. He said yes, he had proved something that did not amount to much; that if they had asked him the right questions he would have *knocked the black out.* Never heard him say any thing about the sanity of testator after probate of will.

The will was signed in the north-east corner of room. I did not see it signed; saw them writing at something; supposed it was the will. Am certain it was not signed on bed side, unless it was when I went after wafers. Testator's bed in south-west corner of room.

On cross-examination—Not certain that I heard all that was said, or recollect all that occurred in the room just before will signed. Am certain that testator did not request Wright to sign his name, till told by Byrne that he, or Wright, could sign it. At the time Byrne said here is Maj. Wright, he can sign it, testator said yes, Major, I wish you would. Dr. Purdom was in room, when negro boy Brice came in. Capt. Gant was entirely worthy of credit on oath.

Re-examined—The reason testator could not have seen the will signed was, because there were too many persons between him and the table; he could not have seen it as I could not.

George D. Perry—Had a conversation with testator month or two before his death. He spoke of the manner in which he had made his property, and said he wanted his brother in Tennesse, I think he said John, to have it.

J. K. Young: I am an attorney residing here, (Lewisville.) Negro boy came for me Saturday morning, 8th November, 1851, little after day light, day before testator died, and said testator wanted to see me. Went to his room. He asked me if the papers were fixed up in the suit between him and Lemay? Told him Pike had attended to it. He asked me if Pike was gone? I told him he had. He then said if the papers were not fixed up right, he wanted me to do it, referring to a suit which had been disposed of a few days before, in which Pike was his attorney. Remained there half an hour. Boy came for me again about same time next morning, saying Wilkins wanted to see me. Went to his room, asked him how he was, and told him not to be alarmed. He said he was not scared. Asked him what he wanted with me? He said he might die, and if he did, wanted to say certain things to me as a particular friend. He wanted me to write to his brother John, at Vernon, Tennessee, and say to him that he wanted him to have most of his property; and if he was not living, he wanted a sister in Carolina to have it, and if she was not living, he wanted her children and John's to have it. Told him I would comply with his request. Remained there some three quarters of an hour. Returned again about 7 or 8 o'clock, and asked him again about the disposition of his property. He lay a short time, and said he wanted me to write to his brother John, and say to him, he wanted him to have most of it, and another man the balance, and he would see that man himself; and made some statement in relation to a sister as before. Remained some ten or fifteen minutes, and then took a walk with W. A. Higgs. Absent half an hour. We were talking about testator's request. Told Higgs it could not be carried out without a will, and if I thought he was capable of making a will, would suggest it to him. Higgs said he thought I ought to do it. We then returned. I told testator his request could not be carried out without a will. That if his father and mother were dead, his brothers and sisters would share his property equally. He then requested me to write his will. I again asked

him about the disposition of his property, and he said he wanted his brother John to have most of it, and another man the balance, and he would see him. I told him I would comply with his request. Went to my office to write will, and meeting Dr. Purdom, he asked me what I was going to do? I told him I was going to write Wilkins' will. He said it was not worth while, for Wilkins was not capable of making a will, and had not been for hours. Concluded not to write it. Returned to see testator about 9 or 10 o'clock—spoke to him—do not think he recognized me. His hands were cold and clammy—could feel no pulse. He was lying in south-west corner of room. I took a seat in north-east corner—remained there some hour, during which time, Judge Fort, Parson Harris and others, came in, and sang and prayed. Do not think testator was conscious of what was going on, unless his attention was drawn to the subject. He muttered many things, which I could not understand. While they were singing and praying, he seemed more calm and quiet. I left the room soon after the services were closed.

W. A. Higgs: Testator died at my house. Saw him frequently during his illness. Saw him night before he died. Left his room at late bed time. Was waked up at three or four o'clock next morning, and told he was dying. Went in to see him—he looked wild and bad. Dr. Purdom and I had a conversation in relation to persons keeping wills by them. I asked testator if he had a will? and he said not. Told him he ought to make a will. Purdom remarked to me, he was not capable. He was muttering something all the time—recollect nothing he said, except he asked if the jury was empaneled, and had the witnesses all come. After day light, he requested me to send for Young, which I did. Young came, &c.: (testifies substantially same as Young, as to conversation between Young and testator, about his property, his making a will, &c.) Saw Wright, and witnesses to will take it to a table in testator's room. Testator was propped up in the bed and tried to write his name on a piece of paper, which was handed him on a glass frame. I was close to the bed. He tried

to write, and was then laid down, and said, hand me some of them fine pipe stems: said, look up there! When will was read to him and the name of *William* read, he said, his name is not *William*, but *John*. I think the will was read a second time, and when they came to the name of *John*, he said yes, *John* is the child. When testator could not sign will, Byrne said, I can sign it, or any one else if you request it: said, here is Major Wright, he can sign it. Wright then came to bed side, took the will and held it up, and asked testator if he wanted him to sign it, and he said yes. This was a short time after he had been laid down, and said, look up there, and hand me those pipe stems. Will was signed in north-east corner of room. Do not think testator saw it signed, as there was a crowd between him and table. Cannot say that testator took any notice of any one at the time will was signed: but do not think he did.

Gant told me if they had asked him the proper questions, at the time the will was probated, he would have *knocked the black out*, but he did not want to volunteer. Said testator knew no more what he was doing, when fixing will, than after he was dead. I asked him why he did not state that to the court when will was probated, and he said he did not want to volunteer.

(These declarations of *Gant* were admitted by the court, against objection of *Abraham*.)

On cross-examination—*Gant* was worthy of credit in any court. Higgs admitted he had written to John Wilkins to come out, as requested by his brother: and had taken an active part in his behalf. He had stayed at witness' house, and he had loaned him money to go home on, &c., but was not interested in the result of the suit, &c. Had said if his name had been suggested to testator, he would probably have given his property to him, as soon as to Abraham, &c. Had said that Abraham should not have it, if there was any law to prevent it, &c., &c.

Lewis A. Fort: Set up with testator all the night before he died. He was very talkative during the night only when he would doze off: slept but little: to about twelve o'clock at night,

he appeared to be very talkative, I suppose from fever. Did not consider him insensible up to that time. From that time on till day, his mind grew worse, and he would talk very irrational. Would frequently ask if they were not calling him, at the court house: frequently say Pike was going to make a speech and he wanted to go and hear him: frequently ask who *they* were, alluding to the bed posts. For some time, very solicitous that we should catch his horse, and wanted to go down to his plantation. Large fire in the house, and candle light all night. I left about day light, and returned in an hour and a half or two hours, and remained with him from that time, until near 12 o'clock: found his mind still flighty, and he appeared to be sinking physically. Would frequently talk as he did the previous night, often asking who was calling him at the court house. When I left him, I thought he was about drawing his last breath. I merely got out of the room to keep from seeing him die: came back in about half an hour, and found him dead. Was present when Byrne brought in the will and read it to testator. Heard Byrne ask him if he could write his name: pen was held out to him, and he took it without making any reply, that I heard. There was a paper on the back of a book, past-board or something of that sort, held up before him. At first, he seemed not to know what they wanted him to do. He was then told to write his name at a place pointed out by Byrne. He put the pen where B.'s finger was on the paper, and made some marks, rather incomprehensible to me. When they saw he could not sign his name, he was asked if Maj. Wright could sign it for him? He answered in the affirmative. Will was then taken to table for Wright to sign it, but I did not see him sign it. I suppose, from the time Byrne brought the will in to be signed, until I left to prevent seeing testator die, was within the limits of an hour. About that time, he would recognize some persons, and others he would not. He did not recognize me the last time I went to see him. About 12 o'clock the night before his death, I discovered a radical change had taken place in his mind. When the will

was taken to the table, I was left standing by the bed side. Table diagonally across room from bed towards north-east. Testator was lying with his head to south-west, on his back, face turned up. Crowd of persons between bed and table. I did not see Wright sit down to sign will. Do not think testator could have seen Wright sign will, lying in the position he was. When we were not talking with him, he was frequently speaking of various things, disconnected, so that I could not make any sense of it. I saw *Gant* sign the will, but do not think I saw Dillard sign it.

(Abraham objected to all matters of opinion given by witness, as to capacity of testator to make will, &c.)

On cross-examination—Heard Higgs ask testator during the night before he died, what disposition he would make of his property if he should die. His answer was vague and indefinite. When his mind was drawn to any particular subject, and he was asked a question about that subject, if it required a short answer, yes, or no, he would generally answer it correctly.

REBUTTING TESTIMONY ON THE PART OF ABRAHAM.—*J. L. Howard*—Stayed all night with testator some three or four months before his death. He was sick: said he was going to the mountains, and would have to get some one to attend to his little business: requested me to tell Abraham to come and see him, and said he believed he would give Abraham all his property, or what little he had.

Henry M. Lemay: Heard testator say, that the girl, *Sarah Jane*, and *Bill*, were given to him by John Lemay, with the express understanding, that they were to be set free at his death. The boy, John, was born of the girl, Sarah, after she had been given to testator.

John McCan: Heard testator say, while he was contending with Henry Lemay for certain property given him by John Lemay, deceased, that it was not the value of the property that he was after, but that he would spend all he was worth, or carry out the wish of his deceased friend. Said it was the wish of

John Lemay, that the negro, Sarah Jane, should be set free at his death.

Abraham also read in evidence, the order of the Probate Court, admitting the will to probate, &c., and appointing him executor, &c. Before the examination in chief closed, he proved the death of *Gant*, and his signature as one of the subscribing witnesses to the will.

The above is the substance of all the testimony offered or introduced by the parties on the trial.

Abraham moved the following instructions to the jury:

1. The law presumes every one to be sane and capable of disposing of his property, by will, until the contrary appear. The burthen, therefore, of showing that Allen T. Wilkins was insane, or incapable of making this will, devolves upon the party who impeaches it.

2. Mere imbecility of mind, in a testator, will not invalidate his last will and testament. That every person, not entirely deprived of reason, be his understanding ever so weak, is legally capable of disposing of his property by will; and courts, in passing on the validity of a will, do not measure the extent of the understanding of the testator, if he be not totally deprived of reason: whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his action.

3. Unless the jury believe from the evidence, that said Allen T. Wilkins was entirely deprived of his understanding, they cannot, by law, find against the validity of this will, upon the ground that he did not have sufficient mental capacity to dispose of his property by will.

4. That a man's capacity may be perfect, to dispose of his property by will, and yet, be inadequate for the management of other business.

5. That affirmative facts prove the existence of mind, and when that is once shown, the negative go only to show its defects and weaknesses, not its entire deprivation.

6. If Wilkins was beside himself at some times, but not con-

tinually, and it is doubtful whether the will was made while he was of sound memory or no, then, in case the jury believe, that the will is so conceived, as thereby no argument of phrenzy or folly can be gathered therefrom, it is to be presumed that the same was made during the time of his calm and clear intermissions.

7. In determining whether the testator was capable of making a will, it is important for the jury to consider the attendant circumstances: such as the interests he has favored, and the relations existing between him and those so favored by the will.

8. Evidence of the general knowledge and understanding of the testator, that he was the owner of property, and had the power of disposing of it by will, or his previous declarations and intent as to its disposition, and of his gratitude, friendship, or attachment to the donees, is proper matter for the consideration of the jury in determining the issue in this case.

9. If a party impeaches the validity of a will on account of a supposed incapacity of mind in the testator, it is incumbent on him to establish such incapacity by the clearest and most satisfactory proofs: the burthen of proof rests upon the party attempting to invalidate what, on its face, purports to be a legal act.

10. Although the opinion of the physician is competent, yet, the jury, in determining the question as to the capacity of the testator, are to form their own opinions and conclusions from the facts proved on the trial, in accordance with the principles of law, given them in charge by the court, and are not concluded by the opinions of any of the witnesses.

11. If the will was attested in the same room, the law will presume it to have been in the presence of the testator, and if he might have seen the witnesses attest, it is the same as if he had been actually looking at them when they subscribed their names. The object of the law in requiring the will to be attested in the presence of the testator, is to prevent another instrument being substituted in the place of the one intended as his will.

The court gave all of the above instructions but the *second*, *third* and *fifth*, and Abraham excepted to the decision of the court refusing these.

The petitioner moved the following:

1. If the jury believe from the the evidence, that the instrument, purporting to be the last will and testament of deceased, was signed by the attesting witnesses thereto, whilst the testator was in a state of insensibility, or not conscious of the disposition that was being made of his property, they must find for petitioner, against the validity of the will.

2. If the jury believe from the evidence, that testator's mind labored under such a delusion or derangement as to incapacitate him from making a rational disposition of his property, shortly before, as well as after the execution of the will, mere proof of calmness, or testator possessing the power to answer common and familiar questions propounded to him, at or near the time of the execution of the paper purporting to be the last will and testament, are not sufficient to rebut the presumption against the paper.

3. If the jury believe from the evidence, that the mind of the testator was laboring under delusion, or derangement, shortly before the execution of the will, such as to incapacitate him from making a rational disposition of his property, they must find for the petitioner, and against the will, unless the jury believe, from the evidence, that his mind was free from such delusion, or derangement, at the time of the execution of the will, the burthen of proving the same devolving upon the person setting up the will.

4. If the jury believe from the evidence, that the testator's mind, shortly before the execution of the instrument, purporting, &c., was laboring under delusion or derangement, such as to incapacitate him from making a rational disposition, and do not believe from the evidence, that at the time of the execution of the same, the mind of the testator was in such a condition as to enable him to be conscious of, and understanding the nature of the said instrument, the relative situation of his family and connections, the general extent of his property disposed by the same,

and that the same was disposed of according to testator's desire, they must find against the will.

5. If the jury believe from the evidence, that the said testator, at the time of the signing and sealing said instrument, was not mentally capable of making a rational and intelligent disposition of his estate, they must find against the will.

6. That if the jury believe from the evidence, that at the time of the signing of the said testator's name to the instrument, and the attesting the same by the attesting witnesses, the testator could not have seen said acts done, they must find for petitioner, unless the same were acknowledged by him.

The court gave all of these instructions, and Abraham excepted.

The jury returned a verdict against the validity of the will, and judgment was rendered accordingly.

Abraham moved for a new trial, on the grounds: 1*st.* That the court admitted illegal and incompetent evidence, &c.: 2*d.* The court refused to give certain instructions moved by Abraham, and gave those moved by petitioner, &c.: 3*d.* The verdict is contrary to law, evidence, and the instructions of the court.

The court overruled the motion for a new trial, and Abraham excepted, took a bill of exceptions setting out the evidence, &c., and appealed to this court.

1. It is insisted by the counsel for appellee, that the will is void, because Wright, who signed the name of testator thereto, did not, as it is alleged, subscribe his own name *as a witness.*

Every last will and testament must be subscribed by the testator at the end of the will, or by some person for him, at his request, &c. *Digest, chap.* 170, *sec.* 4.

Every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to such will, and state that he signed the testator's name at his request. *Ib. sec.* 5.

"There is no room to doubt that where another person signs the testator's name, by his direction, the will is invalid, unless

such person shall also write his own name as a witness: in other words, the requirement of the statute, that the witness in such case, shall also write his own name, is not merely directory, to secure better evidence of the due execution of the will, but is a necessary ingredient of the attestation itself," &c. "It is clear, from the statute, that where the testator does not himself subscribe the will, the formal attestation of the person who signs his name for him is required." *In the matter of the will of Cornelius*, 14 *Ark. Rep.* 682, 683.

The 5th section of the statute of Missouri, concerning wills, is literally the same as the 5th section of our statute, above copied. In *McGee et al. vs. Porter*, 14 *Mo. Rep.* 614, the Supreme Court of that State held, that this section of the act was mandatory, and not merely directory: and that the failure of the person who subscribes the testator's name, by his direction, to a will, to subscribe his own name thereto as a witness, stating that he subscribed the testator's name at his request, was a fatal defect in the execution of the will.

In this case, the following form of subscription and attestation was adopted:

"ALLEN T. WILKINS, [SEAL.]
By MOREHEAD WRIGHT,
In his presence, and at his request."

In *Sequine vs. Sequine*, 2 *Barb. Sup. Ct. Rep.* 393, Mr. Justice EDMONDS, delivering the opinion of the Supreme Court of New York, said: "I assent fully to the remark, that the requisites of the statute should be strictly enforced, and that it is far better that one, and even many, wills should be set aside, than that the safeguards which the wisdom of the statute has thrown around the aged and weak, in their dying hours, should, in the least, be impaired by a course of loose or liberal construction. But while this principle is fully implanted in the law, and while our courts have, with commendable firmness, insisted upon a rigid compliance with the formula required in our statute on wills, they

have never held that a *literal compliance was necessary.* A *substantial compliance is enough.* The Chief Justice, in delivering the opinion of the court for the correction of errors, in *Runsen vs. Brinkerhoff*, 26 *Wend.* 332, lays down the true rule, that no form of words is necessary. The only sure guide for the courts, is to look at the *substance*, *sense* and *object* of the law, and with the aid of these lights, endeavor to ascertain if there has been a *substantial compliance.*"

In this case, the statute was, perhaps, not *literally* complied with, but if we should say it was not *substantially* conformed to, we should be at a loss to give any clear and sensible reason for the conclusion.

Wright subscribed his own name, and clearly indicates that he signed the name of the testator, and at his request. True, he wrote his name immediately under that of the testator, but there is no good reason why this should not be as valid as if he had written it in the margin on the left. The statute does not point out the particular place on the paper where the name shall be signed. He does not expressly state that he signed it as a witness, but, in doing the act, he placed himself in the attitude of a witness to the fact.

2. It is insisted by the appellant's counsel, that the court erred in permitting the appellee to introduce the declarations of *Gant*, one of the subscribing witnesses to the will, who was deceased.

In all trials respecting the validity of any will, if any subscribing witness be deceased, or cannot be found, the oath of such witness examined at the probate, shall be admitted in evidence, and have such weight as the jury may think it deserves. *Digest, chap.* 170, *sec.* 35.

The appellant read in evidence the affidavit of *Gant* made in the Probate Court, upon the probate of the will. The appellee was permitted to prove declarations made by him shortly afterwards, tending to impair the effect of his affidavit.

It was held in *Stobart vs. Dryden*, 1 *Mees. & W.* 615, (quoted

with approbation in 1 *Greenl. Ev., sec.* 126,) that the declarations of a deceased attesting witness, to a deed or will, in disparagement of the evidence afforded by his signature, were inadmissible.

This case has been repeatedly reviewed by the courts of this country: held to be against the weight of English authorities: not approved as sound law, and the admissibility of the declarations of the deceased witness sanctioned. See *Harden vs. Hays*, 9 *Barr Penn. Rep.* 157; *Townshend vs. Townshend*, 9 *Gill's Rep.* 419; *Losee vs. Losee*, 2 *Hill N. Y. Rep.* 612, *and cases cited in note; McElwee vs. Sutton*, 2 *Bailey's Rep.* 128; *Crouse et al. vs. Miller*, 10 *Serg. & R.* 157; *Fox vs. Evans*, 3 *Yeates* 506; *Gardenhire vs. Parks et al.*, 2 *Yerger Rep.* 23; *Lessee of Vandyke vs. Thompson et al.*, 1 *Harrington* 109.

Upon these authorities, some of which are in point, and others upon analogous principles, we think the court did not err in admitting the declarations of *Gant*, to disparage the weight to be attached to his affidavit before the Probate Court. Had he been living, he should have been called and examined, and then it would have been competent, by cross-examination, to prove his declarations. But he being dead, he could not be called, and his affidavit before the Probate Court, stood in the place of his examination. The party ought not, by the death of the witness, to be deprived of obtaining the advantage of his declarations, disparaging what he had sworn while living. 3 *Burrow* 1244; 4 *Barn. & Ald.* 55; 5 *Bing.* 435.

3. In *Kelly's heirs et al. vs. McGuire et al.*, 15 *Ark. Rep.* 601, this court held, that it was competent for witnesses to give their opinions as to capacity or incapacity, when the facts or circumstances are disclosed on which the opinions are founded. The witness, *Lewis B. Fort*, stated very fully and clearly, the facts and circumstances upon which he founded his opinions of the sanity of the testator, Wilkins. No objection appears of record to have been taken to opinions given by any of the other witnesses.

4. The exceptions in reference to the instructions are next to be considered.

The *second* and *third* instructions moved by the appellant, and refused by the court, were, in effect, that unless it was proven that the testator was *totally* deprived of *reason* and *understanding*, his will was valid.

The cases of *Jackson vs. King*, 4 *Cowen* 207, *Odell vs. Buck*, 21 *Wend.* 142, and *Stewart's Executor vs. Lispenard*, 26 *Wend.* 255, would seem to sustain this doctrine: indeed, the instructions in question appear to have been copied from the abstracts of the *Lispenard case*, where the previous New York decisions are reviewed.

Alice Lispenard was naturally of weak mind—a partial *idiot*, but her will was upheld because she was not entirely deprived of reason and understanding.

The doctrine of the *Lispenard* case, was urged upon this court, in support of the legal capacity of Greenbury Kelly, to dispose of property by deed, in the case of *Kelly's heirs et al. vs. McGuire et al.* Greenbury Kelly, by reason of extreme old age, disease, &c., was laboring under *dementia*, and the court, by HEMPSTEAD, Special Judge, said:

"It would be wholly impracticable to lay down any exact general rule as to incapacity to contract; because, each case will be found influenced by its own peculiar circumstances. But it may be freely admitted, that mere weakness of understanding is not, of itself, sufficient to invalidate a contract, if the person is *capable of comprehending the subject.* The law does not seem to have attempted to draw any discriminating line, by which to determine, how great must be the imbecility of mind, to render a contract void: or how much intellect must remain to uphold it. The difficulty of making such discrimination is apparent. *Jackson vs. King*, 4 *Cowen* 218."

The deed was held void, partly for want of capacity, and partly for fraud in obtaining it.

Wilkins appears to have been a man of good enough sense,

when in health, but, suddenly stricken down by disease, his mental powers seemed to have participated in the derangement of the physical organs upon which they were dependant for manifestation.

It appears from the above extract in the Kelly case, that this court, to some extent, recognized the correctness of the doctrine of the Lispenard case, but we are not warranted, from the language used, in saying that they meant to approve the full scope of the doctrine, that there must be a *total deprivation of reason and understanding*, to render a deed or will invalid at law.

We do not propose to say more, in this case, upon this point, than was said in the Kelly case, deeming it unnecessary, in view of the final disposition which we shall make of the case.

The *fifth* instruction moved by the appellant and refused by the court, is copied from *Dean's Medical Jurisprudence, p.* 556. It is MR. DEAN'S mode of expressing one of the doctrines established by the Lispenard case. Though, perhaps, logically correct, it is rather a proposition in mental philosophy, than a practical principle of law. It might have been given to the jury without error, but was hardly necessary, to enable them to come to a correct conclusion as to whether the testator was rational—whether he was sufficiently in his senses to understand what he was doing, when the will was executed or not.

The appellant made a sweeping objection to all of the instructions given by the court to the jury, at the instance of appellee. No specific objection is urged to any one of them in the argument here, except to the *sixth*.

It is manifest, from the *eleventh* instruction, given at the instance of the appellant, and the *sixth*, given on the motion of the appellee, that the court, and the counsel for both parties were under the impression, at the time this cause was tried, that the statute required the witnesses to subscribe the will in the *presence*, actual or constructive, of *the testator*.

The *fourth section of chapter* 170, of the *Digest*, which prescribes the formula to be observed in the execution of wills, does

not require the witnesses to subscribe their names to the will in the presence of the testator. The 19th section of the same chapter provides for the taking of the deposition of a subscribing witness, when he is prevented by sickness from attending at the time any will may be produced for probate, before the Probate Court, or clerk thereof in vacation, or resides out of the State, or more than sixty miles from the place where the will is to be proven: and the 20th section requires such witness to state, in his deposition, that he subscribed the will, in the *presence of the testator*. There is, therefore, an incongruity between the 4th and 20th sections. Had they been construed *in pari materia*, possibly they might have been made to harmonize; but, in *Rogers vs. Diamond*, 13 *Ark. Rep.* 487, they were construed independently, and the 20th section held only to apply to the deposition of the witness, and what statements it must contain, where his personal attendance cannot be had before the Court of Probate.

According to the case of *Rogers vs. Diamond*, it would seem, therefore, that the law stands thus: If the witness be personally present in court, &c., to prove the execution of the will, he *need not state* that he subscribed it in the *presence of the testator;* but if his deposition be taken, he is required to state that he subscribed *in the presence of the testator;* so that, in such cases, the validity of the will would be made to depend upon the mode in which the proof is taken. There is surely no valid reason for such a distinction. The fault, however, is in the Legislation; and deeming it highly impolitic to change the decisions of this court upon important branches of the law, like this, we shall not review the case of *Rogers vs. Diamond*, for the purpose of attempting to harmonize the incongruity between the provisions of the statute which we have been considering, deeming it the more appropriate province of the Legislature to amend the sections, so as to make them harmonize.

We must hold, therefore, upon the authority of *Rogers vs. Diamond*, that the court below erred in giving the *sixth* instruc-

tion moved for the appellee: but, it is to be presumed that the error was *neutralized* by the *eleventh* instruction, given to the jury, at the instance of the appellant.

5. The reversal or affirmance of the judgment of the court below in this case, does not depend upon the question, whether the court did, or did not err, in some of its decisions, pending the trial, but upon the question whether, upon the whole record, the decision of the court, overruling the motion for a new trial, was right. The jury, upon all the evidence introduced, or offered by the parties, rendered a verdict against the validity of the will; and, no doubt, upon the ground of the mental incapacity of the testator. We cannot conclude, upon all the facts of the case, that their determination was influenced by any misdirection of the court. The evidence clearly supports the verdict. We think that no impartial mind can examine the testimony, and avoid the conclusion, that at the time the will was signed for Wilkins, his powers of intellect were too far wasted and deranged by the violent disease, which was pressing him into the grave, and which terminated his mortal existence so shortly afterwards, to make a rational disposition of his property. He was, evidently, laboring under delusion from about 12 o'clock of Saturday night, until he died, between 12 and 1 o'clock of the next day. When he was aroused from his reveries, and his attention called to any particular thing, he seemed to understand it, but his mind soon again relapsed, and went upon its incoherent wanderings. He had lost the power of discriminating objects, and of combining and arranging ideas; or to use the expressive language of Major Wright, "his mind was not strong enough to *organize* anything." Seemed, at times, to be unconscious of his real condition—wanted his horse caught to ride to his farm—desirous to go to the court house and hear Captain Pike argue a case, in which he had been interested, &c.—fancied he was working at the forge, and directed the striker to *blow up*. The inanimate bed posts assumed, in his delirious mind, the forms of men, and again, of pipe stems, &c. True, he directed Mr. Byrne to pre-

pare his will; but, before this, on the same morning, he requested Mr. Young to write a will, making a different disposition of his property.

We cannot suppose, that if the case were reversed, and sent back for a new trial, another jury, upon the same evidence, and a correct interpretation of the law, would sustain the validity of the will. Upon the whole record, therefore, the judgment is affirmed. *Zachary vs. Pace*, 4 *Eng.* 213; *Gibbon vs. Dillingham*, 5 *Ib.* 16; *Jordan vs. Foster*, 6 *Ib.* 139.

Hon. C. C. SCOTT, Judge, absent.

MOSS VS. THE STATE.

One of several defendants in an indictment, still pending against him for the same offence, is not a competent witness for his co-defendant.

This court will not set aside the verdict of a jury upon the *weight of evidence.* (14 *Ark.* 419; 13 *Ib.* 285, 236, 712; 7 *Eng.* 43.)

This court will presume in favor of the verdict and judgment, where the bill of exceptions fails to state that *all the evidence* is put upon the record. (2 *Eng.* 348; 3 *Ib.* 429; 4 *Ib.* 478.)

Appeal from the Circuit Court of Prairie County.

Hon. JOHN J. CLENDENIN, Circuit Judge.

WILLIAMS & WILLIAMS, for the appellant.

Mr. Attorney General, JORDAN, contra.

Mr. Justice HANLY delivered the opinion of the Court.

The appellant was indicted in the Circuit Court of Prairie county, at the February term, 1855, with George A. Eagle, William Whorton, and Michael N. Whorton, under the 8th section of the gaming act, (see *Digest, page* 367,) for playing at, and betting upon, with his co-defendants, a "certain unlawful game of cards, commonly called "*seven up*," within the county of Prairie.

At the August term, 1855, the defendant, (appellant) appeared in court, interposed his plea of "not guilty," and was tried by a jury and convicted.

No exceptions were taken at the trial, to any ruling of the court.

The appellant moved for a new trial, setting out the following causes, *to wit:* 1st. "The court erred in refusing to permit the defendant, Moss, to introduce the said George A. Eagle, as a witness in his behalf, the said Eagle being indicted with the defendant, and not yet put upon his trial: 2d. The verdict of the jury is contrary to the law and evidence."

The court overruled the motion for a new trial, and the appellant excepted, setting out in his bill, his motion for a new trial as above, and the following facts, which are represented as having been deposed to at the trial.

George Ewell, a witness introduced by the State, testified, that some time within twelve months, previous to the finding of the indictment in this cause, he was at the *grocery* of Mansel Stone, in Prairie county, at night, and saw the defendant, (appellant) and the other defendants named in the indictment, playing a game of *seven up at cards*. One dollar was staked. Each one of the defendants bet twenty-five cents on the game, all of them playing and betting at the same time. That he, witness, thought, when he gave evidence before the grand jury in this case, that George A. Eagle, who is indicted in the same indictment with the appellant, Moss, was in said game, but since that time he had concluded from the "talk around," that he might be mistaken, but sup-

posed he, Eagle, was in the game, as stated before the grand jury. He was, however, not certain of this, but gives it as his present impression. He further stated, that this betting was done in Prairie county. Did not recollect to have seen Mansel Stone present when the game was going on.

The bill of exceptions states, that the appellee "closed her testimony in chief" when the above named witness had concluded his evidence as above, and that the appellant, Moss, then called *Mansel Stone* as a witness in his behalf, who testified; that, on on the night that the appellant, William and Michael N. Whorton, (who are included in the same indictment) were at his grocery playing cards, when the witness Ewell was there, he saw the playing; that he was in the house waiting on them, and saw *no money on the table, or bet by any of the parties*; that he had no person to attend to his house on that night, and attended to the business himself, and did not believe there was any money bet, but there might have been; that, at the time, and on the night alluded to, George A. Eagle was not in the game, nor was he in the house, or on the premises.

The bill of exceptions further states that the appellant "after the State had gotten through with all the evidence on the part of the prosecution," offered to introduce George A. Eagle, one of the defendants in the indictment in this case, as a witness in his behalf, which was objected to by the attorney for the appellee, and the objection was sustained by the court, and the said Eagle excluded as a witness for the appellant. To which ruling of the court, the bill of exceptions states, "the appellant excepted at the time," but which is not noted or mentioned on the minutes of the court, as shown by the transcript in this cause.

The bill of exceptions omits to state whether it contains all the evidence introduced at the trial.

The appellant, on his motion for a new trial being overruled as above, and his exceptions filed and made a part of the record in the cause, prayed an appeal to this court, which was granted, and he now asks to reverse the judgment of the court below: 1st.

because Eagle was not allowed to testify in his behalf at the trial, and secondly, because the court would not grant him a new trial; averring that the verdict of the jury is contrary to law and evidence.

We will proceed to dispose of these assignments of error in the order in which they are respectively presented.

1. Was Eagle a competent witness for the appellant, under the facts and circumstances which we have stated? We hold he was not; for it appears to be a technical rule of evidence, and one well and firmly settled, that a party in the same suit or indictment cannot be a witness for his co-defendant, until he has been first acquitted, or at least convicted, and it seems, whether the defendants be tried jointly or separately does not vary or change the rule. It is, his being a party to the record that renders him incompetent, and the practice is, when nothing appears against one of the defendants, for the court to direct his immediate acquittal, so that the other defendants may use him as a witness. See 1 *Hale P. C.* 306; *Peake's Ev.*, 100, *note*; 6 *Term Rep.* 623; *The People vs. Bill*, 10 *John's. Rep.* 95.

It follows, therefore, that the court below did not err in excluding Eagle as a witness for the defendant, he being charged in the indictment with appellant, with the same offence, and had not been tried and acquitted, or convicted at the time he was offered as a witness.

Our statutory provision, authorizing a severance of trial in criminal prosecutions, where two or more are included in the same indictment, and the ruling of this conrt in the case of *Calico & Drake vs. The State*, 4 *Ark. Rep.* 430, cited and relied on by the counsel for the appellant, do not, in our judgment, militate against the principles above stated. The reason of the rule of evidence, which we have stated, remains in its full vigor, notwithstanding the act and adjudication referred to.

The determination of this point brings us to the consideration and solution of the second and remaining one presented by the assignment of errors; that is to say, did the court below err in overruling the appellant's motion for a new trial?

2. Upon this point there can be no doubt. There were but two witnesses who testified at the trial—Ewell and Stone. The former made an affirmative statement of facts, which tended to prove, quite conclusively, that the appellant was guilty as charged. The testimony of Stone was of that negative character, which did not counterpoise that of Ewell. The jury were the exclusive judges of the credit due to the witnesses, from the peculiar circumstances developed by them when upon the stand. They had a perfect right to discredit the statements of Stone, and found their verdict upon those of Ewell; and neither the court below, nor this court could, legitimately, disturb their verdict. To do so, would be to violate a salutary, and it is to be hoped, a permanent rule of practice, both in civil and criminal causes; the rule in such case being, that a judgment may be reversed upon a motion for a new trial overruled, where there is a lack of evidence of some material matter necessary to uphold the verdict; but, because a verdict may appear to be against evidence, this court will not assume the power of dictating to juries that they must believe evidence against their own convictions of its truth. See *Miller vs. Ratliff*, 14 *Ark. Rep.* 419; *Mains vs. The State*, 13 *Ark. Rep.* 285; *Doghead Glory vs. The State*, *Ib.* 236; *Cameron vs. The State*, *Ib.* 712; *Floyd vs. The State*, 7 *Eng. Rep.* 43.

But independent of the foregoing considerations, this court would be compelled to sustain the verdict of the jury in this cause on another account. The transcript fails to state that the evidence embodied in the bill of exceptions was all the evidence adduced at the trial. The law in such case is, that it will be presumed that facts, without proof of which the verdict could not have been found, were proven at the trial without the record expressly negatives such facts. See *Best on Presumptions* 68; *Wharton's Amr. Cr. L.* 269; *Smith vs. Berry*, 1 *S. & M.* 321; *Pindor vs. Felts*, 2 *Ib.* 535; *Briggs vs. Clarke*, 7 *How. Rep.* 457; *Robinson vs. Francis*, *Ib.* 458; *Jordan vs. Adams*, 2 *Eng.* 348; *Taylor vs. Spears*, 3 *Ib.* 429; 4 *Ib.* 478.

In view of the whole case, we hold, therefore, that there is no error in the jugdment in the Prairie Circuit Court upon the entire transcript, and we accordingly affirm the judgment. Let the judgment be affirmed with costs.

Mr. Justice SCOTT, absent.

GREENWOOD VS. THE STATE.

Where it appears from the transcript that there is a conflict between the statements in the record entry, and in the bill of exceptions, this court will disregard the statement contained in the bill of exceptions. (*State vs. Jennings, use &c.*, 5 *Eng.* 449.)

Where the record states that the jury were "duly elected, tried and sworn herein," this court will hold that it is shown with sufficient certainty, by intendment, that the jury were properly sworn in the cause.

The appointment of a deputy sheriff continues no longer than the term for which his principal was elected; and if the principal sheriff be re-elected, it requires a new appointment, and approval under the statute, to continue in office his former deputy.

Appeal from the Circuit Court of Poinsett County.

Hon. GEORGE W. BEAZLEY, Circuit Judge.

WILLIAM BYERS, for the appellant.

JORDAN, Attorney General, contra.

Mr. Justice HANLY delivered the opinion of the Court.

This was an indictment against the appellant, for an assault and battery, upon the body of one Thomas Henderson. The case

was tried before a jury upon a plea of not guilty. The facts, as they appeared in evidence, are, that one Thompson Cooper, who had, at one time, been appointed deputy to James Davidson, sheriff of Poinsett county, but after such appointment, Davidson's term of office had expired, and he had been re-elected, commissioned and qualified, as sheriff, and Cooper had not been re-appointed deputy, but believing himself to be deputy, a writ of capias came to his hands against the appellant for an assault and battery. Cooper called upon Henderson to go with him, and assist him in arresting appellant on the capias. They found appellant at home, and in bed, and Cooper informed him of the nature of his business. Appellant got up, put on his clothes, and Cooper commenced reading the writ to him, when he left the house and started off in a tolerably fast gait. Henderson pursued, and overtook him at the yard fence, and just as he crossed the fence, Henderson caught him by the coat tail. Appellant endeavored to extricate himself from Henderson, by pulling loose, but Henderson held to the coat tail. Appellant failing to pull himself loose, turned, and struch Henderson three blows. The bill of exceptions states that, "this happened in Poinsett county, and within one year next before the filing of the indictment in the cause."

Appellant moved the court to instruct the jury: "If they believe from the evidence, that Thompson Cooper was appointed deputy sheriff, under James Davidson, sheriff of Poinsett county, and that Davidson was re-elected and qualified, after the appointment, and before the arrest of Greenwood, and that Cooper was not appointed deputy sheriff after Davidson's re-election, Cooper was not, in law, the deputy of Davidson; and, as such, was not authorized or warranted in taking the body of Greenwood, by virtue of any process from this court; and that the said Cooper, in so doing, and all persons acting with him in the arrest of Greenwood, were trespassers, and Greenwood had a right to repel any injury offered to his person by the said Cooper, or any

one acting with him;" which the court refused to give and appellant excepted.

The court then gave, on its own suggestion, and against the objection of the appellant, the following instruction, *to wit:* "If the jury shall find, from the testimony, that Thompson Cooper was appointed legally, a deputy sheriff, and Davidson, the sheriff, was re-elected at the next regular election, and Cooper continued to act as deputy sheriff, by the consent and desire of Davidson, the sheriff, Cooper was a legal deputy sheriff, without formal re-appointment." To the giving of which instruction, appellant also excepted.

The jury found the appellant guilty, and assessed his fine at ten dollars, and the court rendered judgment in conformity with the verdict.

Appellant moved the court for a new trial, and assigned as causes: 1*st.* That the verdict is contrary to the evidence. 2*d.* That the verdict is contrary to the law. 3*d.* That the court erred in refusing to give the instruction asked for by the appellant. 4*th.* That the instruction given by the court is not law.

The motion for a new trial was overruled by the court, for which appellant also excepted.

The transcript from the entries of the recorded minutes of the court, states: "That the defendant pleaded not guilty, to which the State joined issue, and thereupon to try the issue joined, came a jury, &c., who were duly elected, tried and sworn herein:" and the bill of exceptions states, "that the cause was submitted to a jury who were empanneled and sworn to try said cause."

The cause was brought to this court by appeal.

Several errors were assigned, which we will proceed to notice and determine, in the order in which they are presented.

It is insisted on the part of the appellant, that the transcript in this cause, shows that the jury who tried the issue in the court below, were sworn in a manner falling short of the requirements

of the law in such cases. There appears, on the face of the transcript, a slight discrepancy, in this: the transcript of the minute entries of the court, states that the "jury were duly elected, tried and sworn," whilst the transcript of the bill of exceptions taken on the overruling of the appellant's motion for a new trial, only states, "that the cause was submitted to a jury, who were empanneled and sworn to try said cause."

In the case of *The State vs. Jennings, use &c.*, 5 *Eng. Rep.* 449, Mr. Justice WALKER, in delivering the opinion of the court, upon a point similar to the one which we are considering at the present, remarked: "That the principal ground relied on for a re-consideration is, we apprehend, based upon a misapprehension of the record. It no where appears, of record, that the plaintiff abandoned any of the counts in his declaration. The statement in the bill of exceptions, that such was the case, furnishes no evidence whatever of the fact. The office of a bill of exceptions is, to preserve the evidence of facts, which, in the ordinary course of proceeding in the courts, would not otherwise appear of record in the case." By applying the test suggested by this court, in the case just quoted, we are bound to disregard the statement contained in the bill of exceptions, in reference to the swearing of the jury, and predicate our decision, upon the point we are considering, upon the entry copied from the minutes of the court.

The question recurs, does the entry from the minutes of the court show, with sufficient certainty, that the jury, who tried the cause, were sworn in the manner prescribed by the law in such cases?

There have been several adjudications of this court bearing on the question, ranging from 2d to 7th *English Reps.* In the case of *The State vs. Smith Bell*, 5 *Eng. Rep.* 540, Mr. Justice SCOTT, in delivering the opinion of the court, said: "The record shows that the jury were sworn only 'to try the issue joined.' This was irregular: they should have been sworn to give a true verdict, according to law and evidence, (*citing Patterson vs. The*

State, 2 *Eng. Rep.* 59.) Had it been stated on the record that the jury were *duly* or *regularly sworn*, we would have presumed that the oath had been properly administered."

So, in the case of *Sanford vs. The State*, 6 *Eng. Rep.* 331, JOHNSON, C. J., said: The jurors in such cases, are the judges as well of the law as the facts, and, consequently, should be sworn to try the case according to both, or at least it should appear that they were *regularly* or *duly sworn*," (citing the cases from 2d to 5th *Eng. Rep.*, above quoted.) And to the same purport are the cases of *Burrow vs. The State*, 7 *Eng. Rep.* 70, and *Bivens vs. The State*, 6 *Eng. Rep.* 465.

Upon the authority of these cases, we hold that the transcript shows, with sufficient certainty, by intendment, that the jury were properly sworn in this cause, and we will not disturb the verdict on account of the defect insisted upon by the appellant.

The instruction asked for by the appellant, and the one given by the court, upon its own suggestion, involve the same question, and the principles of law which will determine the one, will be equally decisive and conclusive of the other. We will, therefore, for the sake of brevity, consider them together.

It may be stated, as an incontrovertible proposition, that, if Thompson Cooper, the person who assumed to act as the deputy of James Davidson, the sheriff of Poinsett, was not, at the time the process under which the arrest of appellant was made, the deputy of Davidson, both he and Henderson, the person summoned to assist in the arrest of the appellant, and on whom the assault aud battery is charged to have been made, were trespassers in what they did: for the process which came to the hands of Cooper, whether placed there by the clerk, supposing him to be deputy of Davidson, or by Davidson himself, did not authorize Cooper to execute it; and, consequently, did not warrant him to call to his aid the assistance of Henderson, to do what he was not authorized to do. The statute, under which sheriffs are authorized to appoint deputies, is in these words: "Each sheriff may appoint one or more deputies, for whose con-

duct he shall be responsible: and the appointment of each deputy shall be approved or confirmed by the Circuit or County Court: and such approval shall be entered on the record of the court." See *Digest*, *sec.* 6, *p.* 939.

It may be laid down, we think, as an unquestionable proposition, that, since the passage of the act which we have just quoted, a deputy sheriff cannot be appointed, so as to be invested with the authority of the principal, without his appointment shall be confirmed or approved by the Circuit or County Court, of the county in which he is to act as such deputy. And we think it clear, from the tenor of the section of the Digest in question, that this approval by one of the courts named, must precede the time at which the person shall commence to act as such deputy, for the authority to so act is derived from the law, coupled with the appointment. The appointment, without the confirmation or approval of the court, being an inchoate authority.

We will proceed, therefore, to determine from the transcript in this cause, considered in connection with the principles of the law bearing upon the question, whether Cooper was the legally constituted deputy of Davidson, at the time he undertook to execute the process of capias on the appellant.

There can be no question, that, if the Legislature had not considered it imperative upon that department to prescribe some restrictions upon the inherent powers of sheriffs of the State, by the enactment of the section already given, they may well have exercised the right of appointing deputies, as a power belonging to them, derived from the common law, or sanctioned by custom, "whereof the memory of man runneth not to the contrary."

It is to be presumed, that the Legislature had an object in view at the time the provision referred to was engrafted upon our system of laws, and it is manifest, we think, what object was intended, and what was expected to be accomplished by it. It was the evident intention of the Legislature to take from the sheriffs, throughout the State, the common law right in respect

to the appointment of deputies, and make its exercise dependent, to some extent, upon the discretion of one of two courts, and thereby better insure the appointment of faithful functionaries—such as, the public might confide in on account of their integrity, probity and qualification.

It may be remarked that, notwithstanding the legislative enactment referred to, and notwithstanding the approval of the appointment by one of the courts named, a deputy sheriff holds his office or appointment, not for any given or named period fixed or limited by the law, but the sufference or consent of his principal, so that it does not extend beyond the time limited as the period of tenure for the principal. The principal sheriff holds his office, under the constitution, for two years. He cannot, therefore, confer an appointment upon a deputy, to extend to a longer period than his own tenure. At the time his office expires by constitutional limitation, his appointments of deputy are, *eo instanti*, revoked by operation and implication of law. Should he be re-elected, he derives his authority to act, as he did in the first instance, from his new election under the constitution. He is, to all intents and purposes, a new officer—is required to be commissioned anew—to take anew the oath of office, make a new bond, &c. So, we apprehend, in respect to his deputies—their offices having expired with the commission of the principal, they must have a new commission posterior to his, and the sanction of the court must be obtained anew.

In the case at bar, the evidence shown by the transcript, renders it very clear, that the instruction moved for by the appellant, did not present a naked or abstract question of law. The evidence is conclusive upon the point, that Cooper had not been re-appointed deputy sheriff of Poinsett county, since the re-election of Davidson, next before the time at which he, Cooper, attempted to execute the process, in conjunction with Henderson, upon appellant. We, therefore, hold that, without such re-appointment and approval, or confirmation thereof by the Circuit or County Court of Poinsett county, he, Cooper, could

not legally act as deputy sheriff. He was, therefore, not warranted in calling upon Henderson to aid him in doing what he had no authority to do: that is to say, to take appellant under the warrant placed in his hands. His conduct towards appellant, in his arrest under the warrant, was a trespass upon his person, and the act of Henderson in laying hold of appellant on his attempt to escape, constituted an assault and battery upon the person of appellant, which authorized appellant to resist with just such force as was necessary to repel the attack upon his person.

The court, therefore, erred in refusing to give the instruction asked for by the appellant, and also in giving the one on its own suggestion.

We are constrained to believe, from the evidence in the cause, that, if the jury had not been misled by the instruction of the court, their verdict would have been different.

We, therefore, reverse the judgment of the court below, and remand the cause to the Circuit Court of Poinsett county, with directions that a new trial be granted the appellant, and that the court proceed in accordance with law, and not inconsistent herewith.

Mr. Justice SCOTT, absent.

MOONEY VS. BRINKLEY.

A defendant in chancery having submitted to answer the whole bill, and not having, by demurrer, nor by answer, objected to the jurisdiction of the court over any of the matters set up in the bill, cannot, upon the hearing, nor upon appeal, object to the jurisdiction, unless the court was wholly incompetent to grant the relief sought by the bill.

A mortgager having the right of possession of the mortgaged premises, under the terms of the mortgage, until the time of payment limited thereby, cannot be dispossessed by an action at law before the time limited for payment.

But if the mortgager of real estate acts so improperly as to cause damage or waste, whereby the debt of the mortgagee may be jeoparded, the remedy of the mortgagee would be by a bill in equity, to place the mortgaged property in the hands of a receiver, and not by an action at law of forcible entry and detainer.

And if he resorted, illegally, to such action at law, and thereby subjected himself to an action of trespass; and to relieve himself from liability for such tresspass, had to ask the interposition of a court of equity, he should bear all the costs growing out of such illegal action on his part.

Where a mortgagee, for the purpose of taking care of mortgaged property, incurs expenses after he comes ligitimately into possession, he will be allowed them in the settlement; but if he obtains such possession illegally, and thereby unnecessarily incurs such expenses—as where, by an illegal action of Forcible entry and detainer, the mortgagee obtains possession of a tannery and incurs expenses in working out the hides in tan, which was the proper business and trade of the mortgager—he ought not, in equity, to be allowed such expenses, at the cost of the mortgager.

Appeal from Clark Circuit Court in Chancery.

The Hon. SHELTON WATSON, Circuit Judge.

FLANAGIN & CUMMINS, for appellant.

WATKINS & GALLAGHER, for appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court. On the 14th of September, 1848, John S. Brinkley filed a bill

on the chancery side of the Clark Circuit Court, against Lazarus B. Mooney and James R. Rogers, to foreclose a mortgage, and for other purposes.

The allegations of the bill are, substantially, as follows:

That, on the 21st of May, 1846, Mooney purchased of Rogers a tract of land lying near Arkadelphia, containing four acres, for $120, giving his note therefor, payable on the 15th November, 1847, and taking Roger's bond for title.

About two years before the filing of the bill, complainant being a merchant in Arkadelphia, and Mooney being poor and destitute of capital, but complainant having confidence in his honesty, industry, and believing he would prosper, if assisted, at the request of Mooney, furnished him with means to establish and carry on a tan-yard upon the tract of land bought by him of Rogers.

On the 28th of January, 1847, complainant and Mooney had a settlement in respect of the money, merchandize, stock, &c., furnished by complainant for the purpose aforesaid, and it was found that Mooney was indebted to him $1003 08, for which he executed to complainant his obligation, due one day after date, with interest at six per cent., with the privilege of discharging the same "in leather, boots, shoes, and any other trade that might be agreed on by the parties, at cash prices, according to custom." To secure the payment of which, Mooney, on the same day, executed to complainant a mortgage, or trust deed, upon the tract of land aforesaid, and all the improvements thereon; also 168 beef hides; 50 deer skins, and 13 kip skins, a portion of which hides were then in tan; also one wagon, one yoke of oxen, and all the hides of any description which might come into the tan-yard between the date of the deed, and 1st of March, 1848, Mooney reserving the right of retailing leather in the usual course of trade. The property was conveyed to complainant in trust, and upon condition, that if Mooney should pay the amount of the above obligation, "which might be discharged in trade as specified in the face of the note," with interest, &c., on or before the 1st day of March,

1848, complainant was to re-convey to Mooney the premises; but on default of such payment, complainant was empowered to advertise and sell the property for the payment of the debt, &c. The bond and mortgage are exhibited.

That, though the debt was due when the mortgage was executed, yet for the purpose of favoring and indulging Mooney, so as to enable him to pay the debt out of the proceeds and profits of the tan-yard, without a sale of his property, the mortgage was so drawn as not to be subject to foreclosure until the first of March, 1848.

That, without the assistance of complainant, Mooney could not have established and carried on the tan-yard—complainant having furnished all tools, implements, provisions, &c., necessary to support the family and hands of Mooney, and paid the wages of the laborers engaged in establishing and carrying on the yard.

That, after the execution of the mortgage, complainant continued, as before, from time to time, to furnish such supplies as were necessary to support the family of Mooney and carry on the tan-yard; and the supplies so furnished amounted to $219 49, a bill of the particulars of which is exhibited.

After the yard was put into operation, complainant delivered to Mooney two lots of hides to be tanned on the shares one-half for the other—the first lot consisting of 200 cow hides; 21 kip skins; 81 deer skins, and one goat skin, for which Mooney's receipt was taken, dated 6th February, 1847, and is exhibited: The second lot consisting of 13 cow hides and 2 calf skins, as per receipt of 10th March, 1847, which is exhibited. That Mooney received hides from divers other persons to be tanned on the same terms, which were in process of tanning when the yard came into the hands of complainant, as hereinafter stated.

That by proper industry and attention to business, Mooney might have paid the sums due complainant out of the proceeds of the tan-yard, without a sale of the mortgaged property, but after the execution of the mortgage, he became dissipated, was constantly intoxicated, loitered about the *dram-shops* in Arka-

delphia, and was utterly incapable of attending to any business. Finding that, in consequence of his dissipation, he was neglecting the tan-yard, permitting the hides to spoil and daily become damaged, complainant became convinced that Mooney was acting in bad faith towards, and had formed a settled design to defraud, him. He was utterly insolvent, and unless complainant secured the mortgaged property he would lose his debt. That after the season for procuring tan-bark had passed, Mooney, in pursuance of his design to defraud complainant, sold, or contracted to sell, all tan-bark taken and preserved by him for the use of the yard for that year, to a neighboring tanner, and made an arrangement to transfer all the hides in his tan-yard, to another tan-yard; and was on the point of carrying such design into execution. Complainant, under these circumstances, for the purpose of protecting his rights, and preventing Mooney from carrying his fraudulent designs into execution, on the 16th of June, A. D., 1847, brought an action of *unlawful detainer* against him, in the Clark Circuit Court, for the property mentioned in the mortgage, together with the tan-yard, all implements, tools, apparatus, and all property of every description, attached to, or in any way connected with said tan-yard; and on the same day, by virtue of the writ issued therein, complainant was put into possession of the premises by the sheriff. At the return term, September, 1847, Mooney demurred to the declaration for misjoinder of causes of action; complainant offered to file an amended declaration, which the court would not permit him to do, unless he would restore the personal property delivered to him under the writ; he declined to do this, and judgment was rendered in favor of Mooney on the demurrer. He then moved for restitution of the property, which the court refused, and both parties brought error. A transcript of the proceedings is exhibited. See *Brinkley vs. Mooney*, 4 *Eng. Rep.* 445, 449.

That complainant, after thus obtaining possession of the premises, finding the hides spoiling for want of attention, and deeming it necessary to secure the amount due him by Mooney, &c., kept possession of the tan-yard, &c., hired hands and proceeded,

at his own expense, to have all the hides, of every description, found in the yard, finished off and made into leather, which process of tanning and finishing was completed about the 15th July, 1848, and all the leather so finished held subject to the order of the court.

That upon taking possession of the yard, complainant employed a competent person to take charge thereof, and superintend the same, who kept a correct account of the expenses incurred by complainant in carrying on the yard, and completing the tanning of the hides, which amounted to $888 62, an account of which is exhibited, and he claims an allowance thereof, &c.

That by the neglect of Mooney, while he was in possession of the yard, many of the hides being tanned therein were damaged, and among them those placed there by complainant to be tanned upon the shares. That after the process of tanning was completed, complainant caused the damages, which had so occurred to his share of the hides delivered by him to Mooney to be tanned, to be estimated by competent judges, and they were assessed at $72 92. That 53 of the hides, of the value of $3 per hide, amounting to $159, and 75 deer skins of the value of $75, placed by complainant in the hands of Mooney, were not to be found when complainant came into possession of the yard, but that Mooney had fraudulently converted them to his own use. An account of the damages so assessed, and of the value of the missing hides, amounting in the aggregate to $306 92, is exhibited, and complainant insists that upon an account being taken in the premises, he should be allowed that sum.

An inventory of all the hides found in the yard, when complainant took possession of it, and finished by him, showing which belonged to the yard, which to complainant and which to other persons, with an estimate of the damages which had occurred thereto, by the neglect of Mooney, is exhibited. That of these, 15 sides of harness leather, 228 sides of upper leather, 63 deer skins and 21 kip skins, belonged to the yard, being the tanner's share, were embraced by the mortgage and subject to the pay-

ment of the mortgage debt. That 15 sides of harness, 83 sides of sole, 35 sides of upper leather, — deer skins, and — kip skins belonged to complainant, being his half of such of the remaining hides placed there by him to be tanned as were found in the yard when it came into his possession. And 266 sides of leather belonging other customers.

That the names of the several customers, and the hides which belonged to them respectively, could be ascertained by a book kept by Mooney, and still in his possession, in connection with the marks upon the hides; and complainant prays that Mooney may be compelled to produce the book, so that the hides belonging to the customers, might be delivered to their proper owners, who were becoming clamorous therefor.

That on the 1st of January, 1847, Mooney hired a negro man of Duncan for one year, to cook in the tan-yard, at $—— and complainant went his security upon a note for the hire. When the mortgage was executed, by agreement, the amount of this note, less interest, was charged to Mooney and embraced in the debt secured by the mortgage, complainant executing his obligation to Mooney to pay the note to Duncan, and save him harmless. That the negro was engaged in the tan-yard when complainant obtained possession, and he employed him therein until the expiration of the time for which Mooney had hired him, say six months and a half, and then delivered him to Duncan.

Complainant avers that he did not obtain possession, or dispossess Mooney of any personal property, except the hides above described; a lot of tanner's tools of the value of $——, a list of which is exhibited: said negro boy, and about 35 cords of tan bark, worth $35, which was used in tanning the hides. That all of said property except the negro, which had been delivered to Duncan, and the tan-bark, which had been consumed in finishing the leather, was still in possession of complainant and subject to the order of the court.

That the drunkenness of Mooney, his neglect of the tan-yard, damaging of the hides, fraudulent design to sell the tan-bark,

transfer the hides, &c., &c., forced complainant to resort to the action of unlawful detainer to obtain possession of the premises, &c., in order to protect his rights, &c.

That Mooney had recently brought an action of trepass against complainant in the Clark Circuit Court, charging him with taking and converting to his own use, 500 beef hides, 150 deer skins, 100 cords of tan-bark, 1 bark mill, 4 fleshing knives, 2 currying knives, 2 sets of instruments used for fleshing leather, 2 sets of gearing, 4 shovels, 4 spades, 4 mattocks, 50 hides of leather, 10 vats of leather, or hides in tan, one negro man, and one barrel of train oil, the alleged property of Mooney, of the alleged value of $3000, to his damage, as averred, of $5000, which action was pending for trial; a transcript whereof is exhibited.

That said complainant had not, at any time, taken any property from said Mooney, except that above stated, and in the manner and under the circumstances above detailed; and that said action of trespass was founded upon the supposed trespasses committed by the complainant in obtaining possession of said property as aforesaid, and none other.

The transcript of the trespass action shows that complainant interposed three pleas to the action: 1st. Not guilty; and 2d, and 3d, attempts to justify under the proceedings in the unlawful detainer suit, to which last two, demurrers were sustained, and issue taken to the first.

That Rogers had sued Mooney for the purchase money of said tract of land, obtained judgment, issued execution, caused the land to be levied upon and advertised by the sheriff for sale, and complainant was compelled, in order to protect his rights under the mortgage, to pay the judgment, which he did, on the 11th September, 1848, amounting to $136 25, and took Rogers' receipt therefor, which is exhibited. He insists that Rogers should be compelled to make Mooney a deed to the land, which he had not done in accordance with his bond for title; and that upon an account being taken between Mooney and complainant, he should be allowed the sum so paid by him to Rogers to remove the incumbrance from the mortgaged premises, with interest, &c.

The bill prays that an account may be taken of the amount due complainant upon the mortgage debt; of the supplies, &c., furnished Mooney by complainant after the execution of the mortgage; of the damages upon complainant's hides occasioned by the neglect of Mooney; of the value of the missing hides; of the expenses of complainant in carrying on and completing the tanning of the hides; of the amount paid Rogers by complainant. That Mooney be required to pay to complainant the amount found to be justly due from him to complainant, upon the account so taken and stated; and in default thereof, that the mortgage be foreclosed, and the property specified therein, together with such other of said property in possession of complainant as aforesaid, as may he liable thereto, be sold for that purpose. That Mooney be perpetually enjoined from further prosecuting said action of trespass, and from instituting or prosecuting any other action at law against complainant in respect of the property aforesaid. That Rogers be compelled to execute to Mooney, or the person to whom the same may be sold under the foreclosure, a deed to said land, &c. That a receiver be appointed to take charge of the leather and other personal property in possession of complainant as aforesaid, with instructions to deliver to the customers of the yard such portions of the leather as belonged to them, and to sell the remainder of the leather, and other personal property, at public auction for cash, and hold the proceeds thereof subject to the further order of the court. That Mooney be required to produce and place in the hands of the receiver the tanyard books, &c., and for general relief.

On the filing of the bill, a temporary injunction and restraining order were granted, as prayed, and a receiver appointed to take charge of the personal property, &c.

At the March term, 1849, Mooney filed his answer to the bill.

He admits that he purchased the said tract of land of Rogers, at the price and on the terms alleged in the bill; that Rogers had obtained judgment, and issued execution against him for the purchase money, and complainant had paid off the judgment,

though not at respondent's request. Avers that he was a tanner by trade, and purchased the land for the purpose of establishing thereon a tan-yard, and carrying it on for his own benefit, and immediately after the purchase, commenced improvements thereon for that purpose.

That prior to the 28th January, 1847, he had the tannery in operation; had $1000 worth of leather in the book, and a considerable amount of hides on hand not placed in tan, for which he was then preparing vats, &c. He had made improvements on the land about the yard to the value of $1200; the hides and leather on hand were worth $1200, and the tools, &c., and materials for tanning on hand, were worth $60.

Admits that he was poor and possessed of no considerable amount of property, except his interest in the tan-yard, but attributes his continued poverty and inability to pay his debts to the unjust and fraudulent conduct of complainant, &c. Denies that he solicited complainant to set him up in business, but avers that complainant voluntarily offered to advance him $400, to aid him in setting up the tannery, to be repaid in leather within two years. He availed himself of the offer, and used the means furnished by complainant in putting the tan-yard in operation.

Admits that they had a settlement on the 28th January, 1847, and he fell in debt to complainant $1003 08, the principal part of which was used by respondent in establishing the tannery; but included the hire of Duncan's negro boy for the year 1847, for which complainant was bound as security, &c. That he executed to complainant his bond and mortgage to secure the debt, as alleged in the bill.

After the execution of the mortgage, and before respondent was dispossessed by complainant, he had paid about $40 on the mortgage debt; received many hides by purchase, and to be tanned on the shares, in the usual course of business, and had parted with little or no part of the leather, or stock, except in the payment of the $40 to complainant.

That by the terms of the mortgage respondent was entitled to

possession of the premises, to carry on business, and to retail his leather in the usual course of trade, until the 1st of March, 1848.

That the supplies, tools, provisions, &c., and everything furnished to respondent by complainant, except the cash to establish and carry on the tan-yard, were sold to him by complainant on credit, as a merchant, at a profit, and were all included in the mortgage debt.

He denies, however, that complainant furnished every thing used in establishing and carrying on the tannery, and avers that he obtained considerable means from other persons, and used them for that purpose.

That it was fully understood between complainant and respondent, when the advances were made, that the latter had no resources of re-payment, except his labor in, and the profits of, the tan-yard, and that no profits could be derived therefrom for about two years after it was established, it being the custom of the country to tan hides upon the shares, &c.

That from the time the yard was established until respondent was dispossessed, hides were continually coming in to be so tanned, &c. That the retailing of leather was a source of great profit, &c., and the confidence of the community in his efficiency, &c., in business, was of great value to respondent, &c. That but for the fraudulent conduct of complainant in seizing upon the tan-yard, dispossessing respondent, and depriving him of all means of carrying on the business, he would have been able by the 1st of March, 1848, to have paid for the land, discharged his indebtedness to complainant, and still have had on hand as large a stock of hides and materials as when the mortgage was executed. Such was respondent's calculation when the mortgage was made, and such the reasons why complainant voluntarily agreed to extend the time of payment until 1st March, 1848.

He admits that after the execution of the mortgage, he continued to purchase of complainant supplies, provisions, &c., on credit for the support of his family, and the carrying on of the tan-yard; disputes some of the items in the bill exhibited by complainant therefor, and admits the correctness of others.

He admits that complainant delivered to him, to be tanned on shares, the hides and skins mentioned in the bill, and described in his receipts therefor exhibited with the bill. That he received many hides from other persons to be tanned on the same terms, which hides were in the tannery when complainant seized it, &c.

He positively denies that after the execution of the mortgage, he was habitually unfit for business from intoxication, or did, from any cause, neglect the business of the tannery, so as to suffer the hides to be damaged, &c. That no hides or leather were injured from neglect, want of skill, or inattention on the part of respondent or his hands, from the time the mortgage was executed, until the seizure of the premises by complainant. That in 1846, about thirty sides were somewhat injured, but none afterwards, while respondent controlled the tannery. That hides, in tanning, will often become more or less injured by worms, even with the utmost attention, and some of the hides may have been slightly injured from this cause.

He admits that he was sometimes intoxicated about the time stated in the bill, but avers that his habits before and after the execution of the mortgage were the same, and that he was not, from this or other cause, incapable of attending to his business, and did not neglect, or fail to conduct the tannery, &c., with proper skill and attention.

He expressly denies all the fraudulent conduct and designs alleged against him in the bill. Denies that the hides in process of tanning were suffering any damage from neglect; or that he sold, or intended to sell the tan-bark; or that he contracted to sell, or made any arrangement to sell, dispose of, or remove from the tannery, any hides, implements or other property connected therewith, except the ordinary retail trade in the tan-yard, of the leather made therein, the right to do which was expressly secured to him by the mortgage. That all such allegations of fraud and misconduct, were fabricated by complainant as a pretence for his unlawful proceedings to dispossess respondent, deprive him of the means of paying his debts, and reap himself the profits of the tan-yard, &c.

That for these purposes, and not for the false reasons alleged in the bill, complainant brought said action of unlawful detainer, and thereby obtained possession, not only of the land and tan-yard, but of all the personal property connected with, or used in the tannery, and the negro man hired to work therein. That in such action, the sheriff nor any one else had a right to interfere with the personal property, but by the fraud and contrivance of complainant the sheriff was induced to put him in possession thereof.

That since the filing of the bill, the Supreme Court had reversed the judgment of the Circuit Court in said action, and remanded the cause, with leave to complainant to file an amended declaration therein.

That respondent had not been in the tan-yard since complainant obtained possession of it, and knew nothing of his hiring hands or working out the leather, &c.

But he submits that inasmuch as complainant turned him out of possession of the tannery, deprived him of the means of carrying on his trade, to which he had been educated, of supporting himself and family, and paying his debts, &c., he nor his property ought to be charged with any of the alleged expenses incurred by complainant in consequence of his fraudulent seizure and possession of the tan-yard, &c. That the account for $888 62, exhibited and claimed by complainant, as the amount of expenses incurred in preserving and finishing the leather, &c., was false and fraudulent, and trumped up to swindle the respondent, &c.

He avers that all the hides, &c., delivered to him by complainant to be tanned on shares, were in the yard in process of tanning when complainant took possession thereof, and positively denies that respondent ever converted or disposed of any of them, as alleged in the bill.

Admits that the inventory exhibited with the bill contains about a correct account of the kip and deer skins in the tannery when he was dispossessed, but not of the other hides and leather. That there was in the yard, when he was dispossessed, at least

1000 sides of hides and leather, besides the kip and deer skins. Denies the estimated value of the leather contained in said inventory to be correct; that any damage had occurred to the hides, &c., while he was in charge of the yard, and that all such damage occurred after the seizure of complainant, &c.

That complainant had stopped the trade, and broken up the custom and credit of the yard, &c.

Admits that he kept a book showing the names of customers and the hides that belonged to them, which he had turned over to the receiver. Doubts not but that the customers are anxious to get their leather, but is apprehensive that complainant will defraud them. Complainant had refused to surrender the property, &c., to the receiver, as ordered by the court at the previous term.

That the hire of Duncan's negro included in the mortgage debt was $162. Complainant took possession of him when he seized the yard, &c., and kept him for the remainder of the time for which he was hired, but respondent did not know how he employed him, whether in the yard or otherwise. He had indemnified respondent against the note for the hire, as alleged, &c.

That by said action of unlawful detainer, complainant got possession of the tan-yard, implements, all hides and leather placed there to be tanned on shares, including his own, all the leather, materials, &c., &c., belonging to respondent—said negro man, &c.

He admits that complainant had not, otherwise than by means of said action, taken possession of any property of respondent.

That respondent's habits were well known to complainant, and there was no change in them after the execution of the mortgage. That, when absent from the tan-yard himself, he had a competent man employed to superintend the tannery, &c. Denies the truth of any causes alleged by complainant for resorting to said action of unlawful detainer to dispossess him, &c.

Admits that he had brought an action of trespass against complainant in the Clark Circuit Court, which was pending there for

trial, as alleged. Insists that, inasmuch as complainant fraudulently, and without authority, seized said personal property, respondent has the right to prosecute said action, and recover exemplary damages, &c. Admits that the action was founded upon the seizure of complainant of the property under the action of unlawful detainer, and not upon other or different trespasses.

Admits that Rogers had not made him a deed for the land; and submits that respondent is not responsible to complainant for the money paid by him to Rogers on account of the land.

Admits his intention to prosecute his action of trespass, &c.

Having fully answered, he prays to be discharged.

Rogers filed an answer admitting that the allegations of the bill, as to him, were true, and expressing a willingness to make a deed to the land, to such person, and at such time, as the court might order, &c.

Mooney filed the affidavit of the receiver, (March 27th, 1849,) stating that complainant had not delivered to him the property which he was ordered to take charge of, though he had made demand therefor, 25th September, 1848, &c.

Mooney also moved to dissolve the injunction upon the denials, &c., of his answer, &c.

Complainant obtained a continuance of the motion to dissolve, upon a showing that he could procure depositions to support the allegations of the bill, by the next term. He also made affidavit that all the leather which he offered, in the bill, to surrender, had been safely kept in his ware-house, since the filing of the bill: and that, within twenty days after the order was made, appointing the receiver, he had offered him the key of the ware-house. That on the 28th of March, 1849, he had turned over to the receiver all the property which he was ordered to take charge of, and taken his receipt therefor, which was produced and filed.

Replications to the answers were filed, and the cause set down for hearing at the next term.

At the September Term, 1849, Mooney filed a motion to compel complainant to elect which suit he would prosecute; the action of unlawful detainer, or bill in chancery.

Complainant, thereupon, asked leave to file a supplemental bill, showing, that since the original bill was filed, this court had reversed the judgment of the Circuit Court in the action of unlawful detainer, and remanded the cause, with leave to complainant to file an amended declaration. That complainant did not take out the mandate, (but that Mooney did,) and had taken no steps in the case since the filing of the original bill, and intended to take none, the whole subject being before the Court of Equity, where all the matters in controversy between him and Mooney could only be properly adjusted and settled. He offered to account in the chancery cause for the rents of the said real estate, while in his possession, and to surrender it to the receiver, to be leased pending the suit in chancery. Praying that Mooney might be restrained from requiring him to proceed in the action at law.

The court refused to permit the supplemental bill to be filed, and complainant excepted.

At the March term, 1851, the cause came on to be heard, (the parties having taken the depositions of about sixty witnesses,) and the court being unable to render a decree without a statement of accounts between the parties, referred the accounts, with the evidence, to the Master, to state, adjust and report upon the same, directing him to ascertain:

The amount of the mortgage debt, with interest:

The amount of supplies, &c., furnished by Brinkley to Mooney, after the execution of the mortgage, and before he was dispossessed:

The amount paid by Brinkley to Rodgers, purchase money of the land:

The amount of reasonable and economical expenses incurred by Brinkley, in working out the stock on hand, when he took possession of the yard; taking into consideration the value of the

hire of the negro boy for the residue of the year, after Brinkley took possession of him, &c.

The reasonable profits of the tan-yard, for each year, after Brinkley took possession of it, giving Mooney credit therefor, and making annual rests, &c., and to report the balance, &c.

The Master made his report at the September term, 1851. He charges Mooney with:

The amount of the mortgage debt, $1,003 08, and interest, &c.

For supplies, &c., furnished by complainant, after execution of mortgage, &c., $178 29, with interest, &c.

Amount paid Rogers by complainant, $136 25, and interest, &c.

For expenses, &c., incurred by complainant in working out the stock, after he took possession, $727 90, without interest.

The Master credited Mooney with:

Value of hire of Duncan's negro, for remainder of year, after complainant took possession of the yard, &c., $87 75.

Hire of Hart's boy, for getting bark, &c., 18 75.

Profits of tan-yard from 16th June, 1847, the time complainant took possession, until the date of the Master's report, at $250 per annum, applying these credits annually, so as to stop interest in favor of complainant, &c.

The Master reported against allowing complainant any thing for damages done his hides by Mooney, or for missing hides; thinking the proof left it in doubt, whether the damages, &c., occurred before Mooney was turned out, &c.

Both parties filed numerous exceptions to the Master's report.

The cause was finally heard at the March term, 1852.

The court, upon the facts established in the case, was of opinion, that the complainant was entitled to the relief sought by the bill; that it had jurisdiction of the matters in controversy; that complainant was entitled to occupy the position of a mortgagee, and was not a trespasser in view of a court of equity: and that even if a court of equity had not cognizance of the matters in controversy, Mooney had failed to take the objection in apt time, and in proper form.

That Mooney be perpetually enjoined from further prosecuting his action of trespass, or instituting or prosecuting any action at law, against complainant, in respect of the property aforesaid: and that the said action of trespass, and the said action of unlawful detainer be both dismissed, and the costs of each of said actions be charged upon the mortgaged property, &c.

That the said tract of land be sold by a commissioner, &c., the receiver to act as such, &c., and conveyed to the purchaser: and that Rogers also make a deed to the purchaser. That the receiver sell the leather and other property placed in his hands under the previous order of the court; and that he have the money arising from such sales in court, by the next term, &c.

That the money arising from the sale of the mortgaged property, be applied: *First*, To the payment of the costs of this suit: *Second*, To the costs of said actions of trespass and unlawful detainer: *Third*, To the payment of the amount which might be found due complainant from Mooney, in respect of the matters charged in the bill, &c., and the residue be paid to Mooney.

The court, upon the exceptions taken to the master's report, decreed as follows:

That complainant, instead of being charged with $250 per annum, profits of the tan-yeard, from the 16th June, 1847, as reported by the master, should only be charged with the sum of $100 per annum, on account of the rents and profits of said tan-yard, from the 15th of July, 1848, the day the stock on hand when he took possession, was finished up—annual rests being made—that sum being the amount the testimony in the case showed to be just and proper. That complainant was not chargeable with rents and profits of the yard during the time he used the same in tanning out the stock on hand.

That complainant was entitled to interest on the $727 90, amount of expenses incurred by him in finishing up the stock on hand from 15th July, 1848.

That the matter of damages to complainant's hides, while in charge of Mooney, was not referred to the master, but that com-

plainant was entitled to an allowance for any such damages as may have occurred, and that the master, upon the subsequent reference, should ascertain and report the same, &c.

That complainant was entitled to credit for $18, paid by him for Mooney to Hart, for negro hire, &c.

All the exceptions taken by Mooney, to the report of the master, (extending to all the items in it,) were overruled, except the one founded on the objection that the master had not credited him with the value of the tools which came into the possession of complainant, but were not embraced in the mortgage. And the court ordered that the master should take an account of the value of such tools, and credit Mooney with the value thereof, as of 16th June, 1847.

The matters of account were, therefore, re-committed to the master, with directions to correct and re-state the same, in accordance with the principles above settled, and the directions aforesaid, and that he report at the next term of the court, &c.

Mooney appealed from the decree to this court.

The testimony conduces to prove that complainant was an honest, correct business man. That Mooney, after purchasing the land of Rogers, went industriously to work, and by the assistance of complainant, who furnished the means, established the tan-yard, erected a dwelling and other improvements upon the land. He was in the habit of taking a "*spree*," occasionally; but when at home, was usually sober, hard-working, and attentive to business. Before, and about the time he was dispossessed, he seems to have become quite dissipated—was frequently seen drunk in Arkadelphia, sometimes lying upon the benches about the dram-shop doors, and occasionally in the streets; and, though, when at home, and sober, he was generally found industriously occupied in his business, perhaps a portion of the hides in the yard were damaged to some extent, for want of proper care and attention. On this point, however, there is a conflict of testimony. He had hands employed, who were in charge of the yard, &c., in his absence. When he was dispossessed, he and his

family were turned out into the woods, and complainant put into the possession of the premises: and he hired hands, furnished materials, and completed the process of tanning and finishing into leather all the hides in the yard. The appraisers summoned by the sheriff, at the time the writ of unlawful detainer was executed, valued the land and improvements at $1,000, and the personal property, including all the hides in the yard, tools, hire of Duncan's negro, &c., at $1,000. Other witnesses made a lower estimate of the value of the land and improvements. The profits of such a tan-yard were variously estimated. The witnesses examined by the master, supposed it would produce, with the number of vats sunk by Mooney, $1,000 worth of leather per annum, at a profit of 25 per cent., or $250. That the rent would be worth about $100 a year.

This is merely the outlines of the testimony, which is quite voluminous, but a detailed statement of it is not deemed necessary.

1. The defendant submitted to answer the whole bill, and did not, by demurrer, nor in his answer, object to the jurisdiction of the court of equity over any of the matters set up in the bill. Having thus submitted the cause to the cognizance of the court, it was too late for him upon the hearing, and it is too late here, to object to the jurisdiction, unless the court were wholly incompetent to grant the relief which complainant sought by the bill. *Ludlow vs. Simonds*, 2 *Caines' Cases in Error*, 40, 56; *Underhill vs. Van Cortlandt*, 2 *Johns. Ch. Rep.* 369; *Hawley vs. Cramer*, 4 *Cow.* 727; *Grandin vs. Leroy*, 2 *Paige Ch. Rep.* 509. It is better for both parties, after protracted and expensive litigation, that all the matters in controversy between them, connected with the mortgage and embraced by the bill, should be finally settled.

2. It is manifest, from the face of the mortgage, that Mooney was entitled to the possession of the land, improvements thereon, and other property embraced in the deed, with the right to carry on the tanning business, retail leather in the usual course of

trade, &c., until the 1st of March, 1848. He had no other means of discharging the debt, and no other resources seem to have been relied upon by the parties. On the maturity of the mortgage, the complainant had the power of sale, if the defendant was in default.

The complainant had no legal right, therefore, on the 16th of June, 1847, by the action of unlawful detainer, to dispossess the defendant, as he did, of the premises, and take them into his owu possession. The action was premature, as to the real property, and wholly unwarranted as to the personal property. 1 *Ala. Rep.* 729; 4 *Ib.* 746, and authorities cited.

If the defendant was guilty of intoxication, inattention to business, and the mortgaged property was suffering damage or waste from his neglect, &c., as alleged, the remedy of the complainant was by application to a court of equity, to place the premises in the hands of a receiver, and he had no right to seek redress by an unwarranted and abusive use of the action at law, to which he resorted. *Cooper vs. Davis*, 15 *Conn. Rep.* 556.

Had the complainant come lawfully into the possession of the premises, after the maturity of the mortgage, and default of payment, he would have been accountable for reasonable rents, and would have been allowed the costs of necessary repairs, until foreclosure, &c. 4 *Kent. Com.* 166. And, doubtless, upon principle, if he had completed the process of tanning and finishing the stock of hides on hand into leather, for the benefit of the defendant, he could have been entitled to reasonable and necessary expenses, incurred in so doing.

But in this case, the complainant took upon himself the responsibility of unlawfully thrusting the defendant out of the premises, and taking them under his own charge, some eight months and a half before the maturity of the mortgage, thereby depriving the defendant of the privilege of working out the stock by his own labor, and of all other profits which he might have derived from the tan-yard. Some of the witnesses supposed the defendant could have made as much as $1,000 a year. Thus the com-

plainant placed himself in the position of a trespasser: of one in possession without any legal right or color of title. Under such circumstances, we know of no principle of law or equity which gives him any just claim to be allowed the expenses which he thought proper to incur, in connection with the position which he had so assumed.

We must hold, therefore, that the court below erroneously allowed him the $727 90, for such expenses, with interest.

3. The court below, also, most clearly erred in taxing the costs of all three of the suits upon the proceeds of the mortgaged property, which was, in effect, charging upon defendant all the expenses of the litigation. Had the complainant prosecuted his action of unlawful detainer to final judgment, it is manifest that he must have failed therein, and been taxed with costs. It is equally clear, that defendant would have succeeded in the action of trespass, or at least, that he had good grounds to bring the action, and might have recovered his costs therein, had he not been enjoined by complainant.

It is, moreover, manifest that complainant was compelled to resort to equity, and filed this bill, mainly, for the purpose of relieving himself from the embarrassments and responsibilities consequent upon his illegal steps to dispossess the defendant. We think, therefore, that he ought, in justice, to be taxed with the costs of all three of the suits.

In all other respects, we think the decree of the court below is correct, and will be affirmed. But so much of the decree as is above held to be erroneous, must be reversed and the cause remanded for further proceedings.

Hon. C. C SCOTT, Judge, absent.

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MEADOWS VS. ROGERS.

It is within the power of the Circuit Court, in the exercise of a sound discretion, to disallow to the plaintiff any costs which he has caused unreasonably and unnecessarily to be accumulated, and the judgment of the court below, in the exercise of such discretion, should not be overruled by this court, except in cases of manifest error and abuse of power.

It is the duty of the clerk of the Circuit Court, to embrace in one subpoena all the witnesses directed by one party to be summoned. But this rule is not absolutely mandatory—as where the party, after ordering a subpoena for witnesses, ascertains that it is necessary for him to have others summoned.

Appeal from the Clark Circuit Court.

Hon. THOMAS HUBBARD, Circuit Judge.

FLANNAGIN, for appellant.

CUMMINS, for appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Meadows brought an action of trespass against Rogers in the Clark Circuit Court; and, upon a trial of the cause, obtained verdict and judgment for $15 damages, and for costs. The grounds of the action were, that a flock of the plaintiff's hogs invaded the defendant's corn field, and he chased them with his dogs and killed one of them.

The plaintiff subpoenaed ten witnesses, nine of whom were present, and examined. The defendant filed an affidavit, alleging that most of them were summoned to accumulate costs, vex and harrass him, &c., praying the court to allow the plaintiff the costs of but one or two witnesses to each fact, &c. The plaintiff filed a

response, verified by his affidavit, stating what he had each witness subpoenaed to prove, &c.

It was admitted, upon the hearing of the motion, that the plaintiff ordered subpoenas at the same time for six witnesses, for whom three subpoenas were issued. That the clerk was not directed to issue one or three subpoenas, but that he put the names of the six in three subpoenas, for the reason that the blanks in the printed subpoenas were not large enough to insert more than two names in each. That the subpoenas for the four other witnesses were ordered separately at different times.

The court ordered the clerk to tax in favor of the plaintiff the costs of one subpoena with circular mileage and service, for summoning five of the witnesses, subpoenaed and sworn on the part of the paintiff, and their claim for attendance, and to disallow all costs for other subpoenas sued out by the plaintiff, &c.

The plaintiff excepted, took a bill of exceptions, setting out the testimony given by each witness upon the trial, the facts proven on the hearing of the motion, &c., and appealed to this court. The defendant examined but one witness.

1. Under our statute, the plaintiff in an action of trespass, or other action, recovering judgment is entitled to costs, unless the damages recovered fall below the jurisdiction of the court, &c. *Digest, chap.* 40, *sec.* 12, 20.

But this means the reasonable, proper and necessary costs incurred in the prosecution of the cause. It was not the intention of the act, that the defendant should be taxed with unnecessary and vexatious costs. *Ib., section* 30. It is, beyond doubt, within the power of the court, in the exercise of a sound discretion, to disallow to the plaintiff any costs, which he has caused unreasonably and unnecessarily to be accumulated, and the judgment of the court below, in the exercise of such discretion, should not be overruled by this court, except in cases of manifest error and abuse of the power.

The judge, who presided in the trial of this cause, heard all the witnesses examined, saw the manner and extent of the examina-

tion of each, understood what they severally proved, and was fully advised of the character of the whole case, was more competent to give proper directions about the taxing of the costs than we can possibly be.

2. The *1st section, chapter* 171, *Digest,* directs that a "subpoena shall contain the names of all witnesses for whom a subpoena is required by the same party in the same cause, who reside in one county."

The fact that the blanks in the clerk's printed forms were not large enough to contain more than two names, was no valid excuse for the failure to insert the names of all six of the witnesses applied for at the same time by plaintiff, in one subpoena, as directed by law. It was the duty of the clerk to write the process or procure printed forms with larger blanks. If the clerk, and not the plaintiff, was at fault in this instance, it is a matter between them, but the defendant is not to be taxed with unnecessary costs on account of their failure to follow the law, without any sufficient excuse.

Nor was the showing, that plaintiff ordered the subpoenas for the four remaining witnesses at different times, sufficient excuse for issuing a separate subpoena for each. There may have been no necessity or good reason, for ought that appears in the bill of exceptions, for ordering the subpoenas at different times.

We would not hold that this statute is absolutely mandatory, and to be followed under all circumstances.

It might often happen, that a party, after ordering a subpoena for witnesses, might ascertain that it was necessary for him to have others summoned whose materiality was not known to him before. In such case, the court would hardly refuse to allow him the costs of the additional subpoenas.

We find in the transcript before us, no evidence of such error or abuse of discretion on the part of the court below, as to warrant us in reversing its direction in reference to the taxing of the costs in this case. Affirmed.

Mr. Justice SCOTT, absent.

CINCINNATI AND LITTLE ROCK SLATE CO. VS. BRIDGE & CO.

It is error to join several garnishees in the same writ of garnishment, without allegations of joint liability or indebtedness. (*Thorn & Robins vs. Woodruff et al.*, 5 *Ark.* 55; *Moreland et al. vs. Pelham*, 2 *Eng.* 338.)

Writ of Error to Pulaski Circuit Court.

Hon. JOHN J. CLENDENIN, Circuit Judge.

WATKINS & GALLAGHER, for the plaintiffs.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Bridge & Shepherd sued out of the Pulaski Circuit Court, a writ of garnishment, reciting that they had recovered a judgment in said court, against Dyer, &c. "And, whereas, it is alleged by said plaintiffs, that they have reason to believe, that David Bender, Mrs. Rebecca Graham, and the Cincinnati and Little Rock Slate Company, have in their hands and possession, goods and chattels, moneys, and credits and effects, belonging to the said Dyer." The sheriff was, therefore, commanded to summon the said garnishees to appear, &c., "to answer what goods, chattels, moneys, credits and effects, they may have in their hands or possession, belonging to said Dyer," &c.

The writ was returned, executed upon the garnishees.

At the return term, the plaintiffs filed separate allegations against each of the garnishees, in the form following: "And the plaintiffs, by attorney come, and show and suggest to the court here, that said garnishee has in her possession and control, divers moneys, &c., and therefore, propounds to said garnishee, the following interrogatories," &c. Then follow interrogatories.

The garnishees made default, and the plaintiffs took separate

judgments against Bender and the Slate Company, for the amount of their judgment against Dyer, dismissing as to Mrs. Graham. The Slate Company brought error.

It was error to join the several garnishees in the same writ, without allegations of joint liability or indebtedness, &c., as held in *Thorn & Robins vs. Woodruff et al.*, 5 *Ark. Rep.* 55; *Moreland et al. vs. Pelham*, 2 *Eng. Rep.* 338.

The judgment is reversed, and the cause remanded, &c.

Absent, Mr. Justice SCOTT.

CANNON ET AL. VS. THE STATE.

On the trial of a *scire facias* on recognizance for appearance in a criminal case, the bail bond and record entry of forfeiture are competent evidence, and sufficient to fix the bail, if the recognizance be in form, and taken by the proper officer, and the *scire facias* follows, substantially, the recognizance.

To a plea of former recovery to a *scire facias* on recognizance, the State replied, in substance, that the trial and former recovery pleaded by the defendant, was not a trial and recovery upon the merits, but was only a judgment in bar, rendered upon a question of law, not involving the facts or the merits of the cause: HELD, That the replication was a good response to the matter of the plea.

A substantial compliance with the statutory form (*sec.* 61, *chap.* 52, *Digest,*) in a *scire facias* on recognizance of bail in criminal cases, sufficient.

Appeal from Yell Circuit Court.

Hon JOHN J. CLENDENIN, Circuit Judge.

WALKER & GREEN, for appellants.

JORDAN, Attorney General, contra.

Mr. Justice HANLY delivered the opinion of the Court.

This was a proceeding by *scire facias*, determined in the Yell Circuit Court, at the September term, 1855. A *scire facias* issued from that court, on the 2d day of May, 1855, reciting that, "Whereas, Richard H. Lewellen, as principal, and John W. Cannon, James M. Bass, John C. Barrett and James E. Millard, as his sureties, on the 6th day of April, 1854, before John C. Herring, sheriff in and for the county of Yell, and State of Arkansas, acknowledged themselves to owe and be indebted to the State of Arkansas, in the full and just sum of three hundred dollars: that is to say, the said Richard H., in the sum of $300, and the said John W., J. M., J. C. and J. E., in the like sum, to be levied of their respective goods and chattels, lands and tenements: to be void upon condition, that the above bounden Richard H., should well and truly make his personal appearance before the Judge of our Circuit Court of Yell county, on the first day of our then next September term, at a court to be holden at the court house, in the town of Danville, on the 4th Monday of September, then next, then and there to answer the said State of Arkansas, of an indictment preferred against him, for obtaining property under false pretences, and that he should not depart therefrom, without leave of said court; and, whereas, on the said 4th Monday of September, 1854, the said Richard H., wholly failed to keep the condition of said recognizance, in this: that, although called, he failed to appear and answer the charges, and not thereafter depart said court without leave thereof, whereby the condition of said recognizance became, and was forfeited, as appears of record, in said court," with the usual summons appended. This writ of *sci. fa.* was regularly directed to the sheriff of Yell county, and was duly executed by him, on all the parties named therein, except the said Richard H., the principal recognizor. At the return term, it appears from the transcript, that a *nolle prosequi* was entered by the attorney for the State, as to the party not served, Richard H. Two of the defendants, Bass and Bar-

rett, moved to quash the *sci. fa.* on the ground of a misjoinder of parties, which was overruled, and the other defendants pleaded: Millard, a plea of former recovery: Cannon, *nul tiel* record, *nul tiel* recognizance, and *nul tiel* forfeiture. Replication to the plea of Millard, averring that the former recovery was not upon an issue to the merits, and averring, that the court, in such judgment, awarded an alias *sci. fa.* against the party on the recognizance on which this proceeding is had. To this replication, the defendant, Millard, demurred, and joinder therein by the State. The State took issue upon the three pleas of Cannon. The demurrer to the State's replication to Millard's plea overruled, and exceptions. The issues upon the pleas of Cannon were tried by the court, and a finding thereon for the State.

On the trial of the issues formed on Cannon's pleas, the State produced and read, against the objection of the defendant, a bond in these words:

"We, Richard H. Lewellen, as principal, and John W. Cannon, J. M. Bass, J. C. Barrett, and James E. Millard, as securities, acknowledge ourselves to owe and be indebted to the State of Arkansas, in the full and just sum of three hundred dollars: that is to say, the said Richard H., in the sum of three hundred dollars, and the said John W., J. M., J. C. and J. E., in the like sum, to be levied of our goods and chattels, lands and tenements. To be void," &c. Conditioned, as the law requires, and in the manner recited in the *sci. fa.*, as above, which purports to be signed and sealed by the parties, with this endorsement at the bottom thereof, *to wit:* "Approve of the above securities," signed by the sheriff of Yell, in his official capacity.

The State furthermore read, against the objection of the defendant, the following entry from the record of the Yell Circuit Court, purporting to have been entered at the September term, 1854, *to wit:* "Comes the State by her attorney, and the defendant, Richard H., being solemnly called, comes not, but makes default, and the sureties (who are named as above,) also being called, but likewise make default. It is, therefore, considered by

the court here, that the said recognizance bond be, and the same is, hereby forfeited, and the State recover," &c. To the reading of which bond, and entry as above, the defendant excepted, and set them out in his bill.

Judgment final was rendered by the court, upon the finding and ruling of the court, as above, for the State, and against the defendants, for the sum of $300.

The cause was brought to, and is now pending in this court on appeal.

Several points are relied and insisted on by the appellants, for the reversal of the judgment of the court below, *to wit:*

1st. The finding of the court is not sustained by the proof.

2d. The court erred in permitting the bail bond and forfeiture to be read as evidence.

3d. The court erred in overruling the demurrer of Millard to the replication of the State, to his plea of former recovery.

4th. That the court erred in refusing to sustain the motion to quash the *sci. fa.*

We will proceed to consider and dispose of the points relied on, in the order in which they occur.

1. The only evidence before the court upon the issues to Cannon's pleas of *nul tiel record*, *nul tiel recognizance* and *nul tiel forfeiture*, were the recognizance bond, and the entry upon the record of the forfeiture of such recognizance. The question is, does that evidence sustain those issues? It is insisted, on the part of the appellants, that there is a variance between the recognizance recited in the *sci. fa.*, and the one produced in proof, in this: that in the said *sci. fa.*, the parties, both principal and sureties, are charged to be jointly bound in the penal sum of $300: whereas, the recognizance itself shows that the principal, Lewellen, is bound in the sum of $300, and the securities in the like sum. We have examined this objection, together with the various authorities to which we have been referred, and cannot discover the potency of the objection, or the application of the authorities to the particular case before us. We think the *sci.*

fa. follows, substantially, the recognizance. We, therefore hold, that the proof was sufficient to authorize the finding, if the *sci. fa.* and recognizance were in due form; and the officer, who took the latter, had the authority under the law to do so.

2. The determination of the first error assigned disposes, virtually, of the second. We will, therefore, not notice this assignment further.

3. It is insisted, that the replication of the State, to the plea of Millard, is defective, for the reason that it does not contain matter of estoppel, nor does it traverse, or confess and avoid the matters set up in the plea, and we are referred to 1 *Chitty's Plead.* 648, 650, *and* 659, in support of this position. There can be no doubt, but that it is a rule of pleading, that the replication must either, *first*, present matter of *estoppel* to the plea, or *secondly*, must *traverse*, or *thirdly*, confess and avoid the matter pleaded by the defendant. See 1 *Chit. Pl.* 648. And, it seems, from the brief of the attorney for the State, in this instance, that this is not controverted. It is insisted, however, on the part of the appellee, that this rule has been observed in reference to the replication we are considering. It cannot be controverted but that the replication at hand, is somewhat inartificially prepared, and is made to partake, to some extent, of the office of a demurrer. But when divested of these artificial defects, we think there is enough of substance left, to show the evident object of the pleader, as well as to inform his adversary of that object. The response to the plea, made by the replication, shorn of the redundant matter to which we have alluded, is simply this: that the trial and former recovery pleaded by the defendant, was not a trial and recovery upon the merits, but was only a judgment in bar, rendered upon a question of law, not involving the facts, or the merits of the cause. This, we apprehend, was a good response to the matter of the plea, the law being in such case, that, "if a former recovery for the same debt, or a plea of set-off on a recognizance of record, be pleaded, the replication was to be *nul tiel record;* and to a plea of judgment recovered, the plaintiff might *new assign*, that his action was for the breach of

different promises." 1 *Chit. Pl.* 582; *Snider vs. Cray*, 9 *Johns. Rep.* 327. But the appellee, in his replication, did not technically *new assign*, but pleaded by way of confession and avoidance, that the judgment, set up in the plea of the defendant, as a bar to the *sci. fa.*, was not a judgment recovered on the merits; and, in this, we think, he was clearly sustained by the authorities and precedents. See 1 *Chit. Pl.* 198; *Knox vs. Waldoborough*, 5 *Greenl. Rep.* 185; *Gilmer vs. Rives*, 10 *Peters Rep.* 298; *Wilbur vs. Gilman*, 21 *Pick. Rep.*; *Hampton vs. Broom*, *Miles Rep.* 241. We are, therefore, of opinion, that the court below did not err in overruling the appellant's demurrer to the appellee's replication.

4. In support of this assignment, the appellants have referred us to *Gray vs. The State*, 5 *Ark. Rep.* 265, and *Hicks vs. The State*, 3 *Ark. Rep.* 313. These cases were very good law, at the time they were respectively determined. We not only recognize, but fully approve of the principles determined in those cases, and would not hesitate to act upon them, and hold the *sci. fa.*, in this case, bad, were it not for the statute which was passed since the decisions in the above cases were made. It seems, the act to which we refer, was passed with a view of settling, from thenceforward, the difficulty experienced in procuring a form for a *sci. fa.*, which would meet the requirements of the statutory enactments, in respect to recognizances of bail in criminal causes. The 61*st section, of the* 52*d chapter of the Digest*, under the head of "CRIMINAL PROCEEDINGS," prescribes a form for *sci. fa.'s* in such cases, and the one pursued in the instance we are considering, is substantially a compliance with that form.

We have, therefore, to hold that the court below did not err in overruling the appellants motion to quash the *sci. fa.* in this cause.

This disposes of all the errors assigned, and we, finding no error in the record, and proceedings in the Yell Circuit Court, in this cause, affirm the judgment thereof, in this behalf rendered, at the cost of the appellants.

Absent, Mr. Justice SCOTT.

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THE STATE VS. WILLIAMS ET AL.

Where the defendant interposes a demurrer, which was argued and submitted, and the record then states, "that the parties came by their attorneys, and the plaintiff saying nothing further in reply to the defendant's demurrer, the court doth render judgment against said plaintiff," and then follows a final judgment in the cause, this court will hold, that the demurrer was disposed of before final judgment was rendered.

Where one of several defendants interpose a demurrer, going to the right of the plaintiff to recover and not to the personal discharge of the party pleading, and it is adjudged in his favor, it enures to the benefit of his co-defendants.

The provision of the statute, that the recognizance of bail, for the appearance of a party, to answer for a criminal offence, shall name the nature of the offence charged, is sufficiently complied with, by stating that he shall appear and answer the "State upon a charge of *killing* one Thomas Wheeler:" which will be construed to mean a *felonious killing*.

It is not necessary that a recognizance of bail should recite all the facts, which prove that the officer, before whom it was acknowledged or executed, had jurisdiction to act in the particular case, if it is conditioned to do some act, for the doing of which, such an obligation may properly be taken.

As to the form of a recognizance and *scire facias* thereon, see *Cannon et al. vs. The State, ante.*

Where the *scire facias* purports to issue upon a recognizance taken before one justice of the peace, and the recognizance given on oyer, appears to have been taken before two justices of the peace, it is a fatal variance—the demurrer presenting the variance being treated as a plea of *nul tiel record.*

Quere: Is a demurrer the proper mode of taking advantage of a variance between a recognizance of bail and the *scire facias* thereon?

Writ of Error to Independence Circuit Court.

Hon. BEAUFORT H. NEELY, Circuit Judge.

JORDAN, Attorney General, for plaintiffs.

WM. BYERS, contra.

Mr. Justice HANLY delivered the opinion of the Court.

This was a *sci. fa.* on forfeited recognizance, determined at the September term of the Independence Circuit Court.

On the 18th day of September, 1854, a judgment of forfeiture was entered; and on the 1st of November, thereafter, a writ of *sci. fa.* issued, which was returned, executed on *Byers* and *Rattan*, and *non est* as to *Williams.*

At the September term, 1855, Byers appeared, and craved oyer of the recognizance mentioned in the *sci. fa.*, which was granted, by filing the original recognizance, which is as follows:

STATE OF ARKANSAS, }
COUNTY OF INDEPENDENCE. }

We, Norman W. Williams, as principal, and William Byers and John Y. Rattan, as securities, do hereby acknowledge ourselves to owe and be indebted to the State of Arkansas, in the sum of two thousand dollars, to be made and levied of our respective goods and chattels, lands and tenements, and to the use of the said State rendered; but to be void upon condition, that the said Norman W. Williams, shall well and truly make his personal appearance, before the Judge of the Circuit Court of Independence county, in said State, at the court house thereof, on the first day of the next term of said court, then and there to answer unto said State, upon a charge of killing one Thomas Wheeler, late of the county of Independence, and State of Arkansas, and not depart from said court, without leave thereof, else to remain in full force and virtue.

Given under our hands and seals, at said county, this 11th day of July, 1854.

NORMAN W. WILLIAMS, [SEAL.]
WM. BYERS, [SEAL.]
JOHN Y. RATTAN, [LEAL.]

The above and foregoing recognizance was taken, acknow-

ledged, and signed, sealed and entered into before me, on the day of the date thereof.

JESSE SEARCY, *J. P.*

JOHN L. FRALEY, *J. P.*

The writ of *sci. fa.* substantially describes this recognizance, except that it alleges that it was before Jesse Searcy, a justice of the peace, &c., (alone) that the defendants entered into it; and that Williams should appear on the first Monday in September, A. D. 1854, to answer, &c.

Byers demurred to the recognizance and *sci. fa.*, and assigned as cause:

1. That the *sci. fa.* and recognizance are wholly defective and insufficient, in this; that the said recognizance required the said Norman W. Williams to appear and answer said "*State upon a charge of killing one Thomas Wheeler*, late of the *county of Independence, and State of Arkansas*," as appears by said recognizance, and said *sci. fa.;* and, as neither the said recognizance or *sci. fa.* shows that the said Williams was required to answer any criminal charge—nor do they show that the said Williams was under any legal obligation to appear before said Circuit Court, at the time named in said recognizance and *sci. fa.*

2. The recognizance is void upon its face, as it does not appear that it was taken by, or before any officer, authorized by law to take recognizance, or that there was any criminal charge against said Williams, or that such facts existed as to give the persons taking said recognizance authority to take the same.

3. Both said recognizance, and *sci. fa.* are informal, irregular and void.

The State joined in the demurrer, and the same was submitted to the court, and by the court sustained, and the State saying nothing further, final judgment was given for the defendants.

The defendants insist that the demurrer was correctly sustained:

1st. Upon the ground that there was a substantial variance be-

tween the recognizance and the *sci. fa.*, in this; that the recognizance given on oyer, appears to have been taken before Jesse Searcy and John L. Fraley, two justices. The *sci. fa.* purports to issue upon a recognizance taken before *Jesse Searcy, J. P.*

2d. Because it does not appear by said recognizance, or the record, that said Williams was under any legal cause or liability, to enter into recognizance: as that the said Searcy and Fraley, or either of them had any authority to take it.

The State brought error, and assigns as causes, the following:

1. The court erred in rendering judgment against the State without disposing of the demurrer filed by the defendant, Byers, to the *sci. fa.* and recognizance.

2. In rendering judgment in favor of the defendant, Rattan, without any plea or defence interposed by him.

3. The grounds set forth in said demurrer, are insufficient to sustain the same, and it should have been overruled, and judgment given for the plaintiff.

We will consider and dispose of these assignments, in the order in which they are presented.

1. As to this assignment, its determination depends upon the fact, whether its assumption is sustained by the transcript in the cause. By reference to the transcript, we find, under date the 14th September, 1855, the following entry, *to wit:*

"And, now, on this day came the parties, by their attorneys, and the said plaintiff saying nothing further in reply to said defendants demurrer, the court doth render judgment against said plaintiff. It is therefore, considered," &c.

This entry, coupled with the additional fact, that the transcript shows, the demurrer of the defendant, Byers, was filed, argued and submitted, renders it almost conclusively certain to our minds, that the court below did not proceed to render judgment final against the State, until after the demurrer had been disposed of, by being sustained. Indeed, we hold the entry, which we have copied, is a virtual disposition of the demurrer, whilst it also embodies matter and substance which make it a judgment final

against the State. It is true, that it is usual, in such cases, for the record to show more than one entry, as for instance: 1. The submission of the demurrer to the court with or without argument. 2. The disposition of such demurrer by the court, including a judgment of *respondeat ouster*. 3. A final judgment, if the party will not answer over in pursuance of the preceding order. We, therefore, hold that this assignment is not sustained by the transcript in point of law and fact.

2. It is true, that it does not appear from the transcript, that the defendant, *Rattan*, made any appearance to the *sci. fa.* in the court below, and that the court, upon sustaining the demurrer of *Byers* to the *sci. fa.*, for the causes therein set forth, and the refusal of the State to *answer over*, proceeded to, and did render judgment final, in favor of both *Byers* and *Rattan*. This assignment questions the propriety of the judgment of the court below, on this account.

In *Gordon vs. The State, use &c.*, 6 *Eng. Rep.* 12, it was held by this court that, where several are sued upon an obligation, a successful plea by one discharges the other defendants, unless the nature of the plea is of a character going to the personal discharge of the pleader, of which the others could take no advantage, as infancy, bankruptcy, &c. This, we believe, is a universal principle, recognized and acted upon in the administration of the law in all courts, where the practice of the English common law courts is pursued or adhered to.

We, therefore, hold that there is no error in the judgment of the court below, in respect to this assignment.

3. In considering this assignment, we shall have to recur, necessarily, to the demurrer of the defendant, Byers, to the *sci. fa.* in this cause, and in doing so, shall consider the causes set down in such demurrer as they appear.

1. It is insisted by the demurrer, that the *sci. fa.* and recognizance are both defective in this; that the recognizance required Williams, the principal, to appear and answer "the State upon a charge of *killing* one *Thomas Wheeler*," &c., averring

that this statement does not, either in substance or fact, amount to a naming of the "nature of the offence charged" in the purview and meaning of the act in such case made and provided.

In support of this position, we have been referred to several provisions of our statute on the subject, and a number of adjudications of the courts of other States. We will proceed to consider of those citations, as well as those with which we have been furnished by the Attorney General.

Digest, chap. 52, *sec.* 57, provides that: "Upon an indictment preferred, or to be preferred, in all criminal and penal prosecutions, recognizances for the appearance of the party charged with an offence, shall be made payable to the State of Arkansas, and may be entered into before the court in which the prosecution is had, or before any judge of any court of record, or justice of the peace, in such sums as may be deemed necessary to secure the appearance of the party, conditioned that he will appear on the first day of the next term of the Circuit Court in which the indictment is preferred, or to be preferred, "naming the county and State, the time and the place of holding the court, and the nature of the offence charged, and that he will not depart therefrom, without leave of the court."

There can be no doubt, from the above provision of our statute, that it is necessary the recognizance should state "*the nature of the offence charged*," and it seems that this is in accordance with the decision in *The State vs. Smith*, 2 *Greenl. Rep.* 62, and the other cases referred to by the appellees on this branch of the subject. But it is insisted, on the part of the appellant, that this has been substantially done in the case under consideration. It is unquestionably true, we think, that all that is required in this respect, to render a recognizance valid, is, that it should state substantially the charge which the principal is required to answer; and such seems to be the doctrine held and maintained in *The People vs. Blankman*, 17 *Wend. Rep.* 255, in which NELSON, Chief Justice, in delivering the opinion of the court, said: "It is not necessary to set forth the charge in the warrant, *mittimus*

or *recognizance*, with all the particularity or detail required in an indictment. * * * * * * In the mittimus, it is necessary to allege the particular crime, with *convenient certainty*, but considerable latitude is allowed in this respect, &c. * * * * * Greater certainty in the description of the offence should not be required in a *recognizance of bail*, than in a *warrant or mittimus*, &c. * * * * * The recital is substantially in the words of the statute, and enough appears in connection to imply the *criminal intent*." The recognizance in this instance requires Williams, the principal, to be and appear, &c., "to answer unto said State upon a charge of *killing* one *Thomas Wheeler*," &c. The construction and interpretation which we give to the word "*killing*," used in the recognizance, in the connection in which it is used, is the same as if the recognizance had contained the word "*feloniously*" prefixed immediately before the word "*killing*," so as to have made the phrase in which it occurs, read thus: *That the said Williams be, and appear, &c., to answer unto the said State upon a charge of feloniously killing one Thomas Wheeler, &c.*; for we hold, the word killing, as used in the recognizance, imports a charge of *felonious killing* against Williams; for the law presumes, and holds, that every killing of a human being (which is nothing more nor less than a *homicide*) to be a *felonious killing*, until the contrary appears. See *Foster* 255; *Archb. Cr. Pl.* 486; *Wharton's Amr. Cr. Law*, 359, 360. It was sufficient, therefore, for the recognizance to recite, as we have held it virtually does in this instance, that the party, *Williams*, should appear to answer to the charge of feloniously killing one *Thomas Wheeler*, without designating whether the felony was *murder*, either in the *first* or *second* degree, or *manslaughter* in one of the several degrees of that species of homicide, as defined by our law; as it seems, from the *40th section of the 52d chapter of the Digest*, it is simply the duty of a justice of the peace to determine, when he is investigating a criminal charge against any one, whether there is probable ground for believing that an offence has been committed by the person charged; and, if

so, to determine whether it is of such grade as to entitle him to bail under the Constitution and Laws, and to fix the amount thereof. He does not determine, in case of homicide, whether the act amounts to any crime below murder in the first degree, and excusable homicide. The fact of his requiring bail of the party, is evidence that he does not consider the crime murder in the first degree, or excusable homicide. The extent and grade of the offence, in practice, is most usually manifested by the amount of bail which is required of the party. We, therefore, hold that the demurrer should have been overruled upon the first ground.

2. In support of this ground, we have been referred to *The State vs. Smith*, 2 *Greenl. Rep.* 62; *Bridge vs. Ford*, 4 *Mass. Rep.* 641; *State vs. Edwards*, 4 *Humph. Rep.* 226; *Com. vs. Daggett*, 16 *Mass. Rep.* 447; *Goodwin vs. The Governor*, 1 *Stew. & Port.* 465, and *Andres vs. The State*, 3 *Blackf.* 108. We have examined these cases together with the dissentient opinion of BEARDSLEY, Justice, in *The People vs. Kane*, 4 *Denio Rep.* 534, *et seq.*, in which the same grounds are taken, as maintained in the above cited causes, and we are inclined to the opinion, as expressed by the court in *The People vs. Kane*, in which, BRONSON, Chief Justice, ably reviews, and overrules, or repudiates most of the cases cited above, and in the course of which, he said: "But when the recognizance has a condition to do some act, for the doing of which such an obligation may be properly taken, and the officer, before whom it was acknowledged, had authority, by law, to act in cases in that general description, I think the recognizance is valid, although it does not recite the special circumstances under which it was taken." And again in the same case, the learned Chief Justice, said: "Of course, these cases" (referring to most of the cases relied on by the appellee in this case) "prove nothing upon the present question. This recognizance was taken by an officer who could let to bail in all bailable cases. And it was a case where bail might by law be taken. * * * * * As the recognizance must be conditioned to do some act, for the doing

of which an obligation could properly be taken, it will, to that extent, show the cause of its caption. But it need not recite all the facts, which prove that the officer had jurisdiction to act in the particular case." The views of BRONSON, Chief Justice, seem to be more thoroughly sustained by both principle and authority, than those expressed in the cases to which we have been referred by the counsel for the appellees in this cause. We are, therefore, inclined, as we do, to hold with the decision in *The People vs. Kane.* See, also, to the same purport, *Rex vs. The Duchess of Kingston, Cowp.* 283; *Rex vs. Marks*, 3 *East* 163; *Archbold's Cr. Pl.* 40, 134, 163, 317; *State vs. Wellman*, 3 *Ham. Ohio Rep.* 14; *Tyler vs. Greenlaw*, 5 *Rand. R.* 711; *McCarty vs. The State*, 1 *Blackf.* 338; *Adair vs. The State*, *Ib.* 200; *Andres vs. The State*, 3 *Ib.* 108; *Long vs. The State*, *Ib.* 344; *Fowler vs. The Com.*, 4 *Mon. Rep.* 130; *Cone vs. Kimberlin*, 6 *Ib.* 434; *The People vs. Van Eps*, 4 *Wend. Rep.* 387; *The People vs. Stager*, 10 *Ib.* 431; *The People vs. Huggins*, *Ib.* 464; *The People vs. Gay*, *Ib.* 509; *The People vs. Blankman*, 17 *Ib.* 252.

Upon principle, as before remarked, and the preponderance of authority, we hold that it is not necessary, that a recognizance of bail should recite all the facts which prove that the officer, before whom it was acknowledged or executed, had jurisdiction to act in the particular case, if it is conditioned to do some act (as in this case) for the doing of which such an obligation may be properly taken. We, consequently, hold that the demurrer of the defendant, Byers, should have been overruled as to the second ground or cause assigned.

3. We have already determined the formality of the recognizance in this case. The only remaining question to consider under this cause of demurrer is, that part of it which pertains to the form of the *sci. fa.*, and this we have fully considered in another case, *Cannon et al. vs. The State*, the opinion in which has just been delivered. We hold, therefore, in this, as we held in that case, that the *sci. fa.* being strictly in conformity to the form prescribed by the 61*st section of the* 52*d chapter of the Di-*

gest, is all that can be required; and, consequently, that the court should have overruled the demurrer on the ground set out in this ground.

This disposes of the entire grounds covered by the *third* error assigned, which we have been considering, holding as we have done, that the court below should have overruled the demurrer of Byers upon all the grounds set out specially therein.

But, as the appellees insist that the demurrer should have been sustained on a cause not specially set out therein, *to wit:* "Upon the ground that there is a substantial variance between the *sci. fa.* and recognizance, in this—that the recognizance given on oyer, appears to have been taken before *Jesse Searey* and *John L. Fraley*, two justices: the *sci. fa.*, purports to issue upon a recognizance taken before "*Jesse Searcy, J. P.*" We consider this such a variance as to render the *sci. fa.* defective, and we will sustain the judgment of the court below for this cause alone, treating the demurrer as performing the office of a plea of *nul tiel record.* 2 *Tidds' Prac.* 1106.

Whether a demurrer is, or is not, the proper plea to be interposed in a case, presenting the facts that this does, has not been considered in this cause, for the reason that it seems to be assumed on the part of the appellees, and not controverted by the counsel for the appellant, that a demurrer in such case answers the same office that a plea of *nul tiel record* usually does. Hence, we have not, on our own suggestion, considered the question in this aspect.

We will not consider this case as a precedent, in another case where the question is directly presented, whether the points we have been considering can be raised by demurrer.

For the cause above stated, the judgment of the Independence Circuit Court will be affirmed.

Absent, Mr. Justice SCOTT.

CUMMINS VS. RAPLEY ET AL.

A debtor, having executed a deed of trust for the benefit of his creditors, filed a bill in chancery to enjoin one of the creditors from enforcing his judgment at law, and to coerce his acceptance of the deed of trust, depositing in court the amount then due, according to its provisions, for the payment of the judgment: the creditor refused to receive the money, except as an unconditional payment, or to accept the deed of trust, or to become a beneficiary under it: upon the hearing, the bill was dismissed: HELD, That the complainant had a right to withdraw the money so deposited.

Appeal from Pulaski Circuit Court in Chancery.

Hon. WILLIAM H. FEILD, Circuit Judge.

PIKE & CUMMINS, for appellant. A deposit in court is an absolute payment *pro tanto*. The appellant could, but the appellees never could withdraw it. 1 *Wend.* 197; 7 *J. R.* 315; 3 *Cow.* 338; 5 *Mass. Rep.* 365; 2 *T. R.* 645; 1 *Saund. Rep.* 33 *c. n. e. and f*; 2 *Salk.* 397 *and notes*; 2 *Str.* 1027; 1 *J. R.* 202; 1 *Bos. & Pull.* 332; 10 *East* 48.

Courts deal summarily with deposits. 2 *Hill N. Y.* 538; 3 *Dan. Ch. Pr.* 2028.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

At the June term of Pulaski Circuit Court, 1851, Cummins filed a petition on the chancery side thereof, stating in substance, as follows:

That on the 28th July, 1848, Charles and Abraham Rapley, filed a bill in said court, against petitioner and others, alleging, among other things, that petitioner, on the 26th April, 1848, had recovered a judgment against them, on the law side of said court, for $989 93, upon a note, &c. That one third of said debt was due and payable, according to the tenor of a certain contract and deed of trust made by them on the 18th of October, 1848,

to secure said debt with others. That they had always been ready to pay the same, according to the terms of said deed, and thereby offered to do so: praying an injunction against the collection of said judgment, and that petitioner should be compelled to receive the same, only according to the terms of said deed, they offering to comply with the terms thereof. That afterwards, when said first instalment of one-third of said debt became payable, according to the terms of said deed, or about that time, the complainants in said bill deposited in said court, with Peay, the clerk thereof, the sum of $348 50, being one-third of said debt, and the first instalment thereof, falling due according to the terms of said deed. That afterwards, on the 7th August, 1849, on the final hearing of the cause, complainants proved, as part of the evidence in the cause, the fact of such deposit of said money, and had the benefit thereof upon the hearing, and the further proceedings therein. That petitioner refused to receive said money under said deed, as a constructive admission that he was bound by the terms of said deed, but offered to take the same as an absolute payment on the debt. That upon the hearing, the injunction theretofore granted therein, was dissolved, and the bill dismissed: and on appeal to the Supreme Court, by the complainants in said bill, the decree of the court below was affirmed. See *Rapley et al. vs. Cummins et al.*, 6 *Eng. Rep.* 689. That after the appeal was taken, Peay, the clerk of the court, permitted said Charles Rapley to withdraw, and use the money so deposited, without any leave of the court. Petitioner submits that the court should have ordered, and should still order the money to be paid to him on said judgment; praying a rule upon said Peay and Charles Rapley, to show cause why the money should not be restored, and paid over to petitioner, on said judgment, with interest, &c.

Peay and Rapley filed a joint response to a rule issued against them, to show cause, &c. They admit that the facts are correctly set forth in the petition. That Abraham and Charles Rapley made a deed of trust to secure their creditors certain debts

due by them, and among them, the debt due to Cummins, assignee, &c. That he refused to accept said trust, and the said Abraham and Charles exhibited their said bill against said Cummins, in the Pulaski Circuit Court, to compel him to do so, and with said bill tendered and paid to said Peay, clerk of said court, the said sum of $348 50, &c., but said Cummins refused to receive said sum so tendered and paid, in writing, which writing is exhibited. That Cummins answered the bill; and, on final hearing, it was dismissed; and on appeal to the Supreme Court, the decree was affirmed, &c., and the said Abraham and Charles, finding that they could get no relief in the premises, and their bill being dismissed, they applied to Peay, and withdrew the said sum of money. Respondents insist that Cummins is entitled to no relief in the premises, and pray to be discharged, &c.

The following is the written refusal of Cummins to accept the money, on the terms proposed, &c., referred to in the response:

"LITTLE ROCK, ARK., *Feb. 5th*, 1849.

GORDON N. PEAY, *Clerk of Pulaski Circuit Court:*

SIR—I am informed that Mr. Charles Rapley has deposited some money in your hands, in some case or cases, where I am agent for the claimants. My clients have expressly rejected and condemned the deed of trust or assignment made by the Messrs. Rapley, to secure their creditors. I allude to the deed of record in your office, in which Ringo and Trapnall are trustees. My clients claim nothing, and will accept nothing under that deed: nor will they receive any payment which may be construed an implied or express approval of, or claim under that deed. I wish you to inform Mr. Rapley of this fact; and furthermore, that unless the money is paid unconditionally, without regard to said deed, no deposit will be recognized or allowed in any way, to stop interest on the debt. My clients are Messrs. Price, Newlen & Co., and Tracy, Irwin & Co.

Your ob't serv't,

E. CUMMINS, *Att'y.*"

On the hearing of the petition, it was argreed by the parties, that the above letter was shown to Rapley about the date thereof, and that he declined to permit the money to be withdrawn by Cummins, on the terms expressed in his letter, but insisted that if the money was taken out, it should be an acquiescence in the deed of trust. That this all occurred in the vacation of the court, and no motion or application ever was made to the court to withdraw the money by any one. That long before the decision of the Supreme Court was delivered, Rapley withdrew the money; Peay, the Clerk, agreeing thereto, upon Rapley giving security that the money would be returned whenever the court should order it. The receipt of Peay to Rapley for the money when deposited, dated 17th October, 1848, was read in evidence. Also the decree in the chancery cause.

The court dismissed the petition, at the costs of Cummins, and he appealed to this court.

The authorities cited by the appellant do not sustain his right to have the money brought again into court, and paid over upon the judgment.

No doubt, where a defendant brings into court, and deposits so much money as he admits to be due the plaintiff, on a demand sued for, it is a payment *pro tanto*, and he has no right to withdraw it, &c.

But here, the complainants in the chancery suit, deposited with the clerk, in vacation, a sum of money, for a specific purpose, subject to be accepted and withdrawn by Cummins, on the terms and conditions upon which it was deposited. He declined so to accept it. On the hearing, the bill was dismissed, and thereby, the object for which the deposit was made by complainants, was defeated.

Cummins refusing to accept the money on the terms proposed, and the court denying the relief sought, we think the Rapleys had a right to withdraw the money.

The judgment of the court below is affirmed.

Absent, Mr. Justice SCOTT.

LINDSAY VS. WAYLAND.

It is by no means certain that *sections* 132 *and* 133, (*chap.* 126, *Digest*,) were intended to apply to cases pending in the Circuit Court on appeal from a justice of the peace; and where, in such case, the court, upon consolidating several suits, upon which one action might have been brought, refuses to tax the plaintiff with the costs in all the cases but one, this court will not control the discretion of the Circuit Court in that respect.

It is not the province of this court to disturb the verdict of a jury, if it be not totally unsupported by evidence, although inclined to think the weight of evidence is against the verdict.

The application of a witness to explain his testimony, after he has given it in and retired, is addressed to the discretion of the Circuit Court.

Where the defence, to an action on a note is, that it was given for the purchase money of a slave, and that the slave was unsound at the time of the purchase, there is no objection to proof that the slave was sound at some time prior to the sale, provided the jury clearly understand that his soundness, at the date of the sale, and not at a prior time, is the matter in issue.

Appeal from the Circuit Court of Lawrence County.

Hon. BEAUFORT H. NEELY, Circuit Judge.

WM. BYERS, for the appellant.

JORDAN, for the appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

On the 28th of March, 1854, Jonathan Wayland, as guardian of Sinclair Manson, commenced nine separate suits against John A. Lindsay, A. J. Hardin and William S. Smith, before a justice of the peace of Lawrence county. The suits were founded upon nine bonds, eight for $100 each, and one for $20, executed by the defendants to the plaintiff, as such guardian, all of them

bearing date on the 12th of July, 1853, and due one day after date. Judgments in favor of the plaintiff, and appeal by the defendants, in each case, to the Circuit Court of Lawrence county.

In the Circuit Court, the defendants moved to consolidate the suits, and that the plaintiff be taxed with the costs of all of them but one. The court ordered the suits to be consolidated, and that the costs in the several cases should abide the event of the suit so consolidated.

The cause was submitted to a jury, the defendants relying upon failure of consideration as a defence; the jury returned a verdict in favor of the plaintiff for the full amount of all the bonds, and judgment was rendered against the defendants accordingly, and for costs. Motion for new trial overruled, bill of exceptions, and appeal by Lindsay to this court.

1. The refusal of the court to tax the plaintiff with the costs of all the suits but one, is assigned for error.

Neither of the bonds being for a greater sum than $100, the plaintiff might have joined them in one suit before the justice of the peace, though the aggregate sum of all of them was greatly over that amount. *Collins vs. Woodruff*, 4 *Eng. Rep.* 463; *State vs. Scoggin*, 5 *Ib.* 327.

But the plaintiff having elected to bring separate actions upon the bonds, there is no provision in the statute, regulating proceedings before justices of the peace, requiring the justice to consolidate them. See *Barnes vs. Holland*, 3 *Mo. Rep.* 47; *Sykes vs. The Planters' House, &c.*, 7 *Ib.* 477.

Section 132, *chapter* 126, *Digest*, under the caption of "PRACTICE AT LAW," provides that, "whenever several suits shall be pending in the same court, by the same plaintiff, against the same defendant, for causes of action which may be joined, &c., the court in which the same may be prosecuted, may, in its discretion, order such suits to be consolidated into one action."

Section 133, of the same *chapter*, provides that, "when any plaintiff shall bring, in the same court, several suits against the same defendant or defendants, for causes of action that may be joined,

the plaintiff shall recover only the costs of one action: and the costs of the other actions shall be adjudged against him, *unless sufficient reason appear to the court for bringing several actions.*"

It is by no means clear, that these sections were intended to apply to cases pending in the Circuit Court, on appeal from justices of the peace. They could not be applied in all such cases, for the reason, that where defendant appeals, and the plaintiff succeeds in the Circuit Court, he is entitled to judgment against the defendant and his securities in the recognizance, for the debt and costs of both courts (*Digest, chap.* 95, *sec.* 193,) and where there might be different securities in the several recognizances, the court would have no power, upon consolidating the several suits, to render judgment in favor of the plaintiff, against the securities in the recognizance taken in one suit, for the several demands, or for costs of all the suits. Such a judgment would not be warranted by the terms of the recognizance.

In this case, however, the same person was security in all the recognizances, but the court rendered no judgment against him at all.

Whether the court acted under the above provisions of the statute, or in the exercise of its common law power in consolidating the several suits in this case, the motion to consolidate, and the taxing of the costs, were to be determined in the exercise of a sound discretion. *Dewes vs. Eastham*, 5 *Yerg. Rep.* 297; *Thompson vs. Shepherd*, 9 *John. Rep.* 262; *Wilkinson vs. Johnson*, 4 *Hill N. Y.* 47; *Dudning vs. Bank of Auburn*, 19 *Wend.* 23; *William Scott & Co. vs. Brown*, 1 *Nott & McC.* 417; 2 *Ib.* 438; *McRea vs. Boast*, 3 *Randoph* 481.

The suits were consolidated upon the motion of Lindsay, and for his own benefit. The taxing of the costs being a matter resting in the sound discretion of the court, we will not reverse the judgment, in the absence of any showing that there was manifest error or abuse of such discretionary power, &c., as held in *Meadows vs. Rogers*, at the present term.

2. The first ground of the motion for a new trial is, that the verdict was contrary to law and evidence.

It appears, from the bill of exceptions, that on the trial, the plaintiff read in evidence to the jury, the nine bonds sued on, and closed.

The defendants proved that the bonds were given for a negro boy, *Sam*, sold by the plaintiff to the defendant, Lindsay, on the 12th of July, 1853, for $820, with bill of sale, warranting the negro to be sound in body and mind.

A number of witnesses, mostly physicians, were examined, as to the soundness of the negro at the time of the sale, &c., &c.

It seems, from the testimony, that Lindsay had the boy hired in the year 1853; that he ran off from him about the last of May, and was out between three and six weeks, and when he returned, he was much reduced in flesh, and looked feeble and emaciated. In a week or two after he returned from the woods, being in Lindsay's possession and employment, he purchased him of the plaintiff. He was kept employed on Lindsay's plantation during the summer, but not generally put at hard or heavy work, nor required to make a full hand, in consequence of his reduced condition. On the 4th of September, 1853, Lindsay obtained a prescription, from his family physician, Dr. Valentine, for the boy, saying he had a chill. Two or three days after this, the physician was called in to see the boy, and found him sick in bed, with symptoms of typhoid fever, of which disease he died, about twenty-two or three days afterwards.

The point in controversy, before the jury, seems to have been, whether or not the seeds or causes of the disease, of which the negro died, were contracted while he was run off, by exposure, alternate hunger and excessive eating, anxiety of mind, &c., &c., and consequently, existed in him at the time of the sale, &c.

It appears, from an entry of record, that the counsel of the

parties agreed that the law of the case was, that if the boy, Sam, was sound at the time of the sale, no defence could be made against the bonds sued on; but that, if the boy was unsound, the unsoundness was a valid and legal defence to the bonds, to the extent of the unsoundness. That, in consequence of this agreement, the court gave no instructions to the jury.

Thus, the parties having agreed upon the law, there was nothing but a single question of fact to be determined by the jury; whether the negro was sound or unsound at the time of the sale. We are inclined to think that the weight of evidence is against the verdict, but it is not totally unsupported by the evidence, and it is not our province to disturb it.

3. The second ground relied on for a new trial, is as follows:

At some time during the progress of the trial, after the witness, Dr. Valentine, had been examined, cross-examined, and retired from the stand, he came before the court, and asked leave to explain his testimony touching the primary and exciting causes of the disease of which Sam died. But he stated, in reply to a question of the court, that he was, himself, satisfied with his testimony, but that he feared that they did not understand him rightly, and he had been so told by Lindsay: but the court refused to allow the explanation by the witness, and defendant excepted.

There is nothing in this exception at all. The application of the witness to explain his testimony, was addressed to the discretion of the court: the court deemed it unnecessary, and perhaps, improper at the time, and we find nothing in the record to induce the belief that the court erred in the matter.

4. The third cause assigned for a new trial, is stated in the bill of exceptions, thus:

"During the progress of the trial, John Bridges was introduced, as a witness for the plaintiff, to prove the soundness and good health of the boy, Sam, in 1852, which the defendant objected to, but the court overruled the objection, so far as to allow

such evidence to be given, relating to the latter part of the year 1852, to which the defendant excepted."

The sale was 12th July, 1853. The plaintiff had a right to go back to a point of time reasonably remote, to commence showing the health of the negro, and trace it to the day of sale. How far he might go back would depend much upon the circumstances of the case, and would have to be controlled by the discretion of the court. In this case, the jury must have understood very well, from the agreement of the counsel in relation to the law of the case, that the soundness of the negro, at the date of sale, and not at a prior period, was the matter in issue; and if the court erred in permitting evidence of his good health, &c., as far back as the latter part of the year 1852, to be introduced, it was merely irrelevant testimony, and we cannot suppose that the jury were misled by it.

The judgment of the court below is affirmed.

Absent, Mr. Justice SCOTT.

CORNISH AS. AD. VS. KEESEE.

Before the defendant in an action of replevin, where the plaintiff has failed to prosecute his replevin suit with effect, can maintain a suit upon the bond against the security, he must obtain some judgment in the action, against the plaintiff; and an execution must be issued thereon and returned unsatisfied in whole or in part.

Error to Union Circuit Court.

Hon. THOMAS HUBBARD, Circuit Judge.

CARLETON, for the plaintiff.

MARR, for the defendant.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

This was an action of debt, brought by John H. Cornish, as administrator of John H. Hines, deceased, and assignee of Shadrack D. Drennon, sheriff, &c., against George W. Sims and Gideon Keesee, in the Union Circuit Court, upon a replevin bond.

The declaration alleged, that, on the 26th of April, 1853, the defendant, Sims, as principal, and the defendant, Keesee, as security, executed to Drennon, as sheriff of Union county, a replevin bond of that date, in the penal sum of $1600, conditioned as follows: That, whereas, *Sims* had sued out of said Circuit Court a writ of replevin against *Cornish*, returnable to the June term, 1853, by which the sheriff, Drennon, was commanded to replevy a slave named *Catron*, and deliver her to *Sims*; now if *Sims* should prosecute his replevin suit to effect and without delay, and if *Cornish* should recover judgment against him, *Sims*, in said action, he would return said slave, if return thereof should be ad-

judged, and pay *Cornish* all such sums of money as should be recovered against him, *Sims*, by *Cornish* in said action, for any cause whatsoever, then said obligation was to be void, else to remain in full force, &c., which bond and condition were approved by Drennon, as sheriff, &c.; and, thereupon, the slave was taken from the plaintiff, *Cornish*, and delivered to the defendant, *Sims*. That prior to the issuing and service of said writ of replevin, Cornish had been appointed by the Probate Court of Union county, administrator of said John H. Hines, deceased, and held said slave as such, and as the property of Hines. Profert is made of the letters of plaintiff, as such administrator.

Breaches of the bond are assigned, in substance, as follows:

1. *Breach:* That *Sims*, with an attempt to defraud *Cornish*, as such administrator, falsely and fraudulently instituted said suit of replevin against him, that by means thereof, he (well knowing his title to said slave was fraudulent and void) might obtain possession of said slave. That he did get possession of her by means thereof; that at the time, and ever since, he, said *Sims*, was and has been, a non-resident of this State; and having obtained possession of her, he has, with like fraudulent intent, run her out of the jurisdiction of the court, and beyond the limits of this State, to parts unknown, &c. And has heretofore, well knowing he could not succeed, abandoned and neglected, and still does neglect to prosecute his said suit of replevin against said Cornish with effect, and without delay, but wholly fails and neglects so to do, whereby said Sims has falsely and fraudulently converted said slave and her hire to his own use, to the damage of plaintiff, as such administrator, to the value of said slave, *to wit:* $900, and of her hire, worth $300, &c.

2*d. Breach:* That after the commencement of said replevin suit by *Sims*, for the purpose aforesaid on his part, on the 27th of June, 1853, one Rhoda Hines, the widow of said John H. Hines, exhibited her bill in the chancery side of Union Circuit Court, against said Cornish and Sims, claiming said slave as her separate property, alleging that Sims was a non-resident of the State; that

he had no means in the State; that Cornish was hopelessly insolvent; that Sims' claim to said slave was fraudulent, and that she had petitioned to become party to said replevin suit, but by the strict rules of law and the decision of the court, she had been refused; praying a temporary injunction; that said dispute between Cornish, Sims and herself, about the title of said slave, might be removed to that forum; and that Sims be enjoined from further prosecuting said replevin suit in the law side of the court, which temporary injunction was granted, and said dispute removed to said Chancery Court, and Cornish and Sims made parties thereto. That Cornish filed his answer and cross bill to said bill in chancery, charging, among other things, that the pretended claim of said Sims to said slave was fraudulent and void. That afterwards, at the December term, 1854, of said Chancery Court, it was adjudged and decreed that the claim of Sims in the replevin suit against Cornish, to the slave, was fraudulent and void; that he be forever restrained from further prosecuting said replevin suit against Cornish for the recovery of said slave; that said temporary injunction be made perpetual; that said replevin bond be condemned as forfeited, and that the same be forthwith put in suit at law, to recover the value of said slave and her hire, and that Sims pay the costs of the replevin suit; which decree remains in full force, &c. The value of the slave and her hire, and the amount of the costs in the replevin, and in the chancery suits, are averred. It is also alleged, that execution had been issued against Sims upon the decree, and returned no property found.

3 *Breach:* That plaintiff, Cornish, held said slave as administrator of said John H. Hines; that Sims' claim to the slave was fraudulent and void as to Cornish; that Sims, who was a non-resident of the State, fraudulently, and with an intent to defraud Cornish as such administrator in that behalf, procured said writ of replevin to be sued out against Cornish at the time, place, and in the manner aforesaid, that he might, under color thereof, get possession of said slave. That he procured, with the like fraudulent intent, said writ to be levied on said slave, and her

delivery into his possession; and, thereupon, fraudulently, and for the purpose of defrauding Cornish, as such administrator, out of said slave, run her out of the jurisdiction of the court, and beyond the limits of this State, and to parts unknown, &c., and wholly abandoned and neglected to prosecute said writ of replevin. That afterwards, on the 27th day of June, 1853, said Rhoda Hines, widow of said John H. Hines, exhibited her bill on the chancery side of said court, claiming said slave as her separate property, and charging, among other things, that the claim of Sims set up in said replevin suit against Cornish, to said slave was fraudulent and void; that Sims was a non-resident; that he had removed said slave beyond the limits of the State; that he had no property or effects in the State; that the claim of Cornish to the slave as the property of her said husband was unjust; that Cornish was insolvent, and a judgment against him would be worthless; and that there was nothing within the jurisdiction of said Chancery Court, except the said replevin bond; praying an injunction of said replevin suit; that Cornish and Sims be made parties; that the whole matter be adjusted in the Chancery Court, and she substituted to the rights of Cornish to the said replevin bond. That Sims and Cornish were made parties to said suit in chancery; that Cornish answered the bill, and charged, as by cross-bill, that the claim of Sims to said slave was fraudulent. That the whole matter in relation to the title to said slave was removed from the law to the chancery side of the court. That Sims failed to make any defence to the bill; or to prosecute his said replevin suit against Cornish with effect, and without delay, but in all things wholly made default. That, at the December term of said Chancery Court, 1854, it was decreed, that the claim of Sims to the slave was fraudulent and void, that he be forever restrained from further setting up his title to said slave; that said replevin bond be, and it was condemned as forfeited by reason of the default of Sims; that said bond should forthwith be put in suit at law to recover the value of said slave and her hire, and that Sims pay all the costs of the replevin and chancery suits; which decree remains in full force,

&c. The value of the slave, her hire, and the amount of the costs in each suit are averred. That, by an agreement entered of record, and the decree of the Chancery Court made at the December term, 1854, the said replevin bond, and the recovery thereon, were to go to, and belong to Cornish, as administrator of said John H. Hines, less certain amounts to be deducted out of said money after recovery; and said recovery, except as therein stated, will belong and enure to plaintiff as such administrator. That execution had been issued against Sims upon the decree, and returned no property found, &c.

That the replevin bond being so forfeited, it was assigned by Drennan to the plaintiff, as such administrator, at his request, &c.

That defendants had not paid to said plaintiff the value of said slave, nor her hire, nor returned her to him. Nor had they paid the costs in the replevin or chancery suit.

General breach—non payment of the replevin bond.

Sims not having been served with process, the cause was dismissed as to him. Keesee demurred to the declaration on the following grounds:

1. There is no allegation in either of said breaches, that the plaintiff in this suit ever obtained judgment of any kind whatever against Sims, the plaintiff in the replevin suit.

2. There is no allegation in either of said breaches, that Sims failed to prosecute the replevin suit with effect and without delay, or that the defendant therein, (the plaintiff in this suit) recovered any judgment whatever in said action of replevin, or that any return of the property sued for therein was ever adjudged to the plaintiff against Sims, and that he failed to return the same, or that any sum or sums of money whatever were recovered against Sims by the said plaintiff in said replevin suit, and that Sims failed to pay the same.

The court sustained the demurrer, and the plaintiff resting, final judgment was rendered in favor of defendant.

Plaintiff brought error.

The replevin bond sued on is conditioned according to the provi-

sions of *sec.* 11, *chap.* 136, *Digest;* and, is in form, a good statutory bond, as set out in the declaration.

Before the defendant in an action of replevin, can maintain a suit upon the bond against the security, he must obtain some judgment in the action against the plaintiff, and an execution must be issued thereon, and returned unsatisfied, in whole or in part. *Digest, chap.* 136, *secs.* 11, 29, 30, 37, 38, 39, 40, 43, 44, 45, 46, 47, 51, 52; *Cowden vs. Pease*, 10 *Wend. Rep.* 334; *Cowden vs. Stanton*, 12 *Wend.* 120; *Gould vs. Warren*, 3 *Wend.* 54. The provisions of the New York statute, on which these decisions were made, are similar to ours.

In this case, the declaration shows no judgment whatever against Sims in favor of Cornish in the replevin suit. It was held, in the above cases, that the issuance and return of the execution were matters to be proven, but need not be averred in the declaration. Be this as it may, it was clearly necessary to aver a judgment, &c.

Keesee was not a party to the chancery suit, and his rights or liabilities were not affected thereby.

If he had been a party the court could not have rendered any decree, enlarging or changing the conditions of the bond, so as to make him responsible otherwise, or upon other conditions than were stipulated by the terms of the obligation *Badlaw vs. Tucker*, 1 *Pick.* 285; *Whitewell et al. vs. Burnside*, 1 *Metcalf* 39.

The judgment of the court below is affirmed.

Absent, Mr. Justice SCOTT.

KINNEY & GOODRICH VS. HEALD.

An affidavit for attachment, containing all the substantial requirements of the statute, and filed before the issuance of the writ, is sufficient, though not "entitled," nor attached to any of the original papers in the cause.

An action will lie at the suit of a drawer of a bill of exchange, against the acceptor, upon presentment to, and refusal to pay by the acceptor, and payment by the drawer: And such bill, with endorsement of acceptance, is admissible in evidence for the plaintiff.

The cases of *State Bank vs. Conway*, 13 *Ark.* 305, and *Jones vs. Gatlin*, 16 *Ib.* 35, as to the practice on motions for new trial, cited and approved.

Writ of Error to Sebastian Circuit Court.

Hon. FELIX J. BATSON, Circuit Judge.

WATKINS & GALLAGHER, for the appellants.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of assumpsit, commenced by attachment, brought by the defendant in error, against the plaintiffs, in the Sebastian Circuit Court. The declaration was as follows: "For that, whereas the said plaintiff, on the 19th day of April, 1853, at New Orleans, in the State of Louisiana, *to wit*, at the county of Sebastian, made his bill of exchange in writing, dated on that day, and directed the same to the said defendants, to pay to the order of Hume & Butt, $836 19, and then and there delivered the same to the said Hume & Butt; and the said defendants then and there accepted the same, and promised the said plaintiff to pay the same, according to the tenor and effect thereof, and of their acceptance thereof. Yet they did not pay the amount thereof, although the said bill was then presented to them, on the day when it became due, and thereupon, the same was then and there

returned to the plaintiff; of all of which, the defendants then and there had notice, and then and there, in consideration of the premises, promised to pay," &c., with the usual breach, and damage, &c.

The affidavit upon which the attachment was issued, is in these words:

"We," (the attorneys for the plaintiff—naming them,) "do depose and say, that the defendants" (naming them,) "are justly indebted to *John H. Heald*, in the sum of $836 19, which sum is now due, and that the said defendants" (naming them,) "are not residents of the State of Arkansas."

It appears, from the bill of exceptions taken during the progress of the trial, that the above affidavit was written on a separate piece of paper, not "entitled," nor connected with, or attached to any of the original papers in the cause.

The plaintiffs in error pleaded *non assumpsit*, and excepted to the sufficiency of the above affidavit. The exceptions to the affidavit were considered by the court, and overruled, for which, the plaintiffs in error excepted.

The issue upon the plea of *non assumpsit*, was submitted, by consent, to the court, sitting as a jury; and the defendant in error, to maintain the issue on his part, produced, and offered to read as evidence, a bill of exchange, which is as follows:

"$836 19. NEW ORLEANS, *April 9th* 1853.

Pay to the order of Hume & Butt, eight hundred and thirty-six 19-100 dollars, value received, and charge the same to account of

J. HEALD,
PER JOHN PHELPS.

To Messrs. KINNEY & GOODRICH,
Fort Washita."

This bill was duly accepted by the plaintiffs in error, and the introduction and reading of which, were objected to by them at

the trial, and their objection overruled by the court, and the same permitted to be read as evidence for the defendant in error: to which, the plaintiffs in error excepted at the time, and set out in the bill, that the above facts were all the evidence introduced at the trial. On these facts, the court found for, and rendered judgment in behalf of the defendant in error, for the amount of the bill of exchange, and interest, and the plaintiffs brought error.

Three errors are assigned and relied upon for the reversal of the judgment of the Circuit Court.

1. Because the Circuit Court refused to sustain the exceptions of the plaintiffs in error, to the affidavit for attachment.

2. Because the Circuit Court overruled the objection of the plaintiffs in error, to the introduction as evidence, by the defendant, of the writing sued on.

3. Because the judgment is in favor of the defendant in error, when it should have been for the plaintiffs.

1. The first error assigned, does not seem to be much relied on by the plaintiffs, as it is not noticed in the brief of counsel, or alluded to in their argument. As far as we can judge, from the face of the affidavit, on which the attachment issued, it contains all the substantial requirements of the statute. The mere fact of its having been written on a detached piece of paper, and not "entitled," though a loose and irregular mode of procedure, in such cases, is not so, to such an extent, as to authorize this court to say, that the court below should have sustained the exceptions of the plaintiffs in error, taken to the affidavit on this account.

2. It is evident, from both the letter and tenor of the declaration in this case, that it was intended to be an ordinary suit, by the drawer of the bill of exchange, against an acceptor, after its presentment to, and refusal to be paid by the acceptor, and after its return to, and payment by the drawer, in accordance with the law merchant. There can be no doubt, but that such an action will lie under the law merchant, and we know of no provision of our statute which changes that law, to the extent of rendering the action questionable with us. It was, therefore, proper for the

defendant in error in this cause, not only to produce, but to read the bill, and the acceptance thereon endorsed, as a part of his evidence, to sustain his action. We will consider of this branch of the subject more fully, when we come to consider and dispose of the third error assigned. We, therefore, hold that the court below did not err in permitting the defendant in error to read the bill sued on, and the acceptance thereon endorsed, on the trial.

3. We have said, that an action will lie, at the suit of a *drawer*, against an *acceptor*, under the facts stated in the preceding head, and we are sustained in this, by both principle and authority. See 1 *Saunders Pl. & Ev.* 513; *Symmond vs. Parmintu*, 1 *Wils.* 185; *Bayley on Bills* 392; *Chitty on Bills* 304; *Smith vs. Bryan*, 11 *N. C. Rep.* (*Iredell*,) 419; *Benjamin vs. Tilman*, 2 *McLean's Rep.* 213.

By the law merchant, when the drawer of a bill, payable to the order of a third person, and returned and taken up by him, sues the acceptor, he must, if denied, prove the acceptance. See 1 *Saunders Pl. & Ev.* 493, 503. He must prove the presentment of the draft to the acceptor, and his refusal to pay. This may be done by calling the person who presented the bill, or else by proving a promise by the defendant to pay, as that will dispense with the proof of the presentment. In such a suit, the return of the bill to the drawer, and his payment of it must be proved, in order to show that the right of action thereon, was vested in him. See the reference we have made to 1 *Wils.* 185; *Pfiel vs. Van Catenburg*, 2 *Camp.* 439; 1 *Saunders Pl. & Ev.* 513.

And such we hold the law to be, in this State, in such cases: except, that *here*, it would not be necessary for the plaintiff to prove the acceptance of the bill, unless that fact were denied by the acceptor by plea, verified by affidavit, under our statute.

In *Smith vs. Bryan*, 11 *N. C. Rep.* 419, before referred to, and a case very similar in its facts, to the one we are considering, RUFFIN, C. J., in delivering the opinion of the court, said: "But when the drawer brings suit on the bill, the declaration states,

not only the drawing of the bill, and its acceptance, and the non-payment by the defendant, but that the plaintiff thereby became liable as drawer, and paid it. It is, therefore, indispensible on such a count, to prove the payment of the bill, or, at least, to prove the payee's name, in blank, on the bill, as an authority to fill up a receipt to the plaintiff for its amount: for the mere possession of the bill, payable, and therefore belonging to a third person, is not evidence that the drawer has got it up by paying it, so as to entitle him to sue on it. If a bill be payable to the drawer's own order, and he transfers it by endorsement, and afterwards becomes holder again, he may then have an action on it against the acceptor, because, by the possession, he stands, *prima facie*, on his original rights," &c. * * * * * *

"But, it is otherwise between the drawer and the acceptor of a bill, payable to another; for the drawer has no original right to the instrument against the acceptor, but only the right arising out of his secondary liability, in the event of non-payment by the acceptor, on *due presentment*. Hence, the necessity, as before mentioned, that the drawer should show such failure by the acceptor, and that he, the drawer, paid the money, in order to entitle him to sue on the bill."

We have thought proper to say this much in reference to the averments that a declaration should contain, founded on a cause of action, such as the one before us, and the proof necessary to support such action, with the view and hope of making ourselves understood in reference to the competency of the bill, as evidence, in part, to enable the defendant in error to support his action, the bill itself, with the acceptance thereon endorsed, being an important link in the chain of testimony, which, to entitle the party to a recovery, must be connected and unbroken in all its parts.

The plaintiffs in error, having only excepted during the progress of the trial, to the ruling of the court below, in permitting the defendant in error to read the bill sued on, as a part of his evidence, to support his action, (and we have held that ruling right,) and not having, after all the evidence was submitted to

the court, sitting as a jury, and after the finding of the court in favor of the defendants in error, upon that evidence, moved for a new trial, we cannot, consistently, with the recent decisions of this court, consider whether or no, there was any other evidence adduced on the part of the defendant in error, in addition to the bill and its acceptance endorsed, notwithstanding the bill of exceptions copied in the transcript, affirmatively shows, that none other was, in point of fact, offered; for the practice of this court, and consequently the law, is, in the language of WATKINS, C. J., in *State Bank vs. Conway*, 13 *Ark. Rep.* 354, 355, "That if a party merely excepts to the finding of the court or jury, setting out the testimony, without any motion for a new trial, or without any exception, whereby he shall put his finger upon the alleged error of law, as to any ruling or decision of the court below, there is no case presented for the consideration of this court." And to the same purport, is the opinion of Mr. Justice SCOTT, in *Jones et al. vs. Gatlin*, 16 *Ark. Rep.* 35.

In the case before us, no other question or point of law, was saved during the progress of the trial, after the exception was taken to the admission of the bill as evidence for the defendant in error, and as we have before remarked, no motion for a new trial was made after the evidence was concluded, and the finding of the court thereon pronounced. The exception was to the finding of the court, upon the evidence offered, and the party excepting, in the very expressive language of the learned Chief Justice, just quoted: "did not put his finger upon the alleged error of law," committed by the court, in the finding upon the facts.

Wherefore, upon the transcript as it stands, divested as it should be, of every fact brought upon the record by the bill of exceptions, after the admission of the bill of exchange sued on, we shall be compelled to affirm the judgment of the court below.

Let the judgment of the Sebastian Circuit Court be affirmed at the costs of the plaintiffs in error.

Absent, Mr. Justice SCOTT.

HICKS ET AL. VS. BADHAM.

The questions of law arising upon a demurrer to the declaration, which has been overruled by the court, will be considered as waived by filing a plea in bar.

(The case of *State Bank vs. Conway*, 13 *Ark.* 354, and subsequent cases, as to new trials.)

Appeal from Phillips Circuit Court.

PALMER and WATKINS & GALLAGHER, for appellants.

FOWLER & STILLWELL, for appellee.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of assumpsit instituted at the May term, 1855, of the Circuit Court of Phillips county by the appellee, for the use, &c., against appellants, founded on a promissory note. The plea of the general issue, *non-assumpsit*, was interposed by the defendants below, and issue thereto joined by the plaintiff. This issue was submitted to the court, sitting as a jury, by consent, and there was a finding and judgment by the court in favor of the plaintiff, for the amount of the note sued on, with interest. There was an exception taken to the finding of the court upon the evidence, and a bill of exceptions signed and sealed, purporting to embody and contain all the evidence adduced at the trial, but which we do not deem material to state, or farther notice, in the view of the disposition which we shall make of the case.

There was a demurrer to the declaration interposed and overruled by the court; to which, the defendants below excepted, but having interposed their plea in bar afterwards, and not saving the point by their bill of exceptions taken to the finding of the

court upon the evidence, the questions of law arising on such demurrer, must be considered as waived by their subsequent plea in bar.

There was no motion for a new trial.

This case, therefore, falls fully within the rule laid down by this court in *State Bank vs. Conway*, 13 *Ark. Rep.* 354, 355; *Jones et al. vs. Gatlin*, 16 *Ark. Rep.* 35, and *Kinney et al. vs. Heald*, just decided. *Lefils & Christian vs. Sugg*, 15 *Ark. Rep.* 137.

Judgment of the Circuit Court of Phillips county, is, therefore, affirmed, with costs.

Absent, Mr. Justice SCOTT.

WHITE ET AL. VS. THE STATE.

Newly discovered evidence, to afford a ground for new trial, must have been discovered since the fomer trail; must be such as reasonable diligence could not have secured at the former trial; must be material, and not cumulative; must be such as ought to produce on another trial, a diffierent resuelt, on the merits, and must go to the merits.

A motion for new trial, in general, will not be granted unless accompanied by the affidavit of the newly diecovered witness.

Appeal from the Circuit Court of Pope County.

The Hon. FELIX J. BATSON, Circuit Judge.

HOLLOWELL, for appellants.

JORDAN, Attorney General, contra.

Mr. Justice HANLY delivered the opinion of the Court.

The appellants were indicted at the March term, 1855, of the Pope Circuit Court, under the *5th section of the 5th Article of the 51st chapter of the Digest*, under the title of "SABBATH BREAKING." There were two counts. The first was under the *1st clause* in the *5th section;* and the other, under the *second clause* of the same section. At the September term, 1855, the defendants pleaded *not guilty;* were tried by a jury, convicted and fined ten dollars each.

At the same term, the defendants filed a motion for a new trial, on the ground of newly discovered evidence since the trial and verdict. The motion was supported by the affidavit of one of the appellants; stating, in effect, that he was not aware of the existence of the evidence newly discovered, until since the trial; stating furthermore, what he expected to prove, but which we do not deem necessary to state, as it was only cumulative of the evidence, which it appears, from his bill of exceptions, he introduced to the jury at the trial. Neither the motion, nor the affidavit in support of it, shows any diligence on the part of the appellants, to procure the evidence newly discovered, anterior to the trial. We will not copy the evidence set out in the bill of exceptions, as the appellants do not question the propriety of the finding of the jury upon that evidence, but predicate their motion for a new trial wholly upon the ground of newly discovered evidence, which they set out, and which we hold, is only cumulative of that, which they offered to the jury at the trial. *Cumulative evidence*, as understood in the sense in which we use it, in this connection, is such evidence as goes to support the facts principally controverted on the former trial, and respecting which, the party asking for a new trial, as well as the adverse party, produced testimony. See *Wharton's Amer. Crim. Law*, 913.

After, or newly discovered evidence, in order to afford a proper

ground for the granting of a new trial, must possess the following qualifications:

1. It must have been discovered since the former trial.

2. It must be such as reasonable diligence, on the part of the defendant, could not have secured at the former trial.

3. It must be material in its object, and not merely cumulative, and corroborative or collateral.

4. It must be such as ought to produce, on another trial, an opposite result on the merits.

5. It must go to the merits, and not rest merely on a technical defence. See *Whart. Amer. Crim. Law*, 908, 909; *Burris vs. Wise & Hind*, 2 *Ark. Rep.* 33.

The after discovered evidence, set out in this case, wants several of the elements and features necessary, to make it available as a basis of a motion for a new trial. For instance, the appellants show no diligence in the way of its procurement for the former trial: it is wholly cumulative of the evidence which was before the jury; and, lastly, it is not of such a character, as ought, or would, likely, produce on another trial, an opposite result.

There are, however, other grounds, in addition to the above, deemed preliminary points of practice, which must be conformed to, before a motion on the ground of newly discovered evidence will be entertained. It is necessary, that the party should mention the witnesses by name, and what he expects to prove by them. This seems to have been done in the case before us. And, in addition to this, that either the witnesses themselves, should state, on oath, the evidence they can give, or that the party should add his own belief to the statement made by the witnesses. See *Burriss vs. Wise, & Hind* as above; *Hollingsworth vs. Napier*, 3 *Caine's Rep.* 182; *Dunn vs. Marrill et al.*, 1 *Ham. Rep.* 382; *Brown vs. Swan*, 1 *Mass. Rep.* 202; *Adams vs. Ashby*, 2 *Bibb.* 287.

The rule for a new trial, in general, will not be granted in

such cases, if supported only by the affidavit of the party, or one interested. The motion must be accompanied by the affidavit of the newly discovered witness. And this rule is as well applicable to criminal, as civil practice. See *Whart. Amer. Crim Law*, 909; *Webber vs. Tres*, 1 *Tyler Rep.* 441; *Noyce vs. Huntington*, *Kirby* 282.

In the case before us, the motion was only accompanied by the affidavit of one of the appellants.

We, therefore, in view of the above principles; hold, that the court below very properly overruled the appellant's motion for a new trial in this cause, and finding no error in the whole transcript, we consequently, affirm the judgment of the Pope Circuit Court, in this behalf. Let the judgment be affirmed, at the ap pellants costs.

Absent, Mr. Justice SCOTT.

THE STATE VS. JOHNSON.

17 407
69 610

A candidate for an elective office, receiving a majority of the votes polled, where ther were but two persons voted for, but not a majority of the votes of the qualified electors, is not legally elected to the office, though so proclaimed by the judges of election, and commissioned by the Governor—the authority to fill the office being derived from the free choice and election of the qualified electors, not from the pro clamation of the judges of election, nor the certificate of election, nor the commis sion of the Governor.

A commission is, simply, evidence of a right to hold an office, gives color to the acts of the incumbent, and constitutes him an officer *de facto;* but invests him with no right to the office, and it becomes destroyed, canceled and superseded, upon the issuance of a commission to another, who has been legally elected to fill the office.

The corporate authorities of a city, having the right, by their charter, to pass an ordinance providing a tribunal before whom contested elections, under it, should be tried, and providing the course of procedure in such cases, may pass such ordinance after an election has been held, and invest such tribunal with power to determine contests arising out of such previous election.

Appeal from Sebastian Circuit Court.

Hon. JOHN J. CLENDENIN, Circuit Judge, presiding.

JORDAN, Attorney General, for the appellant.

Mr. Justice HANLY delivered the opinion of the Court.

Upon the order of the prosecuting attorney for the 4th Judicial Circuit, the clerk of the Sebastian Circuit Court issued a writ of *quo warranto*, against the appellee, Raphael M. Johnson, requiring him to show by what authority or warrant, he exercises the office and frenchise of Mayor of the city of Fort Smith, in the county of Sebastian, in this State. This writ bears date the 20th August, 1855, and was made returnable, and was returned to the September term, of the Sebastian Circuit Court, next after its date. At the term of the court to which such writ was returned, the appellee appeared thereto, and interposed a plea in response to the writ, alleging therein, that he was, at the time of the election hereinafter mentioned, a free, white, male inhabitant of said city, over the age of twenty-one years, and a resident within the corporate limits of said city: that an election, for the election of the officers of said city, was holden in said city, on the first Monday in May, A. D. 1855, by the judges and clerks elected for that purpose, by the electors present, at the opening of the polls, in pursuance of, and in accordance with the provisions of the *33d and 34th sections* of the *act* of the *General Assembly* of this State, approved the 19th December, A. D. 1854, entitled, "An act to provide more fully for the incorporation of the City of Fort Smith:" that, upon said election, —— votes were offered to be given in, and the appellee received of the votes so offered, for the office of

Mayor, —— votes, being a majority of all the votes offered to be given in for the candidates for that office; and he avers, that he then and there received a majority of the votes cast, by the qualified electors of said city, for the candidates for the said office of Mayor, and was, thereby, duly elected Mayor of said city, for the term of one year: that immediately after the said election was completed, the judges who held it, granted unto him a certificate of his election, and that the said judges filed the poll-books of said election with the city council of said city, immediately after the organization of said council: that within three days after said election was completed, the said judges forwarded to the Secretary of State, an abstract of all the votes polled at said election for Mayor of said city: that on the 16th day of May, A. D. 1855, a commission, in the name, and by the authority of the State of Arkansas, sealed with the seal of said State, signed by Elias N. Conway, Governor thereof, and attested by the Secretary of said State, and bearing date the day and year aforesaid, was issued to the appellee, whereby, after reciting, that whereas, it appeared that the appellee had been duly elected Mayor, in and for the city of Fort Smith, in this State, at an election held in said city, on the 7th of May, 1855, the said Governor, by virtue of the authority in him vested by the constitution and laws of said State, did thereby commission said appellee, Mayor, in and for said city, for and during the time prescribed by the laws of said State. And thereby authorized and required the appellee to do and perform all and singular the duties incumbent on him as Mayor, in and for said city, according to law, and the trust reposed in him, as in and by the said commission to the court shown, more fully appears: that on the 20th May, 1855, he took and subscribed the oath prescribed, to qualify him as such Mayor, in due form of law, and on that day entered on the duties of his office as such Mayor, and averring that, by that warrant, he was exercising the franchise of Mayor of the City of Fort Smith, and had entered upon, and was using the powers, rights and privileges to said office belonging.

And at the same term, at which the above answer or plea was filed by the appellee, the State, by her attorney, interposed her replication thereto, in substance, as follows: That by an ordinance of the City Council of the City of Fort Smith, entitled, "An ordinance providing the mode of contesting elections within and for the said city, passed and approved by the council of said city, on the 8th day of May, A. D. 1855, in pursuance of the provisions of the 33d and 34th *sections* of the *act* of the *General Assembly* of this State," approved the 19th December, 1854, entitled, "An act to provide more fully for the incorporation of the City of Fort Smith," it was provided as follows, *to wit:*

1. *Be it ordained by the City Council of Fort Smith*, That John Pearson, Calvin Walker and Francis McKiernan, justices of the peace within said city, be, and they are hereby constituted a board of commissioners, for the purpose of hearing and determining upon the elections held within and for said city.

2. When the election of any Mayor, Alderman or Constable of said city, shall be contested, it shall be before said board of commissioners, and the person contesting any such election, shall give the opposite party notice in writing, two days before the time of contesting the same, specifying the grounds upon which he intends to rely, and if any objection be made to the qualification of voters, the names of such voters, with the objections, shall be stated in the notice, and the parties shall be allowed process for witnesses.

3. That the said board of commissioners shall have full power and jurisdiction in the premises, and shall hear and determine such contest, in a summary way, according to the evidence, and if such board of commissioners, or a majority of them, shall be of opinion, that the person proclaimed elected, is not duly elected, but that the person contesting is elected, they shall enter up an order to that effect, which said order, under the hands of said commissioners, or a majority of them, shall be filed with the Recorder of said city.

4. That upon the application of either party, seeking to contest such election, the said commissioners, or a majority of them,

shall immediately set a day and place to hear such contest, and shall have full power to issue subpoenas for witnesses, to administer oaths, and shall, in every respect, constitute a corporation court, for the purpose aforesaid, and shall have full and ample powers to do any and all things necessary for the full and complete performance of the duties aforesaid.

5. If a vacancy shall occur in said board by refusal to act, death, resignation or otherwise, such vacancy may, at any time, be filled by appointment of the city council.

6. If the election of Mayor shall be contested, and the order of said commissioners shall be, that the person so contesting is duly elected, it shall be the duty of the recorder to forward a certified copy of such order, so filed with him, together with a certified copy of this ordinance, to the Governor of the State of Arkansas, within three days after filing such order with him as aforesaid.

7. The decision of said board of commissioners shall be conclusive, and the party so declared to be elected, shall be entitled to such office, and upon being duly qualified as prescribed by law, may enter upon the duties thereof.

8. *Be it further ordained*, That this ordinance take effect and be in force, from and after its passage. Approved, May 8, 1855.

That under and in pursuance of the provisions of said ordinance, afterwards, *to wit:* On the 9th May, 1855, one Wm. H. Rogers, also a free white male inhabitant of said city, over the age of twenty-one years, and a candidate for the office of Mayor, at said city election, so held on the said 7th of May, 1855, made application to the said board of commissioners to contest the election of said appellee to the said office so proclaimed to be elected to, at said election, by the judges thereof, and thereupon, the said board, appointed the 16th May, 1855, at 10 o'clock, A. M., of said day, at the court house, in the said county of Sebastian, to hear and determine such contest, and afterwards, on the 14th May, 1855, the said Rogers, under the ordinance as above, caused notice in writing to be duly served on the appellee, specifying the

time and place of holding such contest, and the grounds on which he, Rogers, intended to rely, together with the names of the voters at said election whose qualifications were objected to, and the objections: that on the 16th May, 1855, at the hour and place named, the board met and proceeded to hear evidence, and thereon adjudged and declared that appellee did not receive a majority of the votes polled for the office of Mayor of the City of Fort Smith, and was not elected to said office at the election aforesaid, and that the said Rogers was, by a majority of those votes, and so entered up their order or judgment accordingly, which said judgment was signed by each of the commissioners, and filed within the time, and in the manner prescribed by the ordinance, as above: that the decision or judgment of the commissioners as above, was, on the 21st May, 1855, copied, and that, with a copy of said ordinance, was transmitted to the Governor of this State, who, on the 7th June, 1855, commissioned, in due form, the said Rogers, as Mayor of the said city of Fort Smith, for the time prescribed by law: that Rogers took the oath of office, as such Mayor, in due form, on the 13th June, 1855, and then took upon himself the duties of said office, and the franchises pertaining thereto, and from that time forward, had continued so to act.

The appellee demurred to the response or replication of the appellant to his plea, and which was, on argument and consideration, sustained by the court, to which appellant excepted at the time, when judgment final was rendered, discharging appellee from the writ in this cause, and the State appealed, on which the case now stands in this court.

The only question presented for our adjudication is, as to the propriety of the judgment of the court below, in sustaining the appellee's demurrer to the State's replication, and rendering judgment discharging appellee from the writ in this behalf.

We think there can be no question, in view of the facts set forth in the replication, that the appellee was not legitimately elected Mayor of the City of Fort Smith, by the electors thereof,

on the 7th May, 1855, but, if we may determine from the same source, it appears, most conclusively, that Rogers was; for, according to our construction of the several acts of the Legislature, pertaining to the incorporation of the City of Fort Smith, the electors of that city were required to possess certain qualifications; as for instance, to be free, white men, over the age of twenty-one years, &c., &c. To determine the result of the election between the appellee and Rogers, they being the only two candidates for the office of Mayor of that city, at the election on the 7th May, 1855, we have but to ascertain who received the majority of the votes of the electors, possessing the qualifications prescribed by those acts of the Legislature, to which we have before herein referred. The poll books of an election serve as conclusive evidence to the judges, who preside at the polls, to enable them to determine the result; as it is from those books alone, that such judges can ascertain that fact. After they have been thus used, and are deposited and filed away, as the law requires, they are, simply, memorials of what they contain, and intrinsically, as a medium of evidence of the qualification of the electors, they are only *prima facie* evidence of that fact. The proclamation and certificate of the judges, who presided over the election of the 7th May, 1855, declaring and making known, that the appellee had received a majority of the electoral votes polled on that day for the office of Mayor, were certainly not more potent than the original books, from which the fact proclaimed and certified to, was derived. The office of the proclamation was to inform the parties concerned of the present result, and that of the certificate and the abstract they were required to make out and send to the Governor, was to furnish *him* with evidence, *prima facie*, or *conclusive*, as to him it makes no difference, whereon he might proceed to issue the commission to the person so appearing to him to have been elected. But, at last, after all this has been done, and the party thus commissioned, he derives his authority as an officer, not from the *proclamation* of the judges, not from the *certificates* of elections, not from those *abstracts* made out for the

Governor, and not from the *commission;* but from the free choice and election of the *people*, not *the people* in the popular sense of those words, but from the people who were competent and *qualified electors*, when the votes were polled and the election held. See *Marberry vs. Madison*, 1 *Cranch.* 137; *Wammach vs. Holloway*, 2 *Ala. Rep.* 33.

If we are correct in this, and of which we do not entertain a doubt, it is shown by the facts set forth in the replication of the appellant to the plea of the appellee, which are confessed by the demurrer, that *Rogers* received a clear majority of eleven votes over the appellant, of such as were *competent* and *qualified to vote*, under the acts of the Legislature, at the election for Mayor of the City of Fort Smith, held on the 7th May, 1855. The commission to appellee gave to him no right to the office of Mayor. It was, it is true, evidence of a right to the office; gave color to his acts, and constituted him thereunder, an officer, *de facto;* but invested him with no right, impairing the right to the office of Mayor, which Rogers had derived from the people by means of the election on the 7th May, 1855. After the close of the election, Rogers was, to all intents and purposes, Mayor, *de jure*, of the City of Fort Smith, and so soon as he was commissioned by the Governor, and proceeded to act thereunder, he became Mayor, *de facto*, of that city, and the commission, which had been issued to appellee by the Governor, became, and was, from that time, virtually destroyed, canceled and superseded; so, that if he continued to act as Mayor, after that time, he was a naked officer, *de facto*, without the commission to give color to his acts as such.

It is evident to our minds, from the facts and the views already expressed, that the appellee was commissioned and acted as Mayor of Fort Smith; and, consequently, exercised the franchises pertaining to that office, without lawful authority: and the fact of usurpation having been established by a *judicial* or *quasi judicial* tribunal, instituted for the purpose, in the mode prescribed by law, the franchise may be resumed by the State.

The fact that the ordinance providing a tribunal, before whom contested elections should be tried, and prescribing the course of procedure in such cases, having been passed after the election of the 7th May, 1855, does not, in the slightest, affect this case, as between the appellant and appellee. The city authorities of Fort Smith had the right, under their charter, to pass the ordinance in question.

It did not disturb any *right* of the appellee. It gave to Rogers a remedy, as against the appellee, and opened to Rogers the means of confirming to himself the right which he had derived from the election, which was being threatened by the appellee.

We are clear, therefore, from the above views, that the court below erred in sustaining the demurrer of the appellee to the appellant's replication, and rendering judgment discharging the appellee from the writ of *quo warranto* issued in this behalf.

Wherefore, the judgment of the Sebastian Circuit Court for the cause aforesaid, is reversed, and this cause is remanded to that court, with directions that the demurrer aforesaid be overruled, and that the court otherwise proceed herein, in accordance with law, and not inconsistent with this opinion.

Absent, Mr. Justice SCOTT.

17 416
64 593

REDD VS. ST. FRANCIS COUNTY.

This court has jurisdiction, on appeal from the Circuit Court, of a cause originating in the County Court, on the petition of a land owner to reduce and correct the assessment of his lands.

The 4th section of the act of 1853, (Acts of 1853, page 73,) prescribing the mode of assessing the lands of non-residents, is not in conflict with Article 4, section 2, of the Constitution of the United States, nor of the compact entered into between this State, upon its admission into the Union, and the United States, which forbids non-resident proprietors to be taxed higher than residents.

This court will not set aside the assessment of lands made by three house-holders of the vicinage under oath, upon the testimony of witnesses who swear merely as to the value of the lands, generally, in the same township.

Appeal from St. Francis County.

Hon. GEORGE W. BEAZLEY, Circuit Judge.

PALMER and WATKINS & GALLAGHER, for the appellant.

JORDAN, Attorney General, for the appellee.

Mr. Justice HANLY delivered the opinion of the Court.

This was a case commenced in the County Court of St. Francis county, founded on a petition filed in that court by the appellant, setting up that he was not a resident or inhabitant of the county of St. Francis, but was the owner therein of a large body of lands, which were taxed and assessed to him for the year 1855, at the rate and price of $10 per acre; averring that the actual and intrinsic value of such lands did not exceed the price and sum of three dollars per acre. The petition also states, that the mode and manner pursued by the assessor for said county in the assessment of said lands for said year, was by having the same appraised and valued by three house-holders of the elective township, with-

in which said lands are situate, selected and appointed by the sheriff of said county, charging therein, that such mode of assessment was not only unjust, but unconstitutional, and insisting that such assessment ought to be corrected, and his said lands valued at three dollars per acre.

This petition was presented to the County Court of St. Francis county, at the July term thereof for 1855, being the first term of said court held after the assessment of 1855, was filed in the office of the clerk of the County Court for said county under the statute in such case made and provided.

At the term of the court at which it was presented, the County Court proceeded to consider of, and act upon, the petition, and after hearing the evidence introduced upon the part of the appellant, and such as may have been introduced by the appellee, dismissed the petition of the appellant, without the relief prayed for, and rendered judgment against him for the costs, incident to proceedings thereon in the County Court. To which judgment of the court, the appellant, by his attorney, excepted at the time. The appellant moved the court in writing filed for a new trial, which, on consideration, was overruled by the court; to which appellant also excepted, and tendered his bill of exceptions, which was duly signed and sealed by the court; and from which it appears that the following evidence was introduced at the hearing of the above petition: that is to say, that the appellant was a non-resident of the county of St. Francis; that the term, at which said petition was presented and heard, was the first term of the County Court of St. Francis county, held since the 25th March, 1855, the time at which the assessment list for said county was filed that year; that the lands taxed and described in the petition were assessed to the appellant, for the year 1855, at the rate of $10, per acre; that the lands, *generally, in the townships* in which such lands are situate, are not worth more than $6 per acre; that the lands had a prospective value placed on them, and not a cash value; and this was all the evidence adduced at the hearing of said petition, as the bill of exceptions expressly states.

The appellant, on his motion for a new trial as above, being overruled by the County Court, filed the affidavit and recognizance required by law, and prayed for an appeal from the judgment of the County Court to the Circuit Court of said county of St. Francis, which was granted.

At the October term, 1855, of the Circuit Court for St. Francis county, the appeal in this cause came up before that court, and the judgment of County Court was affirmed, no error being found in the transcript thereof.

The appellant appealed from the judgment of the Circuit Court of St. Francis county, affirming the judgment of the County Court of said county, and rendering judgment for costs against him, upon which appeal the cause is now pending in this court.

1. No question is made on the part of the appellee as to the jurisdiction of this court, derived *intermediately* through the Circuit Court. The appellant has, however, devoted much space in his brief to the discussion of the question of jurisdiction, as if, in his opinion, it were a matter of doubt whether this court can take cognizance of this cause by appeal from the Circuit Court. We think there can be no doubt on the subject, when the several acts of the Legislature, that have been passed bearing on the subject, are considered in connection with the various adjudications of this court construing them with reference to questions of jurisdiction. Without, therefore, attempting to travel over the field of argument laid open by the appellant in this cause, we shall content ourselves by simply stating the result of our convictions on the subject; holding as we do, that this court has full jurisdiction of this cause, derived *intermediately* through the Circuit Court. See *Carnall vs. Crawford County*, 6 *Eng. Rep.* 613; *Allis ex-parte*, 7 *Eng. Rep.* 102; *Roberts vs. Williams*, 15 *Ark. Rep.* 45.

Having disposed of the above question, we will at once proceed to the consideration and determination of the several errors assigned, as follows:

1. That the County Court of St. Francis county, erred in over-

ruling appellant's application to correct and adjust the assessment of the lands of appellant made by the sheriff.

2. That the County Court erred in overruling appellant's motion for a new trial.

3. That the judgment of the County Court should have been for the appellant instead of the appellee.

4. That the Circuit Court erred in holding there was no error in the record and proceedings, and in the judgment of the County Court.

5. That the Circuit Court erred, in affirming the judgment of the County Court.

6. That the Circuit Court erred, in rendering judgment for the appellee, and against the appellant.

1. It is insisted that the fourth section of the act of 1853, is virtually in conflict with that provision of the Constitution of the United States, *article* 4, *section* 2, that declares that: "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," as well as the compact entered into between this State and the United States, when Arkansas was admitted into the Union, which forbids non-resident proprietors to be taxed higher than residents.

The fourth section of the act of 1853, is in these words: "That all lands belonging to non-residents, shall be valued by three house-holders of the election township, within which the lands are situate, to be appointed by the sheriff, and such valuation, provided it is not less three dollars per acre, shall govern the sheriff in assessing the same." See *Acts of* 1853, *page* 73.

In order to determine the question made by the appellant in reference to this section, it is necessary, that we should consider it with reference to the provisions of the revenue law of this State, applicable to residents, which are as follows:

"*Secion* 13. Each assessor shall require each person in his county to give in a description of all his lands, by township, range, section, quarter section, tract, lot or part thereof, and the number of acres in each particular tract or sub-division thereof.

Section 14. The sheriff or assessor shall make out a schedule of the property given in by each and every person for taxation, and its value, and when thus made out, it shall be sworn to by the person or his agent, as being the full amount of property owned by him subject to taxation, together with the true value thereof; provided, that no land shall be valued at less than three dollars per acre.

Section 15. The assessor shall require each person owning or holding taxable property in his county, to value the same under oath, valueing each lot or town lot separately, and each kind of other property separately from every other kind.

Section 19. If any taxable inhabitant of any township neglect or refuse, when called on to furnish the assessor, with a list of his taxable property, as required by law, or if the assessor has reason to believe that the list so furnished him is fraudulent, or does not contain a correct list of the property owned by such person, the assessor shall ascertain by the best means in his power, the taxable property and the value thereof, and as a penalty for such neglect, he shall assess said property at double its value." See *Digest*, 872. These are all the provisions of our law bearing on the subject, directly before us.

There can be no question, if the Legislature have, by the act of 1853, conferred "immunities and privileges" upon the citizens of this State not guaranteed thereby, or other acts in relation to the same subject matter, to the citizens of other States of this Union, holding interests in this State, that the act in question is repugnant to the provisions of the Constitution which we have quoted above; and, moreover, if the act of 1853, has the effect to tax the property of non-residents higher than it does that of residents, by the terms of the compact entered into with the United States, before herein referred to, that act is void, and cannot, in good faith, be enforced by the courts of the country. We will proceed at once to examine those various provisions with the view of determining the propositions which we have stated.

It is evident, we think, from the provisions of the statutes which

we have copied above, what objects the Legislature had in view by their enactment. There can be no doubt, but that the act of 1853, was passed to cure the defects which really existed in the law in reference to the assessment of property of non-residents, which was in force up to that time. The law, as copied from the *Digest*, required *all persons owning taxable property in this State, either by themselves or agents*, to furnish lists under oath to the assessor in the several counties. This requirement, as applicable to non-residents, must have been not only inconvenient and burdensome to that class, but highly insecure and unsatisfactory to the State. Burdensome to the non-resident for the reason, that its observance required him to have an agent in each county in the State, in which he might own taxable property, who should have a personal knowledge, not only of the kind of property owned by his principal, but from personal knowledge should be able to swear to its actual and intrinsic value. Insecure to the State, for the reason, that it was confiding to an individual, who might not be supposed to be informed fully on the subject, the assessment of the value of the property of others, who, from corruption or ignorance, might place too high an estimate on such property, or else value it so low as to defraud the State out of its legitimate revenue. By the 16*th section of the* 139*th chapter of our revenue law*, it is provided, that: "All lands shall be valued at the true value thereof in ready money, taking into consideration the fertility of the soil, the vicinity of the same to roads, towns, villages and navigable waters, water privileges on the same, and all other local advantages, &c. See *Digest, page* 872. It may be that the Legislature had become satisfied, from the experience derived from the practical working and operation of the law, as it existed prior to 1853, that it was not practicable for non-resident proprietors to furnish lists and appraisements, under oath, of their lands and property subject to assessment and taxation; and hence, the necessity of the act of 1853, to cure the evils existing in the old law in respect to non-residents. This was evidently the mischief which the new act was intended to remedy.

If so, the object the Legislature had in view, was not only laudable, but eminently calculated to accomplish the design intended. The appointment of three house-holders from the *vicinage*, of the *election township* in which the lands of non-residents might or should be situate, would be more likely to effectuate and attain this design, than by any other means that could be devised or suggested. "Being residents, and, consequently, familiar with the actual locality of the lands, with reference to the character of the soil, its proximity to roads, towns, villages and navigable waters with privileges on the same, and all other local advantages," it is fair to presume, that they would be more competent to determine its "true value in ready money," than its proprietor, a stranger to all these, or even an agent, who, ordinarily, could not be expected to be fully informed on these subjects. How it is possible, under such circumstances, for the lands of non-residents to be assessed higher than their real value would justify or warrant, we are unable to conceive, without it should be assumed, that the assessor in every instance was corrupt; and, consequently, that he would only appoint the appraisers of such men as would, by forswearing, loan themselves to his corrupt designs. The whole scope and design of the fourth section of the act of 1853, was to prescribe a mode and means of ascertaining the value of certain species of taxable property, and this clearly was within the province and power of the Legislature. It is provided by the Constitution of this State, under the head of "Revenue," that, "all revenue shall be raised by taxation to be fixed by law," and that "all property subject to taxation shall be taxed according to its value—*that value to be ascertained in such manner, as the General Assembly shall direct*," &c.

The Legislature has *directed* one *manner* to be pursued for the ascertainment of the value of taxable property owned by *residents*, and another manner for the ascertainment of the value of such property when owned by non-residents. We have endeavored to show, that this policy was forced on the Legislature, on account of the inconvenience or impracticability of the old system; that

it cannot, except in extreme cases, operate to the disadvantage of non-residents. The difference in the two modes devised in the case of residents, and non-residents does not, in our judgment, amount to a discrimination in favor of our own citizens, both being alike fair. It is the fact of discrimination in favor of our citizens, or the imposition of burdens upon the citizens of other States, from which our own citizens are made exempt, which must be the true test to determine the constitutionality of an act, such as we are at present considering. We find no such *discrimination* in the act in question; and, therefore, hold, that it is not obnoxious to the *second section of the fourth article of the Constitution*, as copied above, and that it does not, in its letter or spirit, violate the compact entered into between this State and the United States at the time of the admission of Arkansas into the Union and family of States.

2. Having disposed of the above question, we will next proceed to consider and determine the remaining one raised by the assignment of errors. That is to say, whether the County Court of St. Francis county ought to have, from the evidence set forth in the bill of exceptions and stated above, reduced the assessment upon the lands of the appellant?

By the practice, the appellant on presenting his petition to the County Court to correct and adjust his assessment, took upon himself the burden of proving the averments and allegations set forth in his petition. It was his duty, therefore, to have furnished proof necessary to make out the truth of his charges. We do not regard the evidence set out in the bill of exceptions, of such character as to out weigh the assessment of three persons, who fixed the value on the lands of appellant at ten dollars per acre; particularly, when we are forced to the conclusion, as we are in this instance, that the three assessors appointed by the sheriff made up their assessment and valuation from actual observation or knowledge of the worth of the lands assessed by them; whilst, the witness or witnesses, who deposed or testified before the County Court, judging from the manner in which the evidence is put down, testified only from a general knowledge, which such wit-

ness or witnesses had of the lands of the townships in which the lands of the appellant are situate, and not from a knowledge of the particular lands upon which the assessment was made. The statement of the testimony in the bill of exceptions, is, that the lands *generally in those townships*, are not worth more than six dollars per acre." The enquiry before the County Court was not as to the value of the lands *generally, in the townships* in which appellants lands were situate, but was, as to the value of the particular lands of the appellant. Beside this, the transcript does not show or indicate how many witnesses swore to the facts stated. This court is bound to presume in favor of the judgment of the County Court: and, consequently, that there was but *one*, or at most, not more than *two* witnesses, who swore to the facts stated. Supposing the appraisers sworn by the sheriff, and the *one* or *two* witnesses, who testified in the County Court, to be equally creditable, the weight or preponderance of evidence is in favor of the sheriff's assessment of the lands at ten dollars per acre. In either view, we think the judgment of the County Court right, and will not, therefore, disturb it.

3. The determination of the last preceding proposition is a virtual decision of the cause, upon the other errors assigned. The Circuit Court, acting upon the transcript from the County Court, very properly held there was no error therein, and affirmed the judgment of said court.

Wherefore, in view of the case as above, we affirm the judgment of the St. Francis Circuit Court at the costs of the appellant. Let the judgment be affirmed.

Absent, Mr. Justice SCOTT.

ADKINS VS. HERSHY.

Where a party, in a suit before a justice of the peace, or on appeal from such justice to the Circuit Court, is made a witness, under the statute, by the opposite party, he may give evidence as well for, as against himself—as where a defendant files a set-off, and is called by the opposite party to prove the cause of action sued on, he may also give evidence to prove his own set-off.

Appeal from the Circuit Court of Johnson County.

Hon. JOHN J. CLENDENIN, Circuit Judge.

MAY, for the appellant.

Mr. Justice HANLY delivered the opinion of the Court.

This cause was originally commenced before a justice of the peace, on an open account, and was before, and decided by this court, at the January term, 1854, when the judgment of the Circuit Court was reversed, and the cause remanded.

At the September term of the Johnson Circuit Court for 1855, the judgment of this court was spread upon the minutes of that court, and the cause again proceeded in, when, by consent, it was submitted to the court, sitting as a jury, when the finding and judgment were again for the appellee on the evidence.

The appellant moved the court for a new trial, and on his motion being overruled, he excepted, and set out in his bill, the following facts, *to wit:*

That the appellee, to prove his demand, called upon the appellant to testify; who, being duly sworn, said that appellee's account was just and correct: that he had bought and received of appellee the articles therein specified; and thereupon appellee closed his evidence, when appellant's counsel offered to prove by

him his set-off, which was filed in due and ample time, and in proper form; to which evidence the appellee objected, and the court sustained the objection, and refused to permit appellant to prove his set-off by his own testimony, to which the appellant excepted at the time.

The appellant appealed; upon which the cause is now pending in this court.

1. Upon an appeal being taken from a justice of the peace, to the Circuit Court, that court proceeds to try, hear and determine the cause anew on its merits, and the same course of procedure, and the same rules of practice are observed in the Circuit Court that obtain, in such case, before a justice of the peace. See *Digest, sec.* 181, *p.* 668; *Drennen vs. Lindsey*, 15 *Ark. Rep.* 359.

2. If there shall be no evidence given to establish any demand founded upon a contract, or to establish any set-off, or if the evidence given be insufficient for that purpose, the justice, before whom any such cause may be depending, or the Circuit Court in which jurisdiction may have been acquired of such cause by appeal, upon the application of the party offering such demand or set-off, may order the opposite party to be sworn, and examined in relation thereto, and after the examination of either party, no further evidence shall be given in relation to such demand or set off. See *Digest, sec.* 108, *p.* 656.

We think it clear, from the foregoing provision of the statute, that the design which the Legislature had in view by its enactment, was, to make the party sworn as a witness, stand in the place and attitude of a witness in the cause, as much so, as if he were an indifferent party. And we are confirmed in this, by the latter phrase of the section, the substance of which we have given above, which is, that "after the examination of either party, no further evidence shall be given in relation to such demand or set-off;" coupled with the provision contained in the 109*th section* of the same *chapter*, which is in these words: "Either party, in any suit founded on contract, may cause the opposite party to be subpoenaed as a witness in the cause

in the same manner, and with like effect, as any other person." It would be extremely onerous and unjust, if it were competent for the appellee, in the case we are considering, to require the appellant to be sworn as a witness in his behalf, for a special purpose, as, for instance, to prove his demand, and after he had established it, as was really the case in the instance before us, to discharge him from the stand, and thereby preclude him from giving evidence to sustain his set-off. An indifferent witness, in ordinary causes pending in the courts, is sworn to speak the truth, and the whole truth, touching the cause in which he is sworn. We cannot speak as to the practice in relation to the swearing of parties under the provision of the statute before referred to. Whether it is uniform throughout the State, we know not. But as far as our experience in, and knowledge of the practice in such case extends, it is to administer the same oath to parties, when sworn as witnesses under the statute as above, that is usually administered to witnesses in ordinary cases. When a party is called as a witness by his adversary, the presumption is, that he has no other means of proving his case, except by his testimony. By the act of calling him, the party virtually declares that he confides the cause to his conscience, and relies upon his integrity and truthfulness for the facts. When a set-off is filed, that is as much a part of the cause, and is, to all intents and purposes, as much at issue, as the original demand, upon which the action was founded. A witness, sworn in such cause, might as properly be interrogated in reference to the set-off, as the original cause of action. And such, we apprehend, is the case in reference to the party who is made a witness. He may testify in regard to any matter that is pertinent to the issue to be tried.

Whether the evidence of appellant would have changed the result in this cause, we, of course, cannot determine, except from conjecture. We think it possible, at least, that he would swear to his set-off: if so, it is evident the result of the cause would have been different, had the judge, who tried the cause, given heed to his evidence.

We are clearly of the opinion, that the court below should have allowed the appellant, when upon the stand, to have testified in reference to his set-off. Having refused to allow him to do this, and believing it possible that, had he been allowed to testify, the result might have been different, the judgment of the court below will be reversed, and the cause remanded, with directions to the Circuit Court of Johnson county, to grant the appellant a new trial, and that the cause proceed in accordance with law, and not inconsistent with this opinion. Let the judgment be reversed at the cost of the appellee.

Absent, Mr. Justice SCOTT.

BURR & CO. VS. SICKLES & CO.

A remittance of money by mail, is at the risk of the party mailing it, unless there be an express direction to remit in that mode, or a usage or course of dealing from which the authority so to remit may be inferred.

The fact that a previous remittance had been made by mail, and the mode of remittance not objected to, is not an authority or direction to adopt that mode at the risk of the creditor, to whom the remittance is made: nor is the letter of the creditor requesting remittance, but specifying no mode.

A usage is not proved by a single, isolated instance: nor is a course of trade or dealing proved by a custom on the part of one person.

Appeal from Independence Circuit Court.

Hon. BEAUFORT H. NEELY, Circuit Judge.

FAIRCHILD, for the appellants.

W. BYERS, contra.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of debt, commenced by the appellees against the appellants, in the Independence Circuit Court, on a promissory note, for the sum of $521 12, date the 18th February, 1854, and payable six months from date. The appellants appeared to the action, and filed two pleas in bar, *i. e.*, *nil debit*, and payment; to which issues were joined, and the cause submitted to the court, by consent, upon those issues. At the trial, the following evidence and propositions of law were submitted to the court, *to wit:*

The appellees read as evidence, the note declared on, upon the back of which were endorsed the following credits:

August 24th,	By cash,	$100 00
December, 20th,	" "	180 00
		$280 00

Which was all the evidence introduced or offered by the appellees. The appellants then read in evidence, the following receipt of Reuben Harpham, who is admitted to have been post master at Batesville, at its date.

"Messrs. Burr & Co. have deposited in P. O., Batesville, a $20 Bank bill of the Bk. Misso: A No. 1265; Nov., 1850; payable at Lexington; H. Shields, Cashier; J. M. Hughes, ———. Also land warrants, No.'s 54584 and 29985, issued to John Smith, private, in Capt. Phillip's Co., Arkansas volunteers, Florida war, and W. Helm Hunt, private, in Capt. Kelly's Co., S. C. militia, war of 1812, and both under act of 28th Sept., 1850; all which are enclosed in letter to J. B. Sickles & Co., St. Louis, Mo., which is to be mailed thither, to go in mail of Saturday, 9th December, 1854.

R. HARPHAM, *P. M.*

Batesville, 7th December, 1854."

Which said receipt was taken as evidence of the mailing of the letter, enclosing warrants and money, as therein stated, by the appellants, and directed to the appellees.

The appellants then read in testimony, the following letter, having first given proof of the same having been written by, or on behalf of the appellees:

"*Gentlemen:* We are just in receipt of your favor of the 7th inst., covering two eighty acre land warrants and a $20 bill. We sold the former at one dollar per acre, and placed the whole amount to your credit, as above stated, (alluding to the statement as made upon the note.) In the event of your sending us any more land warrants, please endorse them on the margin, &c.

Messrs. BURR & Co.

Batesville, Arks., *Dec. 20th*, 1854."

And the appellants then read in evidence the following receipt of the post master at Batesville, which was agreed to be taken as his receipt, and as proof of deposit, and mailing of the letter and money therein mentioned.

"Burr & Co., have deposited in P. O. *here*, a $50 bill, on Bk. of Mo., and a $20 bill, Union Bk. Tenn; the last, C. 184, 1 Oct., 1853; the other, 16th Feb'y, 1853, No. 15, 2592, B., under address to J. B. Sickles & Co., St. Louis, Mo.

Batesville, 19*th January*, 1855."

And the appellants also read in evidence, the following letter, having proven it, as the former letter, herein copied, was:

"SAINT LOUIS, *Oct.* 26, 1854.

Messrs. BURR & Co., Batesville, Arks.,

Gentlemen: Yours of the 10th inst. is at hand, and contents

noted, &c. * * * * * * * We were never more badly in want of money than at present, being compelled to borrow largely, to meet our liabilities. You will, therefore, if it is at all possible, do us the favor to remit the balance of your note, &c.

J. B. SICKLES & CO."

And the appellants then introduced James H. Patterson as a witness, who testified, that he was in the habit of doing business with, and had received letters from the firm of J. B. Sickles & Co., which had been recognized by that firm as genuine letters, and that he believed the letters, purporting to be from that firm to the appellants, shown to him, under dates of October, 26th, and December 10th, 1854, were written by the authority and sanction of that house. And he stated further, that there are no means of remittance between Batesville and St. Louis, that are regular, but by the mail or post. That there is no market, at which to buy exchange on St. Louis, at Batesville, and that merchants and others frequently send money for orders, and to pay debts, by the mail or the post, and that he was in the habit of so doing himself, though he always supposed remittances to be at his own risk, unless made upon the authority of the persons to whom made. And this was all the testimony offered at the trial.

The appellants moved the court, when the testimony as above was concluded, to declare it as law, and applicable to this case:

1. That if the appellees, by letter of 26th October, 1854, directed the appellants to remit money to them, and they did remit to them seventy dollars by mail, and that was a usual way of remitting money, then, in such case, the appellants should be credited with the amount of money so remitted.

2. That if the fact be, that the appellants sent to the appellees money by letter of December 7th, 1854, through the mail, and the appellees acknowledged receipt of the same, without disavowing the risk of the mail, that was an implied authority

to the appellants to continue the remittance of money to the appellees by mail, and if they did so, afterwards, say on the 19th January, 1855, remit to the appellees $70, that such remittance was a payment to the appellees, for which the appellants should have credit in this action.

3. That if the appellants sent to the appellees money and land warrants, in payment of the note sued on, by letter of 7th December, through the mail, and which was received by the appellees, by due course of mail, and that it is usual for money and land warrants and valuables to be sent and received by mail, then, the presumption is, that, if the appellants, afterwards, on the 19th January, 1855, sent to the appellees $70, by mail, such money reached its destination by coming to the hands of the appellees, and must be taken to have been a payment by the appellants to the appellees, unless such presumption be rebutted by other testimony.

And the court refused to sustain either or all of said propositions as the law, and as applicable to this case, and found the fact for the appellees to be, that the appellants were not entitled to credit for the $70, mentioned in the receipt of the post master at Batesville, under date 19th January, 1855, and found for the appellees, the sum due on the note, without deducting therefrom, the said sum of $70, and proceeded to render judgment therefor. To which finding of the court, and refusal of the court to declare the three foregoing propositions to be the law, and applicable to this case, the appellants excepted.

From this judgment the appellants appealed, on which the case is now depending in this court.

1. It is laid down by Mr. GREENLEAF, in his admirable treatise on the law of evidence, that: "When payment is made by remittance by post to the creditor, it must be shown, on the part of the debtor, that the letter was properly sealed and directed, and that it was delivered into the post office, and not to a private carrier or poster. He must also prove, either the *express* direction of the creditor to remit, in *that mode*, or a usage or course

of dealing, from which the authority of the creditor may be inferred. When these circumstances concur, and a loss happens, it is the loss of the creditor." See 2 *Greenl. Ev., p.* 497, *sec.* 525, *citing in note* 5, *Warwicke vs. Noakes*, 1 *Peake* 69; *Hawkins vs. Rutt, Ib.* 186; *Walter vs. Haynes, Ryan & Moody* 149; *Chitty on Cont.* 750; 2 *Stark. Ev.* 823.

We will examine and consider the propositions submitted by the appellants to the court, at the trial below, with reference to the facts and law as above stated.

By reference to the letter of the appellees under date the 26th October, 1854, it will be perceived, they gave to the appellants *no express authority* to remit the balance due them on the note in any *particular* or *stated mode.* The direction was general, to remit: leaving the matter, from that letter, with the appellants, to select a *mode*, which might best serve their convenience, and at the same time comport with their interests. Upon the authority of this letter alone, we think it clear, that the appellants were not authorized to select the post, or mail, as the medium or agent of conveying to the appellees, the balance due on the note in question, so as to impose the risk of the remittance, which seems to have been made, of $70, on the 17th January, 1855, upon them.

The fact of the appellants having made to the appellees a similar remittance, on the 7th December, 1854, which was acknowledged by them on the 20th of the same month, does not, in our judgment, qualify the authority of the appellants, or tacitly authorize them to adopt the *mode* pursued in that instance, as *the* mode in which the appellees desired future remittances to be made to them in liquidation and payment of the note sued on, and thereby take upon themselves the risk, *in transitu*, from Batesville to St. Louis. For it is fair that the appellees should have presumed, inasmuch as the appellants, without instructions, and, consequently, at their own risk, selected the post to make their first remittance, that in case they should choose to pursue

that same course, they would expect to do so, as they had done at first, on their own risk.

There is no evidence of any *usage* proven to have prevailed between the parties to this suit, prior to the 19th January, 1855, when the remittance of the $70 was made through the post. The single isolated instance of the remittance made on the 7th December, 1854, certainly does not establish such *usage;* for *usage* is defined to be the legal evidence of custom. See *Broom's Leg. Max.* 712. And custom—the law established by continued usage. See *Read vs. Rann* 10 *B. & C.* 440; *Ecl. Rep.* 21, *per* BAYLEY, Judge.

There was no evidence that it was the *course* of *trade* or *dealing*, between persons doing business in St. Louis and Batesville, that remittances made by the latter to the former, by the post, are made at the risk of the former. Patterson, the only witness who testified in the cause, stated that it was customary, on his part, to give orders and make remittances through the mails: but not a word was said as to the *course of dealing*, in reference to the risk between him and his correspondents, except that he said, he always supposed when *he* made such remittances, he made them at his own risk.

In view, therefore, of the law and facts of the case, we must hold that the finding of the court below was right, and its ruling in respect to the three propositions submitted by the appellants, correct.

The judgment of the court below is, therefore, affirmed with costs.

Absent, Mr. Justice SCOTT.

ROBERTS ET AL. VS. RANDOLPH.

The plaintiff or his attorney may, under our statute, dismiss, in vacation, any suit pending in any of the courts of this State, except in actions of replevin; but he cannot, by an order to dismiss an attachment suit, relieve himself of the costs incurred in preserving the property attached, where the sheriff cannot deliver such property to the owner and relieve himself from responsibility; and this court will not interfere with the discretion of the Circuit Court in allowing the sheriff his reasonable costs incurred in the preservation of the property under such circumstances.

Appeal from the Circuit Court of Desha County.

Hon. THEODORIC F. SORRELLS, Circuit Judge.

GRACE, for the appellant.

CUMMINS, contra.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

The transcript in this case shows that, on the 3d of September, 1852, Roberts & Co. caused to be issued from the office of the clerk of the Circuit Court of Desha county, a writ of attachment against the steam boat GENERAL SHIELDS, having filed an affidavit that the boat was indebted to them in the sum of $834 03, and executed a bond as required by the statute.

Randolph, the sheriff of the county, returned upon the writ, that, on the 4th of the same month, he executed it by seizing and taking into his possession, the boat, her machinery, tackle and furniture, &c., and by reading the writ to William R. Rice, who was captain of the boat, and in charge of her at the time, &c., and that he, Randolph, had kept the boat, and still had her in his possession, and under his charge.

At the return term of the writ, on the 19th October, 1852, it appears that one Clark appeared on behalf of the boat, and filed a motion to quash the proceedings in the attachment suit for irre-

gularities, and to dismiss the cause; which motion the court sustained, and rendered judgment against the plaintiffs for costs.

At the same term Randolph, the sheriff, made an application to the court to allow and tax in his favor, against Roberts & Co., the plaintiffs' in the attachment suit, and as part of the costs therein, the following bill:

"To bailing and attention to the steam boat GENERAL SHIELDS, from the 4th day of September, 1852, up to the 19th October, 1852, inclusive, 45 days, at $5 50 per day,	$ 247 52
Removing the Shields to a safe place of keeping,	10 00
Making	$257 52"

Roberts & Co. resisted the application, and at a subsequent term of the court, the matter was heard and determined by the judge, on the following evidence, in substance:

Moon testified, that he was clerk of the court at the time the attachment was issued. That, on the day after the boat was attached, one of the plaintiffs came to him, and directed him to dismiss the suit, and he told him he would do so. That, on the same day, or the day after, witness went to Randolph, the sheriff, and told him to release the boat, as the plaintiff had directed him, witness, to dismiss the suit.

That, if the plaintiff tendered witness the costs at the time he ordered the suit dismissed, he did not recollect it, but that the case was not kept on the docket because the costs were not paid, but merely because witness neglected to make the entry on the record.

That, on the day he told the sheriff, Randolph, to release the boat, witness saw Captain Rice, who had command of her before, and at the time she was attached, and he was willing to receive her back; but that, afterwards, he refused to receive the boat from the hands of the sheriff. That, at the time witness conversed with Randolph about releasing the boat, and returning her to the

owners, he told witness that he would make out the costs, and go down and see the plaintiffs, seeming to be willing to release the boat; but that afterwards Rice refusing to receive back the boat, Randolph declined to return the writ or release the boat. Witness did not enter any dismissal of the suit, and it was not dismissed until court met, about 19th October, 1852.

Malpass testified, that in the course of one or two days after the boat was attached he was called upon by the plaintiffs to witness a demand made by them upon Randolph, to release the boat from the attachment. That, one of the plaintiffs pulled out of his pocket a hand full of gold, and told Randolph, the sheriff, that he wanted to pay all costs up to that time; and that he tendered him all his costs in and about the attachment; and he wanted him to release the attachment, and not to hold the boat any longer; and that the sheriff refused to release the boat.

Edington testified, that within two or three days after the boat was attached, at the request of the plaintiffs, he prepared and served a written notice upon Randolph, to release the boat from the attachment, and return her to her owners. He also requested Randolph to return the writ to the clerk's office.

The above testimony was introduced on the part of Roberts & Co., who also read in evidence the record of the proceedings in the attachment suit, and closed.

Randolph introduced the following testimony:

Thomas testified, that he knew the steamer GENERAL SHIELDS at the time she was under attachment; that she was in a bad condition, and that Randolph paid five dollars a day for taking care of her, during the time he had her under the writ; and witness thought that it was worth that to take care of her. He knew that Randolph paid one man $165 50; and divers other sums of money for taking care of her, but how much, he did not know. That the charge made by Randolph for taking care of the boat, was reasonable.

Clark testified, that he was somewhat acquainted with the business of taking care of steam boats. That he knew the SHIELDS

while Randolph had her under the attachment, and from her condition, he thought $5 50 per day was a reasonable charge for taking care of her.

Roberts & Co. asked the court to declare the law to be, that they had a right to dismiss the attachment suit, on making a tender of costs, at any time they pleased; and to direct the release of the boat and the return of the writ, on tendering the costs to the sheriff; and he was bound to obey such direction; and if he refused so to do, he could not hold plaintiffs bound for costs after such refusal.

But the court declined so to decide, and held that until the case was regularly dismissed, the plaintiffs had no right to direct the sheriff to release the property.

And the above being all the evidence introduced by the parties, the court found in favor of Randolph; and ordered to be taxed in his favor $182, against the said plaintiff in the attachment suit, and as part of the costs therein, &c.

Roberts & Co. moved the court for a new trial, which was refused and they excepted, and appealed to this court.

For safe keeping property seized under legal process, a sheriff is entitled to such fees as the court, out of which the process issued, shall deem reasonable. *Digest, chapter* 68, *section* 8, *page* 520.

In *Irvin vs. The Real Estate Bank*, 5 *Ark. Rep.* 30, this court held that the allowance of fees for keeping property taken in attachment was a matter left (by the above statute) to the discretion of the Circuit Court; and when the Circuit Judge, in making such allowance, has all the facts before him, and the question involves no principle of law, this court cannot disturb his decision.

The plaintiff, or his attorney, may dismiss any suit pending in any of the courts of this State, except actions of replevin, in vacation, in the office of the clerk, on the payment of all costs that may have accrued therein. *Dig.*, *chap.* 126, *sec.* 134, *p.* 817.

Here, the plaintiffs directed the clerk to dismiss the suit, but it was not done. They did not pay, or offer to pay, the clerk his costs, but he did not on that account, decline to dismiss the suit.

He merely neglected to do so. He perhaps was willing to look to the plaintiffs for the payment of his costs afterwards. As between him and the plaintiffs, therefore, the suit may be regarded as virtually having been dismissed.

The clerk told the sheriff that the plaintiffs had directed him to dismiss the suit, and that he could release the boat. The plaintiffs repeatedly directed the sheriff to release the boat, and return the writ, tendering him his costs. But what was the sheriff to do with her? The testimony shows, that Rice, the captain, who had charge of the boat at the time she was attached, refused to receive her back from the sheriff, and the plaintiffs failed to prove that there was any other person, to whom the sheriff could have surrendered her, or that they notified her owners, or any person authorized to act for them in the premises, of their desire to release the boat. The sheriff had no right, under these circumstances, to set her adrift, or abandon her.

When the court met, it found the attachment suit on the docket, and on a motion interposed on behalf of the owners of the boat, quashed and dismissed the suit at the plaintiffs' costs. The court found, also, that the plaintiffs had sued out the attachment, and caused the boat to be seized and taken out of the possession of those in charge of her; that in a few days afterwards, they had concluded to abandon their suit, but for what cause does not appear. That they had directed the clerk to dismiss the suit, but it had not been done. That they had directed the sheriff to release the boat, but failed to show that there was any one, into whose care he could have delivered her, at the risk and costs of the owners; and that he kept her under his own charge, and at his own expense, until the meeting of the court, the return term of the writ. Under these circumstances the court, in the exercise of the sound discretion entrusted to it by the law, in such matters, taxed the plaintiffs with what it deemed the reasonable expenses incurred by the sheriff in keeping the boat, and we do not feel warranted in disturbing its judgment. Affirmed.

Absent, Mr. Justice SCOTT.

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HILL VS. STEEL.

Where a judgment, rendered by a justice of the peace, is brought into the Circuit Court by appeal, and that court adjudges that the appellant had lost his right of appeal by his own laches—as by permitting a judgment to be rendered against him by default, and failing to appeal within fifteen days—and dismisses the case, there is no mode provided by our law, by which the appellant can obtain a trial *de novo*.

When a case, commenced before a justice of the peace, is brought into the Circuit Court upon *certiorari*, the court can only determine, upon inspection of the proceedings and judgment of the magistrate, whether they were valid, or irregular and void, and quash or affirm.

A judgment would hardly be void, though the suit be commenced and prosecuted on a writing obligatory, executed to the wife in her life-time, whether the suit be properly brought in the name of the husband or not—or whether he should have sued as the representative of his wife—such objection should be made, if good, before the justice; and not in the Circuit Court, upon *certiorari*.

Appeal from Johnson Circuit Court.

HON. JOHN J. CLENDENIN, Circuit Judge, presiding.

MAY, for the appellant.

CUMMINS, contra.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Thomas Steel sued Mark Hill, before a justice of the peace of Johnson county, on a writing obligatory, for less than $100 executed by Hill to *Elizabeth* Steel.

The summons issued by the justice, required the defendant to appear &c., "to answer the complaint of *Thomas Steel*, the surviving husband of *Elizabeth Steel*," &c.

The defendant being served with process, the transcript of the proceedings before the justice shows, that on the day of trial,

15*th July*, 1854, the plaintiff appeared by attorney, and the defendant appeared in person, but made no defence: and the judgment was rendered in favor of the plaintiff, for the amount due upon the bond sued on. That, on the first day of August, following, the defendant appealed to the Circuit Court of Johnson county.

The Circuit Court ordered the case stricken from the docket, for want of jurisdiction, on the ground, that the judgment of the justice was rendered against the defendant on default, and that he made no motion to set it aside within fifteen days thereafter, as required by the statute. See *Digest, chap.* 95, *part* 2, *sec.* 175.

Afterwards, upon the petition of the defendant, Hill, a transcript of the proceedings in the cause before the justice of the peace, was brought into the Circuit Court by *certiorari*, and on inspection thereof by the court, the judgment of the justice was affirmed, and Hill appealed to this court.

When the case was in the Circuit Court on appeal, the court having adjudged that Hill had lost his right of appeal by his own laches, and having dismissed the case, the judgment of the justice became final and absolute; and there was no mode provided by our laws, by which Hill could afterwards obtain a trial *de novo*.

When the cause was brought into the Circuit Court again upon *certiorari*, the court could only determine upon inspection of the proceedings and judgment of the magistrate, whether they were valid, or irregular and void, and quash or affirm.

The justice of the peace, it affirmatively appears, had jurisdiction of the subject matter of the suit, it being a bond for the payment of a less sum of money than $100, and also of the person of Hill by due service of process.

It is stated in the petition for the *certiorari*, that Hill executed the bond sued on, to *Mrs. Steel*, after her marriage with Steel, for money borrowed by him of her, before the marriage, and that the suit was brought by her husband after her death.

It is insisted that the husband had no right of action upon the

bond, unless he had taken out letters of administration upon his wife's estate, and brought the suit as her administrator.

Whether this be the law or not, we need not decide. The proposition is based upon statements dehors the transcript of the proceedings and judgment of the justice. This was a matter which should have been interposed as a defence before the magistrate upon the trial.

If the legal title to the bond did not vest in the husband upon its execution to the wife, and if he had not the right to sue thereon, while she was living, or after her death, in his own name, the judgment would hardly be absolutely void, because he brought the action in his personal right, and not as her representative. See 1 *Chit. Pl.* 31, 32.

We think the court below did not err in affirming the judgment of the justice, on inspection of the transcript. See *Boothe vs. Estes*, 16 *Ark.* 104. Affirmed.

Absent, Mr. Justice SCOTT.

ZACHERY VS. BROWN ET AL.

The maker of a bond, for the payment of money, has the whole of the day on which it falls due to pay it, and cannot be sued until the next day.

Error to Johnson Circuit Court.

Hon. FELIX J. BATSON, Circuit Judge.

MAY, for the plaintiff.

CUMMINS, for defendants.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

This was an action of debt, by petition, in the Johnson Circuit Court. The petition is as follows:

"Your petitioners, Newton W. Brown and James B. Brown, merchants and partners in trade, trading and doing business under the name, style and firm of N. W. & J. B. Brown, the plaintiffs in this cause, state that they are the legal owners of a writing obligatory, against the defendant, Burr H. Zachery, to the following effect:

$302 46. One day after date, for value received, I promise to pay to the order of N. W. & J. B. Brown, three hundred and two dollars and forty-six cents, with interest from the first day of January, 1855, at ten per cent, until paid: this 8th day of February, 1855.

B. H. ZACHERY, [SEAL.]

Yet the debt remains unpaid: therefore, they demand judgment for their debt, and damages for the detention thereof, together with their costs."

The petition was filed and the writ issued on the *9th day of February*, 1855.

The defendant demurred to the petition, on the ground that the action was prematurely brought, the court overruled the demurrer, the defendant suffered final judgment to go for the plaintiffs, and brought error.

The bond bearing date on the 8th, and due and payable on the 9th of February, one day after date, the maker had the whole of the day on which it fell due, to pay it. He was not in default, and there was no breach of his contract until the entire day had expired, without payment. He was not liable to be sued, therefore, until the next day.

It has been held, that the maker of a promissory note, (entitled by the law merchant to three days of grace,) is bound to pay it

upon demand made at any reasonable hour of the last day of grace, and may be sued on that day if he fail to pay on such demand. *Staples et al. vs. Franklin Bank*, 1 *Metc.* 43; *Wilson vs. William*, 1 *Nott & McCord* 440; *Greely et al. vs. Thurston*, 4 *Greenl.* 479; *Dennie vs. Walker*, 7 *N. H. Rep.* 199.

In *Osburn vs. Moncure et al.*, 3 *Wend. Rep.* 170, it was decided, on the contrary, that the maker of the note has the whole of the third day of grace to make payment, and cannot be sued until after the day passes, though demand upon the third day, and notice to an endorser of non-payment are good.

Be this as it may, it is agreed in all of the above cases, and in others cited, that the maker of a bond has the whole of the day on which it falls due to pay it, and cannot be sued until the next day. See, particularly, the case of *Wilson vs. William*, 1 *Nott & McCord*, 440, and authorities cited.

In this case, the suit was prematurely brought, and the objection was properly taken by demurrer. 1 *Chit. Pl.* 443; *Osborn vs. Moncure* 3 *Wend. Rep.* 170.

The judgment of the court below is reversed, and the cause remanded, &c.

Absent, Mr. Justice SCOTT.

KELLER VS. VOWELL.

A plea, that the note sued on was procured by the covin and fraud of the plaintiff, without setting out the facts constituting the fraud, is bad on demurrer.

The defence of partial want or failure of consideration, may be interposed to a note or bond, when the facts, constituting the defence, are specially pleaded, or set out by way of recoupment, or as a bar to so much of the demand as may be thus answered. (*Wheat, use &c. vs. Dotson*, 7 *Eng.* 708.)

The defendant employed the plaintiff to purchase an improvement upon the public land; the plaintiff made the purchase, but fraudulently represented to the defendant, that he gave for the improvement, $100 more than its actual cost; the defendant gave his note, the one sued on, to the plaintiff, for a balance due him on the purchase, including the $100 so falsely represented to have been given for the improvement: HELD, That there was a partial want of consideration to that amount, of which the defendant could take advantage by plea.

Appeal from Poinsett Circuit Court.

The Hon. GEORGE W. BEAZLEY, Circuit Judge.

CUMMINS, for the appellant.

W. BYERS, for the appellee.

Mr. Justice HANLY delivered the opinion of the Court.

This was a petition in debt, on a promissory note, for the sum of $170, brought by the appellee against the appellant, in the Poinsett Circuit Court, to the October term, 1855.

The appellant, at the return term of the writ, appeared and craved oyer of the note, and interposed three pleas in bar of the action, *to wit:*

1. That the note was procured by the covin and fraud of the appellee, and not otherwise.

2. That as to $100, part of the note, the appellant employed

appellee to purchase an improvement on the public lands, from one Rickles, on his, appellants' account, appellant giving him at the time $50, to be applied by him to the payment for the improvement, and was to pay whatever additional amount appellee had to pay therefor. This purchase, appellee accordingly made for appellant, and fraudulently represented that he had given, or paid for said improvement, the sum of $220, or $170 over and above the amount, $50, advanced by the appellant, to contribute to the payment, when, in truth and in fact, the appellee only gave $120 for said improvement, or $70 more than the appellant had advanced. The plea further averring, that, relying upon the false and fraudulent representations, he gave his note, the one sued on, to the appellee for the said sum of $170, when it should not have been for but $70, being $100 more than it should have been, for which there was no consideration whatever.

3. This plea is, in effect, like the *second* one, which we have stated.

The three pleas were regularly sworn to by the appellant.

The appellee demurred to all three of these pleas, setting down as causes:

To 1*st plea:* That it did not set out the facts constituting the fraud.

To 2*d and* 3*d pleas:* 1st. That they only went to *part* of the consideration.

2d. That they set up matter cognizable in a court of equity.

3d. Because the pleas do not disclose any legal duty, on the part of the appellee, to represent the fact in regard to the true price paid for the improvement.

The demurrer was sustained to all three of the pleas: to which appellant excepted, and refused to plead over, and final judgment was rendered for the appellee: from which appellant appealed.

The questions before this court upon the transcript, are, as to the sufficiency of the three pleas, above stated, which we will proceed to consider and determine in their order:

1. It is admitted by the counsel for the appellant, that this plea is clearly bad, and that the demurrer was properly sustained thereto, by the court below. We do not, therefore, propose to consider the plea further. See *Hynson et al. vs. Dunn*, 5 *Ark. Rep.* 395.

2. and 3. By reference to our statement of these pleas, it will be observed, that they do not profess to answer the declaration, except as to $100, for which they allege there was no consideration superinducing the execution of the note to that amount, stating in a very clear and succinct form, the circumstances under which the note in question was made, and the facts showing and indicating the want of consideration as to the amount of $100, embraced in the note. The gravamen of the pleas is the fraud of the appellee, by which the appellant was induced to give to him his note for $100 more than he owed. The pleas assert, that the appellee assured the appellant, that he had paid Rickles $220 for the improvement bought on account of the appellant; when, in truth and in fact, he only gave Rickles $120 for the improvement, of which amount he had paid appellee $50 in cash, at the time he engaged him to make the purchase, and averring that the note given should have only been for $70, instead of $170, the amount of the note sued on.

In *Wheat, use &c. vs. Dotson*, 7 *Eng.* 708, this court, by SCOTT, Judge, (quoting from *Withers vs. Green*, 9 *How. U. S. Rep.* 226,) said: "It would seem, then, to be fairly deducible from the reasoning of the English Judges, from the case of *Barton vs. Butler*, in 7 *East*, decided in 1806, to that of *Poulton vs. Lattimore*, 9 *Barn. & Cres.*, ruled in 1829, that this defence, (alluding to the defence of a partial failure or want of consideration by *recoupment*,) would, by those judges themselves, be deemed permissible, whenever it could be alleged without danger of surprise, and consistently with safety to the rights of the parties: and it appears to be a deduction equally regular, that when notice of the defence was given, either by pleading or by other effectual proceeding, neither surprise nor any other invasion of

the rights of the parties could occur or be reasonably apprehended. But, however the rule laid down by the English courts should be understood, it has been repeatedly decided by learned and able judges, in our own country, when acting, too, not in virtue of a statutory license or provision, but upon principles of justice and convenience, and with the view of preventing litigation and expense, that, where fraud has occurred in obtaining, or in the performance of contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party, when sued upon such contract: and that he shall not be driven to assert them, either for protection, or as a ground for compensation in a cross action."

The same principles promulgated and established in this State, by this court, in the case of *Wheat, use &c. vs. Dotson*, have been not only acquiesced in, but reiterated by repeated adjudications since the decision in that case. So that it may be regarded now, as the settled and permanent law of this State, that the defence of partial want, or failure of consideration, may be interposed to a note or bond, when the facts constituting the defence, are specially pleaded or set out by way of *recoupment*, or as a bar to so much of the demand as may be thus answered. There can be no question or doubt of the propriety and expediency of this rule, saying nothing of its subserviency to "common justice, common consent, and common convenience."

It seems to be conceded by the appellee, that the facts set up in the 2d and 3d pleas of the appellant, would be sufficient to sustain an action, on the part of the appellant, against the appellee, or else entitle him to relief in a court of equity. The admission of this is conclusive as to the sufficiency of the pleas, in accordance with the principles determined in the cases to which we have before referred: for the reason of the rule, in allowing the defence of a partial failure of the consideration of a note or bond, is to avoid and prevent the necessity of a circuity of actions, and the inconvenience and expense incident to mul-

tiplied litigation. In other words, it is the assumption, on the part of the courts of law, of special equity jurisdiction, for those reasons which we have just mentioned.

Viewing the facts set up in the two pleas we are considering, as a good defence to the action on the note, to the amount of one hundred dollars, the court below should have overruled the demurrer as to those pleas. Not having done so, the judgment of the Poinsett Circuit Court is reversed, and the cause remanded, with instructions to the court to overrule the demurrer as to the 2d and 3d pleas of the appellant.

Let the judgment be reversed at the cost of the appellee.

Absent, Mr. Justice SCOTT.

WALLACE VS BROWN.

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The owner of a slave, hired for a term or period of time, cannot bring an action of replevin for the slave, until after the expiration of such term.

To support replevin there must be shown an actual taking or an actual detention—a constructive detention, by the exercise of acts of ownership respecting the goods, not accompanied by manual possession of the defendant, or his agent, will not suffice.

Where there is a total want of evidence to support the verdict and judgment, this court will award a new trial. (*Russell vs. Cady*, 15 *Ark. Rep.* 552.)

Appeal from Crawford Circuit Court.

The Hon. FELIX J. BATSON, Circuit Judge.

WALKER & GREEN, for appellant.

S. F. CLARK, for appellee.

Mr. Justice HANLY delivered the opinion of the Court.

This was replevin in the *detinet*, for a slave, brought by the appellee against the appellant in the Crawford Circuit Court. Plea, *non-detinet:* verdict and judgment for appellee. Appellant moved for a new trial on the ground of the insufficiency of the proof to sustain the verdict, which was overruled, and he excepted, setting out the following facts:

In the month of May, 1854, appellee bought the slave in controversy from one Bishop, and in the month of November following, he hired her to Bishop for the term of one year. In the month of May, 1855, the same slave was levied upon and offered for sale as the property of Bishop, by the United States Marshal for the Western District, Arkansas, under an execution to him directed, which issued on a judgment obtained by one Taylor, against Bishop, in the District Court of the United States for that District, when the attorney for the plaintiff in the execution, bid her in, in the name of appellant, and proclaimed that he purchased her for him. Appellant was absent from the State at the time, and the purchase was made without his knowledge or consent, and he never obtained possession of the slave. Bishop was in possession of the slave when she was levied upon. Appellee was present at the time of the sale by the Marshal, and forbid it, claiming the slave as his property.

1. To sustain replevin, the plaintiff must, at the time of the *caption*, if in the *cepit*, or the *detention*, if in the *detinet*, have had either the general property in the goods, or a special property in them, coupled with the right to *immediate possession*. See 1 *Chitty's Plead.* 163; *Digest, chapter* 136, *section* 1, *page* 842; *Beebe vs. DeBaun*, 3 *Eng. Rep.* 510; *Britt vs. Aylett*, 6 *Eng. Rep.* 475.

2. If the action be in the *detinet*, the *detention* on the part of the defendant must have been *unlawful*. See 1 *Chitty's Plead.* 162; *Digest, chapter* 136, *sections* 1 *and* 5, *page* 842; *Beebe vs. DeBaun, ub. sup.*

3. When the action is founded on the wrongful detention of the property, and the original taking is not complained of, the plea of the general issue shall be, that the defendant does not detain the goods and chattels specified in the declaration or any part thereof, in manner and form as therein alleged, and such plea shall put in issue not only the wrongful detention of the chattels, but also the property of the plaintiff therein. See *Digest*, *chapter* 136, *section* 34, *page* 848, 849.

Let us apply the above principles of law to the case before us. 1. Did the appellee prove at the trial, that he had either a *general* or *special* property in the slave sued for, at the commencement of this suit? 2. If he did, did he also prove that he had, at that time, the right to her *immediate possession?* 3. If these questions are answered affirmatively, did appellee prove that the appellant, at the time this suit was brought, *unlawfully detained* the slave in question? If the appellee has failed to establish any one of these three propositions by his proof, it follows, as a necessary legal consequence, that the verdict of the jury was unwarranted by the evidence, and that the court below should have granted the new trial as moved for by appellant.

In response to the first enquiry under this head, the proof shows very conclusively that the appellee, during the month of November, 1854, hired the slave in controversy to one Bishop for the term and period of one year thence next ensuing, so that the term of her hire was not complete and ended when this suit was brought in May, 1855. It is said by the common law, in virtue of this species of bailment, the hirer acquires a special property in the thing during the continuance of the contract, and for the purposes expressed or implied in it. Hence, he may maintain a suit for any tortious dispossession of it, or any injury to it during the existence of his right. See *Story on Bail.*, *sec.* 394, *page* 386. According to this, the general rights of the owner, with respect to the property hired, are suspended during the continuance of the term for which the contract was made; except in such cases only, where the reversionary rights of the bailor may be affected by

the tortious acts of the bailee, or third persons, in which case he may assert his general rights, being absolute by reversion, to protect his reversionary interest. See *Story on Bail., ubi sup. et seq.* And the principles asserted by Judge STORY, in the above citations, are recognized and approved by a direct adjudication of this court in a case involving facts very analogous to those presented in the case we are considering. The case to which we allude is *Britt vs. Aylett*, 6 *Eng. Rep.* 476, 477, in which this court, by JOHNSON, Chief Justice, said: "It is difficult to conceive upon what ground the plaintiff below could claim a recovery. It is in proof, that the defendant below hired the negroes in controversy from the plaintiff for the period of twelve months, which had not expired at the date of the trial. It is clear, therefore, that, even admitting the title to be in the plaintiff, he was not entitled to the immediate possession; and, consequently, could not legally claim a judgment for such possession." In the case at hand, the hiring of the slave in controversy was not from the appellee to the appellant, as in the case from 6 *Eng.*, but it was to a third person, who has, if there has been a tortious interference with his rights with respect to the property bailed to him, an unquestionable right of action. If, therefore, this action could be maintained at the suit of the appellee, the appellant might be subjected to two actions for the same act without being able to plead a recovery and satisfaction as to one in bar of a recovery as to the other.

Authorities and adjudications might be multiplied and collected upon this point, but we deem the subject so thoroughly settled and at rest, that we will not consume space by farther references. We hold, therefore, that from the evidence stated in the transcript, and in substance detailed above, the appellee had not such property in the slave at the time this suit was commenced as to warrant the verdict in his favor.

In reference to the second inquiry under that head, we think it is clear that there is a total want of proof on the part of the appellee, that he was entitled to the *immediate possession* of the

slave. The proof is manifest, we think, that Bishop was entitled to the possession until after the expiration of the term for which the slave was hired by him.

And as to the third inquiry, as to the *unlawful detention* of the slave by appellant, at the time of the institution of the suit, we think there can be no doubt, from the proof, that the slave had never come into the *actual* possession of the appellant, or his legal agent, before the commencement of this suit. We take the law to be, in such cases, "that in order to support replevin there must be shown an actual *taking* or an actual *detention*, and that a *constructive detention*, by the exercise of acts of ownership respecting the goods, not accompanied by manual possession of the defendant, or his agents, will not suffice." See *Smith's Leading cases* 351, and authorities there collected.

Upon the authority of *Russell vs. Cady*, 15 *Ark. Rep.* 552, and holding, as we have done, that there is a total want of evidence in support of the three propositions lastly above considered, we are constrained to hold that the court below should have sustained the appellant's motion for a new trial, and not having done so, the judgment must be reversed with costs. Let the judgment be reversed.

Absent, Mr. Justice SCOTT.

TAYLOR ET AL. VS. COOLIDGE & CO.

It is error in the court to render judgment, by *nil dicit*, against the defendant, without disposing of a demurrer interposed to the declaration.

The right of action upon an assigned note is in the assignee; and if it passes into the hands of another without assignment or endorsement, he has but an equitable interest, which gives him the right to use the name of the assignee in bringing suit upon the note.

The payee and assignor of an instrument of writing, under seal, for the payment of money, may be sued jointly with the obligor, in an action of debt, by the assignee, on non-payment.

The defendants demurred to the declaration; their demurrer was overruled; they craved oyer of the instrument sued on; and again demurred, and set down for cause, that the declaration did not allege a delivery of the writing obligatory sued upon: HELD, That, as this cause did not grow out of the oyer granted, it should have been set down in the first demurrer.

The cases of *Byrd vs. Cummins*, 3 *Ark.* 394, and *Cummins vs. Woodruff*, 5 *Ark.* 117, as to the effect of oyer of the instrument sued on, and the right of the defendant to take advantage of a variance between it and the note as described in the declation, cited.

The prayer and grant of oyer of the instrument of writing sued on, do not bring the assignments on the note, &c., upon the record: and if the defendant would take advantage of any defence, growing out of the assignments, he must crave oyer of them.

Appeal from Phillips Circuit Court.

Hon. CHARLES W. ADAMS, Circuit Judge.

J. C. PALMER and WATKINS & GALLAGHER, for appellants.

CUMMINS, for appellee.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of debt, brought by the appellees, to the November term of the Phillips Circuit Court, 1854. The action was founded on a writing obligatory, described as bearing date

22d of September, 1853, and payable one year after date, made by Taylor, one of the appellants, payable to Rightor, the other appellant, and by him endorsed.

Without craving oyer of the writing sued on, the appellants demurred to the declaration, and set down for cause: "That there is a misjoinder of parties in said declaration, the said Taylor being originally, and the said Rightor, (if at all,) only collaterally, liable.

This demurrer was considered and overruled by the court, for which the appellants excepted.

The appellants then craved oyer of the writing sued on, which was granted by exhibiting the original, and by filing a copy thereof, in these words.:

"$1,000.

One year after date, I promise to pay William R. Rightor or order, the sum of one thousand dollars, for value received. Witness my hand and seal, this 22d September, A. D. 1853.

SIGNED, JOHN Q. TAYLOR, [SEAL.]"

Endorsed: "Pay to Myrtle, Moore & Co," signed, "WM. R. RIGHTOR," and with this memorandum subjoined: "I waive the necessity of having notice served on me, in the event the within note not paid at maturity.

SIGNED, WM. R. RIGHTOR.

September 20th, 1854."

The appellants, on oyer being given them as above, again demurred to the declaration, and set down as causes: "1. That said declaration does not allege a delivery of said writing obligatory, by the said Rightor, to the said Myrtle, Moore & Co., nor a delivery by the said Myrtle, Moore & Co., to the said plaintiffs.

2. That there is a variance between the instrument sued on, and described in said declaration, and the one given on oyer, in

this: that the instrument is described in said declaration as being made and dated, 22*d September*, 1854, and that exhibited on oyer, bears date the 22*d September*, 1853," &c.

It does not appear from the transcript in this cause, that the court below took any action upon the last demurrer filed by the appellants to the declaration of the appellees: but proceeded without disposing of such demurrer to render judgment, *nil dicit*, against appellants, and in favor of appellees, for the amount of the writing obligatory set out above, and interest and costs of suit. From this judgment appellants appealed, upon which the cause is now depending in this court.

The assignment questions the propriety of the ruling of the Circuit Court, both as to the two demurrers, and the rendering of final judgment, without disposing of the last demurrer by them interposed.

1. It appears by the transcript in this cause, that the court below proceeded to render judgment, *nil dicit*, against appellants, without disposing of the demurrer interposed by them to the appellees' declaration. This was certainly irregular. The court ought not to have proceeded with the cause until all the issues of law, raised upon the record, were determined. See *Hicks vs. Vann*, 4 *Ark. Rep.* 527; *Cole & Severs vs. Wagnon, adm.*, 2 *Ark. Rep.* 155; *Reed et al. vs. State Bank*, 5 *Ark. Rep.* 197; *Boyer vs. Robinson*, 1 *Eng. Rep.* 552; *Stone vs. Robinson et al.*, 4 *Eng. Rep.* 477; *Hammond vs. Freeman*, *Ib.* 67; *Yell, Gov. &c., use Conant & Co. vs. Outlaw et al.*, 14 *Ark. Rep.* 623; *Finn, adm. vs. Crabtree, adm.*, 7 *Eng. Rep.* 598; *Harper vs. Bondurant*, 7 *Sm. & Mar.* 397; *Hyfron vs. Mi. Union Bank*, *Ib.* 434; *Templeton vs. Planters Bank*, 5 *How. Mi. Rep.* 169; *Tomlinson vs. Hoyt*, 1 *Sm. & Mar. Rep.* 515; *Gwinn vs. Mc Conall*, *Ib.* 351; *Bailey vs. Gaskins*, 6 *How.* 519.

2. It is insisted for the appellants, that the judgment of the Circuit Court is clearly erroneous, for the reason that the writing obligatory exhibited on oyer, does not contain any evidence, in-

trinsic, to show that the appellees had the legal title therein, or the right to sue thereon. It is manifest, from the transcript, that the right of action on the writing obligatory set out, was in the endorsees of Rightor, the payee, *to wit:* Myrtle, Moore & Co. If the appellees had any interest in this instrument, as far as the transcript indicates, it could have been none other than what they may have acquired by its delivery from Myrtle, Moore & Co., which was only an equitable interest, giving them the right to use the names of their equitable assignors, to enforce payment from the original parties, by a suit to their use. See *Block vs. Walker*, 2 *Ark. Rep.* 10; *Dickinson et al. vs. Burr*, 15 *Ark. Rep.* 372; *Worthington vs. Curd*, *Ib.* 492.

3. It is also insisted by the appellants, that the court below erred in overruling their first demurrer interposed to the declaration, and we are referred to *Anderson vs. Yell*, 15 *Ark. Rep.* 13, to sustain this position on their part. It will be necessary for us to consider that case, in connection with our statute of assignments, which is, in part, in these words: "All endorsers or assignors of any instrument in writing, assignable by law, for the payment of money alone, on receiving due notice of the non-payment or protest of any such endorsed or assigned instrument in writing, shall be equally liable with the original maker, obligor or payor of such instrument, and may be sued for the same at the same time *with the maker, obligor or payor thereof*, or may be sued *separately*." See *Digest*, *chap.* 15, *p.* 163, *sec.* 9.

In *Anderson vs. Yell*, the form of action pursued was debt: the instrument declared on, a promissory note; and the parties sued, the payor and endorser of the note. The court seemed to question the form of action pursued in this case, and intimate that the action should have been *assumpsit* instead of *debt*. Whether this intimation was made considerately, and with due regard for the section of our chapter of assignments, which we have copied above, we are unable to say. If founded on the common law, there can be no question, but that the proper action in that case would have been *assumpsit*, for the reason, as it

is said, there is no privity between the payor of the note, and the endorsee, the contract between them being an implied one, by relation. But it is conceived, though with great deference and respect for the intimation thrown out in *Anderson vs. Yell*, that our statute changes, in effect, the rule of the common law in this respect, and authorizes the assignor or endorser to be sued in the same form of action, which existed as a remedy in favor of the payee against the maker or payor, or otherwise the law could not be general in its application to the different kinds of instruments for the payment of money, made assignable by the the statute: as, for instance, those under seal, (such as the one in this case was,) and those not under seal. In the former, assumpsit would not lie at the common law, in favor of the payee against the maker or payor, and we know of no statute which changes the rule of the common law, and would authorize assumpsit to be brought on such an instrument, at the suit of the endorsee or assignee, against the payor or maker, and assignor or endorser conjointly. If assumpsit is the *only* remedy in favor of the assignee or endorsee against the payor or maker of a note, and that remedy is not authorized in case of a bond being the foundation of an action, whether at the suit of the original party, or his assignee, it follows as a corollary, that the assignee of a bond for the payment of money, notwithstanding the statute, could not sue the obligor and assignor, "at the same time with each other," but would be compelled to adopt the other alternative authorized by the statute, *i. e.*, sue them "*separately*."

We do not think, however, that *Anderson vs. Yell*, when taken entire, and when critically examined, will justify the construction which the counsel for the appellants would give to it, in its application to the position assumed in this cause. We infer from the tenor of the whole case, that the court only intended to be understood as saying that *assumpsit* would have been the more appropriate remedy in that instance, and in this we most cordially concur, for this would be consistent with both the rule of the common law, and the spirit and meaning of our statute:

the effect of the latter being to change or alter the common law rule, only, so far as should be absolutely necessary to give force and operation to itself: leaving existing remedies unaltered and unmolested, when applicable and effective. We, therefore, hold that the court below did not err in overruling the appellants' demurrer, first interposed to the declaration in this cause.

4. It is also assigned as error, that the court below erred in not acting upon and sustaining the demurrer of the appellants, interposed after oyer had been craved of the instrument sued on. As before shown, two grounds or causes are assigned in the demurrer.

We will proceed to consider of those causes.

1. As to this, we shall only say, that if the cause or ground assumed were good or tenable, it should have been set down in the first demurrer, as it did not grow out of, or result from the oyer which was given of the instrument sued on. Not having been taken in the first demurrer, it must be intended that the ground was waived, or else the defect cured by operation of our statute of *Jeofails* and *Amendments*. See *Digest*, *chap.* 126, *secs.* 61, 62; *Keith vs. Pratt*, 5 *Ark. Rep.* 662.

2. It must be remembered that this ground of demurrer was not assigned until after the appellant had craved oyer of the instrument sued on, and the same made a part of the roll in this cause. The effect of the prayer of oyer, is, to present the instrument itself, literally, instead of the allegations in the declaration, from which the liability of the party is to be determined.

In the case of *Byrd vs. Cummins*, 3 *Ark. Rep.* 394, this court, by DICKINSON, Judge, said: "The argument, that the defendant below could not avail himself of the oyer given, is untenable. It was granted by the plaintiff, and the defendant is entitled to take the whole instrument as a part of the plaintiff's pleading."

In *Cummins vs. Woodruff*, 5 *Ark. Rep.* 117, the action was debt, the plaintiff counting on a bond and note. Defendant craved oyer of both, which was granted by filing two instruments with the word "*seal*," surrounded by a scrawl opposite

each signature. No step was taken by the defendant after the grant of oyer as above, but judgment, *nil dicit*, was rendered. The cause was brought up on error to this court. The opinion of the court was delivered by PASCHAL, Judge, who said: "The instrument declared on as a promissory note, is a writing obligatory, according to the doctrine of this court. The instrument was made a part of the record by filing the original, as settled by this court, in the case of *Hanly vs. R. E. Bank*, 4 *Ark. Rep.* 598, without making it any part of the pleading. The variance would therefore have been fatal, *had the defendant demurred to the declaration, for the variance between the count and the writing given on oyer.*" And again, in the same case, this court say: "When oyer of the instrument was given, it became a part of the pleading: and the only legal way known to us, of objecting to the instrument, would have been by demurring to the declaration for such variance, and specially pointing out the objection. The declaration would have then been amendable on such terms as the court would have deemed just. But the defendant having failed to point out the variance, he consented to the instrument being read as evidence, although misdescribed."

In the case before us, the appellants demurred to the declaration of the appellees, after oyer granted, and assigned as ground in support of such demurrer, that there was a variance between the declaration and the instrument given on oyer, in this: that the declaration describes it as bearing date 22*d September*, 1854, and the instrument in oyer bears date, 22*d September*, 1853. If this were true in point of fact, there can be no doubt but that the variance would be fatal. But, on inspection of the transcript, we find no such variance. The instrument, as described in the transcript of the declaration, bears date the 22*d September*, 1853, and that is the date of the instrument copied in the transcript as having been granted on oyer in the court below. We suppose the counsel in the court below must have been mistaken as to this fact, or else the clerk has not been faithful in his transcript. We are bound to presume in favor of the fidelity of the officer.

5. It is insisted on the part of the appellants, that the instrument given on oyer, fails to show any title in the appellees. This is true in point of fact, but oyer was not craved of the assignments, of which profert was made in the declaration. The transcript, however, purports to set out the assignment from Rightor to Myrtle, Moore & Co., and omits the one averred from Myrtle, Moore & Co. to the appellees. We know of but one way in which the fact of the assignments could have been made to appear on the record, and that was by craving oyer of them. The fact of the assignments was wholly a question of evidence, and had the demurrer last interposed been disposed of, before the judgment of *nil dicit* was rendered against the appellants, the default of the appellants authorizing that judgment, would have been a virtual confession of the entire declaration. As the fact is, we hold the judgment of *nil dicit* irregular, for the reasons before herein assigned.

Several other questions are presented in the appellants' brief, which we do not consider necessary to notice in view of the disposition we shall make of this cause.

Upon the whole record, we are of the opinion, that there is error in the judgment of the Phillips Circuit Court, in this behalf: that the court proceeded to render final judgment in favor of the appellees and against the appellants, without disposing of the issues of law presented by the demurrer of the appellants, interposed after oyer craved of the instrument sued on. Wherefore, the judgment is reversed, and the cause remanded to be proceeded in.

Absent, Mr. Justice SCOTT.

SUTTON ET AL. VS. HAYS.

The act of 2d January, 1849, to aid in the collection of debts due from certain residents in the Indian country, is perfect and complete in itself; and not to be construed, as if in *pari materia*, in connection with *section* 25, *chapter* 126, *Digest;* and the Circuit Court has no power to cancel a bail bond taken under the provision of the said act of 2d January, 1849, unless the *capias* were issued contrary to the true intent and meaning of the act.

The act of 2d January, 1849, does not require that an affidavit, charging fraud against the debtor, should be filed before the issuance of a writ of *capias*.

The affidavit of an agent or attorney, made conformable to the statute, is sufficient to warrant the issuance of a *capias* against the debtor.

The act does not violate any provision of the Constitution of the United States, or of this State.

Appeal from Crawford Circuit Court.

Hon. FELIX J. BATSON, Circuit Judge.

S. F. CLARK, for the appellants.

Mr. Justice HANLY delivered the opinion of the Court.

On the 19th May, 1854, the appellants filed their declaration in assumpsit, together with the affidavit of Samuel L. Griffith, their agent, in the Crawford Circuit Court, under the provisions of the act, entitled, "An act to aid in the collection of debts due from certain residents of the Indian country," approved, 2d January, 1849, upon which a *capias ad respondendum* issued against the appellee, with an endorsement thereon, made by the clerk, directing the sheriff to take bond from the appellee, on his arrest thereunder, in the sum of $3,000. On the day of its date, the appellee was arrested and taken into custody under said writ, and was discharged on his entering into bond, in the penalty so

endorsed by the clerk, with William Walker and Samuel M. Hays, as his securities of bail.

At the return term of the writ, July 1854, the appellee filed his motion to cancel the bail bond and discharge the bail under the statute, (see *Digest*, *chap.* 126, *sec.* 25, *p.* 800,) alleging as causes: 1. That there was no order of court for the capias to issue. 2. That there was no affidavit of fraud to hold to bail under the statute. 3. That the capias issued upon the affidavit of Samuel L. Griffith, made in accordance with said act of 2d January, 1849; and 4. That the provisions of said act are unconstitutional and void.

The court below sustained said motion; ordered the bond to be canceled, the bail to be discharged, and the general appearance of the appellee to be entered. To this decision, the appellants excepted at the time, filed their bill of exceptions, setting out the affidavit upon which the capias was issued, and at the August term of the Crawford Circuit Court, for 1855, they obtained a final judgment against the appellee for $1254 72 damages, and costs of suit, and appealed to this court.

The only error assigned by the appellants is, as to the judgment of the court in sustaining the appellees' motion to cancel the bail bond, and in discharging the bail.

The act of 2d January, 1849, under which the bail bond was taken and the capias sued out in this cause, so far as it pertains to the subject we are considering, is in these words:

"SEC. 1. That, in all final judgments, now rendered in any Circuit Court, or before any justice of the peace of this State, or hereafter to be rendered in any such court, or before any such justice, against any person or persons then residing in the Indian country, west of this State, and contiguous thereto, a writ of *capias ad respondendum* may be issued against the defendant or defendants in such judgment, upon the plaintiff or plaintiffs, or either of them, his, her or their agent or attorney, filing with the clerk of the Circuit Court in which such judgment may have been, or shall be rendered, or before the justice of the

peace entitled to issue execution on such judgment, as the case may be, an affidavit that the defendant or defendants is, or are non-residents of this State, and reside in the Indian country, west of this State, and contiguous thereto, and has, or have, sufficient property to pay such debt; and the body or bodies of such defendant or defendants shall be taken into custody by the officer to whom such writ shall be directed, and kept in jail until payment of such judgment, and all interest and costs, unless he or they be sooner discharged under the insolvent laws of this State.

SEC. 2. That, in any suit hereafter to be commenced in any Circuit Court in this State, against any person or persons residing in the Indian country, west of this State, and contiguous thereto, the clerk of such court shall issue a writ of *capias ad respondendum* against the defendant or defendants in such suit, upon the plaintiff or plaintiffs, or either of them, his, her or their agent or attorney, filing with such clerk an affidavit, as provided for in the first section of this act, and the defendant or defendants shall be detained in custody under such writ, until he or they shall enter into bond, with sufficient security, to be approved by the sheriff, or other officer executing such writ, which said bond shall be returned by the officer taking the same, and filed with the clerk of said Circuit Court." See *acts of* 1849, *p.* 48.

We have examined the affidavit and bond taken in the case before us, and find that they strictly conform to the requirements of this statute, and appear to be regular upon their face. We will proceed, however, to examine the several grounds, upon which the motion of the appellee to cancel the bond and discharge the bail was predicated.

The motion of the appellee appears to have been made under, and in conformity with the *25th section* of the *126th chapter* of the *Digest*, Title, "PRACTICE AT LAW," which is in these words:

"The court out of which any writ of *capias ad respondendum* may have been issued, or any judge thereof in vacation, may reduce the amount for which bail may have been required; and

the court, at any time during the pendency of the writ, if satisfied that bail ought not to have been required, may vacate the order allowing the capias, and may direct the bail bond to be canceled, or the defendant to be discharged from imprisonment; and, in every such case, shall order his appearance to be accepted, and the case proceed in all things as if the original writ had been a summons." See *Digest*, *p.* 800, *sec.* 25.

The above section was compiled from the Revised Statutes, and was a part of an act which was approved 21st December, 1837, and in force by the proclamation of the Governor, March 20th, 1839.

1. The act of 2d January, 1849, from which we have made the extract as above, has no connection with the provisions of the Digest, which we have given. The act of 1849 was evidently intended to provide a remedy, under the peculiar facts contemplated by that act, which was not afforded by the law, as it existed up to that time. These laws are not *in pari materia;* and, consequently, are not necessarily to be construed together. The act of 1849 is perfect and complete within itself, and must be construed as an independent law. No provision is made in that act, giving to the court the power conferred by the terms of the act of 21st December, 1837, taken from the Digest. The court, therefore, had no discretionary power to cancel the bail bond, or direct the appellee to be discharged, without, in its judgment, the writ of capias, under which the bond was issued, was issued without a compliance with the true intent and meaning of the act, under which it purports to have been issued, or being issued in conformity to that act, the court should have believed the act itself to be in derogation of the Constitution of the United States, or of this State. We are clearly of the opinion, that the act of 1849 does not require that there should be an order of court authorizing the writ of capias contemplated therein to be issued. The making of the affidavit, and the filing of it with the clerk authorized him to issue the writ as a ministerial act—as much so

as any other ministerial act that he is required to do. And the court had no more authority to cancel the bond, and discharge the bail, than it would have had to quash a writ of attachment, issued by the clerk, under the provisions of the attachment law.

2. The act of 1849 did not require that an affidavit, charging fraud against the appellee, should be made and filed before the issuance of the writ of capias. The affidavit required and contemplated by that act, was made and filed, and this was authority to the clerk to issue it, and made it regular on its face.

3. The affidavit of Griffith, he being agent or attorney for the appellants, was conformable to the statute. It shows the agency, and is regular as far as we have been able to discover.

4. We are at a loss to conceive what provision of the Constitution of the United States, or of this State, the act of the 2d January, 1849, violates or conflicts with. Certainly not with the 1st *clause* of the 2d *section* of the 4th *article* of the Constitution of the United States, which ordains that: "the citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States:" nor, with the 11th *section* of the 4th *article* of our own, which ordains that: "The person of a debtor, except where there is strong presumption of fraud, shall neither be imprisoned nor continued in prison, after delivering up his estate, for the benefit of his creditors, in such manner as may be prescribed by law." Not the first, for the reason, that the Indian country, west of this State, is not one of the States or Territories of this Union, in the meaning of the Constitution of the United States. And not the second. because the statute that we are considering, expressly provides that the affidavit shall set forth and state that the defendant has "sufficient property to pay the debt," sworn to: which, if delivered up, under the Constitution, in conformity with the provisions of the statute prescribed for that purpose, would operate as a discharge of the party from arrest or imprisonment, for it must be presumed, the act in question was passed with reference to this constitutional provision.

In consideration of these views, we hold, therefore, that the Circuit Court of Crawford county erred in canceling the bail bond and discharging the bail in this cause. The judgment of that court is, therefore, reversed in this particular.

Absent, Mr. Justice SCOTT.

MYERS VS. ANSPACH ET AL.

The cases of *State Bank vs. Conway*, 13 *Ark.* 344; *Jones et al. vs. Gatlin*, 16 *Ark.* cited.

Quere: Does a mistake in stating the name of the judge, before whom a judgment, upon which the suit is founded, was rendered, constitute a variance, of which advantage may be taken.

Appeal from Sebastian Circuit Court

Hon. JOHN J. CLENDENIN, Circuit Judge, presiding.

S. H. HEMPSTEAD, for the appellant.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of debt, brought on a foreign judgment, and was tried in the Sebastian Circuit Court, upon an issue to a plea of *nul tiel record*, interposed by the appellant. Upon this issue, there was a finding for the appellees. The transcript further states, that, after the finding by the court, upon the issue of *nul tiel record*, "neither of the parties requiring a jury, and the court being sufficiently advised of the premises, do find that said

defendant is indebted to the said plaintiff in the sum," &c. There seems to have been no exception taken to the finding of the court upon the issue of *nul tiel record*, nor was the transcript sued on, brought legitimately on the record by oyer craved and granted. The entry, in respect to the record sued on, is in these words: "And the record aforesaid being inspected by the court, it sufficiently appears that there is such a record," &c. No complaint seems to have been made in the court below, to any ruling or decision of that court. There does not seem to have been a motion for a new trial made. The defendant below appealed from the final judgment rendered in the cause, and assigns as error here, "that the court below found the issue on *nul tiel record*, for the appellees, and that the judgment was rendered against appellant, whereas, by the law of the land, such judgment should have been given in his favor."

It is insisted, on the part of the appellant, that the transcript of the judgment does not correspond with the one described in the declaration, in this: that the declaration describes the judgment as recovered at the District Court of the City of Philadelphia, in and for the State of Pennsylvania, at the June term of said court, 1854, "before the Hon. GEORGE SHURMAN, Esq., President Judge," &c., and it appears from the transcript of the judgment that it "was recovered before GEORGE SHARSWOOD, President Judge," &c.

If we had a right to look into this transcript for the purpose of determining this assumption on the part of the counsel, we doubt not, but that it might be shown, from both principle and authority, that it does not constitute such a variance as to render the judgment irregular, or authorize us to reverse it on that account. But on the express authority of *Jones et al vs. Gatlin*, 16 *Ark. Rep.* 35, and the *State Bank vs. Conway*, 13 *Ark. Rep.* 344, we have no power or right to look into the question, as the case is presented to us upon the transcript in this cause. The truth is, there is no case presented for the consideration of this

court, either on error or appeal. See, also, *Kinney et al. vs. Heald*, decided at the present term of this court.

The judgment of the Sebastian Circuit Court is affirmed, with 5 per cent. damages on the amount of the judgment recovered below, and costs.

Absent, Mr. Justice SCOTT.

FOWLER VS. KEATTS AS AD.

In an action of debt, by an executor or administrator, upon a note executed to the testator or intestate, in his life-time, the declaration may be either in the *debet et detinet* or in the *detinet* alone:

And where, in such case, one of the obligors hath departed this life, before suit brought, the breach may negative the payment by the deceased obligor, not sued, as well as by the defendant; or by the defendant alone.

Appeal from Pulaski Circuit Court.

The Hon. JOHN J. CLENDENIN, Circuit Judge.

FOWLER, for appellant.

BERTRAND, for appellee.

Mr. Justice HANLY delivered the opinion of the Court.

The appellee, as administrator, with the will annexed of Lemuel H. Goodrich, deceased, brought debt against the appellant, in the Pulaski Circuit Court, to the June term, 1855, on a writing obligatory, made by the appellant and one Chase, deceased, and not sued, payable to the order of appellee's testator.

At the return term of the writ sued out in this cause, the appellant appeared—craved oyer of the bond sued on, which being granted, he demurred to the declaration, setting out the following special grounds, *to wit:*

1. "Because said plaintiff, as such administrator, counts in the *debet* as well as in the *detinet*, whereas, by law, he should have counted, as such administrator, in the *detinet* alone."

2. "Because, the breach alleged in said declaration, is broader than the contract."

As the demurrer relates to the commencement and breach, we will, to show its application, copy those parts in our statement of the case. They are in these words:

"James B. Keatts, as administrator with the will annexed, of all and singular the goods and chattels, rights and credits, which were of Lemuel H. Goodrich, deceased, plaintiff herein, by attorney, complains of Absalom Fowler, defendant herein, of a plea that he render unto him, as such administrator, the sum of $650, with interest thereon, according to the tenor and effect of the hereinafter mentioned writing obligatory, which, to him, as such administrator, he owes, and from him unjustly detains."

"Yet the said defendant has not, though often requested so to do, paid said sum of $650, or any part thereof, or the interest, or any part thereof, to said plaintiff, as such administrator, since the death of the said Goodrich, nor did he pay said sum of money, or the interest, or any part of either, to said Goodrich in his life-time, nor did the said Chase, in his life-time, pay said sum of money, or the interest, or any part of either, to the said Goodrich, in his life-time, nor to the said plaintiff, as such administrator, since the death of the said Goodrich, nor has the legal representative of the said Chase, since his death, paid said sum of money, or the interest thereon, either to the said Goodrich, before his death, or to the said plaintiff, since his death," &c.

This demurrer being submitted to, and considered by the court, was overruled, and the appellant saying nothing further, final

judgment was rendered for the appellee, and from which the appellant appealed.

The only question presented by the transcript in this cause, and the only error assigned by the appellant, is as to the sufficiency of the declaration in this behalf, or the propriety of the ruling of the court below, in respect to the demurrer thereto.

1. As to this ground—in general, the declaration should be, in the *debet* and *detinet;* but upon the principle that, a man may complain of only a part of his grievance, and not of the whole, the plaintiff may abridge his demand, and declare in the *detinet* only, instead of the *debet* and *detinet.* And in actions by and against executors and administrators, the declaration should, technically, be in the *detinet* only. See 1 *Chitty's Pl.* 361, 362.

The usual form prescribed for the commencement of declarations, in actions of debt by an administrator, where the cause of action originated in the life-time of his intestate, in the English common law courts, is thus given by Mr. CHITTY, in his work on *Pleading:* "A. B., as administrator, &c., complains of C. D., being &c., of a plea that he render to the said A. B., the sum of ——— of lawful money of Great Britain, which he unjustly *detains* from him," &c. But it has been ruled by this court in *Mitchell vs. Conley*, 13 *Ark. Rep.* 416, as it had, before the decision in that case, been similarly ruled in England, that a declaration would be good in such case if commenced, thus: "A. B., as administrator, &c., complains of C. D., of a plea of debt," (see, also, 2 *Chitty's Pl.*, 13 *text, and note G., citing* 11 *East* 65, and other authorities,) holding that the other words, usually found in the precedents, as first above given, are useless—consequently, surplusage, and not ground of demurrer, if omitted.

It was the usual course of adjudication in England, as our extract as above from 1 *Chitty's Pleadings* implies, where the form found in the books of precedents is pursued, and the declaration was in the *debet* and *detinet*, instead of the *detinet* only, to hold *that* a *technical objection*, and, if ground of demurrer at all, only

of special demurrer. We, therefore, hold that the appellant's demurrer was not well taken, for the first ground assigned.

2. As to this ground—It is manifest to us, the demurrer was not well taken, for the reason, that the breach is not broader than the contract declared on would warrant. It is certain, the appellee made his breach broader than he was required to make it, by the strict rules of pleading in such case. All that he need have averred in the breach, was, that the sum demanded was not paid to his testator prior to his death, nor to him since. See 1 *Chitty's Pl.* 334. The fact whether it had been paid by *Chase*, the deceased co-payor, to the testator, before his death, or to the appellee since, was a matter of defence for the appellant, and need not have been negatived by the breach, by the rules of pleading. But certainly, this breach, though unnecessary, is warranted by the terms of the contract declared on, and the incidents which have occurred in respect to it and the parties, since its execution, as appears by the declaration. In *Green et al. vs. Thornton*, 2 *Eng. Rep.* 385, this court, by JOHNSON, Chief Justice, said: "The breach must obviously be governed by the nature of the stipulation. It should be assigned in the words of the contract, either negatively or affirmatively, or in words which are co-extensive with the import and effect of it." See, also, *Mitchell vs. Conley, ubi sup.; Clary vs. Morehouse*, 3 *Ark. Rep.* 261; *Bank of Louisiana vs. Watson*, 4 *Ark. Rep.* 518.

We hold, therefore, that the court below did not err in overruling appellant's demurrer to the declaration in this behalf, on the ground herein before stated. Considering the demurrer taken as utterly frivolous, and wholly without merit, the judgment of the Pulaski Circuit Court will be affirmed, with 5 per cent. damages on the amount of the judgment recovered below, and costs.

Absent, Mr. Justice SCOTT.

STILLWELL VS. GRAY, SURV'R.

Where there is an exception to the instructions given by the court below, and all the testimony saved by bill of exceptions, but no motion for a new trial, this court will consider the testimony only so far as it may be necessary to do so, in order to test the correctness of the instructions.

An instruction, in a suit by a surviving partner, on a writing obligatory given to the firm, to which the defendant pleaded that the bond was not given to the firm, but to the deceased partner, by the firm's name; "That if the jury believe, from the testimony, that the bond in evidence was given for a debt contracted prior to the dissolution of the partnership, the name of the partnership could be used after the dissolution, and the suit maintained by the surviving partner," is not calculated to mislead—being stated hypothetically: nor abstract—there being some evidence conducing to prove the hypothesis; and is good law—one of the firm, having authority to use the firm name in the settlement of its concerns, after dissolution.

Appeal from Pulaski Circuit Court.

Hon. JOHN J. CLENDENIN, Circuit Judge.

FOWLER & STILLWELL, for the appellant.

BERTRAND, for the appellee.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action of debt, commenced at the June term of the Pulaski Circuit Court, by the appellee, "as surviving partner of the late firm of Goodrich & Gray," on a writing obligatory, for $110 49, described as having been made by the appellant, to to the firm of Goodrich & Gray. The declaration averring, that after the execution of the writing sued on, Goodrich departed this life: with a breach negativing the payment to the appellee since, or before the death of Goodrich, or to Goodrich in his lifetime, &c.

At the return term of the writ, the appellant appeared, craved oyer of the writing sued on, which being granted, he interposed the following plea: "That he, the said defendant, did not, in manner and form, as in said declaration is set forth, then and there make his certain writing obligatory of that date, sealed with his seal, and thereby promise one day after the date thereof, to pay to the said Goodrich & Gray, or order, as in said declaration is alleged, the said sum of one hundred and ten dollars and forty-nine cents, with interest at the rate of ten per cent. per annum from the date thereof until paid: but that the said writing obligatory in the said declaration mentioned, was, by him, the said defendant, then and there made and delivered, and payable to one Lemuel H. Goodrich, by the name and style and description of "*Goodrich & Gray*," and not to the said Goodrich & Gray, as alleged in said declaration. Nor did the said plaintiff then and there, or at any time afterwards, have any legal interest whatever in the said writing obligatory, and of this he puts himself on the country."

The appellee moved the court to strike out this plea, which was overruled, and he, thereupon, by consent, took issue in short upon the record to the said plea. The pleading having been thus made up, the cause was submitted to a jury upon this issue, and the finding thereon was for the appellee, for the amount of the debt sued for, and damages by way of interest. Upon which judgment was rendered by the court.

After the evidence had been concluded on both sides, it appears from a bill of exceptions taken at the time, that the appellee asked the court to instruct the jury: "That if they believed, from the testimony, that the bond in evidence was given for a debt contracted prior to the dissolution of the partnership, the name of the partnership could be used after the dissolution, and the suit maintained by the surviving partner," which instruction was given by the court, and the appellant excepted. All the evidence adduced at the trial purports to be set out in the bill of exceptions, taken to the ruling of the court, as above: but as

there was no motion for a new trial, made in the court below, the evidence is improperly on the record, except so far (and for that purpose only,) as it may be applicable to the above instruction, and to show its pertinency. We shall, therefore, only state so much of the testimony, as may serve to illustrate the only question presented by the transcript for our consideration, *to wit:* the propriety of the instruction above copied. The testimony, so far, was as follows: That the said firm of Goodrich & Gray, mentioned in the declaration, had been dissolved from twelve to eighteen months previous to the date and execution of the writing sued on, and that said Goodrich died in the fall of 1854, and after his death, the said writing obligatory was found among his papers, by his administrator, and was inventoried by the administrator, as a part of the assets of the said Goodrich, and was given out by the administrator amongst other notes of the said Goodrich, for collection, to the attorney who instituted this suit. It was also proved that the appellant had acted as collecting attorney for Goodrich & Gray, (it was believed before the dissolution,) and received a large amount of notes and accounts to collect. It was also proved that the blanks, which appear to have existed at one time in the note, or writing sued on, had been filled up in the hand-writing of the appellant, and one of those blanks was filled up with the names of "Goodrich & Gray." And this was all the testimony bearing upon the instruction. The appellant excepted to the ruling of the court in giving the instruction as above, and appealed from the final judgment rendered upon the verdict of the jury, without further exception, or in any wise pointing out the precise error complained of, except as stated in his exception to the instruction, given as before stated.

We have said, that we cannot consider the evidence given at the trial, except for the purpose of determining the pertinency of the instruction given. This is deemed to be the settled and well established rule of practice of this court, as well as all appellate courts in such cases. See *Duggins vs. Watson et al.*, 15 *Ark. Rep.* 121, *et seq.*

It is insisted, on the part of the appellant, that this instruction was clearly *abstract* and *calculated to mislead*, and doubtless, did mislead the jury: averring that such instructions are erroneous, and authorize this court to grant to the party aggrieved, a new trial, or else to reverse the judgment: and several adjudications are referred to in support of this position, which we will consider.

The case of *Samuel vs. Cravens*, 5 *Eng. Rep.* 396, is to the effect, that an instruction, which is calculated to mislead the jury, is erroneous, and for which, a new trial, if asked for, should be granted; and such is the purport of the other cases to which we have been referred on this point. This, we apprehend, is undoubtedly the correct doctrine on the subject. In *Duggins vs. Watson et al., ub sup.*, WATKINS, Chief Justice, in treating upon a point in that case, similar to the one we are at present considering, said: "Where the instruction excepted to, is abstract, or assumes facts, or, upon the facts supposed by it, is bad law, or it is not applicable to the nature of the action, the error is as fully open to revision in the appellate court, without the evidence, as if the instruction be one which contradicts the pleadings. But if the objection be, that there has been no evidence adduced, to which an instruction given can apply, the party excepting, in order to overcome the presumption indulged in favor of the court below, must set out the evidence, which, if it conduce, though *in a slight* degree, to prove the hypothesis, which, as a fact, the jury might possibly find, and which it was therefore proper to submit to them, and then the instruction, if not objectionable in point of law, will be sustained: but if there be no evidence on which to base it, the giving of the instruction, though good in law, will be erroneous." Citing *Pagne vs. Joyner*, 2 *Eng. Rep.* 468; *State Bank vs. Williams. Ib.* 162.

Let us test the instruction given by the court below, by the principles of law we have stated, with the view of determining whether it is obnoxious to the objections insisted upon by the appellant.

1. Was the instruction "*calculated to mislead the jury*" in reference to the application of the facts proved, to the law pertinent to the issue before the court? We think not; for it is framed, hypothetically, thus: "that if they believe, from the testimony, that the bond," &c. No fact appears to be assumed by the instruction by intendment, or otherwise. The jury were left free and unbiased, and could not have supposed, by its tenor, that the court believed the hypothesis assumed, to be true.

2. Was the instruction *wholly abstract?* We think not, for, to our minds, there "was some evidence which conduced, in a slight degree," it is true, "to prove the hypothesis, which, as a fact, the jury might possibly find, and which it was, therefore, proper to submit to them"—as, for instance, the fact, that the bond was once in blank, and the proof that those blanks were filled up in the hand-writing of the appellant, including the names of "Goodrich & Gray." This fact alone, was one from which the jury might legitimately have inferred, when considered in reference to the character of the other evidence offered to support the issue on the part of the appellant, that the bond in question had been given in liquidation and settlement of an account due the firm of "Goodrich & Gray," before the dissolution of that firm. Beside this, the fact of the bond having been made by the appellant to the firm, after dissolution, is *prima facie* evidence of itself, independent of any other fact, that it was given in liquidation of one due the firm, during their continuance as co-partners. We think, then, that the instruction was not *wholly abstract*, and not therefore erroneous, on that account.

3. Was the instruction "good law?" We think most clearly so. *First.* Because it was clearly (after the dissolution,) competent for one of the firm to act for the firm, and in the firm's name, in liquidation. See *Chitty on Contracts*, 261. *Secondly.* Because, on dissolution of a partnership by death, the right of action to enforce partnership contracts, survives to the survivor, and does not go to or vest in the legal representatives of the deceased partner. See *Wallace vs. Fitzsimmons*, 1 *Dall. Rep.* 248; 1

Chitty's Plead. 19; *Penn vs. Butler*, 4 *Dall.* 354; *Nixon vs. McCarty*, 2 *Ib.* 65, 66, *note.*

In accordance with the above views, we, therefore, hold that the court below did not err in giving the instruction to the jury, as before stated. The judgment of the Pulaski Circuit Court will be affirmed with costs.

Absent, Mr. Justice SCOTT.

HOUCH VS. LYNCH.

The case of *Miller vs. Ratliff*, 14 *Ark.* 419, and other decisions, that this court will not interfere with the finding of a jury upon the weight of evidence, approved.

Appeal from Crawford Circuit Court.

The Hon. FELIX J. BATSON, Circuit Judge.

S. F. CLARK, for the appellant.

Mr. Justice HANLY delivered the opinion of the Court.

This was an action which originated before a justice of the peace of Crawford county, founded on a detailed account for balance due, for goods, wares and merchandize, amounting to $64 51. On submission of the cause to the justice, there was a finding and judgment for the amount of the balance of the account sued for: from which, the appellant took an appeal to the Circuit Court of

Crawford county. The cause coming on for trial in that court, a jury was called, who, upon hearing all the evidence adduced on both sides, returned a verdict in favor of the appellee for the sum of $64 51, the amount of the judgment recovered before the justice; upon which verdict, the court below rendered judgment. The appellant moved the court for a new trial, which being overruled, he excepted; setting out all the evidence adduced, and appealed to this court.

We will not state the evidence, for the reason that there were no instructions given or refused by the court, and the decision of the jury was upon the weight of evidence, which, in our judgment, was clearly in favor of the verdict.

A judgment may be reversed upon a motion for a new trial overruled, when there is a want of evidence of some material matter necessary to uphold the verdict; but because a verdict may appear to be against evidence, this court will not assume the power of dictating to juries, that they must believe evidence, against their own convictions of its truth. See *Miller vs. Ratliff*, 14 *Ark. Rep.* 419, and the several decisions made at the present term on this point.

The judgment of the Circuit Court of Crawford county, is, therefore, affirmed with costs.

Absent, Mr. Justice SCOTT.

WASSELL VS. ENGLISH ET AL.

A judgment cannot legally be rendered against a steam boat, as a substantive party, and the owners, upon confession by the master.

Error to Pulaski Circuit Court.

FOWLER, for the plaintiff.

PIKE & CUMMINS and GALLAGHER, for defendants.

This cause was decided by the Hon. THOMAS B. HANLY, Judge, and the Hon. THOMAS JOHNSON, Special Judge—the Hon. E. H. ENGLISH, Chief Justice, not sitting, and the Hon. C. C. SCOTT being absent.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

The only question material to be decided in this case, relates to the validity of the judgment offered in evidence by the plaintiff. The judgment is directly against the steam boat EXCHANGE, and owners, and purports to be by confession; and that, too, by the Captain of said boat. This court, in the case of *Turner et al. vs. Wallace*, in commenting upon the statute providing for an attachment against boats, &c., said: "The proceeding, by which a steam boat, or the owners, masters, supercargoes or consignees thereof, as such, can be directly subjected to the payment of debts, is solely and exclusively the creature of our statute authorizing the attachment of boats, vessels, &c., and contained in chapter 18 of the *Digest*. It is clear, therefore, inasmuch as this was not a proceeding by attachment, but in strict accordance

with the common law, that no judgment could be legally taken against a steam boat as a substantive party; and, that, consequently, such judgment is a mere nullity. The steam boat being an impossible party, under the form of procedure, it is clear, that the justice could not exercise jurisdiction over her, and as a matter of course, the Circuit Court could not do so, through the appeal." See 6 *English Rep.* 662. In the case of *Gibson et al vs. Wilson et al.*, 5 *Ark. Rep.* 442, this court laid down the same doctrine. In that case, although an attachment was sued out, inasmuch as it was not executed as required by the statute, the court held that the property never passed into the custody of the officer. In that case, strangers came in, and interpleaded their title to the property acquired by purchase from the defendant in the attachment suit. Upon that state of case, it was held, that between those parties, the Circuit Court had not cognizance of the cause. That its jurisdiction to hear and determine it, as between the interpleaders and the plaintiff, arose by virtue of the writ of attachment, and, as there was no valid service, of course there was no suit in court between them. That was a suit instituted under the general attachment law of this State, and the question arises as to the true ground upon which the court predicated its decision. The reason of the doctrine there laid down, is plainly and manifestly, that the attachment being a proceeding *in rem*, and nothing appearing upon the record to show that the property had been legally seized, and transferred from the defendant into the custody of the law, that therefore, the court could take no jurisdiction over it, so as to test the strength of title as between the attaching creditor and the interpleader. The property not having been attached by an actual seizure, the title could not be adjudicated upon by the court; and, consequently, the real owner could not be prejudiced, as no judgment that the court could have pronounced, would have had the effect to impair his rights. See, also, *Splawn vs. Martin*, decided at the present term of this court. If process sued out under the general attachment law, without a legal service upon the property, can-

not so operate as to confer jurisdiction upon the court over such property, it is manifest that the clerk in vacation or the court in term time, could not legally exercise jurisdiction; and that, too, without either a writ or a legal seizure. In a writ, by attachment, whether general, or special, as in this case, the court can exercise no jurisdiction over the thing, without an actual seizure by the officer, and a return upon the writ as required by the statute, and such proceeding being in derogation of the common law, everything necessary to the jurisdiction must affirmatively appear upon the record. The paper offered as evidence of title in this case, leaves no room for intendment, even if such intendment could be indulged; but on the contrary, affirmatively shows that the appearance was voluntary, and the judgment was by confession. We are clearly of opinion, therefore, that the court that rendered the supposed judgment, had no jurisdiction of the subject matter, and that, consequently, it is absolutely void.

The Circuit Court, therefore ruled correctly in excluding it from the jury, and as such, the said judgment ought to be, and is, in all things affirmed.

17	483
74	550

17	483
79	538
79	539
79	543
j79	547
79	567
79	568
e79	569
79	570

17	483
f86	217

GRISSOM VS. HILL.

It is not against public policy, nor the spirit of our laws, to donate, in perpetuity, a lot of ground for charitable purposes—as for the use of a religious denomination as a place of worship: and deeds for such purposes should be liberally construed, in order to uphold the trust.

The trustees under such a deed, which provides that the "lot of land is never to be sold, or to be used in any other way, only for the use of a church," cannot create a charge upon the lot by a contract for the erection of a house thereon, so as to authorize the mechanic to obtain a lien and sell the lot in payment thereof—they cannot do indirectly that which they are prohibited from doing directly.

And if the trustees permit such a lien to be created upon the lot, and suffer it to be sold, thereby defeating the object of the grant, the grantor, though there be no clause of forfeiture in the deed, may apply to a court of equity to set aside the sale, and divest the title and possession of the purchaser.

Appeal from Ouachita Circuit Court in Chancery.

Hon. SHELTON WATSON, Circuit Judge.

CURRAN & GALLAGHER and CASE, for appellant.

PIKE & CUMMINS, contra.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

In August, 1852, Ezra Hill filed a bill on the chancery side of the Ouachita Circuit Court, against Arthur W. Simmons and others, alleging, in substance, that on the 8th of November, 1848, the complainant being seized in fee of a certain lot of ground, situated in the city of Camden, he, and his wife, by deed of that date, conveyed the same to Arthur W. Simmons, Berry Beard, Thomas W. Bruce, Levi Reece and John L. Wells, as trustees, for the use and benefit of the Methodist Protestant Church, and their suc-

cessors in office, for life. That the object of complainant, in making said conveyance, was purely charitable, and to promote religion and morality, and that he never received or demanded any other consideration therefor, than the implied and expressed stipulation of the grantees to carry out the object of the said grant: and to the end that such should be the case, the conveyance was made upon the express condition, as set forth in the deed, *that said lot of land was never to be sold, or to be used in any other way, only for the use of a church, for the benefit of said Protestant Church.* Which deed, with said condition plainly written therein, was, on the day of its execution, filed for registration in the office of the recorder of said county, and duly recorded.

That shortly after the said donation was so made, said trustees caused a large framed house to be erected upon the lot, to be used, as complainant supposed, as a place of public worship, for the Protestant Methodist Church, in Camden, but, to the surprise of complainant, and contrary to the object, spirit and intent of said donation, and without the assent of the complainant, a school was taught in said house during the most of the year 1849, to the great annoyance of complainant, and the immediate neighborhood.

That said building had been, for nearly three years, wholly deserted as a house of public worship.

That on the 12th of March, 1850, James S. Grissom, filed in the office of the clerk of the Circuit Court of said county, his account, sworn to, for the sum of $283 63, for the purpose of availing himself of the statutes, on the subject of mechanics' liens, it appearing from said account that he, and his servants, apprentices and journeymen had built said house at the employment of the trustees. On the 3d September, 1850, a *scire facias* was issued thereon against the trustees, requiring them to show cause why Grissom should not have judgment for the amount of his lien, and execution thereon against the house and lot charged, which writ was returned by the sheriff, duly executed. That, at at the October term, 1850, of said Circuit Court, judgment was

taken by Grissom upon default of the trustees, and a writ of enquiry ordered, which was executed at the April term, 1851, and the jury assessed the damages of Grissom at $283 63, for which final judgment was rendered, and that he have his lien upon the house and lot, &c.

That, on the 21st July, 1851, an execution was issued upon the judgment, levied upon the property, which was duly advertised, sold by the sheriff at the court house door, on the first day of the return term, (29th September, 1851,) and purchased by Grissom, at $250, who obtained the sheriff's deed therefor, which was duly acknowledged and recorded.

The deed from Hill and wife to the trustees, and a transcript of the proceedings of Grissom to enforce his mechanics' lien, including the sheriff's deed to him, are made exhibits to the bill.

The complainant further charges, that the abandonment of the house, as a place of public worship, for the Methodist Protestant Church, the converting of the same into a school house, and the permitting of it to be sold, under the supposed lien of Grissom, which, complainant alleges, was through the negligence, inattention and fraud of the trustees, were all gross and flagrant violations of the conditions and terms of the grant. That Grissom, before building the house, had full notice of the conditions upon which the title vested in the trustees; and charged his lien upon the property with his eyes open, knowing at the time, that the very proceedings which he had adopted, would divest the title of the trustees.

That Grissom now (the time of filing the bill,) holds possession of the house, has locked it up, and refuses to permit the trustees, or complainant, to enter the same, which is in fraud and violation of the rights of complainant.

That by said action on the part of the trustees and Grissom, the interest and title of the trustees have been, and are forfeited, and the same ought, in equity and good conscience, to be wholly divested out of them, and re-vested in complainant.

The trustees and Grissom are made parties, and the bill prays

that the title of the trustees be declared forfeited and re-vested in complainant; and that the title acquired by Grissom, be set aside and declared void, &c.

The deed from Hill and wife to the trustees, is, in substance, as follows:

"This deed of conveyance, made and entered into, this 8th day of November, A. D. 1848, by, and from Ezra Hill and wife, &c., of &c., of the first part, and Arthur W. Simmons, &c., &c., trustees, for the use and benefit of the Methodist Protestant Church, and their successors in office, for life, of the second part, *witnesseth*, that the said parties of the first part, for, and in consideration of one dollar, &c., have granted, bargained and sold, aliened and conveyed, and hereby grant, bargain and sell, alien and convey, unto the parties of the second part, the following described lot of land, namely: (*here the lot is described.*) To have and to hold the above granted parcel of land and premises, unto the said parties of the second part, their heirs and assigns forever. And the said parties of the first part, and their heirs, shall, and will warrant and forever defend the same unto the said parties of second part, and to their heirs and assigns forever, against the lawful claims of all persons, &c. *But said lot of land is never to be sold, or to be used in any other way, only for the use of a church, for the benefit of the said Protestant Church.*"

Then follows a clause relinquishing the dower of the wife; and the usual formal conclusion, with the signatures and seals of the grantors.

The defendant, Berry Beard, filed a disclaimer, and the bill was dismissed as to him; the other defendants interposed a demurrer to the bill for want of equity; the demurrer was overruled by the Chancellor; the defendants rested, and final decree was rendered for the complainants in accordance with the prayer of the bill; from which Grissom appealed to this court.

The trustees having acquiesced in the decree of the court be-

low, all controversy as to their rights, as between them and Hill, must be regarded as at an end, and the questions to be determined upon this appeal, arise between Grissom and Hill.

The lot was granted by Hill to to the grantees, and their successors, in trust, for the use and benefit of a Christian denomination, upon two conditions: 1st. That said lot was never to be sold: and, 2d. That it was never to be used in any other way, than for the use of a Church, for the benefit of said denomination.

1. It is insisted by the counsel of the appellant, that the lot having been granted to the trustees, for the purpose of erecting thereon a house of worship, the power to encumber it with the cost of such erection, and subject it to the lien of the mechanic, and sale to discharge such incumbrance, necessarily followed as incidents of the trust.

2. That the provision in the deed, that the lot *was never to be sold*, must be construed to apply to voluntary alienations by the trustees, and not to alienations by act of law.

3. That, in the absence of an express clause of forfeiture in the deed, the lot could never revert to the grantor, on account of the violation of the terms and conditions of the trust. The second proposition will be considered first.

Settlements to the use of individuals, with restrictions upon alienation, are not favored by the law, and deeds or wills making such restrictions, are strictly construed. Hence, it is held, in the English cases, cited by the counsel for the appellant, (1 *Sim.* 66; 2 *Ib.* 479; 1 *Russ. & Mill.* 69; 6 *Term Rep.* 684,) that where an annuity is settled upon an individual, with a provision against voluntary alienation, or incumbrances by him, upon his becoming a bankrupt, the annuity passes to his assignee, unless there is a provision in the will or deed that it shall determine upon his bankruptcy, &c. The same doctrine has been recognized in *Hallett vs. Thompson*, 5 *Paige* 583, where it was held, that where a legacy would pass to the assignees of the legatee, under the insolvent act, &c., it might be reached by a judgment

creditor by bill in equity, and applied to the satisfaction of his debt. The Chancellor in that case, remarked, that: "As a general rule, it is contrary to sound public policy, to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able, at the same time, to keep it from his honest creditors."

A summary of the English cases, on this subject, may be found in *Hill on Trustees, p. 395.*

But, surely, in a Christian country like ours, it is not against public policy, or the spirit of our laws, for a man to donate to trustees, a lot of ground, to be held and appropriated by them and their successors, in perpetuity, for the use and benefit of a religious denomination as a place of worship. Such conveyances are favored and upheld by *chap.* 135, *Digest, p.* 840.

Deeds and wills creating trusts for charitable purposes, such as the one in question, are to be liberally construed, in order to uphold the trust, and carry out the intention of the donor. *Hill on Trustees*, 450, *et seq.*

The object of Hill, in making the deed in question, as is manifest from its provisions, was to donate and secure to the perpetual use of the Protestant Methodist denomination in Camden, a lot of ground, upon which to erect and maintain a house of worship, and hence he provided that the lot should never be sold, or appropriated to any other purpose.

If the trustees could, by improvident contracts, involve the property in debt, and thereby subject it to be sold under execution, the intention of the donor might be defeated in that way, as well as by a voluntary sale on their part, because the purchaser could appropriate the lot and church, in either case, to his own private purposes, and prevent the use of it, for religious purposes, as it seems was done in this case. The trustees would hardly be allowed to do, indirectly, that which they have no power to do directly.

Even where a deed does not prohibit the sale of the trust estate, if the sale of it would defeat or prejudice the object of the charity,

the trustees have no power to sell it. "It is plain," says Mr. HILL, "that, in ordinary cases, a most important part of the duty of the trustees is to preserve the trust property, and it lies with those who seek to support a sale by them, to show that the transaction in question was beneficial for the charity. In the absence of such proof, and *a fortiori*, if there be any evidence showing that the sale was improvident, or prejudicial to the charity, it will be treated as a breach of trust, and set aside." *Hill on Trustees*, 463.

The nature of the donation in this case, is such, that a sale of the property would necessarily defeat the object of the charity.

"The trustees of a charity will not be justified in placing the funds under the control of other persons, who were not contemplated by the creator of the trust." *Hill on Trustees*, 466.

If the appellant has obtained a valid title to the lot in question, he might appropriate it, and the house upon it, to secular purposes, foreign to the objects of charity contemplated by the donor.

It is not, however, to be understood, that the deed secures the lot from any and all transfers by act of law. Unless exempted by law, it would, like other property, be subject to sale for public taxes and charges: provisions for the support of government being paramount.

1. Having thus disposed of the second point made for the appellant, there is no difficulty in determining the first.

The conditions contained in the deed from Hill to the trustees, are to be regarded as prior incumbrances upon the property; and the deed being recorded, the appellant, in making his contract with the trustees to build upon the lot, was bound to take notice of, and contract in reference to the provisions of the deed. *Digest*, *chap.* 105, *secs.* 20, 27.

In *Brown vs. Morrison et al.*, 5 *Ark. Rep.* 221, Mr. Justice LACY, delivering the opinion of the court, said: "The Legislature possesses no power to divest legal or equitable rights previously vested. The legal or equitable estate may be charged

with the lien, provided that does not interfere with other paramount interests or duties. The vested rights of third persons, who are neither parties nor privies to the contract between the tenant in possession and mechanics, cannot be prejudiced or sported away by their agreement. To allow this, would be to expose the whole estate to utter ruin, or onerous burdens, that would materially impair its value. The law makes it the duty of all persons, who contract, to ascertain the nature and extent of the interest they acquire. This rule imposes no greater hardship or inconvenience on mechanics than on other individuals. He who has the fee, or is tenant in possession, can be compelled to exhibit his title to the premises on which he wishes to build, and even should he refuse, the records of the courts, which are always open for inspection and examination, will readily show it and all prior incumbrances, with which the estate stands charged."

In this case, the appellant, having proceeded with a full knowledge of the provisions of the deed, and the condition of the lot, can consider it no hardship to be required to look to the persons who employed him to erect the church upon the lot, for his pay.

3. If the estate vested in the trustees by the deed, be regarded strictly as an estate upon conditions, "it is usual," says Mr. KENT, (4 *Com.* 123,) "in the grant, to reserve, in express terms, to the grantor and his heirs, a right of entry for the breach of the conditions; but the grantor or his heirs may enter, and take advantage of the breach by ejectment, though there be no clause of entry."

A vested devise of lands to a town, for a school house, provided it be built within one hundred rods of the place where the meeting house stands, was held to be valid as a condition subsequent; and the vested estate would be forfeited, and go over to the residuary devisee as a contingent interest, on non-compliance in a reasonable time with the condition. *Hayden vs. Stoughton*, 5 *Pick. Rep.* 528.

So, if land be given, on condition that the public buildings of the parish be erected thereon, it has been held to revert to the donor if the seat of justice of the parish be removed, under the sanction of an act of the Legislature passed subsequent to the grant. *Police Jury vs. Reeves*, 18 *Martin's Lou. Rep.* 221.

These cases are cited by Mr. KENT, (4 *Com.* 125, 126,) as examples of the forfeiture of estates upon conditions, for failure to observe the conditions of the grant.

So it was held in *Lessee of Sperry vs. Pond*, 5 *Ohio Rep.* 241, that a conveyance, on condition that the grantee shall keep a saw-mill and grist-mill doing business on the premises, is a valid one, and if the grantee fails to perform the condition, he forfeits the estate.

But whether this is technically an estate upon conditions, such as, upon failure to observe the conditions on the part of the trustees, the lot will absolutely revert to the donor, and thereby cut-off, on account of the acts of the trustees, the beneficial interest of the *cestui que trusts*—the denomination for whose use the trust was created—it is not necessary to decide, as no one is representing, or claiming any thing for them on this appeal; unless it be Hill.

It appears from the allegations of the bill, that the trustees not only permitted the property to be sold, but that Grissom, the purchaser, locked up the house of worship erected upon the lot, and refused to permit it to be entered. In other words, that it had been converted into private property: and thus both conditions of the deed were violated.

That Hill, who made the grant for the use of the church, and who was entitled to have the property appropriated to the charitable purposes of the grant, had the right to apply to equity to set aside the sale to Grissom, and divest his title and possession, there can be but little question. *Hill on Trustees*, 521, 522. On this appeal, no other question is properly presented, and inasmuch as the appellant has no cause of complaint, the decree must be affirmed.

Absent, Mr. Justice HANLY.

DUNNEGAN ET AL. VS. BYERS.

In ordinary suits at law, where a motion for a new trial is overruled, and the party making the motion does not except, he is presumed to have acquiesced in the decision, and will not be heard to question its correctness on error or appeal. *Quere:* Does not the same rule apply in garnishment cases?

Where a garnishee has had reasonable time to ascertain whether his creditor still holds, or has parted with, the evidence of his indebtedness, he will not be allowed, after judgment of garnishment has been rendered against him, a new trial, unless he shows that he has used due diligence.

Our statute of garnishment is broad enough to cover debts due after the issuance and service of the writ; and if not due at the time the garnishee answers, the court would have the power to continue the case until maturity of the debt, or render judgment with stay of execution.

Appeal from Independence Circuit Court.

Hon. BEAUFORT H. NEELY, Circuit Judge.

FOWLER & STILLWELL, for the appellants.

WM. BYERS, contra.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

It appears from the transcript in this case, that, on the 20th of March, 1855, William Byers recovered judgment in the Independence Circuit Court, against James Dunnegan, Sr., for $150, debt, $10 12 damages, and for costs. That, on the 28th of July of the same year, he sued out a writ of garnishment againt James Dunnegan, Jr., and William Hargiss, reciting said judgment, and alleging that they had in their hands and possession, goods and chattels, moneys, credits and effects, belonging to the judgment debtor, &c.

At the return term of the writ, (September, 1855,) allegations

and interrogatories were filed by Byers, in accordance with the statute, against the garnishees; to which they answered, among other things, that on or about the 1st of March, 1855, they purchased of said James Dunnegan, Sr., a stock of goods, of the value of, from $1650 to 1700. That the terms of the purchase were a credit of twelve months, with interest, with the privilege of other twelve months, if desired by them, at ten per cent. interest. That they executed their promissory note for the whole amount of the purchase money, (the precise amount not remembered) payable to said James Dunnegan, Sr., or order, and delivered the same to him; since which time they had no knowledge where it was, who owned it, or anything about it, other than as stated above. That they had paid nothing upon the note, owed the whole of it to the owner, but it was not due.

The following is the record entry of the submission of the cause, and judgment of the court, (18*th September*, 1855.)

"This cause was submitted to the court (by the parties) upon the allegations and interrogatories of the plaintiff, and the answer of the defendants, and the evidence in the cause, and the court, after hearing all the evidence, and being sufficiently advised in the premises, found for the plaintiff, that said defendants at the time of service of the writ of garnishment upon them in this case, were indebted to the said James Dunnegan, Sr., in a greater sum than the amount of the said judgment in favor of said Byers against said James Dunnegan, Sr., and which becomes due on the 1st of March, 1856; that the said Byers, on the 20th day of March, 1855, recovered judgment against the said James Dunnegan, Sr., as alleged, &c., for the sum of $150 as his debt, and $10 12 as his damages, with his costs, and that said debt, damages and interest thereon amount to the sum of $164 00. It is therefore considered by the court, that the said plaintiff do have and recover, of and from the said defendants as garnishees of the said James Dunnegan, Sr., the said sum of $164, with interest thereon, at the rate of six per cent. per annum, from this date until paid: and that execution in this case shall not issue until

the 1st day of March, A. D. 1856, and that the costs of this suit, which have now accrued, be paid out of said sum when collected."

The garnishees filed a motion asking a new trial orhearing, on the following grounds:

"That, at the time they filed their answer to the interrogatories, &c., they did not know, and consequently did not state, whether the note they had given to the judgment debtor, James Dunnegan, Sr., and which was mentioned in said answer, had been transferred, or whether the same was held or owned by him at the date of the service of the said garnishment or not. They state, that since the rendition of said judgment against them, at the present term of this court, they have been informed, and believe that said promissory note was transferred by the said jndgment debtor, who was the holder and owner of said note prior to the date of said service of the writ of garnishment, and that, in another trial, they could show the fact so to be. This discovery has been made since the trial herein had."

The motion was sworn to, and filed on the next day after the judgment was rendered.

The court overruled the motion.

No bill of exceptions whatever was taken to any decision of the court, and it does not appear what evidence was introduced upon the trial of the cause, othermise than by the record entry of the submission and judgment above copied.

Defendants appealed to this court.

1. It is assigned for error, that the court overruled the motion of appellants for a new trial.

In ordinary suits at law, where a motion for a new trial is overruled, and the party making the motion does not except, he is presumed to have acquiesced in the decision, and will not be heard to question its correctness on error or appeal. *Hopkins et al. vs. L. B. & C. M. Dowd*, 6 *Eng. Rep.* 627; *Sawyers vs. Lathrop*, 4 *Ib.* 67; *Danley vs. Robbin's heirs*, 3 *Ark.* 144. We know of no good reason why this rule should not apply in gar-

nishment cases; but if it does not, the showing made by the appellants was not sufficient to entitle them to a new trial.

The writ of garnishment was executed on them 31st of July, and the trial was had on the 18th September following. They had over a month and a half to ascertain whether their note had been transferred by Dunnegan or not, and yet they do not show that they had used any diligence to ascertain the fact. They chose to answer at their peril. *Cross vs. Haldeman*, 15 *Ark. Rep.* 203. The showing was deficient in other respects. See *White et al. vs. The State, present term.*

2. The only other assignment of errors is the general one, that the judgment was in favor of the appellee, when, by law, it should have been for appellants.

It appears from the face of the record, that the debt was not due when the writ of garnishment was issued, nor when the judgment was rendered, but the court stayed execution until it became due. We say until the debt became due, because the legal presumptions are in favor of the finding and judgment of the court, the evidence not appearing of record.

The appellee having put in no denial of the answer, the court, doubtless, treated it as true, (*Digest, chap.* 78, *sec.* 5,) and the finding of the court was not contradictory of the answer, as to the maturity of the debt.

The answer states that the appellants purchased the goods of Dunnegan on twelve months credit, with interest, *with the privilege of other twelve months if desired by them*, with ten per cent. interest, and that they executed their note for the purchase money. But it is not stated in the answer, that the "*privilege of other twelve months*" credit was inserted in the note, as one of the stipulations of the *written* evidence of the contract: nor did the appellants, in their answer, state that they desired additional credit, or insisted upon it as a right. We must presume, therefore, that the court ascertained from the evidence introduced upon the trial, that the agreement for additional credit was not

inserted in the note, or that it was waived by the appellants.

Whether the court allowed the appellants three days of grace upon the note, in staying execution until the 1st of March, 1856, we have no means of determining. The answer states that the goods were purchased *on or about* the 1st of March, 1855, on a credit of twelve months, &c., and a note given for the purchase money. The court found upon the evidence that the debt was due on the 1st of March, 1856, and if the appellants were entitled to grace, we must presume the court gave it to them, as the contrary does not affirmatively appear.

The only question, really, which is legitimately presented upon the record, for our consideration is, whether the appellants were subject to the process of garnishment until after the debt was due.

In cases of attachment and garnishment, either before a justice of the peace or in the Circuit Court, the statutes contemplate that the garnishee may be summoned before the debt is due, and provide for a stay of execution until after its maturity, where it is not due when the judgment is rendered. *Digest, chap.* 16, *secs.* 16, 20; *chap.* 17, *secs.* 26, 37.

The statute providing for judicial garnishments, (*Digest, chap.* 78,) is silent on this point; but it is equally as broad and comprehensive as the statutes above referred to, as to what effects of the principal debtor may be reached in the hands of the garnishee. It provides that: "In all cases where any plaintiff may have obtained a judgment, &c., and shall have reason to believe that any other person *is indebted to the defendant*, or has in his hands, &c., *goods and chattels*, moneys, *credits* and effects belonging to such defendant, such plaintiff may sue out a writ of garnishment," &c. *Sec.* 1.

Again: "The plaintiff, &c., shall file allegations and interrogatories, &c., upon which he may be desirous of obtaining the answer of such garnishee, touching the *goods* and *chattels*, *moneys*, *credits* and *effects* of the said defendant, and the value thereof,

in his hands and possession, at the time of the service of such writ, *or at any time thereafter.*" *Sec.* 3.

In Massachusetts, under a statute not more comprehensive in its terms than this, it is well settled that a debt, certainly payable at some future day, and not dependent upon a contingency, is subject to garnishment or trustee process, as it is called there. *Dans et al. vs. Ham et al.*, 3 *Mass. Rep.* 33; *Wentworth vs. Whitmore*, 1 *Ib.* 471; *Willard vs. Sheafe et al.*, 4 *Ib.* 235; *Wood vs. Patridge*, 11 *Ib.* 488; *Clark vs. Brown et al.*, 14 *Ib.* 271; *Thorndike vs. De Wolfe et al.*, 6 *Pick.* 120; *Tucker vs. Clisby et al.*, 12 *Ib.* 22; *Stone vs. Hodges et al.*, 14 *Ib.* 81.

In *Childress vs. Dickens et al.*, 8 *Yerger Rep.* 113, it was held, that by the statutes of Tennessee, a debt which was not due, could not be attached in the hands of a garnishee. That the garnishee was only required to answer, what he was indebted at the time of the summons.

But, by our statute, the garnishee is required to answer as to his indebtedness, &c., at the time of the service of the writ, *or at any time thereafter.*

We think the statute is broad enough to cover debts falling due after the issuance and service of the writ: and if not due at the time the garnishee answers, being, to some extent, in the nature of an equity proceeding, (*Walker vs. Bradley*, 2 *Ark.* 593,) the court would have the power to continue the case until the maturity of the debt, or render judgment with stay of execution.

There is no good reason, why a debt not due, should be subject to the process of attachment and garnishment, and not to judicial garnishment.

The debtor has no cause of complaint. It merely fixes a lien upon the debt in his hands, in favor of the plaintiff in the garnishment: he is allowed the privilege of answering; the benefit of all just defences; is not subjected to costs, and not required to pay the debt until it is due. A more rigid and narrow con-

struction of the statute would restrict its usefulness. The judgment is affirmed.

Absent, Mr. Justice HANLY.

NOTE.—The Hon. THOMAS B. HANLY, Judge, was absent during the remainder of this term.

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JONES VS. AUSTIN.

Where the matter in issue arises out of the sale of an improvement upon the public land, there is not such question or controversy in respect to the title to land, as would, under the decision in *Fitzgerald et al. vs. Beebe*, 2 *Eng. Rep.* 308, exclude the jurisdiction of a justice of the peace, where the sum in controversy is less than one hundred dollars.

Where the verdict is not entirely without evidence to support it, and the evidence is applicable to the instructions, which are not contrary to the law, the verdict and judgment thereon will be sustained.

Where a contract is obtained from a party, who is unable to read or write, by fraud, the jury may disregard it.

To procure the execution of an instrument of writing by a party, who is unable to read or write, without his knowing its contents, or when he believed its contents were different from what they, on account of the fraudulent representations of others, really were, is such a fraud as would avoid the instrument.

Appeal from Drew Circuit Court.

Hon. THEODORIC F. SORRELS, Circuit Judge.

CUMMINS, for appellant.

HARRISON, for appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Fountain C. Austin sued Willis Jones, before a justice of the peace of Drew county, on a note for $100, executed by Jones to Austin, on the 5th of January, 1854, and due the first of January, 1855. Judgment in favor of the plaintiff before the justice, and appeal to the Circuit Court of said county by defendant.

In the Circuit Court, the cause was submitted to a jury, Jones relying, it seems, upon the defence of failure of consideration.

After Austin had read in evidence the note sued on, and closed, Jones introduced the following instrument, proving by one of the subscribing witnesses, that Austin made his mark thereto, &c.

"DREW COUNTY, ARKANSAS.

Know all men by these presents, That I, F. C. Austin, *has bargain an sold* to Willis Jones, all the improvements on the *north half of section nine, and south half section four*, for the sum of five hundred dollars, four hundred dollars to be paid at March court, one hundred to be paid the first day of January, 1855. I furthermore bind myself to give to the said Jones possession this day, January, 5th, 1854.

his
F. C. ⋈ AUSTIN."
mark

O'Neill, one of the subscribing witnesses to the above instrument, testified that he was one of the arbitrators selected by Austin and Jones to settle a controversy between them in regard to an improvement; and his recollection of the final agreement between the parties (to carry which into effect, Jones gave the note sued on and another for $400, and Austin gave the above instrument) was, that Austin had sold to Jones all his (Austin's) improvements on the two half sections of land named in the instrument, and no other improvements or claims. Witness did not read the

instrument at the time, or before Austin signed it, but explained to him what the agreement was, as settled by the arbitrators, and which was as above stated, as witness understood it. Austin could neither read nor write. Witness was under the impression that the instrument was not read to Austin, but was signed by him after witness explained the agreement to him. Witness thought the instrument read, as he understood the agreement, and did not suppose it included the improvements of *Gaddie*, or any one else, on the lands. Witness had attended to the matter throughout, and made the compromise for Austin in his absence. He supposed Austin was only selling his own improvements on the lands. Nothing was said of the improvements of other persons being on the lands. Jones said he wanted the instrument, which was written by himself, to show to his neighbors and father-in-law in Mississippi, to remove a false impression which had got abroad, that he had entered the improvement of Austin, and refused to pay him for it: he gave no other reason for wanting it. Witness did not know whether Jones knew that *Gaddie* and *Ethridge* had improvements on said lands or not. He had lived there for some time before that, and ought to have known that their improvements were partly on the lands. The object of the instrument being given was not to operate as a conveyance, but to be used by Jones to clear his character. When it was presented to Austin, he objected to signing it, because he could not give a deed for public land. Witness explained it to him, telling him it was not a contract to convey the lands, nor his improvements thereon, but to show that Jones had paid him for his improvements, and to vindicate Jones' character. Jones read the instrument to witness, and *Dear*, the other subscribing witness, but not to Austin. Witness did not recollect anything of the word "*all*" occurring in it: or "*all* the improvements:" for, if he had noticed it, he would have objected to it. Jones was, at the time, living on the Gaddie improvement. Possession was delivered to him of Austin's improvement within an hour or two after the instrument was given, and he expressed himself satisfied.

Halley testified, that about the time Jones and Austin were making the trade about the improvement on the two half sections named in the above instrument, he went round with them as they run the lines of the land. The line included some ten acres of the improvement of Gaddie. When they came to this part of the line, witness asked Austin if he claimed all the land in that half section included by the line? He said he did; that he bought it from Evans, and intended to have it. Witness asked him if he did not intend to pay Gaddie for it? He said he would; or clear as much land on Gaddie's tract for him. The improvement of Gaddie, included within the line, was worth about $40. The improvement of Ethridge, included within said half sections, consisted of six or eight acres, and was worth $20 or $30. Austin claimed all the improvements on the two half sections. Witness was also present when the above instrument was executed. The arbitrators were in one room, and witness and Austin in an adjoining one. When the arbitrators seemed to have agreed, they sent for Austin, who went in to them, and witness distinctly heard O'Neill's voice, he thought, stating what the agreement was: that Austin was to sell Jones all the improvements on said two half sections. Witness did not, at the time, hear the instrument read, or see it, but a few days afterwards he called on Jones and asked him to show it to him, which he did; and it then read as it now does in every respect. His reason for asking to see the instrument was, that it was reported in the neighborhood that Austin had undertaken to sell part of the improvements of Gaddie and Ethridge.

Wood testified, that he was one of the arbitrators to settle the controversy between Austin and Jones. That on the day or night before the notes and agreement were given, when the arbitrators were considering the subject, Jones finally said he would give Austin $500 for the improvements, if Austin would give him a writing that he had sold him all the improvements on the two half sections named in the agreement. The arbitrators said it should be done next day. Next day, Austin was informed of

this. Witness was present when the instrument was explained to Austin before he signed it, and it was explained as he had above stated the contract to be.

Gaddie testified, that he had an improvement, eight or ten acres of which, cleared and fenced, were within the north half of section nine, referred to in the agreement. That before the agreement was made, Jones had rented from him his entire improvement for so much per acre, and lived at his house, and on his improvement (part of which extended into the north half of section nine, as aforesaid,) at the time said agreement was executed. He afterwards arranged the rent as to all said improvements, except that part extending on to the north half of section nine, which he refused to pay for. Witness still claimed the improvement made by him, and would insist on pay for it from some one.

Holland testified, that he was along when Jones and Austin ran the lines of said lands, and Austin claimed all the land on the north half of section nine. It was asked at the time by Jones or Austin, how far Gaddie's claim would extend on the north half of section nine, and witness showed them by reference to a tree top.

Ethridge testified, that he had made an improvement, some six or eight acres of which lay on the north half of said section nine. He still claimed said improvement, and would insist on payment therefor. Jones had not, as far as witness knew, been in possession of that part lying in section nine.

The above being all the evidence offered or introduced by the parties, Jones moved the court to dismiss the case for want of jurisdiction in the justice of the peace, and in the Circuit Court on the appeal, of the subject matter of the suit, because it appeared from the evidence, that titles to real estate were involved, &c. The court overruled the motion.

The court charged the jury: 1. That the contract of Austin, read in evidence, was *prima facie* evidence, and *prima facie* valid; but, if they believed from the evidence, that said instru-

ment was obtained from Austin by fraud, then they might wholly disregard the same.

2. If the jury find from the evidence, that the signature of Austin was procured to said instrument, without his knowing its contents, or when he believed its contents were different from what they, on account of the fraudulent representations of others, really were, this would be such fraud as to avoid the instrument, and in that case, the jury have a right to disregard said instrument.

3. If the jury, however, find said instrument executed by Austin was valid, and further that one or more, or part of one or more of the improvements on the lands in said contract mentioned, never belonged to Austin, and Jones never got them, then, they should deduct from the note sued on, the value of such improvement as Jones was thus deprived of.

4. If they found said contract to be fraudulent and void, they might find the amount of note and interest for Austin."

The jury returned a verdict in favor of Austin, for the amount of the note sued on, and interest, and judgment was rendered accordingly.

Jones moved for a new trial, on the ground, that the verdict was contrary to law, evidence, and the instructions of the court: that the court erred in its instructions to the jury, and in not dismissing the case for want of jurisdiction. The court overruled the motion, Jones excepted, and appealed to this court.

1. The counsel for the appellant insists that the court below should have dismissed the case for want of jurisdiction, on the authority of *Fitzgerald et al. vs. Beebe*, 2 *Eng. Rep.* 308, where it was held that justices of the peace have no power to entertain an action for use and occupation, where the title of the plaintiff may be disputed, and drawn into question and controversy by the occupant: in other words, that they have no jurisdiction "of any action where the title to any lands shall come in question." *Digest, chap.* 95, *part* 2, *sec.* 5, *p.* 641.

The case before us, is not like the one cited. Here, neither

the instrument read in evidence by Jones, nor the parol testimony introduced by the parties, conduced to show that Austin had contracted to sell or convey to Jones, any title to the lands, not even a pre-emption, but merely improvements upon what we suppose, from the testimony, to have been public lands. The main point in controversy, seems to have been, as to whether Austin sold his own improvement only, or such portions of the improvements of Gaddie and Ethridge also, as extended over upon the tract of land on which Austin's improvement was situated.

The note sued on did not exceed $100, and was within the jurisdiction of the justice, and we find nothing in the testimony upon which the court below could have held that the jurisdiction was defeated.

2. The verdict is not entirely without evidence to sustain it: nor were the first and second instructions given by the court to the jury, which are the only ones complained of here, altogether abstract, as contended by the counsel for the appellant. There were portions of O'Neill's testimony, to which they were, to some extent, applicable. No other objection is made to them.

The parol testimony in explanation of the written contract read in evidence, took a tolerably latitudinous range, but neither party seems to have objected to it.

Upon the whole record, no error has been pointed out for which we think the judgment should be reversed, and it is affirmed.

PALMER, USE &C., VS. HICKS.

The plaintiff, for whose use a suit is brought, is liable under the statute, for the costs; and, if a non-resident, is required to file a bond for cost before the institution of the suit.

Where a non-resident plaintiff brings a suit without filing bond for costs, and the defendant pleads that fact in abatement, but cannot prove the non-residence of the plaintiff, he is entitled to discovery from the plaintiff.

Appeal from Phillips Circuit Court.

Hon. GEO. W. BEAZELY, Circuit Judge.

PALMER and WATKINS & GALLAGHER, for appellant.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

This was an action of debt brought by John C. Palmer, for the use of John B. Woodfin, against Lucretia M. Hicks, in the Phillips Circuit Court.

The action was founded on a writing obligatory, payable to Palmer, for the use of Woodfin.

The defendant filed a plea in abatement, alleging that Woodfin, for whose use the suit was brought, was a non-resident of the State, at the time the suit was commenced, and that no bond for costs was filed. The plaintiff took issue to the plea.

The defendant filed a petition for discovery, alleging the non-residence of Woodfin, but that she knew of no witness by whom she could prove the fact; and interrogating both Woodfin and Palmer in regard thereto.

The plaintiff interposed a general demurrer to the petition, &c. The court overruled the demurrer, and the plaintiff rested thereon. Thereupon, the court made an order, that both Palmer and Woodfin be required to answer the interrogatories, &c., con-

tained in the petition, by the next term, or they would be taken as confessed; and the cause was continued.

At the next term, no answer having been filed, the allegations, &c., contained in the petition were taken as confessed; the issue to the plea in abatement submitted to the court, and finding and judgment for the defendant. The plaintiff appealed.

The appellant insists that a court of equity would not compel a discovery to sustain a plea in abatement; and, therefore, the defendant was not entitled to the discovery sought by her petition, under the statute.

The statute provides, that: "Either party to a suit in any court of record shall be entitled to a discovery from the other party, of all matters material to the issue in such suit, in all cases where the same party would, by the rules of equity, be entitled to a discovery in a court of equity in aid of such suit." *Digest, chap.* 126, *sec.* 93, *p.* 810.

As a general rule, the defendant in any civil action may file a bill of discovery, to aid him in the defence of such action, where the discovery sought is shown to be material. *Story's Eq. Pl., sec.* 324, *a.* 319, 845; *Lane vs. Stebbins*, 9 *Paige* 692; *March vs. Davison, Ib.* 580; *Many vs. Beekman Iron Company, Ib.* 188; *Adams' Equity*, 1 *to* 22. And the defence at law cannot be established by the testimony of a witness, or without the aid of the discovery sought. *Leggett vs. Postly*, 2 *Paige* 549; 1 *American Chancery Digest, p.* 293, *et seq.*

We have not been able to find any case where it was decided that a defendant in a suit at law was not entitled to a discovery in support of a plea in abatement. The authorities cited by the counsel for appellant are not in point. These authorities show, that as a general rule, a plaintiff in equity is entitled to a discovery from the defendant of the matters charged in the bill, provided they are necessary and proper to ascertain facts material to the *merits* of the plaintiff's case, and to enable him to obtain a decree. And so the same rule is stated by STORY, in his *Equity Pleading, sec.* 845.

But the rule in reference to obtaining a discovery in chancery, in aid of a defence at law, is generally stated in the books as we have given it above.

It is true, that the law court does not favor pleas in abatement, as they are not treated as pleas to the merits; and, perhaps, they are not more favorably regarded in a court of equity. But, though the failure of a non-resident to file a bond for costs before bringing suit in our courts, is treated as a matter in abatement, we are not warranted in saying that the defence is not meritorious. If there is any merit in the statute, there is merit in the defence.

The statute requires a bond for costs to be filed in all suits in law or equity, when the plaintiff, *or person for whose use the action is commenced*, is a non-resident of the State. *Digest, chap.* 40, *sec.* 1; *State, use &c., vs. Lawson*, 5 *Ark. Rep.* 665. The party for whose use the suit is brought, is liable for the costs. Same *chapter Digest, sec* 27.

The filing of the bond for costs is a pre-requisite to the right of the non-resident to sue in our courts; and if he chooses to commence a suit without filing such bond, and thereby to disregard the law, we know of no good reason why he should not be compelled to discover his non-residence, where the defendant is unable to prove it by a witness, as alleged in this case.

No other objection is made to the petition for discovery. It seems to be in good form, and sought the discovery of a matter material to the issue made up upon the plea. We think the court did not err in overruling the demurrer to the petition.

The question, whether Palmer, to whom the bond was made payable, for the use of Woodfin, and in whose name the suit was brought, was also liable for costs, does not legitimately arise in the case. The judgment is affirmed.

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OLIVER VS. THE STATE.

A constable in the execution of civil process, is not restricted to the township in which he resides: and it is sufficient in an indictment for resisting process in the hands of a constable, that it state that the resistance was made in the county where he resides.

An indictment for resisting an officer in the execution of process is sufficient if the charge be made in the language of the statute (*Digest, page* 359,) without stating the manner of resistance.

As to the necessary averments of an indictment descriptive of the offence charged, see the case of *Slicker vs. The State*, 13 *Ark.* 397.

We have no law authorizing the court to sit as a jury in the trial of a criminal case (*Wilson vs. The State*, 16 *Ark.*; *Bond vs. State*, at the present term.)

In an indictment for resisting process, the justice, who issued the process, is a competent witness to prove his own official character.

On the trial of an indictment for resisting process of execution, upon which the officer has made return of "no property found," it is not contradictory of the return—in the sense in which the truth of a return of an officer is not permitted to be disputed—to prove acts of the defendant preventing the levy of the execution.

The defendant may well prove, in such case, that the property upon which the officer attempted to make the levy, being in his possession, was his own, and not the property of the defendant in the execution.

Appeal from Scott Circuit Court.

Hon. FELIX J. BATSON, Circuit Judge.

FOWLER & STILLWELL, for the appellant.

JORDAN, Attorney General, contra.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

Oliver was indicted in the Circuit Court of Scott county, as follows:

The grand jurors, &c., &c., present that Richmond Oliver, on

the 10th day of February, A. D., 1855, in the county of Scott aforesaid, did, then and there, knowingly and wilfully resist Hiram Glover, who was then and there the constable of Washburn Township in the county aforesaid, in the attempt to execute a certain execution issued by Robert N. Smith, an acting justice of the peace, within and for the township and county aforesaid, in favor of Stephen H. Chism against James Hays, against the peace and dignity," &c.

The defendant moved to quash the indictment, and the motion being overruled, he rested thereon, and refusing to plead further, the court directed the plea of not guilty to be entered for him. Neither party requiring a jury, the cause was submitted to the court sitting as such, and the court found the defendant guilty upon the evidence, assessed his fine at fifty dollars, and rendered judgment accordingly. The defendant moved in arrest of judgment, which was overruled, and he appealed to this court.

The first objection taken to the indictment is, that it does not charge that the process was resisted within the township of which Glover was constable.

This was not necessary, because a constable, it seems, is not restricted to the limits of his own township in executing civil process. See *Digest*, *chap.* 35, *secs.* 26, 27, 31, *chap.* 95, *part* 2, *secs.* 16, 17, 145, 146.

The fourth objection is, that the manner of resistance was not charged.

This was unnecessary. It is sufficient to charge, in the language of the statute (*Digest*, *chap.* 51, *part* 7, *art.* 4, *sec.* 2, *page* 359,) that the defendant resisted the officer in the execution of the process. The particular mode of resistance or obstruction is properly a matter of evidence. *U. S. vs. Bachelder*, 2 *Gallison Rep.* 14; *McQuid vs. The People*, 3 *Gilman's Rep.* 76.

The other objections taken to the indictment, are answered by the decision of this court, in the case of *Slicker vs. The State*, 13 *Ark. Rep.* 397; and although the indictment does not describe the process alleged to have been resisted, with the particularity

observed in the English precedents, yet, upon the authority of the above case, we must hold it to be substantially good.

We have no law authorizing the court to sit as a jury in the trial of a criminal case, as held in *Wilson vs. The State*, 16 *Ark. Rep.*, and *Bond vs. The State*, at the present term: and for this error the judgment must be reversed.

Pending the trial the defendant excepted to several decisions made by the court, and it is perhaps proper that we should decide the questions reserved, as they may arise again upon another trial of the cause after it is remanded.

1. The court permitted Smith, the justice of the peace, who issued the execution charged to have been resisted, to prove his official character, that he was such justice, &c., against the objection of the defendant. There was no error in this. 1 *Greenl's. Ev.*, *secs.* 83, 92.

2. The State read the execution in evidence, and the defendant read the return of "no property found," endorsed thereon by Glover, the constable. The court then permitted the State to prove by Glover, that, on the day the execution came to his hands, he went in company with Chism, the plaintiff in the execution, to the house of Oliver, the defendant in the indictment, for the purpose of levying the execution upon a mare then in the possession of Oliver. That, when they arrived at the house, they found Oliver sitting on the mare out-side of his yard fence. Chism told him they had come to levy on the mare as the property of Hays, the defendant in the execution. Oliver said the mare was his own property, and he would not have her levied upon. Glover then started towards the mare, and Oliver took out his pocket knife, holding it down in his hand, without opening either blade, and told Glover not to come to him, and that if either he or Chism touched the mare, he would cut him. Glover still walked toward the mare, and Oliver turned her round and rode inside of his yard, and told a boy to bring him his butcher knife. He got the knife, and swore he would not have his mare taken. Glover told him he would have him arrested, and he

then turned the mare and rode off as fast as she could gallop. He was sitting on the mare all the while, &c.

To this evidence, Oliver objected as incompetent, on the ground that it was contradictory of the return of the constable on the execution, of no property found.

There is nothing in this objection: the evidence does not contradict the return, in the sense in which the truth of such returns is not permitted to be disputed. The constable might, perhaps, have returned the particular facts: that the plaintiff in the execution pointed out a mare in the possession of Oliver, to be levied upon: that he attempted to do so, but the levy was resisted by a show of arms, and then by flight—running off the animal. But the return of no property found was a short mode of stating the result of the efforts of the constable to satisfy the execution; and it was hardly necessary for him to detail, in his return, his unsuccessful adventures in search of property, &c.

3. The defendant, Oliver, proposed to prove that the mare, upon which the constable attempted to levy the execution, belonged to him, and was not the property of Hays, the defendant in the execution, but the court excluded the evidence.

The constable, it seems, found the mare not in the possession of the defendant in the execution, but in the possession, and at the house of Oliver. If she belonged to him, the constable was invading his rights, and a trespasser, in attempting to levy upon her. *Elder vs. Robinson*, 10 *Wend. Rep.* 128; *Mitchell vs. The State*, 7 *Eng. Rep.* 55; *Overby et al. vs. McGhee*, 15 *Ark. Rep.* Without intending to decide that Oliver was justifiable in making a flourish of knives to resist a mere levy upon the mare, even if she belonged to him, when the law points out more peaceful remedies, yet we must hold, upon the above authorities, that the court should have permitted him to prove that the mare was his property, and not subject to the execution. Reversed.

NUNN ET AL. VS. MATLOCK.

A court of equity is competent to relieve against an ordinary judgment obtained in a court of record by means of fraud; and the statutory judgment springing into being upon the forfeiture of a forthcoming bond, cannot stand upon any higher ground: And so, where there is fraud in procuring an execution to be levied upon property not subject to execution; and in procuring the bond given for its delivery, to be forfeited, and so returned by the sheriff, the court will grant relief by perpetual injunction.

Appeal from Ouachita Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

GALLAGHER, for appellants.

WATKINS & CURRAN, for appellee.

Mr. Justice SCOTT delivered the opinion of the Court.

Samuel Nunn, one of the appellants, having a judgment in the Ouachita Circuit Court, against Spartan G. Goodlett, Hugh W. Ashley, and Robert H. Atkins, sued out an execution against them, which was levied upon certain personal property of Goodlett, consisting of 50 head of hogs, two head of horses, 1 wagon, two saddles, 3 beds and furniture, 1 grind stone, 1 steel mill, 4 ploughs, 2 pair of geer, 6 head of cattle and one ox yoke.

The execution, in virtue of which this levy was made, was returnable on the first Monday after the fourth Monday in September, A. D. 1849, and the levy was made the 21st of that month. That day, Goodlett, with John Matlock as his security, executed a forthcoming bond for the delivery of the property so levied upon, to the sheriff, at the residence of Goodlett, on the first day of October following.

Immediately afterwards, one Thomas, claiming the property levied upon, as trustee, under the provisions of a deed in trust executed by Goodlett, on the 26th April, A. D. 1847, for the benefit of Matlock & McCollum, which by that firm had been transferred to the individual benefit of John Matlock, gave notice in writing thereof to the sheriff, under the provisions of the statute, (*Digest, chap.* 67, *secs.* 32, 33, 34, 35, 36,) and demanded a trial of the right of property.

The sheriff proceeded accordingly by jury, who failed three several times to agree on a verdict. The last mis-trial was on the day appointed in the forthcoming bond for the delivery of the property levied upon, and so claimed, and, by previous advertisement of the sheriff, for the sale of the same. The sheriff then proceeded to the place appointed for the delivery and sale of the property, and Goodlett there pointed out to him, and offered to surrender all of it to him, except the 50 head of hogs, and the 6 head of cattle. The sheriff refused to accept this partial surrender of the property levied upon, and, at once, returned the forthcoming bond, forfeited.

At the return term of the forthcoming bond, no motion was made to quash it and the execution out of which it had sprung, although it seems liable to objection in the fact, apparent upon the face of the bond, that the sheriff had improperly united two several and distinct judgments in favor of two several plaintiffs; in the forthcoming bond, thus improperly blending the separate rights of different and unconnected plaintiffs, in vexatious if not in inextricable confusion.

At the next succeeding term—that to which the execution upon the statutory judgment was returnable—a motion to quash the forthcoming bond was made, for various alleged causes: the irregularity pointed out, not being one of them, and was overruled; but no exception appears to have been taken, or writ of error sued out; the motion, doubtless, having been considered out of time.

This last mentioned execution appears, from the return of the

sheriff, to have been arrested in its progress by a writ of injunction, which a master in chancery had assumed to order, upon a bill in equity filed to this term, by Matlock against Nunn, praying relief against the forthcoming bond by injunction and otherwise. In this bill, Matlock alleges, that the property levied upon, was not subject to the execution, and that, knowing this to be so, he executed the forthcoming bond, as the security for Goodlett, with the full expectation and belief that the sheriff would, in the mode provided by the statute, try the right of property interposed in his behalf, by the trustee, Thomas, and make this manifest. And he charges that the proceedings of Nunn and the sheriff in the premises, and in procuring the bond to be forfeited, and so returned by the sheriff, were fraudulent to his injury.

This, Nunn at first denies in his answer, but then proceeds by way of cross-bill, under the statute, and charges, in substance, that Atkins and Ashley falsely and fraudulently represented to the sheriff previously to any levy of the original writ of execution, and while it was in his hands for levy against all the original defendants therein, that they, Ashley and Atkins, had paid the debt, interest and costs, and had full authority from the respondent, Nunn, to control the said execution, and direct the said sheriff's action and proceedings thereunder, as in the name of Nunn; all of which was false. And that the sheriff, placing full confidence in the false and fraudulent representations, obeyed the instructions of Ashley and Atkins throughout, from the levy to the final return of forfeiture of the forthcoming bond. And, at their special instance and request, levied the execution upon the alleged trust property, and continued to insist upon that levy, and resisted as aforesaid, the claim of Thomas, as trustee, in behalf of Matlock, after that claim had been interposed up to the return of forfeiture upon the forthcoming bond.

The answer of Nunn then proceeds as follows, *to wit:* "And this defendant further says, that the said Hugh W. Ashley and Robert Atkins have intermeddled with the business of this defendant herein, without permission from him, his agent or attor-

ney, and falsely and fraudulently assumed to control said execution, and to direct the said Green L. Grant, as such sheriff, in the execution and satisfaction thereof, and falsely and fraudulently represented that they, or one of them, had paid and satisfied said execution, when in truth and in fact, they had not, nor had either of them paid the same, or any part thereof: and by their said false and fraudulent representations and conduct, have subjected this defendant to great costs, damages and expenses, in regard to the said several trials of the right of said complainant to said property. Wherefore, this defendant prays that the said Hugh W. Ashley and Robert H. Atkins may be made parties to complainant's said bill, and that they, upon their respective corporal oaths, may answer the interrogatories hereunto annexed, and that this defendant may have a decree over against them, the said Ashley and Atkins, for all costs and damages occasioned by the levy of the said original execution upon said property, and in case said injunction should be perpetuated, that this defendant may have a decree of this court over against the said Ashley and Atkins, for the debt, interest and costs, in said original execution specified, together with all the said costs and damages, which this defendant may have sustained by reason of the levy of the said original execution on said property claimed as aforesaid, by said complainant, and such other and further relief," &c.

In obedience to process ordered by the court, Ashley and Atkins appeared by their solicitor, and not only consented to be made parties, as prayed by Nunn, but also that the allegations of Nunn's answer, by way of cross-bill, should be taken against them as confessed to be true, and the relief prayed against them decreed accordingly.

Afterwards, the case was finally heard upon the bill and exhibits, the answer and exhibits, both as such, and as a cross-bill, and the whole of the proceedings of record on the law side of the court, including the forthcoming bond, and the several executions and returns thereupon made by the sheriff. Whereupon,

the court decreed that the forthcoming bond, and the sheriff's return of forfeiture thereof, and the execution issued upon the same, should be null and void, and that Nunn should be perpetually enjoined from further proceeding on the same by execution, or in any other wise whatsoever. That Atkins and Ashley should pay all the costs of the proceedings in the trials of the right of property, and also the costs in this cause; and that Nunn should be remitted back to his judgment at law in the Circuit Court, against Goodlett, Atkins and Ashley, and have execution of the same.

From this decree, Nunn, Ashley and Atkins, appealed to this court.

In several particulars, these proceedings are quite irregular and open to observation; but we have no concern with any thing that does not operate to the prejudice of the rights of the appellants.

As to two of them, Ashley and Atkins, it is entirely clear in our opinion, that they have no ground of complaint whatsoever. It is not possible that they should have expected to have been allowed in a court of equity, any benefit from a judgment directly resulting from their own falsehood, misrepresentation and fraud, which they openly, by their solicitors, admit upon the record.

It would be strange, indeed, if, by a judgment so superinduced, they could be discharged from their liability to Nunn on his judgment against them and Goodlett.

The decree against them for costs we think equitable and just. But, although all this may be so, unless the statutory judgment arising upon the forfeiture of the forthcoming bond can be properly held as invalid in a court of equity under the facts and circumstances in this cause shown, as against Nunn, and in favor of Matlock, these two parties, (Ashley and Atkins,) although not entitled to relief, would enjoy it so far as the original judgment against them was concerned. There can be no doubt, however, of the competency of a court of equity to relieve against an ordinary judgment, obtained in a court of record by means of fraud, and

this statutory judgment cannot possibly stand upon any higher ground. Matlock charges in his bill that it was so obtained; and although Nunn, in his direct answer to Matlock's bill, denies this, yet, when his entire answer, including that which he makes by way of cross-bill, is considered together, he virtually admits it to be true. And the same may be said of Matlock's other allegation, that the property levied upon was not liable to the execution, because Nunn substantially presents the very fact as an independent ground of relief against Ashley and Atkins for costs and damages, to which they have, as he alleges, subjected him by fraudulently intermeddling with his execution, and causing it to be levied upon the property in question; and this not by way of alternative relief, as he also prays shall be decreed him in case the injunction of Matlock should be perpetuated, but absolutely and in any event.

Matlock is in no manner upon this record shown to be in fault, nor in any degree implicated in the fraudulent practice and proceedings which Nunn charges, and Ashley and Atkins admit, finally resulting in this statutory judgment against which Matlock seeks relief.

Thus Nunn, in effect, insists as against Matlock, that this judgment shall be held valid, and at the same time alleges it to have been obtained by the fraud of Ashley and Atkins, and on that ground seeks relief against them for the costs and damages to which he alleges they have subjected him by means of their frauds. Certainly, in a court of equity, he ought not to be allowed any benefit from a fraud against an innocent party, which he repudiates and seeks redress for as against the fraudulent. It would be to adopt a wrong, and claim benefit from it. It does not appear that Ashley and Atkins are insolvent; hence, no probable injury to Nunn is apparent from this source, while Matlock being a mere security, must be inevitably injured, if held bound, because it does appear that Goodlett is insolvent.

Upon the whole case, we think the decree rendered ought to be affirmed.

PLATENIUS AS AD. VS. THE STATE.

The act of the 7th December, 1854, entitled "An act further to regulate the manner of bringing suits against the State," is constitutional and within the competent powers of the Legislature.

Writ of Error to the Circuit Court of Pulaski County.

The Hon. JOHN J. CLENDENIN, Circuit Judge.

PIKE, for the plaintiff.

S. H. HEMPSTEAD, for the defendant.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of covenant instituted by the plaintiff in error, against the defendant, under the provisions of the statute put in force, by the proclamation of the Governor, on the 20th of March, A. D. 1839. *Digest, chap.* 157, *page* 961.

The declaration was filed in the Pulaski Circuit Court, on the 21st day of November, A. D. 1854, and a writ of summons was issued the same day returnable to the next succeeding June term, which was regularly served upon the Auditor of Public Accounts.

The following is a copy of the declaration: (omitting four hundred and ninety-nine counts like that copied, except that each is on a different and distinct bond for the same amount, dates, &c.)

"IN THE PULASKI CIRCUIT COURT,
To the December Term, A. D. 1854.

William A. Platenius as, and in his capacity of administrator, *ad colligendum*, of all and singular the goods and chattels, rights

and credits, which were of James Holford, deceased, who died testate, by attorney, complains of the State of Arkansas of a plea of covenant broken.

For that whereas, heretofore, *to wit:* on the 1st day of January, A. D. 1840, at Little Rock, in said State of Arkansas, under and by virtue of the act of the General Assembly of said State, entitled: "An act to establish the Real Estate Bank of the State of Arkansas," approved the 26th day of October, A. D. 1836, and of the other act of the said General Assembly, entitled: "An act to increase the rate of interest on the bonds of the State, issued to the Real Estate Bank of the State of Arkansas," approved the 19th day of December, A. D. 1837: and of the other act of said General Assembly, entitled: "An act to authorize the Stockholders of the Real Estate Bank of the State of Arkansas to establish a branch in the western part of this State," approved the 24th day of February, A. D. 1838, and under the fifth section of said last mentioned act, and the second section of said second mentioned act, and the tenth section of said first mentioned act, for the ends and purpose in said last mentioned act specified, *to wit:* to enable said bank to raise the residue of the capital provided for by said first mentioned act, and put said branch in the western part of this State, in operation, the said State of Arkansas made and executed, and to the said Real Estate Bank of the State of Arkansas, delivered her certain bond and writing obligatory, dated the said 1st day of January, A. D. 1840, sealed with the great seal of said State, then thereto caused to be affixed by his Excellency, James S. Conway, then Governor of said State, signed by said Governor, and countersigned by John Hutt, then the Treasurer of said State, and which, with the endorsements thereon, hereinafter mentioned, is now here shown to the court, and the caption whereof is as follows, that is to say:

UNITED STATES OF AMERICA,
STATE OF ARKANSAS.

One thousand dollars, Arkansas State Bond; £ stg. 225—No.

1: *C. Frs.* 5600: *Real Estate Bank of the State of Arkansas: Under an act of the General Assembly of the State of Arkansas, entitled: "An act to establish the Real Estate Bank of the State of Arkansas, approved October 26th,* 1836:" *and an act supplementary thereto, entitled: "An act to increase the rate of interest on the bonds of the State, issued to the Real Estate Bank of the State of Arkansas," approved the* 19*th December,* 1837:" *and an act entitled: "An act to authorize the Stockholders of the Real Estate Bank of the State of Arkansas to establish a branch in the western part of this State," approved February* 24*th,* 1838."

To the payment of which bond by said last mentioned act of Assembly, the faith and credit of said State were irrevocably pledged: and thereby the said State of Arkansas then and there acknowledged herself to be indebted to said Real Estate Bank of the State of Arkansas, in the sum of one thousand dollars: and thereby covenanted and agreed with said Real Estate Bank of the State of Arkansas, that she would pay the said sum of one thousand dollars, in current money of the United States, to the President, Directors and Company of the said Real Estate Bank, on the 26th day of October, in the year of Our Lord one thousand eight hundred and sixty-one, and also, that she would pay half yearly, on the first day of January, and the first day of July, in each year, interest on said last mentioned sum of one thousand dollars, at the rate of six per cent. per annum, at the place to be named in the endorsement upon said writing obligatory, until the payment of said principal sum; which said writing obligatory, being in law payable to said Real Estate Bank of the State of Arkansas, and said covenant therein contained, being made with said bank, by its description of "The President, Directors and Company of said Bank," the said Real Estate Bank, afterwards, *to wit:* on the 1st day of January, A. D. 1840, by its endorsement on said writing obligatory, then made in the first person, by William E. Woodruff, the President, and Carey

A. Harris, the Cashier of said bank, for value received, assigned, transferred and endorsed the said writing obligatory, under and by virtue of the powers, by the 10th section of said act of Assembly establishing said Real Estate Bank, in the said President and Cashier vested, to the said James Holford, who was then living; and thereby directed the said sum of money, and the instalments of interest therein mentioned, to be paid to him or his order; and therein, they did, by virtue of the act of Assembly last aforesaid, and the other acts above mentioned, and the authority to them thereby given, fix the place at which said principal and interest should be paid, to be in the city of London, (which was, and is in the Kingdom of Great Britain, beyond seas,) at the counting house of Messrs. Frederick, Huth & Co., in said city of London, and so made the said principal and interest there payable to the said James Holford, at the rate of four shillings sixpence sterling per dollar, or four dollars and forty-four cents per pound sterling; the said interest to be paid on presentation and delivery of certain dividend warrants (or coupons) thereto annexed by said bank, being memoranda of the amount and time of payment of each semi-annual instalment of interest: and said principal to be paid on presentation and delivery of said bond, on the day when it should become due, and then there bound said State to the payment of said interest and principal, and then there delivered said last mentioned bond, so endorsed to said assignee, James Holford, who then thereby became the endorsee and assignee thereof, and the plaintiff is now the holder and owner of the same, as such administrator as aforesaid.

And the said plaintiff in fact saith that the said State of Arkansas hath not paid at said banking house of said Frederick Huth & Co., in said city of London, or elsewhere, the said several instalments of interest, at the rate of six per cent. per annum, which have become due and payable since the making of said writing obligatory, upon said last mentioned sum of one thousand dollars, or two hundred and twenty-five pounds sterling, on

the 1st day of July, in the year 1840, and upon the 1st day of January and the 1st of July, in each and every year thereafter, up to, and including the present year, 1854, *to wit:* the sum of thirty dollars, or six pounds, fifteen shillings sterling on each of said days, to the said James Holford, or to any other holder of said bond, or person authorized to receive the same, either upon those days, or at any other time or times whatsoever, according to the form and effect of said writing obligatory and covenant, and said endorsement thereof, or either of said sums, or any part of either, although often requested so to do; but the said State, the said several sums of thirty dollars, or six pounds fifteen shillings sterling each, unto the said James Holford, in his life-time, or to the plaintiff since his death, or to any other holder of said bond, or person authorized to receive the same, at the end of the said respective terms, or ever as yet, in whole or in part, to pay hath altogether omitted, neglected and refused; nor hath she ever made any provision for the payment of any of said instalments, or ever had or placed any money at said place of payment, to pay and meet any of said instalments, nor hath any other person, nor said bank done it for her; nor ever been there ready to pay the same, so that it hath always been useless there to present any of said dividend warrants for payment, or to demand payment there, of any of said instalments of interest, against the form and effect of said covenant and writing obligatory, and of the said endorsement thereof: and so the said plaintiff saith that the said State, although often requested, hath not kept her said covenant, so by her made as aforesaid, and hath broken the same, and to keep the same with the said James Holford, and with the plaintiff as such administrator, hath hitherto wholly refused, and still doth refuse; nor hath paid the difference of exchange, or any part thereof, on any one or more of said instalments of interest, between Little Rock, and the city of London, in favor of London, as it hath since the making of said writing obligatory, hitherto ever been:" (*Note:* Here follow 499 other counts in the declaration, which are omitted.)

"By means of which said several breaches of said several covenants of said State of Arkansas, in the several counts of this declaration herein above alleged and assigned, the said plaintiff saith that he, as such administrator as aforesaid, is injured and hath sustained damage to the sum of one million of dollars; and therefore, in his capacity of such administrator as aforesaid, he sues; and he here brings into court an authenticated copy of the letters of administration, *ad colligendum*, of all and singular the goods and chattels, rights and credits, which were of the said James Holford at the time of his death, and which letters were, after the death of the said James Holford, *to wit:* on the 20th day of May, A. D. 1854, granted to the plaintiff by the Hon. ALEXANDER W. BRADFORD, Surrogate, with probate jurisdiction, of the county of New York, in the State of New York, one of the United States of America, in due form of law, and give sufficient evidence to the said court of the said grant of administration to the said plaintiff."

At the return term, *to wit:* the 25th of June, 1855, the Attorney General, with whom was the special attorney retained by the State, filed the following motion, *to wit:*

"The said State, by attorney, moves the court to require the plaintiff to file the bonds mentioned and referred to in the declaration, according to act of Assembly of the 7th December, 1854, and if the same are not filed, that the suit be dismissed."

The court taking time to advise until the 9th of July following, on that day ruled that the plaintiff should produce and file the bonds in court, which the plaintiff, as is shown by the bill of exceptions, in open court declined to do, whereupon, the court immediately sustained the motion, and dismissed the cause; the plaintiff thereupon excepting, and having his bill of exceptions sealed and made a part of the recod, afterwards brought his cause into this court by writ of error.

Here, he insists upon the single point, that the act of the Legislature, under the provisions of which the Circuit Court dis-

missed his suit, was unconstitutional, and ought to have been disregarded.

It was provided by the act under which these proceedings were commenced, that such suits, when commenced, be conducted to final judgment, in the same manner as actions by and against individuals. And when judgment should be rendered, it should be the duty of the Auditor of Public Accounts, to transmit a copy of it to the General Assembly, which should make an appropriation for its satisfaction. That appeals and writs of error should be allowed, and that nothing in the act should preclude any claimant from making application to the General Assembly for the satisfaction of his claim, in the first instance, without any resort to such proceedings.

It is provided by the act under which these proceedings were dismissed, which is entitled: "An act further to regulate the manner of bringing suits against the State," (act approved by the Governor, December 7th, 1856. *Pamph. Acts of* 1855, *p.* 17.)

SEC. 1. "That in every case in which suits, or any proceeding has been instituted, to enforce the collection of any bond or bonds issued by the State of Arkansas, or the interest due, or which shall be due on any such bond or bonds, before any judgment or decree shall be rendered in any court, such original bond or bonds, as the case may be, shall be produced and filed in the office of the clerk of the court, and shall not be withdrawn until the final determination of such suit or proceedings, and the full payment of such bond or bonds, and all interest thereon, and the same may then be withdrawn, canceled and filed with the State Treasurer by order of the court, but not otherwise."

SEC. 2. "That in every case in which any suit or proceeding has been, or shall hereafter be instituted, upon any bond or bonds of this State, or for interest which may or shall be due thereon, the court, at the first term after the commencement of suit or suits, proceeding or proceedings, whether the same be at law or equity, and whether the same be by an original or cross-

bill, shall require that the original bond or bonds be forthwith produced and filed, as required by the first section of this act, and in case such original bond or bonds be not forthwith produced and filed in the manner, and to remain so filed as aforesaid, it shall be the duty of the court, on the same day, to dismiss such suit, proceeding or cross-bill."

SEC. 3. "That all laws and parts of laws contrary to this act, be, and the same are hereby repealed, and this act shall take effect and be in force from and after its passage."

It is argued that this latter act impairs the obligation of the contract proceeded upon in this cause.

Judge STORY says, in his commentaries on the Constitution of the United States, (*vol.* 2, *Book* 3, *sec* 1380, *p.* 232): "It seems agreed, that, when the obligation of contracts is spoken of in the Constitution, we are to understand, not the mere moral, but the legal obligation of the contracts. The moral obligation of contracts is, so far as human society is concerned, of an imperfect kind, which the parties are left free to obey or not, as they please. It is addressed to the conscience of the parties, under the solemn admonitions of accountability to the Supreme Being. No human law given, can either impair or reach it. The Constitution has not in contemplation any such obligations, but such only as might be impaired by a State, if not prohibited. It is the civil obligation of contracts which it is designed to reach; that is, the obligation which is recognized by, and results from the law of the State in which it is made."

In the next succeeding section, he says: "Nay, there may exist (abstractly speaking,) a perfect obligation, in contracts where there is no known and adequate means to enforce them. As, for instance, between independent nations, when their relative strength and power preclude the possibility, on the side of the weaker party, of enforcing them. So, in the same government, where a contract is made by a State with one of its own citizens, which yet its laws do not permit to be enforced by any suit or action. In this predicament are the United States, who

are not suable on any contracts made by themselves: but no one doubts that these are still obligatory on the United States. Yet their obligation is not recognized by any positive municipal law, in a great variety of cases. It depends, altogether, upon principles of public or universal law. Still, in these cases, there is a right in the one party to have the contract performed, and a duty on the other side to perform it. But, generally speaking, when we speak of the obligation of a contract, we include in the idea, some known means acknowledged by the municipal law to enforce it."

So, in section 1385, (*p.* 236,) he says: "Although there is a distinction between the obligation of a contract, and a remedy upon it, yet, if there are certain remedies existing at the time when it is made, all of which are afterwards wholly extinguished by new laws, so that there remain no means of enforcing its obligations and no redress: such an abolition of all remedies, operating *in presenti*, is, also, an impairing of the obligation of such contract. But every change and modification of the remedy do not involve such a consequence. No one will doubt that the Legislature may vary the nature and extent of remedies; so, always, that some substantial remedy be in fact left. Nor can it be doubted that the Legislature may prescribe the terms and modes in which remedies may be pursued, and bar suits not brought within such periods, and not pursued in such modes. * * * * * And a State Legislature may discharge a party from imprisonment, upon a judgment in a civil case of contract, without infringing the Constitution: for this is but a modification of the remedy, and does not impair the obligation of the contract."

We have made these extracts as a more convenient mode, than citing the cases upon which they are based, and stating their substance, of presenting the principles of law, which, we think, govern the question we have to decide.

According to these principles, had the remedy in question been a perfect one for the broken contract, and had therefore

afforded adequate means, as by execution, for enforcing its pre-existing obligation, the objection taken could not have been maintained so long as a like substantive one remained to the party. And it was upon this foundation that the constitutionality of the act of our Legislature, exempting the debtors of the State Bank, from the process of garnishment from courts of law, was upheld by this court in the case of *Danley et al. vs. The State Bank*, 15 *Ark. Rep.* 16.

Much more, then, is the objection to be disallowed under like circumstances, when, as in the case at bar, the remedy in question was, in truth, but an imperfect one, precatory in its nature, and living but in entreaty; and, consequently, totally inadequate to enforce peremptorily the duty of performing the contract. And that the remedy in question was of this nature, and, that if it had been repealed, instead of having been modified, as it was, that another one, substantially as effective, would have remained, seems clear enough, when it is remembered that the proceedings in question were but a mode of application to the Legislature for the satisfaction of the claim; and that, without resorting to them at all, the same statute allowed direct application to that department of the government for the like purpose. The judgment of the court in the one case, ascertaining the fact of its indebtedness, and its amount, as the finding of an accounting officer of the government might do in the other; when, as to both, the matter would come to a stop, unless the Legislature should think proper to satisfy the claim: the courts having no power to force satisfaction of their judgments against the State.

The remedy in question, at best, can scarcely be regarded as any means of legally enforcing the duty of performing the obligation of the contract proceeded on; and, therefore, although the plaintiff in error might be considered as having had a right to bring suit and obtain judgment in this way, and that the enactment of the 9th of December, 1854, materially obstructed and impaired those rights, it cannot be doubted, in view of these principles, but that it was within the competent powers of the

Legislature so to obstruct and impair them: because, thereby, no means of enforcing the duty of performing the contract, recognized and enforced by law, was taken away, and necessarily, the obligation of the contract remained the same.

We think that the objection ought not to be allowed. The judgment of the Circuit Court will, therefore, be affirmed, with costs.

PLATENIUS AD. VS. STATE.

Error to Pulaski Circuit Court.

BEERS USE OF PLATENIUS AS AD. VS. STATE.

Error to Pulaski Circuit Court.

PRESIDENT AND DIRECTORS BANK OF WASHINGTON VS. STATE.

Appeal from Pulaski Chancery Court.

SAME VS. SAME.

Appeal from Pulaski Chancery Court.

Affirmed: The principles involved being the same as in the preceding case of *Platenius as ad. vs. The State.*

MEMPHIS AND ST. FRANCIS PLANK ROAD CO. VS. SULLIVAN.

This case comes within the rule laid down in *State Bank vs. Conway*, 13 *Ark. Rep.* 344.

Appeal from Crittenden Circuit Court.

WATKINS & GALLAGHER, for the appellant.

Mr. Justice SCOTT delivered the opinion of the Court.

This case originated before a justice of the peace, and was taken by appeal to the Circuit Court of St. Francis county, where it was tried, *de novo*, upon the merits, by the court sitting as a jury, and verdict and judgment were rendered for the defendant. The other party excepted generally, and took a bill of exceptions setting out all the testimony, but made no motion for a new trial, excepted to no ruling of the court in admitting or rejecting testimony, nor took any steps to have the opinion of the court declared on any point of law during the progress of the case. In a word, as the appellant has failed to save, by exception, any alleged error of law, in any specific ruling or decision of the court below, and thus enable himself in this court to "put his finger" upon any such alleged error, but has left every thing at large, so as to make it impossible for this court to know, whether the court below erred in matter of law, or erred in matter of fact, there is necessarily no case that the court can look into: the presumption in favor of the correctness of the proceeding below, remaining unexpelled.

Therefore, as has been often ruled here, the judgment in this case must be affirmed, under the law, as declared in *State Bank vs. Conway*, 13 *Ark. Rep.* 344, and always since adhered to.

OWEN VS. ARRINGTON & CO.

This court will not reverse a judgment, for the failure of the record to state that a motion, in the court below, to set aside the judgment, had been disposed of; but will presume in favor of the regularity of the proceedings of the Circuit Court, that the motion had been abandoned.

The blank endorsement and delivery 'of a promissory note,' constitute such a transfer of the interest in the paper as to vest in the transferee the right of action and recovery. (*Worthington vs. Curd & Co.*, 15 *Ark.* 508.)

Independent of the ordinary presumption, in favor of the regularity of the proceedings of the Circuit Court, this court will presume that the cause was regularly tried by the court on all the issues — being issues of fact — though not so stated of record, where the judgment recites a finding by the court of all the facts necessary to sustain the judgment.

Error to Union Circuit Court.

HON. THOMAS HUBBARD, Circuit Judge.

QUILLIN and WATKINS & GALLAGHER, for plaintiff.

CARLETON, for defendants.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of assumpsit, in the Union Circuit Court, upon a promissory note, for $706 90, payable the 1st March, 1851, to the order of John Ford, at the office of Robins, Arrington & Co., No. 19, Bank Place, New Orleans, which was endorsed in blank by Ford, and at maturity was at the instance of B. C. Adams, the then holder, protested for non-payment.

The defendant filed six pleas, on which the plaintiffs took issue in short upon the record, by consent, to wit:

1st. Non assumpsit.

2d. The legal interest in the cause of action is not in the plaintiffs.

3d. The legal title to the promissory note, is not in the plaintiffs.

4th. The legal interest in the cause of action is in one B. C. Adams, and not in plaintiffs.

5th. Payment in full to plaintiff before the commencement of this suit.

6th. Payment to Robins, Arrington & Co., while they were in possession, and the owners of the note sued on, and before it came to the hands of the plaintiffs.

At a subsequent term, it appears that the court refused the motion of the defendant below for a continuance, and immediately following the entry thereof, the record proceeds: "And the said defendant, Ezra M. Owen, saying nothing further in bar or preclusion of the said plaintiff's' action; and it appearing to the court that said action is founded on a promissory note, executed by the defendants, payable to the order of John Ford, at the office of Robins, Arrington & Co., No. 19, Bank Place, New Orleans, for the sum of seven hundred and six dollars and ninety cents, due on the first day of March, 1851, and dated November 6th, 1850. And it appearing to the court, that said note is entitled to credits, amounting to the sum of two hundred and two dollars and sixty-two cents, and one for the sum of forty dollars. Which said note is endorsed by John Ford. And it appearing further to the court, that the said plaintiffs have sustained damage by reason of the non-performance of the said defendant's promises, in the sum of six hundred and sixty dollars and fifty-four cents, and the plaintiffs discontinuing this suit, as to the said defendant, John V. Arrington, who is not served with process herein. Therefore, it is by the court considered that the said plaintiffs, Nicholas O. Arrington, and Robert Arrington, late partners in trade, and doing business in the firm name of N. O. Arrington & Co., do have, and recover of, and from the said de-

fendant, Ezra M. Owen, the aforesaid sum of six hundred and sixty dollars and fifty-four cents, besides all their costs herein expended."

Afterwards, during the term, the defendant below filed a motion and an affidavit in support of it, to set aside the judgment already entered. It does not appear, from the transcript, that any action, whatever, was taken in the premises, nor is there any exceptions in the record in reference thereto.

It is insisted, that this latter is sufficient for the reversal of this judgment. We do not think so. Because, it is incumbent upon the party complaining of error, to show that it has been committed by the court. This has not been done as to this point. In the absence of something in the record to the contrary, we are authorized to presume in favor of the regularity of the proceedings, that the motion was abandoned.

It is next insisted, that it ought to appear, in order that the judgment shall be sustained, that the blank endorsement had been filled up previously to its rendition.

That point we considered in the case of *Worthington vs. Curd & Co.*, 15 *Ark.* 508; and, upon the weight of authority held, that according to the commercial law, (which we there applied to a writing obligatory, payable in property, as to its transfer): "The blank endorsement and delivery of the instrument, constitute such a transfer of the interests in the paper, as to vest, in the transferee, the right of action and recovery." The same rule had been several times before applied in this court to bonds and notes, payable in money absolutely, as will be seen from the cases there cited.

The remaining position, that some of the issues were not disposed of, although somewhat plausible on a slight examination of the transcript, will be found, upon a more thorough one, to be equally untenable. Because, independent of the ordinary presumption in favor of the regularity of a judgment, in the absence of matters in the record to the contrary, it is apparent upon the face of this one, in what is stated to have been made to appear

to the court, that the cause was regularly tried by the court, under the provisions of our statute, neither party requiring a jury, although not so stated in terms.

Finding no error in the record sufficient to authorize its reversal, the judgment will be affirmed, with costs.

BISCOE ET AL. VS. MADDEN AS AD.

17 533
68 460
17 533
73 48

The two years statute of non-claim, and not the general statute of limitation, gives the rule of limitation to claims against the estates of deceased persons, not barred at the time of the death of the debtor. (*State Bank vs. Walker ad.*, 14 *Ark.* 236; *Walker vs. Byers*, *Ib.* 259.)

And so, to a claim against the estate of a deceased person prosecuted in the Probate Court, a plea, that the cause of action did not accrue within three years (the period of the general limitation as to such claims,) before the commencement of the suit, is no answer to the demand.

Where the plaintiffs, to the plea of the statute of limitations, reply that they instituted suit within the statute bar, suffered a non-suit, and again sued on the same cause of action within the year, it is no objection to the plea, nor to the proof in support of it, that the first suit was an erroneous proceeding; nor that other persons were plaintiffs therein — as where the first suit was brought by the original Trustees of the Real Estate Bank, after an assignment of the note sued on to the residuary Trustees, and the second was by the residuary Trustees alone.

Writ of Error to Pope Circuit Court.

Hon. WM. H. FEILD, Circuit Judge.

CUMMINS, for the plaintiffs.

WATKINS & GALLAGHER, for defendant.

Mr. Justice SCOTT delivered the opinion of the Court.

This case was brought here by writ of error to the Circuit Court of Pope county. The plaintiffs in error seek to reverse the judgment of that court, affirming in this case the judgment of the Probate Court of that county, refusing to allow, against the estate of James Madden, deceased, the claim in question. That claim, as appears from the bill of exceptions taken in the Probate Court, was founded upon a promissory note, which is here copied, and was sustained in the manner which we will then state in substance:

$1491 50. ——— COUNTY, *1st day of July*, 1843.

On or before the 1st day of July, A. D. 1844, we, Philip Madden, as principal, and J. Moreland, and James Madden, as securities, jointly and severally promise to pay to Lambert Reardon, Sam C. Roane, Ebenezer Walters, Henry L. Biscoe, William F. Moore, John Preston, Jr., Sandford C. Faulkner, Anthony H. Davies, Silas Craig, George Hill, James H. Walker, Enoch J. Smith, Lorenzo N. Clark, John Drennen, Robert S. Gibson, as trustees of the Real Estate Bank of the State of Arkansas, and to their successors and survivors, or to their order, one thousand four hundred and ninety-one dollars and fifty cents, payable and negotiable at the office of said trustees, at Van Buren, for value received, with interest on said sum from date, at the rate of eight per cent. per annum. (The said trustees are hereby authorized to insert the date of this note from the time the same is accepted and negotiated by them.)

PHILIP MADDEN,
J. MORELAND,
JAMES MADDEN."

Endorsed as follows, *to wit:*

"Pay Henry L. Biscoe, Sandford C. Faulkner, George Hill,

John Drennen and Ebenezer Walters, residuary trustees, without recourse.

(Signed by the several payees.)

April 2d, 1846."

Next following, are copies *in haec verba* of this note and the endorsement, and then an affidavit, of which the following is a copy, *to wit:*

"STATE OF ARKANSAS, }
COUNTY OF CRAWFORD, }

I, John Drennen, one of the residuary trustees of the Real Estate Bank of the State of Arkansas, being duly sworn, do say, upon oath, that nothing has been paid or delivered towards the satisfaction of the above annexed and foregoing demand, *to wit:* of the note whereof the annexed and foregoing paper is a true copy, and that the sum of fourteen hundred and ninety-one dollars and fifty cents, with interest thereon, at the rate of eight per centum per annum, from the first day of July, A. D. 1843, being the sum above demanded, is justly due.

JOHN DRENNEN.

Sworn to and subscribed before me, this 18th day of June, 1849.

R. P. PRYOR, *J. P.*"

Then follows, *to wit:*

"The within demand was presented to me, and the original note exhibited, and a copy thereof delivered to me, this 17th day of August, A. D. 1849, and as administrator of the estate of James Madden, deceased, do hereby refuse to allow and class the same.

THOMAS MADDEN.

Filed in my office on the 17th day of September, 1849.

W. STOUT, *Clerk.*"

At the same time, the claimants filed in the clerk's office of

the same Probate Court, a notice, of which the following is a copy, *to wit:*

"To THOMAS MADDEN, *Administrator of the estate of James Madden, deceased,*

SIR: You will please take notice, that on the first day of the next term of the Probate Court, in and for the county of Pope, in the State of Arkansas, at a court to be holden at the court-house, in said county and State, on the first Tuesday after the 4th Monday of October, next, we will present to said court, our claim against said estate of James Madden, deceased, for allowance; which claim is founded on a certain promissory note, in the words and figures following, *to wit:* (Here follow copies of the note, and of the endorsements:) "which claim has been presented to you, the original note exhibited, and a copy delivered to you, and which you have refused to allow and class. This 18th day of August, A. D. 1845.

HENRY L. BISCOE,
GEORGE HILL,
JOHN DRENNEN,
SANFORD C. FAULKNER,
Surviving residuary trustees of the Real Estate Bank of the State of Arkansas.

By A. PIKE, *Attorney.*"

Then follows the return of the sheriff, showing that he executed the foregoing notice upon the administrator, in person, on the 28th day of August, A. D. 1849. At the return term, both parties appeared in the Probate Court, by their attorneys, and upon the part of the administrator, the following plea was filed:

"And the said Thomas Madden, as administrator of the estate of James Madden, by attorney, comes and defends the wrong and injury, when, &c., and says, that the said plaintiffs ought not to have or maintain their aforesaid action against him; because,

he says, that said supposed cause of action did not accrue to said plaintiffs at any time within three years before the commencement of suit, and this he is ready to verify," &c.

To this plea the claimants replied as follows, *to wit:*

"And the said plaintiffs, as to said plea, &c., *precludi non*, because they say, that heretofore, *to wit:* on the 20th day of July, A. D. 1846, and within three years next after the accrual of the cause of action herein, that they, the said plaintiffs, together with Lambert Reardon, Sam. C. Roane, Ebenezer Walters, William F. Moore, John Preston, Jr., Anthony H. Davies, Silas Craig, James H. Walker and Enoch J. Smith, survivors of Lorenzo N. Clark and Robert S. Gibson, who, with these plaintiffs, were the original trustees and assignees of said Real Estate Bank of the State of Arkansas, instituted their action of debt against the said intestate, James Madden, and his co-contractors, Jeremiah Moreland and Philip Madden, in the Circuit Court of the county of Johnson, in the State of Arkansas, on the identical promissory note now presented to this court for allowance, which action the original trustees and assignees of said Real Estate Bank continued to prosecute in said Circuit Court of Johnson county, until the March term thereof, A. D. 1848, at which term, and on the 7th day of said month, said original trustees and assignees of said Real Estate Bank, suffered a non-suit therein, and these plaintiffs aver, that afterwards, *to wit:* on the 23d day of June, 1848, and before the expiration of one year from the time of suffering said non-suit, they, together with one Ebenezer Walters, a residuary trustee of said Real Estate Bank, and as assignees of said original trustees of said bank, instituted their action of debt against the said intestate, James Madden, and one of his said co-contractors, *to wit:* one Jeremiah Moreland, in the Circuit Court of Johnson county, aforesaid, on the identical note now presented to this court for allowance, which action these plaintiffs and the said Ebenezer Walters continued to prosecute in said Circuit Court of Johnson county, until the September term thereof, A. D. 1848, at which term of said court,

and on the 14th day of said month, these plaintiffs, and the said Ebenezer Walters, residuary trustees as aforesaid, suffered a non-suit therein, and these plaintiffs aver, that afterwards, *to wit:* on the 17th day of August, A. D. 1849, and before the expiration of one year from the time of suffering said last mentioned non-suit, they, as surviving residuary trustees, and assignees of said original trustees of said Real Estate Bank, instituted this, their action on the same identical promissory note mentioned, by exhibiting their claim against the estate of James Madden, deceased, to Thomas Madden, as administrator of said estate, and delivering to said administrator a copy of said promissory note, with the assignments thereon, and exhibiting to him the original promissory note, and probate thereof, and this they are ready to verify," &c.

To which plea there was a general rejoinder and issue in short upon the record by consent, and the cause submitted to, and tried by the court. And the court upon finding the issue joined for the administrator, rejected the claim and refused to allow and class it. To which the claimants excepted, and thereupon moving for a new trial, because the court had rejected the claim, and had found contrary to law and evidence, which was overruled, tendered their bill of exceptions setting out the whole case and and all the testimony, which was regularly made a part of the record: and then appealed to the Circuit Court.

Besides the facts already stated, it also appears from the bill of exceptions—the transcripts of the several records of the Circuit Court of Johnson county, being therein copied, *in haec verba*—that the two several suits were brought, and non-suits suffered, as stated in the plea. That Thomas Madden admitted that he was the administrator of the estate of James Madden, deceased, and that, as such, the claimants regularly and legally exhibited to him their claim in question, on the 17th of August, A. D. 1849, that he that day refused to allow and class it, and that on the 28th of the same month, they notified him regularly of their purpose to proceed for its allowance in the Probate

Court. It also was shown by testimony, that the note in question was the same that is mentioned in the proceedings in the Johnson Circuit Court, as shown in the aforesaid transcripts of the records of that court.

Since the full examination of the question in the case of *Walker as ad. vs. Byers*, 14 *Ark. Rep.* 247, it has been uniformly held in this court,that the two years' statute of non-claim gives the rule as to claims against the estates of deceased persons, and not the general statute of limitations. "That is to say, that under our administration system, as regulated by statute, when a party dies, all subsisting claims against him, not then barred, are put on the *same footing*, and may be presented and allowed against his estate at any time within two years from the grant of letters; and if not presented within that time are barred, without any saving or exception in favor of disabilities, and without reference to the length of time such claims might have had to run as against living persons under the general statute." *State Bank vs. Walker as ad.*, 14 *Ark. Rep.* 236. "Our law, in effect, regarding the whole period, from the time of his death, to the expiration of the two years from the granting of letters as a *single point of time* for purposes of exhibition of claims *subsisting at the time of the death*, or which may come into existence at any time before the expiration of the two years." *Walker vs. Byers. page* 259.

In a word, although the general statute of limitations has begun to run in the life-time of a creditor in favor of his debtor, it will run on, notwithstanding the death of the creditor, the debtor remaining in life, as in the case of *Brown ad. vs. Merrick & Fenno*, 16 *Ark. Rep.* Nevertheless, when the debtor should die, it would immediately cease to run, because, effectually displaced at once under our law, by the statute of non-claim, which runs off alike against all subsisting claims against the estate, not barred at the death of the debtor, not from their *accrual* as the statute of limitations did, but from the *grant of letters* upon his estate.

Hence, on the presentation of a claim for allowance against an estate, no question as to the general statute of limitation can be legitimately raised, and no plea predicated upon it can be of any avail, unless it goes to the point, that by reason of the operation of that statute upon the claim, in the life-time of the deceased, no action could have been maintained upon it at the time of his death.

If an action could have been maintained upon it at the time of the debtor's death, it may be allowed and classed, at any time before the expiration of the two years from the grant of letters upon his estate, although had he lived, the statute of limitations would have run out on the very next day after his death. So, a claim that might have had five years to run, had the debtor lived, or one not due for five years to come, would be barred if not presented within the two years. These being but consequences of the effectual displacing of the general statute by that of non-claim.

Under this state of the law, it does not seem material to the determination of this case, to decide the question discussed, as to what constitutes such a commencement in the Probate Court of a new action, after a non-suit in the Circuit Court, as will repel the statute bar, under the provisions of the 24th section of the limitation law. Because, the allegation in the plea, that the cause of action did not accrue to the claimant at any time within three years before the commencement of their suit is no answer to their demand; and, consequently, they have no need to reply to it at all. It was like pleading the statute, as if in force, after it might have been repealed by the Legislature.

And if the administrator had set up in his plea that the cause of action did not accrue within three years before the death of his intestate—or that, while the statute had operative force upon the claim, the bar, by efflux of time, became perfect—with the design to show, that at the time of the death of the intestate, the claim was not such a subsisting one against him as should be allowed against his estate; even then, a replication, setting up

that suit had been brought within the three years, non-suit suffered, the death of the intestate within the following year allowed for the new suit, and the exhibition of the claim and proceedings to procure its allowance in the Probate or Circuit Court, at any time before the expiration of the two years after the grant of letters, would, doubtless, have repelled the statute bar, as effectually as the allegation of a new suit brought in the Circuit Court within the one year, would have done so, had the intestate lived through that entire year.

Because, inasmuch as the general statute of limitations ceases to act on the claim from the time of the death of the debtor, time can no longer be computed, under that statute, for any purpose; and the statute of non-claim succeeding to it, and occupying its place, that statute allows two years from the grant of letters of administration for the prosecution of all subsisting claims, indiscriminately, which were recoverable against the intestate in his life-time, or the representative of his estate after his death.

The remaining point made by the counsel for the administrator, is, that the claim was barred in the life-time of the intestate, and previous to the suit brought by the endorsees, on the 23d of June, 1848. That is to say, that inasmuch as when the suit was brought, which was instituted on the 20th of July 1846, by all the surviving original trustees, the note upon which it was founded had been, before that time, *to wit:* on the 2d of April, 1846, endorsed in full to the five residuary trustees; that suit, and the non-suit therein suffered, cannot be made available by the latter under the 24th section of the limitation law to repel the statute bar, when set up by the survivors of them in their suit instituted within one year after that non-suit: That, as the two suits were brought by different plaintiffs, they were suits by different *parties;* and as in the one suit a primitive title to sue was alleged, and in the other a derivative one, they were not suits for the same *cause of action.*

It so happens, in fact, that all the parties plaintiff in the last

suit, were parties plaintiff in the first one, joined with other parties plaintiffs, who were not joined in the last.

If the provisions of the limitation law in question had heretofore received a hard and rigid construction, these propositions would strike with more force. But such does not appear in the several previous decisions of this court, where this and other kindred sections of the limitation law have been presented, but the contrary. And this, doubtless, in accordance with the true intention of the Legislature; because these several provisions, having all resulted from hardships pointed out, or from equitable constructions given by the courts, of the statute of the 21st James 1st, the main features of which are retained in our own, are therefore in their nature remedial.

It cannot be rationally supposed that the Legislature designed simply to allow the privilege of renewing suits in those cases only where the plaintiff would take a non-suit, arbitrarily and without cause; because this would be to provide means of protracting litigation vexatiously, without seeming to secure, at the same time, any counterpoising equivalent.

But when it would be supposed that reference was had to such defects in legal proceedings as ordinarily render non-suits necessary, prudent or proper, when parties are, *bona fide*, seeking the enforcement of their rights in courts of justice, and which, with all the learning of the profession, are often developed in the proceedings, when in the most skilful hands, at an unexpected moment; a more rational purpose would seem to have been in view. At any rate, the court, without pronouncing any general rule—and it is not our purpose to do so now—have in several cases, gone beyond the letter of the statute, and, to some extent at least, administered its spirit and obvious intent.

Thus, it has been held that the non-suit need not be a technical one, but the statute equally applies to a dismissal of the suit, as where the party goes out of court, submitting to the order of court requiring him to do so. *State Bank vs. Fowler and*

Pike, 14 *Ark. Rep.* 162; *State Bank vs. Magness*, 6 *Eng. Rep.* 343; *State Bank vs. Arnold*, *Ib.* 348.

So it has been held that the former suit, and the latter one within a year after non-suit suffered, are between the same parties, though in the latter suit, only one of the defendants in the former suit be sued.

Thus, in the *State Bank vs. Roddy et al.*, 7 *Eng. Rep.* 767, the court says: "The first action was commenced against other makers of the same note, who are not sued in the present action. The defendants in this suit were, however, parties to the first suit. As we have repeatedly decided, the question is not, whether a *joint liability* exists against the makers of the note, but whether a former suit was commenced against the defendants in this suit on the *same cause of action*. In such case it has been decided that it is no variance that other parties appear to have been sued in the first action, not declared against in the second." *State Bank vs. Magness*, 6 *Eng.* 344; *State Bank vs. Sherrill*, *Ib.* 334; *State Bank vs. Gray*, 7 *Eng. Rep.* 760; *State Bank vs. Davis*, *Ib.* 768; *State Bank vs. Henderson*, *Ib.* 774.

So, also, it was held in the case of the *State Bank vs. Peel et al.*, 6 *Eng. Rep.* 750, that a writ which was voidable, and had been for that reason quashed, was, in connection with the declaration, evidence of the fact that a suit had been instituted so as to avoid the statute bar. In that case, the court says: "A declaration, when demurred to, and the demurrer is sustained, is no more a valid declaration to put the defendant to answer, than a writ when quashed would be to affect him with notice; and yet, because a demurrer should be sustained to a declaration, no one would contend that no suit had been commenced, because the declaration was adjudged defective."

To the same effect was the previous decision in the case of the *State Bank vs. Sherrill*, 6 *Eng. Rep.* 336, where the court refused to adopt a rule contended for, of "requiring valid and perfect proceedings" in the previous suit, in order for the removal of the bar. And these two cases were followed in the case of

the *State Bank vs. Steen et al.*, 13 *Ark.* 36. And they all seem fully authorized and sustained by the obvious meaning, and, indeed, by almost the very letter, of the statute.

The enactment is, that: "If any action shall be commenced within the times respectively prescribed in this act, and the plaintiff therein suffers a non-suit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on appeal or writ of error, such plaintiff may commence a new action from time to time within one year after such non-suit suffered, or judgment arrested or reversed." *Digest, chap.* 99, *page* 699, *sec.* 24.

It is plain enough, that if the plaintiff's judgment should be reversed or arrested, he will have the privilege to bring the new action without any regard to whether the court decided right or wrong in arresting or reversing it; and all that he would have to show to maintain this privilege would be, that he had a verdict in his favor, on which a judgment was arrested, or a judgment which had been reversed. Whether the arrest or the reversal had been properly or improperly adjudged, would be no concern of his. His privilege in no manner depended upon that.

Is it not plain that these reversals and arrests contemplate erroneous proceedings? If so, is it not almost absolutely certain, that, as to the non-suits in like manner provided for in the same connection, it was contemplated that like erroneous proceedings might superinduce them? That conclusion seems almost inevitable. If so, why should any irregularity be regarded in the former suit, if, in fact, there was one, when set up to prevent the bar? No irregularity in the arrest or reversal is to be regarded, if, in fact, there was a verdict or a judgment, whether erroneous or not; and by parity of reason, the same rule should apply to the suit and non-suit. That is the view taken of like statutory provisions in Massachusetts. *Coffin vs. Cottle*, 16 *Pick. Rep.* 383. And the same doctrine is maintained in Pennsylvania, in the case of *Donnings vs. Lindsey*, 2 *Barr Rep.* 382, where it is held, that the commencement of a suit, which was abated for

non-joinder of certain persons as defendants, who were joined in the new suit, has the effect to defeat the statute bar.

Although none of these cases come peremptorily up, as cases, to the precise point that we have to decide, they all inculcate doctrines which carry us to the conclusion, that it ought not to be held for the appellee. To hold otherwise, we should have to hold that erroneous suits were no suits at all. The claimants were certainly parties plaintiff in all the suits, and in all of them the recovery of this identical debt was sought, and always for the use of the same beneficiaries, as was distinctly disclosed in all the suits.

It is our opinion, therefore, that the Circuit Court erred in affirming the judgment of the Probate Court; and should have reversed it and proceeded to render judgment for the claimants in form as on *non obstante veredicto*, as the Probate Court should have done upon the oral allegations and upon the proof, irrespective of the immaterial issue that was joined and found. It being manifest from the face of the record, that the claim was not barred by the statute of non-claim, and as it appears therefrom that the intestate was in life on the 12th of September, 1848, and that this claim was presented to his administrator, on the 17th of August, 1849, it is manifest that it was so presented within the first year after the grant of letters upon his estate.

The judgment will, therefore, be reversed, and remanded to the Pope Circuit Court, with instructions to reverse the judgment of the Probate Court, give such judgment as that court ought to have given, and certify the same into that court according to law.

BISCOE ET AL. VS. MADDEN AS AD.

SAME VS. SAME.

Writs of Error to Pope Circuit Court.

In these cases the same points were involved, that are decided in the preceding opinion between the same parties.

BETTISON VS. BUDD.

The rule, that a tenant shall not be allowed to dispute the title of his landlord, does not reach beyond the particular title under which he enters into possession; and if the landlord is divested of his title, the defendant may make it appear, and protect himself in a suit by his landlord for possession of the premises.

A tenant is not bound, in virtue of his relation to his landlord, to see that the taxes assessed upon the land are paid: and if the land be forfeited for non-payment of taxes, and offered for sale by the Auditor, and the tenant become the purchaser, he may set up such title against his landlord.

The case of *Steadman vs. The Planters' Bank*, 2 *Eng. Rep.* 427, as to the legal effect of the Auditor's deed, for land forfeited to the State and sold for taxes, approved.

It is not essential that the sheriff, in returning an execution under which real estate has been levied upon and sold, should endorse thereon the levy and sale, where he has executed, &c., a deed to the purchaser reciting these facts—such recital in the deed, being *prima facie* true.

A sheriff's deed for land sold under execution, reciting the execution under which the the land was sold, but not the judgment on which the execution was issued, is admissible in evidence, in a suit by the grantee for the land, upon proof of a judgment corresponding and harmonizing with the recital in the execution, so far as the names of the parties are concerned, but differing in some slight particulars in respect to the amounts constituting the sum for which the judgment was rendered.

Appeal from Pulaski Circuit Court.

Hon. WILLIAM H. FEILD, Circuit Judge.

On the 24th April, 1852, Joseph R. Bettison brought ejectment against John J. Budd, in Pulaski Circuit Court before the Hon. WM. H. FEILD, Circuit Judge, to recover possession of *lots one, two, three* and *four*, in fractional *block twelve*, in Pope's addition to the city of Little Rock.

Defendant pleaded the general issue, limitation of ten years, and also that he purchased the premises at tax sale, and was in possession, under his purchase, for more than five years before suit brought. There were other pleadings in the cause, but no question grows out of them on this appeal.

The issues being submitted to a jury, the plaintiff proved, that Budd and wife, on the 23d day of June, 1840, by deed, duly recorded, containing "a clause of general warranty of title and of seizin," conveyed the lots, *one, two* and *three*, to him; that Budd was in possession of all of the lots sued for at the time, and before the suit was brought, and had refused to surrender them to Bettison, on demand, claiming them to be his own property.

The plaintiff also read in evidence, from the records of Pulaski Circuit Court, a judgment rendered March 13th, 1840, in favor of George S. Lincoln, against John H. Reed, *John J. Budd*, the defendant, Eli Colby and M. J. Steck. Also an execution (and return), issued thereon to the sheriff of Pulaski county, dated 15th December, 1840, returnable 2d March, 1841, commanding the sheriff to levy of the goods and lands of Reed, Budd and Colby, (suggesting the death of Steck,) for debt, $94 89, damages, $16 66, "with interest on $101 05, part thereof from 14th September, 1839," and $22 59½ costs of suit, recited in the execution to be the several sums recovered by the judgment.

The sheriff's return endorsed on the execution is as follows: "Came to hand 19th December, 184 , 4 o'clock, P. M.

JAMES LAWSON, Jr., *Sheriff.*

"*Satisfied—debt paid plaintiff, cost paid Clerk.*

JAMES LAWSON, Jr., *Sheriff,*

By GEO. A. WORTHEN, *Deputy.*"

The plaintiff also read in evidence a deed executed by Lawson, as sheriff of Pulaski county, dated 6th March, 1841, acknowledged and recorded, conveying to Bettison the interest of Budd in the lots, *one, two* and *four.* The recitals in the deed are as follows:

"Know all men, &c., that I, James Lawson, sheriff, &c., did, by virtue of an execution in the name of Geo. S. Lincoln against John H. Reed, John J. Budd, Eli Colby and M. J. Steck, issued from the office of the clerk of the Circuit Court of the county aforesaid, for the sum of $94 debt, $16 damages, and $22 59 costs, which execution commanded the sheriff to make the above sum out of the goods, chattels, lands and tenements of John J. Budd, John H. Reed and Eli Colby: and by virtue of the above specified execution, and the authority vested in me as sheriff, I levied on the following described property, *viz:* Lots No. 1, 2, 4, in block No. 12, in the city of Little Rock—New Town—as the property of John J. Budd, and after advertising the same according to law, did, on the 1st day of March, 1841, at the court house door, in the city of Little Rock, and which court was sitting, offer at public sale, when Joseph R. Bettison became the highest and last bidder, at the sum of two-hundred and forty-one dollars." The deed then proceeds to convey the lots to Bettison.

But the plaintiff offering no further evidence connecting said execution and deed, the defendant moved to exclude the deed from the jury, upon the grounds that the execution was returned satisfied—paid—and no levy or sale endorsed and returned thereon by the sheriff, which motion the court sustained, and plaintiff excepted. The plaintiff offered no other evidence.

The defendant then offered in evidence the Auditor's deeds to Budd for lots 1, 2 and 3, to the introduction of which, the plaintiff objected, upon the ground that no evidence was produced to show that the law of the State had been complied with in the forfeiture and sale of the lots mentioned in the deeds, so as to make them evidence of title; and that the deeds were void upon their face, and inadmissible without proof, *aliunde*, of their validity; and upon the further ground that defendant, under his deed of general warranty to Bettison, was estopped from controverting the plaintiff's title. But the court overruled the objections, and permitted the deeds to be read in evidence, and the plaintiff excepted.

The deeds were all duly acknowledged and recorded, and were all in the same and usual form.

One of them is as follows:

"THE STATE OF ARKANSAS,

To all to whom these presents shall come—GREETING:

KNOW ye, that in pursuance of the provisions of the act of the General Assembly of the State of Arkansas, entitled 'An act providing for the levying and collecting the revenue of this State,' approved March 5th, 1838, and an act of said General Assembly entitled, 'An act to change the time of the Auditor's sale of lands forfeited for taxes,'" approved December 15th, 1838, the Auditor did sell lot *three* in block *twelve*, east of the Quapaw line, in the city of Little Rock, at public auction, on the eighth day of February, 1847, to John J. Budd, for and in consideration of the sum of five dollars, this day paid to the Treasurer of the State of Arkansas, by said John J. Budd. Now, therefore, know ye, that I, Elias N. Conway, Auditor of Public Accounts of the State of Arkansas, for and in consideration of the premises, do by these presents, grant and convey to the said John J. Budd, and to his heirs and assigns forever, all the right, title, interest and estate of the former owner in and to the above described tract of land, and also, all the right, title, interest and claim of the State of

Arkansas thereto—to have and to hold the same as now held or owned by the said State unto the said John J. Budd, and to his heirs and assigns forever.

IN TESTIMONY WHEREOF, I, Elias N. Conway, Auditor, in and for the State, hereunto set my hand [L. S.] and affix the seal of office, at Little Rock, this eighth day of February, A. D. 1847.

E. N. CONWAY, *Auditor.*

The plaintiff moved the following instruction, *to wit:*

"If the jury believe from the evidence, that the defendant in this suit, Budd, sold and conveyed the lots in controversy, or any of them, by deed of general warranty to said Bettison, and that he, Budd, afterwards acquired another title to said lots, or any of them, such after acquired title, in law, enured to the benefit of Bettison, and in this suit such after acquired title cannot be set up by said Budd as defence."

Which the court refused to give, and the plaintiff excepted.

On the motion of the defendant, the court instructed the jury as follows:

1st. "That if Bettison neglected to pay the taxes on the lots in controversy, after he bought them from Budd and wife, in June, 1840, and the lots were forfeited to the State on account of such non-payment of taxes, and afterwards offered for sale for taxes by the Auditor, Budd had the same right to purchase them that any other citizen had—unless he was tenant or agent of Bettison, such purchase would not enure to the benefit of Bettison."

2d. "The Auditor's deeds, read in evidence, are *prima facie* evidence of title in Budd to the lots in controversy, and must prevail in the absence of proof to show them to be void."

To the giving of which instructions, the plaintiff excepted, and took a bill of exceptions setting out the facts.

The jury returned a verdict for defendant, and the plaintiff, without moving for a new trial, appealed.

FOWLER, for the appellant.

ENGLISH, for the appellee.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

There being no motion for a new trial, no question can arise except such as relate to the admissibility of the evidence to establish the issues made by the pleadings. The deed from the defendant and wife to the plaintiff, and those introduced by the defendant having been executed for the same identical property, it is believed to be proper in the first place to determine which shall prevail. This deed of the plaintiff is not incorporated in the bill of exceptions, yet, inasmuch as it is there alleged to have been duly executed by the said defendant and wife, and duly acknowledged by them both, and reciting that thereby they conveyed to the said plaintiff the lots of land numbered one, two and three, in block numbered twelve in the declaration mentioned, with a clause of general warranty of title and seizin, and that it bore date of the 23d June, 1840, and was also duly registered. If these facts be true, and that they are, we are bound to believe, as they are matter of record, and in no respect impugned, it is clear, that, at the date of said deed, all the right and title of the defendant to the lots therein described, passed to, and vested in the plaintiff. The point then to be settled is, whether the defendant did, subsequently, acquire title to the said lots of land; and, if so, whether it so continued in him down to the rendition of the judgment in this suit. It is contended by the counsel for the plaintiff, that the defendant being in possession of the premises, was his tenant, and that as such he was estopped to deny his title. At what particular period of time the defendant went into possession of the lots, after the execution of the deed to the plaintiff, does not appear in the proof. True it is, that he was so possessed before and at the time of the institution of this suit,

and this may be strictly true, and yet, he may not have been in at any time during which the taxes were assessed, and for the non-payment of which the lots were sold by the Auditor. But this being a matter of doubt, we will suppose that the jury were authorized from the circumstances so to find, and that they actually did so determine; and then enquire whether the principle, so contended for by the plaintiff's counsel, be in accordance with the law of the land. It is a familiar and a general rule, that a tenant shall not be allowed to dispute the title of his landlord. But this, though true as a general proposition, is not understood to be without its exceptions. It will be perceived by a reference to the authorities that it does not reach beyond the particular title under which the tenant enters into possession of the premises; and that if the landlord is divested of his title, either by his own act or by the operation of law, that the tenant may make it appear and protect himself in a suit for the possession. In the case of *Jackson vs. Rowland*, 6 *Wend. Rep.* 670, the court said: "But it is said the defendant being a tenant of the lessor, is not permitted to avail himself of this outstanding title. A tenant cannot dispute the title of his landlord so long as it remains as it was at the time the tenancy commenced; but he may show the title under which he entered has expired, or has been extinguished. The plaintiff places his right to recover upon a principle that recognizes and asserts such a position. The contract, by which the relation of landlord and tenant was created in this case, was not made between the lessor and the defendant, but between Hay and the defendant, and the lessor claims to have acquired Hay's right to the premises, and to have succeeded to his character as landlord. If he has become landlord, surely the defendant, in case Hay should seek to eject him, might set up an outstanding title in the lessor. No well founded objection is perceived to the defendant's setting up a title acquired under a judgment since he became tenant, overreaching the title of his landlord. But it is also insisted that the defendant being the tenant of the plaintiff, he was bound in virtue of such his relation to see that the

taxes assessed upon the premises were paid, and that in case he has acquired a title under a deed from the Auditor, such title will enure to the benefit of the plaintiff. The cases referred to in support of this proposition, we do not think analogous to the one under consideration; and, consequently, cannot be relied upon. The case referred to of *Whiting & Slark vs. Beebe et al.*, 6 *Eng. Rep.* 583, is not conceived to be in point, although the judge who delivered that opinion, quoted with approbation from 9 and 10 *Serg. & Rawle*, and without comment, seemed to incorporate it in the opinion, as a part of the law of this State. The facts of the case, then, before the court, we think did not warrant it in laying the law down so broadly as it would seem to have been done. Beebe purchased, *pendente lite*, and was in possession as tenant under the contested titles at issue in the suit, and to which he had, by the amended bill, been made a party. It is said that the principle there recognized in regard to his position, as purchaser, *pendente lite*, denied to him all aid from adverse claims for the purpose of strengthening their title, or his, (Beebe's,) through them: or if placed upon the ground of an independent title, and properly established and presented, the purchase was for a charge upon the land if unoccupied, or upon the tenant if occupied. That Beebe entered under the claims then in litigation and held subject to the final disposition of those cases; and that in that position, his purchase was necessarily in trust, and enured to the benefit of the *cestui que trust*, when the suit should determine who he really was. The doctrine there laid down is, doubtless, sound, when applied to a purchaser, *pendente lite*, as he may be said to hold in trust for the party who may eventually succeed in the suit: but surely it cannot be so, when applied to a clear and independent title, as the tax is not a charge upon the tenant, but a fixed lien upon the land, and if not paid by the person in whose name it is assessed, will follow the land into the hands of any person who may subsequently become the proprietor thereof. It will be perceived by reference to the case in 9 and 10 *Serg. & Rawle*, that the court predicate their decision

expressly upon the ground, that the taxes assessed upon occupied or rented land, are not a charge upon the land itself, but that it is a charge upon the party in possession, whether he be the owner or the tenant. Under their act of 1804, tenants in possession are made liable, just as if they were the owners of the land, with an optional right of recovery against their landlord, or of defalcation out of the rent. Before the passage of said act, the laws were founded on a supposition, for the most part true, that the owners of improved lands resided on them, and in that case the taxes could be obtained by the use of due diligence from their persons or property. This is the doctrine laid down in the case of *Burd et al. vs. Ramsey*, 9 *Serg. & Rawle, p.* 112 to 115. The case of *Stokely vs. Bonner*, 10 *Serg. and Rawle*, from 254 to 257, is of like import. It is there said, and that with direct reference to the statute of that State, that the assessment may be either in the name of the owner or the tenant; and that where the tax is assessed in the name of the owner, the tenant is made liable to pay it, and his liability is in addition to that of the owner, as it existed previously to the act of 1804, so that the collector may proceed against either or both, till the amount due is collected. The case of *Burr vs. McEwen et al.*, 1 *Baldwin* 162, also is made to turn upon the local law of Pennsylvania, and that case is not parallel to this, and the defendants did not hold and possess the land merely as tenants, but on the contrary, they held as of their own property under a regular conveyance, but as it turned out in the proof, they really held as trustees under a resulting trust. If they held under a conveyance from the true owners, though in truth under a resulting trust, there can be no good reason why they should not have been compellable to pay the taxes assessed upon the land, or to say the least of it, if, under the circumstances, they had suffered the trust property to be sold for non-payment of taxes, they could not have been permitted to purchase of the Auditor, so as to divest the title of the *cestue que trust*, as that would have been to permit them to take advantage of their own wrong. The case of *Douglas vs. Dan-*

gerfield, 10 *Ohio* 156, is also inapplicable to the facts of this case. In that case the land was purchased by an agent of the owner for his use. It is clear that the agent's title enured to the use of his principal, as all acts done by the agent within the scope of his authority are, in contemplation of law, done by the principal himself. The law of this State confers no authority upon the tax collector to make the tax out of the tenant, but on the contrary, it fixes the tax as a charge and lien upon the land itself, and that, too, without regard to the fact of its being occupied or unoccupied. The 139*th chapter* of the *Digest*, *secs.* 89, and 90, provides that: "All taxes upon lands and town lots, whether for State or county purposes, and all penalties and interest charged for the non-payment of taxes, shall be levied upon the lands charged therewith, until payment or forfeiture, notwithstanding any change of title, by deed, judgment or otherwise; and that each collector, on the failure of any resident of his county to pay the amount of taxes with which he may be charged on the tax book, and if sufficient personal property belonging to such delinquent, liable to be taken, whereon to levy and make distress for the payment of such taxes, cannot be found, shall levy on and sell the lands or town lots on which such taxes may be charged, in the same manner as lands may be levied on and sold by virtue of any execution issued out of the Circuit Court." It is clear, that under our statute, all taxes assessed upon lands, whether occupied or not, are a charge upon such lands into whosesoever hands the same may pass, until such taxes are paid, or such lands forfeited for non-payment. True it is, that the owner, if he be a resident of the county where such lands are situated, may release his lands by producing to the collector a sufficiency of personal property to satisfy the same. We, therefore, conclude that the defendant in this case was under no legal obligation to pay the taxes assessed upon the land of the plaintiff, and that no such obligation necessarily grows out of the relation of landlord and tenant; and that, consequently, he is not, upon that ground, estopped to set up title in opposition to the plaintiff.

Having already laid down the law to be, that the defendant, upon the hypothesis that he held as the tenant of the plaintiff, is not estopped, only as to the title under which he entered, the question now to be decided is, whether such title has expired or been extinguished. This will depend upon the sufficiency or insufficiency of the Auditor's deed for the same lots of land, and upon which the defendant relies for his title. The plaintiff objected to the introduction of the Auditor's deeds, upon the ground that they were not competent evidence of title, *per se*, and that no proof, *aliunde*, had been offered, to show a compliance with the statute, either in the forfeiture, or the sales of the lots in controversy. The statute provides that, "The Auditor shall execute, under his hand and the seal of his office, and deliver to each person purchasing lands or lots at such sale, a deed of conveyance, in which he shall describe the lands or lots sold, and shall convey to the purchaser all the right, title, interest and estate of the former owner, in and to such lands or lots, and also all the right, title, interest and claim of the State thereto;" and further, that, "The deed so made shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all courts of this State as evidence of a good and valid title in such grantee, his heirs or assigns, and shall be evidence that all things required by law to be done to make a good and valid title, were done by the collector and the Auditor." The deeds exhibited in this case, contain all the requisites prescribed by the statute, and are duly executed, acknowledged and recorded. This being the case, they make at least a *prima facie* case, that all things required by the law to be done to make a good and valid sale, were done by the collector and Auditor. See *Steadman vs. The Planter's Bank*, 2 *Eng. Rep.* 427. Under this view of the statute, it is clear, that the title which the plaintiff acquired under the deed of the defendant and wife, was extinguished by the operation of the law, when the lots became forfeited to the State, and, that the instant his title became so extinguished, the defendant was at liberty to purchase the pro-

perty. The court, then, ruled correctly in admitting the Auditor's deed in evidence. This settles the controversy so far as relates to the title acquired by the plaintiff under the deed from the defendant and wife. The only remaining point to be disposed of, relates to the admissibility of the sheriff's deed offered by the plaintiff. The sheriff's deed offered by the plaintiff seems to have been regularly executed, acknowledged and recorded, and in case it was not subject to some legal objection based upon other grounds, it necessarily made a *prima facie* case of title, and as such, ought to have been received. The statute requires that the deed shall recite the names of the parties to the execution, the date when issued, the date of the judgment, order or decree, and other particulars recited in the execution; also, a description of the time, place and manner of sale, and further declares that such recitals shall be received in evidence of the facts therein contained. See *section* 60, of *chap.* 67, of the *Digest.* The obvious intention of this statute was to save the purchaser from the necessity of exhibiting the judgment and execution upon the trial, in cases where his rights under such judgment and execution might be called in question; and also to serve as a matter of convenience, as well to the sheriff as to the purchaser, as it would point the former to his authority to sell, if he was called on to answer, and would facilitate the latter in deriving his title. The recitals of the deed in this case, fall short of the statute, yet it was competent evidence, in connection with the judgment and execution, since it recited sufficient to show authority in the sheriff to sell. The Supreme Court of Ohio, in the case of *The Lessor of Perkins vs. Diffle, see* 10 *Ohio Rep.* by WILCOX, *page* 437, said: "The law regulating judgments and executions requires that the deed of conveyance to be made by the sheriff or other officer, shall recite the execution, or the substance thereof, and the names of the parties, the kind of action, the amount, and date of the term of the rendition of each judgment, by virtue whereof said lands and tenements were sold," &c. "The deed in the present case recites the execution, and

the names of the parties as therein stated, but in referring to the judgment does not again recite their names; neither does it state the amount of the judgment, except as it appears upon the execution. It recites sufficient to show that the officer had authority to sell; and this we hold to be all that is necessary, although in every instance it would be well for a sheriff or other officer to follow literally the provisions of the statute. So far as the statute makes provision for any recitals, beyond what is necessary to show an authority to sell, we consider it as directory merely; and it was so decided in the case of *Armstrong vs. McCoy*, 8 *Ohio Rep.* 126. Such being the opinion of the court, the objection to the shereiff's deed is overruled, and this deed, in connection with the previous evidence, makes a *prima facie* case for the plaintiff." See, also, *Humphrey vs. Beeson*, 1 *Iowa*, by GREEN, *page* 214, and the cases there cited. The defendant objected to the deed as evidence upon the ground that the levy and sale recited in said deed were not endorsed by the sheriff upon the execution; which objection the court sustained and excluded the deed. It was not essential that the levy and sale should have been thus endorsed, since the deed itself recited both of these facts, and those recitals are *prima facie* true. This sale was made by operation of law, and by a public officer, entrusted with the execution of the law, duly appointed and sworn for that purpose. The same degree of faith and credit is due to his deed under hand and seal, as could, or ought to be given to any return on the back of the execution, if it had been produced, for the one act is as much the act of the sheriff, and as much within the line of his official duty as the other; and they are equally entitled to credit in the eye of the law. See *Hopkins vs. De Graffferried*, 2 *Bay Rep.* 445. True it is, that the sheriff, in his return upon the execution in this case, neither certifies a levy nor a sale, yet there is nothing in the return that necessarily repudiates the idea, or excludes the conclusion that such levy and sale may have been made. The deed having recited and certified both facts to exist, and there being nothing in the return

necessarily impeaching the truth of such recitals, we think the recitals in the deed are evidence, *prima facie*, of their truth. The question then to be decided is, whether the plaintiff had laid the necessary foundation for the introduction of the sheriff's deed. The deed, if introduced at all, was to show the last link and final completion of the title acquired under the sheriff's sale, not only for lots No. 1 and 2, but also for lot No. 4, embraced in this suit, and not embraced in Budd's deed from the Auditor: and in order to have that effect, it was necessary, before it could be introduced, that it should have appeared to harmonize and correspond in every essential particular with the judgment and execution upon which it was supposed to be predicated. Because, if it varied in any material respect from either, it necessarily could not be regarded as the legitimate offspring of that particular proceeding, and if so, the court was correct in ruling it out. We will now enquire how this matter really stands. True it is, that the judgment is not incorporated in the bill of exceptions, yet it is there stated, that the plaintiff read in evidence a judgment from the record of said (Circuit) Court, rendered on the 30th day of March, A. D. 1840, in favor of George S. Lincoln, against John H. Jeed, John J. Budd, Eli Colby and M. J. Steck, and that an execution issued thereon, and the endorsements on the said execution, which execution and endorsements are in the words and figures following, *to wit*, &c. Then follows the execution, in which the judgment is recited. This is not a very technical method of exhibiting the judgment, yet, as it is first stated that it was read, and that an execution issued upon it, which is shown, and in which it is recited, it is believed to be sufficient to let in the deed, in case that no other legal obstacle shall have intervened. The judgment, as recited in the execution and the deed, are in perfect harmony, so far as the names of the parties are concerned, but differ in some slight particulars in respect to the amounts constituting the sum for which the judgment was rendered. All that is required to identify the judgment and execution, as those upon which the deed in such case

is founded, is a general outline indicating that identity. It would be exceedingly hazardous to reject a sheriff's deed as evidence of title merely from slight discrepancies, as it might be difficult to find one corresponding in every *minutia*, with the proceedings which preceded it. We think that sufficient was made to appear to identify the deed with the judgment and execution, and that therefore it should not have been for that cause rejected. It is not for this court to say, in the present attitude of the case, what weight the deed or any other part of the evidence offered should have received at the hands of the jury, as no steps were taken in the court below to bring that question before us. The only question presented is, whether the deed was admissible, as being pertinent to the issue made by the pleadings, and upon this subject we entertain no doubt. The court, therefore, erred in excluding it from the jury, and for this error, the judgment ought to be, and is reversed, and is remanded, to be proceeded in according to law, and not inconsistent with this opinion.

Hon. E. H. ENGLISH, Chief Justice, not sitting.

THE STATE VS. CHAPIN.

The Circuit Courts of this State have jurisdiction of offences if committed within the county, and of the persons of those committing them, when brought into court, whether voluntarily or by legal coercion.

It is not necessary, in all cases, that a man should be actually present in this State to make him amenable to our laws for a crime committed here, if the crime is the immediate result of his act.

An accessory before the fact, in another State, to a *felony* committed here—as where an agreement or conspiracy is entered into in another State, to commit the felony in this—is guilty of a crime in the State where he becomes an accessory, and is answerable there; while the principals, who commit the felony, are indictable here.

Error to Phillips Circuit Court.

Hon. CHARLES W. ADAMS, Circuit Judge.

JORDAN, Attorney General, for the State.

FOWLER & STILLWELL, for defendant.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

This was an indictment for arson, determined in the Phillips Circuit Court.

Adams Chapin, with John N. Cummings, William H. Holland and others, was charged with the burning of the steam-boat *Martha Washington* on the Mississippi river, in the county of Phillips, on the 14th January, 1852. In some of the counts in the indictment, *Chapin* was charged as principal, and in others, as accessory before the fact.

He filed the following plea to the indictment:

"And the said Adams Chapin, &c., &c., &c., saith that the court here ought not to take cognizance of the ~~ra~~son and felony in the

said indictment above specified, because, protesting that he is not guilty of the same; nevertheless, the said Adams Chapin saith that at the said several times when the said supposed offences set forth in the several counts of the said indictment were as therein alleged committed, he was not, nor was he at any time prior thereto, in the said State of Arkansas, or in the said county of Phillips, but was then, and for a long time before and after said time, a citizen of the State of Ohio, one of the sovereign States of the United States of America, where he was actually present at the said time, &c., and this he is ready to verify; wherefore he prays judgment," &c.

To this plea the State replied as follows:

Precludi non, &c., "because she says, that, although the said Adams Chapin is, and was a citizen of the State of Ohio, &c., at the time, and as stated in said plea, and although at the time of, and during the commission of the offence alleged and charged in said indictment, was personally present in the State of Ohio, and had been before that time, and afterwards in said State, and not in the county of Phillips, and State of Arkansas, in person, as he hath above thereof alleged, but the said plaintiff in fact says that the said Adams Chapin did, while in the said State of Ohio, conspire to, and with divers other persons, amongst whom was one John N. Cummings and William H. Holland, to procure, and did then and there advise and counsel the burning of the said steam-boat, Martha Washington, in the said county of Phillips, as charged in said indictment; and the plaintiff avers that, in pursuance of said conspiracy, aid, counsel, advice and encouragement so given by the said Adams Chapin, to and with divers other persons, and amongst whom were the said John N. Cummings and William H. Holland, the said John N. Cummings and the said William H. Holland, did, on the 14th day of January, 1852, in the county of Phillips, in the State of Arkansas, burn said steam-boat Martha Washington, and the said defendant therefore was, while in the said State of Ohio, accessory before the fact, to the burning of said steam-boat, in the county

of Phillips, in the State of Arkansas aforesaid, and did advise and counsel, and encourage the same in manner and form as charged in said indictment, and was in construction and contemplation of law, present at the commission of said offence, *to wit:* at the county of Phillips aforesaid: and the said State of Arkansas further says, that the said Adams Chapin, after the commission of said offence as charged in said bill of indictment, came within, and now is within the said county of Phillips, and within the jurisdiction of this court; without this, that said defendant is not guilty as charged in said bill of indictment, in construction and contemplation of law, and was not in the said county of Phillips, and State of Arkansas, at the commission of said offence as he hath above thereof alleged; and this, the said State of Arkansas is ready to verify, wherefore she prays judgment," &c.

To this replication the defendant rejoined as follows:

"That the court here ought not to take cognizance of the arson and felony aforesaid, by reason of anything contained in the replication of the said State of Arkansas to the plea of said defendant, &c., because, protesting as heretofore, that he is not guilty of the same, or the said supposed conspiracy charged in said replication, or the felonious burning of the said steam-boat, *Martha Washington*, by the said John N. Cummings and William H. Holland, as charged in and by said replication, at the time and place aforesaid; nevertheless, the said Adams Chapin saith, although he, the said defendant, did come into the said State of Arkansas, after the commission of the said supposed conspiracy, and the arson of the said steam-boat, by the said John N. Cummings and William H. Holland, as aforesaid, and is now present within said State of Arkansas, yet he, in fact, saith that he did not so come into said State voluntarily and of his own accord, but that long after said supposed offences, he the said defendant, was forcibly brought within the limits thereof, by and under the power and authority of a warrant issued by the Governor of the State of Ohio, based and predicated upon a requisition made

upon him by the Governor of the State of Arkansas, under the law in such cases made and provided, and that he is now here and within said State of Arkansas, not voluntarily, but under said original arrest, and forcible as pertains to this State in consequence of a recognizance entered into by him in this court at the last term thereof, for his appearance at this term, as appears by said record now remaining in this court: and this, the said defendant is ready to verify, wherefore," &c.

The State demurred to the rejoinder, in short by consent, the court overruled the demurrer, and the State resting, final judgment was rendered discharging the defendant.

The State brought error.

The only matter set up in the rejoinder in avoidance of the matter of the replication is, that the defendant did not come into this State voluntarily, but was brought here upon a requisition of the Governor, forcibly and against his will. This, though responsive to one allegation of the replication, is no answer to what we deem its substantial and essential matter. If the defendant committed an offence against our laws in Phillips county, the Circuit Court of that county had jurisdiction of the offence, and when he was brought into court it had jurisdiction of his person, whether his appearance was voluntary or by legal coercion, and without regard to his citizenship. *Adams vs. The People*, 1 *Comstock Rep.* 179; *The People vs. McLeod*, 25 *Wend.* 573, 574; *Smith Ex parte* 3 *McLean's Rep.* 134, 135.

When a citizen in another State commits a high crime in this, if the jurisdiction of our courts over his person depended upon his voluntary appearance before the tribunal, or within our territorial limits, the criminal, in most instances, would, doubtless, go unpunished.

But the demurrer reaches back to the replication, and we must determine whether it is a sufficient answer to the plea or not.

The plea is, that at the time the arson was committed, the defendant was a citizen of, and present in the State of Ohio, and

was not in Phillips county, Arkansas, where the crime was perpetrated.

The replication confessing this, attempts to avoid it by alleging that the defendant was an accessory before the fact, in Ohio, to a felony committed by his co-conspirators, and the principals in the crime in Arkansas.

By our Bill of Rights, (*sec.* 11,) the accused is entitled to a "trial by an impartial jury of the county or district in which the crime shall have been committed."

And by the Constitution of the United States, (*Amend. Art.* 6:) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district, wherein the crime shall have been committed which district shall have been previously ascertained by law."

The laws of Arkansas have no extra-territorial operation. Each State possesses the exclusive power to provide for the punishment of crimes committed within its limits, except so far as this power may have been surrendered to the Government of the United States by the Federal Constitution.

In this case, the *Martha Washington* was burnt in Arkansas; our laws were violated, and our courts have jurisdiction to try and punish all persons who were actually or constructively present, participating in the crime.

It is not necessary in all cases, that a man should be actually present in this State to make him amenable to our laws for a crime committed here. If the crime is the immediate result of his act, he may be made to answer for it in our courts, though actually absent from the State at the time he does the act, because he is constructively present, or present in contemplation of law.

For example, if a man standing beyond our boundary line, in Texas, were, by firing a gun, or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot, or other implement

propelled, takes effect. 1 *Chit. Crim. Law*, 191; *United States vs. Davis*, 2 *Sumner* 482; *People vs. Adams*, 3 *Denio Rep.* 207; *People vs. Rathburn*, 21 *Wend. Rep*, 500.

Again, if a person absent from this State, commits a crime here, through or by means of an innocent instrument or agent, it seems that the law would regard him as personally present, and hold him responsible for the offence. As, for example, if the defendant had fired the *Martha Washington* through the agency of an idiot. *Foster's Crown Law*, 349; 1 *Chit. Crim. Law* 191; *Wheat. Crim. Law* 115. Or where one utters forged notes through an innocent agent. *People vs. Rathburn*, 21 *Wend. Rep.* 509. Or obtains money by false pretences, through such agency. *People vs. Adams*, 3 *Denio* 190. Or sends poison to another through a letter, intending to poison him, and succeeds. *Queen vs. Garrett*, 22 *Eng. Law and Eq. Rep.*; *People vs. Rathburn*, *ubi sup.* 540.

Again, it seems, that in misdemeanors, where there are no accessories, but all are regarded as principles who, in any manner, participate in the commission of the crime, if a person in one State procure the commission of a crime of that grade in another State, through even a *guilty* agent, the procurer is regarded as a principal in the offence, and as being present, in contemplation of law, where it is committed, and answerable there for the crime. *Commonwealth vs. Gillespie et al.*, 7 *Serg. & Rawle* 478; *People vs. Adams*, *ubi sup*; *Barkhamsted vs. Parsons*, 3 *Conn. Rep.* 1; *The King vs. Johnson*, 6 *East Rep.* 583.

But the offence under consideration was a felony, and Cummings and others, who burnt the boat in Arkansas, in pursuance of a conspiracy entered into with the defendant, Chapin, in Ohio, were, according to the allegations of the replication, guilty agents, and the principals in the crime, while Chapin was an accessory before the fact in Ohio.

Such being the case made by the replication, Chapin was guilty of a crime in Ohio, and answerable there, while Cummings and others, the principals in the arson, were indictable in Arkansas.

We have been able to find no authority to sustain the jurisdiction of the Phillips Circuit Court as to defendant, Chapin, upon the allegations of the replication. 1 *Chit. Crim. Law* 191; *Ex parte Jo Smith, the Mormon Prophet*, 3 *McLean's Rep.* 121; *State vs. Knight, Taylor and Conference, Law and Equity, by Battle, N. C. Rep.* 44; *People vs. Adams, ubi sup.*; *People vs. Rathburn, ubi sup.*; *Digest, Ark.*, *chap.* 52, *sec.* 110.

The judgment of the court below is affirmed.

BOMFORD ET AL. VS. GRIMES AS AD.

17 567
56 161
17 567
61 412

The estate of a deceased person, in the hands of his administrator, is not liable to pay for medical services rendered to the family of the deceased after his death.

It is the right, and duty of an administrator to employ medical attendance for the slaves of the deceased, in his possession, when sick; and it would be the duty of the Probate Court to allow such expenses, as costs of administration.

But the employment in such case would be a personal contract, as between the administrator and physician; and compensation therefor could not be recovered in an action of assumpsit against the administrator as such, as upon a promise by the intestate.

Appeal from Sebastian Circuit Court.

The Hon. FELIX J. BATSON, Circuit Judge.

S. F. CLARK, for appellants.

S. H. HEMPSTEAD, for appellee.

Mr. Chief Justice ENGLISH delivered the opinion of the Court. This was an action of assumpsit, brought by Bomford and Shu-

mard, partners in the practice of medicine, against Marshall Grimes, as administrator of John Booth, deceased, in the Sebastian Circuit Court.

There are three counts in the declaration:

The *first count* alleged that Booth, the deceased, in his lifetime, was indebted to the plaintiffs in the sum of $466 50, for medical services, &c.

The *second count* alleges a like indebtedness of Booth, in his lifetime, to the plaintiffs, and a promise to pay the same by the defendant, as his administrator, after his death.

The *third count* alleges, that the defendant, as such administrator, was indebted to the plaintiffs in a like sum for medical services, &c., rendered to Booth, and members of his family, before and after his death, &c.

The defendant filed two pleas of non-assumpsit:

1. That he did not undertake and promise, &c., in manner and form, &c., as alleged.

2. That his intestate, Booth, did not, in his lifetime, undertake, &c., &c., as alleged.

The cause was submitted to the court, sitting as a jury, upon the following testimony, in substance:

Scott testified, that he was at Booth's, just before his death, and during his last illness, and knew of Bomford, one of the plaintiffs, making a medical visit there. There were, at the time, three others of the family sick besides Booth, and in an adjoining room to that in which he lay. They were colored girls, composed a part of Booth's family, and were said to be his daughters; they had been raised in his family—were recognized as part of it by Booth, and he had supported them, paid their medical bills, &c. Dr. Bomford while there, mixed up medicine, and went into the room where the girls were, &c. Witness thought he heard Booth direct Bomford to attend upon the girls, and give them his medical assistance, but of this he was not certain. All witness knew of plaintiff's medical services to Booth and family, was the one visit above referred to, except that, on the day before this, he

met Dr. Bomford on his way to the residence of Booth, &c. The distance from Fort Smith, where plaintiffs resided, to the residence of Booth, was nine miles or more. Booth died on the next day after the visit of Bomford, above referred to, in the summer of 1853. Bomford administered two or three doses of medicine while there. Witness saw him give medicine to the deceased.

Baker testified, that in the year 1853, he was sheriff of Sebastian county, and shortly after the death of Booth, he, as public administrator, took possession of his estate. That, on the second day after the death of Booth, witness went to his residence for that purpose, and found eight persons of the family lying very sick, and the plaintiffs were attending upon them as their physicians. Three of the sick persons were colored girls, free, and said to be daughters of the deceased, and the remaining five were his slaves. Witness, as such public administrator, directed the plaintiffs to continue their medical services to all the sick, and endeavor to cure them. Witness was present and knew of plaintiffs' making five or six subsequent visits to them. Witness advised with plaintiffs in regard to their disease, and sometimes administered the medicines prescribed, &c. Sometimes one of the plaintiffs visited them, and sometimes the other. The patients were all afflicted with flux, were quite sick, and several of them dangerously so. Witness thought several of their lives were saved by the attentions of the plaintiffs. Witness resided in Fort Smith, and in addition to the five or six visits of the plaintiffs, when he was present, he, on several occasions, saw the plaintiffs, on their return to town from the residence of the deceased, and enquired of them concerning the sick. He knew of plaintiffs administering as many as 35 or 40 doses of medicine while attending on the family, and the patients all got well under their treatment. Plaintiffs attended there, first and last, after the death of the deceased, about 15 or 18 days. Booth died 22d June, 1853.

Stephens testified, that soon after the death of Booth, Baker, the public administrator employed him to take care of the property of deceased, and give assistance to the sick family. That

there were eight persons of the family, the three yellow girls, and five slaves, very sick with the flux, for about fifteen days after the death of Booth; and one or the other of the plaintiffs visited them every day during that time, &c. The distance from Fort Smith to the residence of Booth, was over ten miles. Plaintiffs were regular physicians, and rendered beneficial services to the estate of Booth.

Dr. Main testified, that the customary charges of physicians, were, one dollar per mile for travel from the physician's residence, to the patient; and one dollar for each and every patient attended to for examination and prescription, and 25 cents extra for each ordinary dose of medicine administered. If the visit was paid in the night time, the physician was entitled to double mileage. If a physician traveled ten miles, and examined or prescribed for seven patients in a family, he was entitled to $17 for it, and also, to twenty-five cents per dose for such medicines as he administered. If he attended upon five patients he was entitled to $15, &c. Witness had examined the plaintiffs' bill of particulars, and did not think the charges too high. The bill does not appear in the transcript.

It was admitted, that before the suit, plaintiffs had exhibited their account, properly authenticated by the affidavit of one of them, to the defendant, Grimes, as administrator of Booth, for allowance and classification, and that he had refused to allow more than $30 of it.

It was also shown that letters of administration upon the estate of Booth, were granted to Grimes, on the 20th October, 1853.

Upon the above evidence, the court found, "that said John Booth, in his life-time, did assume and promise, in manner and form, as the said plaintiffs had complained against him, and assessed the plaintiffs' damages by reason of the premises, to *thirty dollars:*" and judgment was accordingly rendered against the defendant, as such administrator, for that sum with costs, &c.

The plaintiffs moved for a new trial, which the court refused;

they excepted, took a bill of exceptions setting out the evidence, and appealed to this court.

It is to be inferred, that the court found in favor of the plaintiffs for so much of their account, only, as was for services rendered by them, to Booth and his family, during his life-time; and this is complained of as an error, the plaintiffs insisting that they were entitled to a finding and judgment for that portion of their demand, also, which was for services rendered by them, after the death of Booth, to the three yellow girls and the five slaves. No doubt, from the evidence, but that the plaintiffs are justly entitled to compensation from some source for these services; but, could they legally recover therefor, of the defendant, Grimes, as the administrator of Booth, in this action?

It is manifest, that our statute of administration provides for the allowance and classification of no claims or demands against the estate of a deceased person, (other than for funeral expenses,) but such as arise upon contracts or liabilities made or incurred by him, in some way, during his life-time. See *Digest, chap.* 4, *secs.* 85 *to* 106.

The estate of an intestate, after the setting apart of the widow's dower, is to be appropriated to the payment of such claims, in the order in which they are classed by the statute, with the necessary expenses of administration, and the residue of the estate, if any, is distributed to the children, or next of kin, &c.

It seems that three yellow girls, who were attended by the plaintiffs, after the death of Booth, were his daughters, and had been raised and supported by him as members of his family.

The statute allows to the widow and family of the deceased, such grain, meat, vegetables, groceries and other provisions on hand, as may be necessary for their subsistence for twelve months, &c., (*Digest, chap.* 4, *sec.* 56,) but makes no provision for paying medical bills.

For medical services rendered to minor children, after the death of the intestate, the physician must look to their guardians, or other persons who have charge of them and their property,

and who, by virtue of legal or natural obligations, may be liable for their maintainance, &c. For such necessaries, the minor may also be personally liable.

As to the slaves of the intestate, when the administrator finds it necessary to call in medical assistance to them, no doubt he has the right, and it is his duty to do so, not only as a matter of humanity, but by way of preserving them as property of the estate, for the benefit of the creditors and distributees; and it would be the duty of the Probate Court, to allow to the administrator, the reasonable and necessary expenses so incurred by him, as part of the costs of administration.

But, as between the administrator and the physician, it would be a personal contract. An administrator has no right to make a contract for a *dead man*. *Underwood vs. Millegan ad.*, 5 *Eng. Rep.* 254.

The judgment of the court below is affirmed.

CRISE VS. THE AUDITOR.

Crise presented his petition for a mandamus to compel the Auditor to issue his warrant in payment of the damages, assessed by a jury of inquest under the swamp land act, in locating a levee upon his land, averring that the levee was placed under contract and was in process of construction: The auditor responded:

1st. That the inquest did not identify the lands.

2d. That he did not find sufficient evidence that the levee has been or will be constructed.

3d. That he has been unable *to find in his office* any evidence that the petitioner was the owner of any land in the county at the time: HELD, That the response was insufficient.

Appeal from Pulaski Circuit Court.

Hon. JOHN J. CLENDENIN, Circuit Judge.

WATKINS & GALLAGHER, for appellant.

JORDAN, Attorney General, contra.

Mr. Chief Justice ENGLISH delivered the opinion of the Court.

At the June Term of the Pulaski Circuit Court, 1855, Philip Crise presented a petition for mandamus against the Auditor, stating in substance, as follows:

That he was a citizen of White county, and resided on the banks of Little Red River. That in the spring of 1854, a swamp land levee was located by Milton Sanders, the agent appointed by the board of swamp land commissioners, to aid in the location and construction of the necessary levee, &c., and in classifying and districting said swamp and overflowed lands, on the farm on which petitioner then resided, and still resides. Being dissatisfied with the location of said levee, he did, on the 5th day of April, 1854, give notice to the board of swamp land commissioners of his dissatisfaction with said location, and of his determination to claim such damages as the location of such levee might occasion him. That upon presentation of such notice, the said commissioners ordered that the sheriff of White county be directed to summon a jury to asses the damages arising to petitioner by reason of the location of said levee on his farm, &c. (A certified copy of the order is exhibited.)

That the sheriff of said county, on the 22d of August, 1854, summoned a jury of twelve freeholders, residents of said county, in no wise akin to petitioner, and in no way interested in his lands, to attend at his house to assess the damages sustained by him by reason of the said levee passing across his farm. That said jury, under the charge and direction of the said sheriff,

on the 23d of August, 1854, assembled at the house of petitioner and after being duly sworn by the said sheriff, that they would faithfully and impartially view the lands and fields of petitioner on which the levee was located, and assess the damages which said levee was calculated to occasion said lands, and after viewing said lands and fields, they rendered a verdict awarding to petitioner the sum of $1558; which verdict was entered on the back of the inqusition, and filed by the sheriff in the office of the clerk of the Circuit Court of White county, in conformity with the act of 12th January, 1853. (A certified copy is exhibited.)

"That upon the taking and return of said inquisition and assessment, said levee was placed under contract by, or under the authority of the board of swamp land commissioners, and became, and is in process of construction."

That petitioner afterwards presented the evidence of said inquisition and verdict, being a copy thereof properly certified by the clerk of said Circuit Court, to the board of swamp land commissioners, at their meeting in October, 1854, and they referred him to the Auditor of the State as the proper officer to issue scrip for the same. That accordingly, in January, 1855, petitioner caused the said inquisition and verdict, properly certified as aforesaid, to be presented to Alexander S. Huey, as such Auditor, and requested him to issue his warrant to petitioner for the amount of swamp land scrip due thereon, in accordance with law, which he refused to do.

PRAYER FOR MANDAMUS.

The exhibits made part of the petition, are as follows:

"OFFICE OF THE BOARD OF SWAMP LAND COMMISSIONERS,
Helena, Arkansas, April 5th, 1854.

At a meeting of the board of swamp land commissioners for the State of Arkansas, in April A. D., 1854, the following order was made, *to wit:*

Whereas, it has been represented to the board by Philip Crise, that the present route of the levee, as located on Little Red River

by the engineer, runs through and on his farm, and that he is heavily damaged thereby; therefore, at his request, it is ordered by the board of swamp land commissioners, that the sheriff of White county be notified and required to summon a jury to assess the damages arising to the said Philip Crise, by reason of the location of said levee on his farm, and that he certify the same in the manner prescribed by law to the next meeting of this board.

I hereby certify the above to be a true and correct copy of the order above mentioned, as the same appeared of record in this office.

W. E. BUTTS, Secretary."

"STATE OF ARKANSAS, }
COUNTY OF WHITE. }

This is to certifiy that by order of the board of swamp land commissioners for the State of Arkansas hereunto annexed, and to me directed, I, Jacob G. Robins, sheriff of the county of White, in the State of Arkansas aforesaid, did, on the 22d day of August A. D., 1854, proceed in obedience to said order to summon a jury of twelve freeholders, residents of said county of White, in no wise akin to said parties, or in any wise interested in the lands of said Philip Crise, to attend at the house of said Philip Crise, to assess the damages sustained by the said Philip Crise by reason of a levee ordered by said board of commissioners, passing through the land of said Philip Crise. And I do further certify, that the said jury, *to wit:* J. S. Tillman, as foreman, Franklin Deshough, John F. Black, G. R. Buckley, Rial Wright, Andrew Jones, Joel B. Boatwright, R. Harris, John Griffin, T. H. Ruff, Peter Tidwell and John Perry, did assemble and meet together at the house of said Philip Crise and upon the lands to be viewed, on the 23d day of August, 1853, and after being duly sworn that they would impartially and faithfully view the lands and fields of the said Philip Crise, on whose lands the said levee is located, and would impartially and faithfully assess the damages which said levee is calculated to occasion said lands, did assess the damages of the said Philip Crise, at the sum of fifteen hundred and fifty eight dollars,

as will appear by their verdict hereunto annexed, all of which said proceedings are herewith returned, this 23d day of August, 1854.

J. C. ROBBINS, Sheriff.
By L. S. HOWARTON, Deputy Sheriff.

"STATE OF ARKANSAS, }
COUNTY OF WHITE. }

We, the undersigned, the jury summoned by the sheriff of White county, to assess the damages caused by the location of a swamp land levee upon the land of Philip Crise, after having been duly sworn faithfully and impartially to view the lands and fields, in which said levee is located, and to assess the damages, which said levee is calculated to occasion to said lands, do value and assess the damages due said Phillip Crise at $1558."

(Signed by J. S. Tillman, foreman, and the eleven other persons named above in the sheriff's return.)

The above exhibits are authenticated by the certificate of the clerk of the Circuit Court of White county, as being correct transcripts of the originals on file in his office, &c.

On the filing of the petition the Circuit Court ordered an alternative writ of mandamus against the Auditor, to which he made the following response, in substance:

"In response to said writ this respondent would most respectfully represent, that the papers do not show what tract or tracts of land are said to be injured by the location of said levee, consequently, the right of way could not be vested in the State, even were she to pay the amount indicated in said account by the jury of inquisition.

Respondent would further represent that he does not find sufficient evidence that said levee has been, or ever will be erected; or that the said petitioner is the owner of any lands in said county.

That, by reference to the assessment list filed in respondent's office for the year 1854, for the county of White, he is unable to find that said Philip Crise has listed any land for taxation for that year.

And, believing he has shown sufficient cause, &c., &c., respondent prays to be discharged," &c.

The petitioner demurred to the response, the court overruled the demurrer, and he rested thereon, and appealed from the judgment of the court, discharging the Auditor.

The damages claimed by the petitioner were assessed to him under the provisions of the *40th section of the act* of 12th January, 1853, *Pamphlet acts* 1852, *p.* 170, which is as follows:

"All contractors for erecting levees shall have the right of way through the lands or fields, where the levees are located by the commissioners; and the contractors shall give bond and security, conditioned for the faithful execution of the contract, and shall be liable to pay damages to the use of the State, and also to any citizen, who may be injured by the non-performance of the contract according to the condition of the bond aforesaid; but if the proprietor or proprietors of such lands or fields should be dissatisfied with the location of such levees through his, her or their lands or fields, and shall on the location of such levees as aforesaid give to the commissioner notice of such dissatisfaction, and of their determination to claim such damages as the location of such levees may occasion, then, and in that case, the said commissioners shall forthwith apply to the sheriff of the proper county, who shall forthwith proceed to summon a jury of twelve free holders of such county, in nowise akin to said parties, or in any wise interested in said lands or fields through which said levees may be designed to pass, which said jury shall assemble at the place intended to be viewed, and shall take an oath, to be administered by the sheriff, that they will faithfully and impartially view the lands or fields of such person on whose lands such levee may be located, and will faithfully and impartially assess the damages, which such levee is calculated to occasion such lands; and the said verdict shall be entered upon the back of the inquisition, and shall, by such sheriff, be filed in the office of the clerk of the Circuit Court of the proper county, and the inquisition and verdict so returned shall be an effectual bar to both parties without

appeal; and if such jury should find damages for such owner or proprietor, then, and in that case, such owner shall have a credit for so much, which when properly certified by the clerk of the proper court, shall be sufficient authority to the proper officer to issue scrip for the same, and when so issued, the same shall be taken and received in payment of any of the swamp and overflowed lands in this State."

This section of the act was perhaps passed in consequence of the decision of this court in *Martin et al., Ex parte*, 13 *Ark. R.* 199, where it was held that the board of swamp land commissioners could not construct the public levees and drains upon the lands of private individuals, to their detriment, unless the State would provide for compensating the proprietors of the lands for such damages as might be occasioned them thereby, &c.

The inquest of damages in the case now before us seems to have been taken literally in conformity with the provisions of the statute.

The first objection to the validity of the inquest, taken by the response of the Auditor, is, that the proceedings do not identify the particular lands of the petitioner which were damaged by the location of the levee, and upon which the State is to obtain the right of way by paying the damages assessed by the jury.

No doubt, the object of requiring the inquest to be returned to the clerk's office was, that there might be preserved some public memorial of the right of way acquired by the State in the premises; and it is manifest that a compliance with the spirit and intention of the law would require a reasonably certain identification of the lands upon the face of the proceedings.

But the statute does not expressly require the lands to be described, and the inquest in this case coming before the court collaterally, it is not warranted in holding the proceeding to be null and void for want of such identification of the lands.

The second objection made by the response of the Auditor is, that he does not find sufficient evidence that said levee has been, or ever will be erected.

The petition avers that the levee was placed under contract and was in process of construction, &c. See *Crise Ex parte*, 16 *Ark.* 193.

This allegation is not denied by the response, nor is it confessed and avoided. The rules of pleading required one or the other.

The third objection is, that the respondent had been unable to find in his office any evidence that the petitioner was the owner of any land in White county in the year 1854.

It appears from the face of the inquest that Crise was the owner of the lands and fields upon which the damages were assessed.

We must presume that the board of swamp land commissioners, sheriff and jury, ascertained this fact, as it is stated in their proceedings. It was hardly necessary for his title to be set out in the inquest.

From some omission his lands may not have been assessed in the year 1854, or may have been listed for taxation in some other name. But be this as it may, this objection of the Auditor presents no relevant issue to be determined by the court, or a jury. The Auditor does not allege that Crise was not in fact the owner or proprietor of any lands upon which the levee was located; and that the inquest was a mere fraud gotten up by him to speculate upon the State; but the response states merely that the Auditor finds no evidence in his office that Crise was the owner of such lands, &c.

We think the response is insufficient, and that the court erred in overruling the demurrer thereto.

The judgment is reversed, and the cause remanded for further proceedings, &c.

17 580
61 607

ALLSTON EX PARTE.

An application to this court in the first instance, for a writ of certiorari to a justice of the peace, because the Circuit Judge is of kin to the petitioner, and disqualified, should show how he was related.

A writ of certiorari will not lie to correct errors in the proceedings of the inferior court, which could have been corrected on appeal.

Petition for writ of Certiorari to a Justice of the Peace.

STILLWELL, for the petitioner.

MR. Chief Justice ENGLISH delivered the opinion of the Court.

This is an application to this court for a *certiorari*, to bring up the proceedings and quash the judgment of a justice of the peace of Franklin county, recovered against the potitioner, Overton B. Allston, by Sadler & Co.

The petitioner states that, "the Hon. FELIX J. BATSON, the Judge of the 4th Judicial Circuit, &c., is of kin to him, and consequently, disqualified to grant relief in the premises."

The petitioner should have stated how he was related to the Circuit Judge, so that this court could determine, as a matter of law, whether the degree of relationship existing between them disqualified the judge to hear and determine the application which is made for relief here. See *Const. Ark.*, *Art.* 6 *sec.* 12; *Digest*, *chap.* 50, *sec.* 16; *Allis Ex parte*, 7 *Eng. Rep.* 105.

We have, however, looked into the transcript, and we do not find that the judgment of the justice of the peace was void for the want of jurisdiction of the subject matter, or persons of the parties. There may be errors in the proceedings of the justice, but these the petitioner could have corrected by an appeal to the Circuit Court, which it does not appear that he took or sought, nor does he state any excuse for not doing so.

Certiorari refused.

WELLS AS AD. VS. FLETCHER AS GUARDIAN.

The administrator applied to the Probate Court for an order for the sale of the slaves or real estate of the deceased, to pay debts, showing that the debts unpaid, of which the amount of a decree against him for the widow's dower formed a part, exceeded the assetts, exclusive of the slaves and real estate: HELD, That as the personal estate, subject to the widow's dower, had been applied to the payment of debts generally, she was equitably entitled to be reimbursed out of what remained of the estate: that neither reason nor equity required her to wait for the accruing rents and hires to pay off the sum decreed to her for dower.

In support of such application, the administrator may show, that since his last settlement with the Probate Court, he has paid other debts of the estate duly proven and allowed.

Appeal from the Circuit Court of Pulaski County.

Hon. WM. H. FEILD, Circuit Judge.

S. H. HEMPSTEAD, for the appellant.

Mr. Justice SCOTT delivered the opinion of the Court.

This cause has been brought into this court by appeal from the Circuit Court of Pulaski county. It originated in the Probate Court of that county, and was an application there by the administrator, who is the appellant here, for an order for the sale of either lands or slaves, as the Probate Court might deem best, for the payment of debts against the estate of his intestate. The petitioner showed in his petition, verified by his affidavit, that all the personal estate of the intestate had been sold for the payment of debts, except three slaves, (the mother and two children,) and that certain lands, which he described also, and these slaves, were all the property of the estate remaining. He represented that lands were appreciating in value, and suggested that it would be most to the interest of all parties interested in the resi-

due of the estate, after the debts should have been paid, that these slaves, rather than lands, should be sold. He also represented that there were debts against the estate still due and payable, a specific schedule of which he presented with his petition, amounting to $939 70, and that there were not sufficient assets in his hands to pay the same: and that it was therefore necessary, either that lands or negroes should be sold, as the court might determine most proper. For proof of the necessity of an order of sale of one or the other species of property, to pay these debts, the petitioner referred to the records of the Probate Court, and to the papers of the estate on file therein, and stated that he had given notice, according to law, of his intended application at that term of the court, by public advertisement, a copy of which he presented with his petition, and prayed for an order of court accordingly.

In this schedule of outstanding debts, was a claim of Lidia Baldwin, the widow of the intestate, for the sum of $925 15, which had been decreed to her for dower in the personal estate, other than slaves, on the chancery side of the Circuit Court of Pulaski county.

Richard Fletcher, as guardian of the minor heirs of the intestate, appeared and objected to the application, alleging in substance:

1. That the assets in the hands of the petitioner were more than sufficient to pay the debts.

2. That the petitioner had not sold all the personal property of the estate, other than slaves.

3. That petitioner had not rendered a true account of his administration, exhibiting the precise amount of assets remaining in his hands. That he had not charged himself with the rent of lands, and had charged himself with only a part of the hire of the negroes. That the rent of land amounted to $175 50, as appeared by the proceedings in the chancery cause for dower, and the hire of negroes to $252.

4. That the petitioner had not exhibited with his petition a statement of the assets in his hands to pay debts.

5. That lands and slaves remaining after the assignment of dower are not subject to be sold to pay the decree for dower in the personal estate, other than slaves.

6. That this decree for dower is not a debt due by the estate.

7. That a sale of lands or slaves for the payment of debts, can only be made for such debts as were created previous to the death of the intestate, and for expenses of administration.

Upon the hearing in the Probate Court, the petitioner, after proving the publication of notice of his intended application, read the decree of the Chancellor against the estate for the widow's dower, which, among other things, directed "the said Stinson Wells, as administrator of the estate of Buford Baldwin, deceased, to forthwith pay and deliver unto the said complainant, (Lidia Baldwin,) the said sum of nine hundred and twenty-five dollars and fifteen cents, out of the assets of said estate, now on hand, or to come to his hands as such administrator;" and decreeing that he should pay all the costs out of said assets.

A number of the papers relating to the administration on file in the court, were also read in evidence, consisting of the inventories, appraisements and accounts that had been settled and filed, and the administrator himself, was, at the instance of Fletcher, examined on oath; from all of which, it substantially appeared that at the last settlement there was a balance against the administrator of $ 2244 73

Deducting from which the appraised value of the slaves,	1900 00
Left the true nominal balance in his hands of	344 73
Which does not appear to have been realized in money, but apparently remained in various debts due the estate.	
To this balance of $344 73, add negro hire, as found by the chancery court, the sum of $250, less $100 charged in administrator's account,	152 00

Rent of land as found in the chancery court, (the sum not being definitely stated in the administrator's account,)	178 50
Balance,	$ 675 23

It would make the total amount of assets remaining, upon the supposition that all the debts due to the estate should be realized, this balance of $675 23.

The Probate Court being satisfied from an examination of all these matters that the assets remaining in the hands of the administrator, were insufficient to pay off the debts, overruled all the objections made by the guardian, and ordered a sale of the negroes on a credit of twelve months; to which Fletcher took a bill of exceptions and appealed to the Circuit Court. That court finding error in the proceedings and judgment of the Probate court, set aside and vacated the latter, and hearing the case, *de novo*, refused the prayer of the petitioner, and he appealed to this court.

In what these errors, so found by the Circuit Court consisted, we are not advised.

In our opinion, so far from the record showing that the Probate Court erred as to the matter of fact, whether or not there was a necessity to order a sale of either the real estate or the slaves, it amply sustains that finding. In point of law, every atom of the remaining property of the estate, both real and personal, was subject to the payment of the decree for the $925 in favor of the widow. It was in lieu of what had been taken away from her by the administrator, wrongfully, and applied in the course of administration to liabilities against the estate generally. Her rights, in point of law, were absolute, and paramount to any rights of creditors of the estate. If, at the expense of these rights of hers, the estate had been relieved of liabilities, she had the highest degree of equity to be reimbursed out of what remained of the estate, and which had been thus preserved by the use of means that were both legally and equitably hers.

Nor was there any ground of reason or equity, upon which to insist that she should wait the slow proces of accruing rents and hires, to pay off the sum decreed to her by the Chancellor. A creditor of the estate could not have been rightfully subjected to such delay. Much more should she not be delayed for this, whose rights were prior, absolute and paramount.

Some of the objections urged by Fletcher, which seem to point to the *mode of proceeding* prescribed by the statute for the sale of real estate, would have some appearance of plausibility, if this had been a decree for the sale of real estate, instead of slaves as it was.

We think there is nothing in the record to show that the Probate Court, in this case, erred either in law or in fact. And if it had done so, when the Circuit Court undertook to try the case, *de novo*, the evidence offered by the administrator, to show that, in the interval between his last settlement (which showed the apparent balance of assets in his hands at the sum of $344 73,) and the day of the filing of his petition, he had paid, (as he had vouchers to show,) the further sum of $197 09 towards debts duly allowed and classed against the estate, ought not to have been rejected, as it appears by the bill of exceptions it was; because that evidence went to the vital question in the case, whether or not there was a necessity to order a sale of property for the payment of the claims against the estate.

The judgment of the Circuit Court will be reversed, and the cause remanded, with instructions to affirm the judgment of the Probate Court, and certify the same to the latter court, that another day may be therein appointed for the sale, that already fixed having passed.

GREEN AS GUARDIAN VS. FORD ADX.

The terms and subject matter of a submission to arbitration, when not in writing, and not shown by other evidence, can only be gathered from the award and what may be shown to have followed: And where the award is of the widow's claims for dower in the personal estate of her deceased husband, and under *sec.* 57, *chap.* 4, *Digest*, the court will not conclude that any other claims, not of the nature of dower, were included in the submission.

It is within the legal discretion of the Probate Court, which ought not to be controlled unless shown to have been used to manifest injustice, (*Bankhead vs. Hubbard et al.*, 14 *Ark.* 298,) to allow the widow a certain sum, by way of commutation, for the provisions, &c., on hand at the death of her husband, where they have been used by the administrator instead of having been delivered to the widow under *sec.* 56, *chap.* 4, *Digest.*

An appeal cannot be taken from the judgment of the Probate Court, allowing a claim against an estate, after the expiration of the term. (*McMoran vs. Overholt*, 14 *Ark.* 245.)

Appeal from Phillips Circuit Court.

Hon. CHARLES W. ADAMS, Circuit Judge.

PALMER, and WATKINS & GALLAGHER, for appellant.

Mr. Justice SCOTT delivered the opinion of the Court.

This case originated in the Probate Court of Phillips county. The administratrix having filed a stated account for settlement, the 7th November, 1853, and the usual notice having been given, the guardian came in and filed exceptions to the whole account; but insists upon objections to but two items. And it is as to these two items that the whole controversy in this case has arisen.

One of them thus appears in the stated account, *to wit:* "And the said Margaret Ford claims to have allowed to her the sum of one hundred and fifty dollars for a commutation for the first year's provisions, which she should have collected to her under the intent of the statute in such cases, because she was the wife of the

deceased at the time of his death, for the support of herself and the children of deceased the first year after his death $150 00."

The other appears in the same account, thus, *to wit:* "For amount paid Margaret Ford, voucher 16, $229 95."

Voucher 16 is as follows, and is thus supported, *to wit:*

"Received of Margaret Ford, as administratrix of John B. Ford, deceased, the sum of two hundred and twenty nine (229) dollars and 95 cents, in full for an allowance in my favor against Ford's estate, by the Court of Probate of Phillips county, Arkansas, at April Term, 1853.

MARGARET FORD."

May 11th, 1853.

"*The Estate of John B. Ford,*

May 6th, 1853. To MARGARET FORD,

For cash borrowed by said John B. Ford, deceased, in his lifetime, from said Margaret, on the 25th of December, 1850, as the same is entered on his cash book of that day, $148 00

For cash borrowed by him on the 3d day of March, 1851, as the same is entered on his cash book of that date. $89 50

$237 50.

CREDIT.

By cash paid on the above account March 3d, 1851, as entered on his cash book, $7 55

Balance due at his death, $229 95."

"STATE OF ARKANSAS, }
COUNTY OF PHILLIPS. }

I, Margaret Ford, do solemnly swear that nothing has been paid or delivered towards the satisfaction of the above demand, except what is credited thereon, and that the sum of two hundred and twenty-nine dollars and ninety-five cents, above demanded, is justly due to me.

MARGARET FORD.

Sworn to and subscribed before me, an acting justice of the peace within the State aforesaid on the 11th day of May, A. D., 1853.

BENJ. F. BALL, J. P."

STATE OF ARKANSAS, }
COUNTY OF PHILLIPS. }

Probate Court for said county, April term, 1853.

This day appeared in open court, Benedict J. Knott, who being legally sworn, on his oath says, that the book produced by him is the cash book of John B. Ford, deceased, and has at all times been so regarded since his death.

B. J. KNOTT.

Sworn to and subscribed in open court, May 11th, 1853.

EDW. H. COWLEY, Clerk."

"The foregoing claim being proven in open court, is allowed and classed in the fifth class—April term, 1853.

A. G. UNDERWOOD, Judge."

"Now, on this day comes Margaret Ford, by her attorney, and files a claim against the estate of John B. Ford, deceased, founded on an open account for a balance of two hundred and twenty-nine dollars and ninety-five cents, accompanied by her affidavit as required by law, and also the affidavit of B. J. Knott; and thereupon said claim is presented to the court for allowance, and the court being satisfied from the affidavit of said Knott, that the book produced by him was the cash book of the deceased; and also being satisfied from testimony of Arthur Thompson, that said John B. Ford was a regular merchant, and had the reputation of keeping correct books in his lifetime; and further that the entries therein are the genuine handwriting of the said Ford made by himself; and being fully satisfied from all the evidence adduced that said claim is just and unsatisfied, do allow the same for the said sum of two hundred and twenty-nine dollars and ninety-five cents, and class it in the fifth class against said estate."

It is insisted that the administratrix is precluded from setting up either of these two items by an arbitration and award, between herself as the widow, and the appellant then administrator of the estate of Ford, which by agreement was entered in the Probate Court, at the April term, 1852, as the judgment and decree of that court.

It appears from the transcripts of the records in that court, that the appellee filed a very comprehensive petition for dower, embracing, specifically, lands, personal property, money, rents, certain choses in action and sales of merchandize made after the death of her husband, both for cash and on credit, together with application for $150, under the provisions of the 57th section of the administration law, and a commutation for such grain, meats, vegetables, groceries and other provisions as the inventory showed was on hand at the time of her husband's death, necessary for the subsistence of herself and family for twelve months after the death of her husband, under the provisions of the 56th section. And also prayed to be allowed out of the estate the amount of the claim for $229 95, alleged to be for ready money loaned to her husband during the coverture.

The court with a liberal hand decreed to her all she asked, but the then administrator took a bill of exceptions and appealed to the Circuit Court. It does not however appear that this appeal was ever prosecuted; on the contrary, it is to be inferred that the arbitration at once intervened and put a stop to it. Nor does it appear with certainty what was submitted to arbitration. That is to say, whether only the matters in dispute in reference to dower, or the whole of the matters embraced in the petition and decree. All that appears in the record, throwing any light upon this point, is the following, *to wit:*

"*Margaret Ford vs. The estate of John B. Ford, deceased.* APPLICATION IN THE PROBATE COURT FOR THE ALLOTMENT OF DOWER IN THE ESTATE OF DECEDENT—The result of my investigation into the case above stated, is, that the decree of the Probate Court as entered of record is wrong, and should have been as follows, as

far as it pertains to the allotment of dower in the personalty. I therefore reform the decree as follows, and hope that the parties will be satisfied with the allotment which I make below, believing it equitable and legally correct, *to wit:*

1st. The widow is entitled to dower to the extent of $\frac{1}{3}$ of the cash on hand at decedent's death, say $521,	$173 33½
2d. $\frac{1}{3}$ of the value of the watch, say $30,	10 00
3d. $\frac{1}{3}$ of the cash sales since the death of Ford, say $201 66,	67 22
4th. $\frac{1}{3}$ of proceeds of credit sales of goods in same time, $1387 38,	461 12
5th. $\frac{1}{3}$ of the goods now on hand, say $1601 07	533 69
6th. $\frac{1}{3}$ of rents of store house, say $95,	31 66⅔
7th. The sum allowed by statute over and above dower,	150 00
	$1427 03
From this sum should be deducted the amount of the account in favor of estate against the widow since the death	$203 62
The amount for which the decree should be, is	$1223 41.

Which amount should be recorded in favor of the widow, to be paid before any other allowance.

The lands I have not taken into the above estimate. The court should have directed the commissioners appointed, to have ascertained whether the lands and house could have been divided in kind, and if it should turn out that such could not be done, then, in that case, the court should have directed that the lands and the house be rented out, and the one third part of the amount arising therefrom, after paying the taxes and the amount expended necessary to keep the same in good repair, to be given to the widow as her dower interest therein.

THOMAS B. HANLY.

May 20th, 1852."

"In the matter of the assignment of dower to Margaret Ford, widow of the late John B. Ford, deceased; it is agreed by and between Barton W. Green, as the administrator of the estate of John B. Ford, deceased, and Margaret Ford, widow of the said John B. Ford, that they will abide by the foregoing allotment and apportionment of dower, (made by T. B. Hanly, who was called upon by the parties as arbitrator, and the mutual friend of the parties, and at the instance and request of the said parties.) And we agree that the same be and remain as a full and final allowance made to the said Margaret out of the personal estate of the said John B. Ford, deceased, as her dower interest and other right therein, as above stated and shown; and the said Margaret agrees that this shall be received and accepted by her in full of her right of dower in the personal property belonging to said estate, and agrees hereby that a decree may be entered accordingly, in the Probate Court of Phillips county, in lieu and in the place of the one heretofore entered by said court in her behalf.

In witness whereof, we, the said parties hereunto set our hands and seals this 22d day of May, A. D., 1852.

B. W. GREEN, [SEAL.]
MARGARET FORD, [SEAL.]

In the above agreement the fourth item is not to be paid until the amount of the credit sales is realized and collected, and if any loss is sustained therein, the loss shall be computed at the same rates as the parties are interested.

MARGARET FORD, [SEAL.]
B. W. GREEN, [SEAL.]

Received on the above, seven hundred and sixty-two dollars and twenty-nine cents, in part payment of the above allotment of dower in the personal estate of John B. Ford, deceased, this 22d day of May, 1852.

MARGARET FORD.

ATTEST:

GEORGE W. BURRISS."

It is stated in the bill of exceptions that this award was entered as the judgment and decree of the Probate Court.

As the submission, which is always the law of each particular case submitted to arbitration, does not, in this case, appear to have been in writing, it is to be supposed that it was by parol: and this is indicated in the case also from what follows the award, over the signature of the parties. When this is the case, the terms and subject matter of the submission, when not shown by other evidence, as in this case, can only be gathered from the award, and what may be shown to have followed. The award is simply as to *dower*, and "the sum allowed by statute, over and above dower, $150," seeming to point to the 57th section of the administration law, where that specific sum is allowed the widow in property, at the appraised value, when the estate is not insolvent, as was alleged and seemed to be admitted in the proceedings of the Probate Court in this case. *Digest, chapter* 4, *page* 121, *section* 57. The agreement, which follows the award in all its terms of expression, seems to follow it with the utmost closeness, alluding to nothing but dower, except in the single expression, "and other interest therein as *above stated*," whereby the other interest in the personal property thereby spoken of, is expressly limited to the claim of $150, under the 57th section of the administration law, as stated in the award.

There is nothing to indicate with any certainty that the submission was more comprehensive than this.

Although the administrator was dissatisfied with the decree of the court, it may have been that that the special matters of dissatisfaction were as *to dower*, and this particular allowance over and above dower, and hence that he submitted nothing else to arbitration.

It is very true that the decision of an arbitrator, though apparently on a single point, may, in effect, be on more than one, as the judgment on that may be a negation as to others. As in this case, the award of dower in the various items of money, rents, sales of merchandize, &c., &c., specifically, is a negation as to

allowance of dower in any thing else—as dower in the county scrip for instance—but an award of dower is no negation of a claim over and above, and not of the nature of *dower;* nor is an award of *one* claim, not included in dower, any negation of any *other* distinct claim, as for instance, a claim of a debt against the estate, or under a different provision of the statute.

It is difficult to say, then, from any thing upon the face of this record, that it has been shown, that any thing else than the matter of dower and the matter of the claim under the 57th section of the administration law, was ever submitted or arbitrated. And it was incumbent upon the guardian setting up the contrary, to show it in proof. And it cannot be maintained that matters not submitted to arbitration, can be affected by an award as to such matters, only, as were submitted.

There is another view in which this point may be regarded. The chief object of the common law, in setting on foot and sustaining arbitrations and awards, was to settle controversies and terminate litigation; hence, that law does not countenance, in general, awards that are only of *parcel* of the things submitted to arbitration, and will always disregard such awards if apparently injurious to the party taking exceptions to them. 7 *East* 81; *Kyd on Awards* 175; 7 *Cranch Rep.* 171.

Within the reason of this rule, it might, therefore, be a matter of difficulty to uphold the award in this case, if it should be true, as is contended, that not only the matters to which it relates, but also the two other distinct matters embraced by the exceptions to the settlement in this case, were also submitted to the arbitration.

In either view, therefore, we see what seems to be sufficient reason to hold that the defence upon this point has not been made out.

It follows that the Probate Court might, therefore, have considered the application for commutation, under the 56th section of the statute, without prejudice from the arbitration, and in its legal discretion in the premises, which ought not to be controlled,

unless shown to have been abused to manifest injustice, (*Bankhead vs. Hubbard et al.*, 14 *Ark. Rep.* 298,) allowed the claim to the extent it did—finding, it is to be presumed, in the absence of any thing in the record to the contrary, from an inspection of the inventory, and from other evidence, that grain, meats, vegetables, groceries and other provisions were actually on hand at the death of the intestate, and had been taken by the administrator, instead of being given up to the widow for the subsistence of the family for twelve months thereafter.

The other item does not seem, upon the face of this record, to stand upon any such meritorious ground; although it was entitled to be considered by the Probate Court, to a like extent, unprejudiced by the award. Because, to say the least of it, as it is presented in this record, it must be considered a very remarkable claim, alleged, as it is, to have originated in an alleged contract, made during coverture, between a wife and a husband in respect of money apparently not shown to be other than the husband's own in point of law. But we design to decide nothing as to this, as we properly cannot; because, no question as to that point can come up in this collateral way in the case before us. The Probate Court having allowed this claim at the April term, 1853, and no appeal having been taken from that judgment of allowance, all inquiry is now shut out, (*McMoran vs. Overholt*, 14 *Ark. Rep.* 245,) from all, except the chancellor, upon proper allegations to him as to this judgment of allowance; and, consequently, this judgment, as long as it stands, sustains unavoidably, the item in the account excepted to, that remained to be passed upon by us.

It is our opinion, therefore, upon the whole case, that the judgment of the Circuit Court affirming that of the Probate Court, must unavoidably be affirmed by this court.

KOWANACHI VS. ASKEW AS AD.

A party, who calls his adversary as a witness, under *section* 108, *chap.* 95, *Digest*, has no right to be sworn as a witness himself, unless his adversary refuse to testify.

Pleas to the merits are a waiver of the necessity of proving the representative character of the plaintiff, in a suit by an administrator.

Appeal from Columbia Circuit Court.

Hon. SHELTON WATSON, Circuit Judge.

J. H. CARLETON, for appellant.

Mr. Justice SCOTT delivered the opinion of the Court.

This cause was tried, *de novo*, in the Circuit Court of Columbia county, on appeal from a justice of the peace. The style of the suit, as well as all the proceedings in the Circuit Court, indicate distinctly, that the plaintiff below sought a recovery in his representative character.

The defendant below interposed the pleas of the general issue, payment and set-off, in short upon the record, by consent; on which, in like manner, issues were formed and submitted to the court sitting as a jury.

It appears by the bill of exceptions, taken to the overruling of a motion for a new trial, that after the plaintiff below had read the note sued on, which was payable to the order of E. W. Christian, and had never been endorsed by him, and the defendant had read the credits endorsed thereon, and had introduced the plaintiff as a witness, to prove the further payment of fifteen dollars, "who answered that he knew nothing about it," the defendant then moved the court to be allowed to be sworn and testify himself in relation to the fifteen dollars, which the court refused, and the defendant excepted.

No further evidence having been introduced by either party, the court found $25 83 debt, and $2 89 damages for the plaintiff, and rendered judgment against the defendant accordingly.

The defendant then moved for a new trial upon the grounds:

1st. That the court had erred in refusing his motion to be allowed to testify as to the $15.

2d. Because no evidence had been produced by the plaintiff to show either the death of his alleged intestate, E. W. Christian, or the grant of letters of administration upon his estate to the plaintiff.

The court overruled the motion, and the defendant excepted and appealed to this court.

Our statute does not adopt the alleged rule of the civil law, "that if a person alleges another to be his debtor, and refers it to the oath of the debtor, he, (the debtor,) will be obliged to swear he owes him nothing; and if he refuses, it will be taken as true, and the debtor condemned to pay the debt;" but enacts, that if a party required to testify under its provisions, (*Digest, chap.* 95, *sec.* 108, *p.* 656,) *refuse* to do so, "the justice shall allow the party offering the demand or set-off, to be sworn and examined in relation to the same matter."

In this case, so far from the party required to testify having refused, he seems to have been sworn and interrogated.

The other ground was equally untenable, because the matter insisted upon, had been waived by the pleas to the merits interposed.

The judgment of the Circuit Court will be affirmed with ten per cent. damages.

PIKE ET AL. VS. FRASER & CO.

The breach, in a declaration in debt, that the defendant had not paid the plaintiff, "or any other person whomsoever," is not objectionable as too broad.

Every intendment must be taken against the pleader; and so, a plea, that the consideration of the note sued upon was, that the plaintiffs would pay off certain bills of exchange drawn by the defendants, averring non-payment, but failing to allege that the time fixed by the contract for payment had arrived—held insufficient.

Appeal from Monroe Circuit Court.

Hon. CHARLES W. ADAMS, Circuit Judge.

FOWLER & STILLWELL, for the appellants.

PIKE & CUMMINS, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

This was an action of debt in the Monroe Circuit Court, on a promissory note, for $2811 85, made by appellants, payable to appellees or bearer, three days after the fifteenth day of June, 1852. The declaration is in the usual form down to the breach, where it is said that the money had not been paid to the plaintiffs, "nor to any other person whomsoever."

Defendants interposed five pleas:

1. That the note was given on the consideration that the defendants had drawn certain bills (describing them,) which the plaintiffs undertook to pay at maturity. But when the bills matured, the plaintiffs failed to pay any part of them, and the defendants had been compelled to pay a part of them, and had been sued on the others; wherefore, the consideration had failed.

2. "That said promissory note in the said plaintiffs' declaration mentioned was made, executed and delivered to the said

plaintiffs, in consideration that they would pay off and discharge certain bills of exchange before that time drawn by the said defendants; and the said defendants, in fact say, that the said plaintiffs, nor either of them, did, or would, after the execution of the said note, pay, liquidate or discharge said bills, or either of them, in manner aforesaid, or otherwise howsoever, but the said bills of exchange, and each of them, still remain subsisting demands against the said defendants, *to wit:* at the county aforesaid, and this the defendants are ready to verify," &c.

3. No consideration.

4. Nil debet.

5. Payment.

Issues were formed on all except the second plea, and tried by the court sitting as a jury, upon evidence introduced on both sides. Verdict was found for the plaintiffs below, for the sum of $2811 85 debt, and $423 46 damages, and judgment rendered accordingly. The defendants excepted, generally, to the verdict and judgment, and took a bill of exceptions setting out all the testimony; but did not move for a new trial, nor in any other wise save any question of law in relation to these issues, in the progress of the case, nor as to the finding and judgment of the court upon their determination. *State Bank vs. Conway*, 13 *Ark. Rep.* 344.

To the second plea set out above, the plaintiffs below interposed a demurrer, which the court sustained. The only question in the case is, therefore, as to the action of the Circuit Court upon this demurrer.

The counsel for the appellants say nothing in favor of this plea, but as the demurrer runs back to the declaration, object that the breach is too wide, in the negation that the money declared for had not been paid by the defendants below, to the plaintiff, nor to "any other person whomsoever." We think there is nothing in this objection. We think, too, that the plea was bad. It was not sufficiently certain. No certain issue could be formed upon it. It may be admitted to be true, and yet the plaintiffs below

may not have broken their contract to pay the bills. They might not have matured, or otherwise the time for payment, as fixed by their contract, might not have arrived; and every intendment must be taken against the pleader.

Finding no error, the judgment of the court below will be affirmed, and five per cent. damages will be awarded in this court upon the sum recovered in the Circuit Court.

BOWMAN VS. BROWNING.

17 599
76 600

Where the defendant is sued for the value of cotton shipped by him under a contract, the plaintiff must prove a stipulation to carry the cotton to some place, or deliver it to some person, or dispose of it in some manner, and a breach of such stipulation.

Where a person has tortiously obtained the possession of the goods of another, and sold them and received the proceeds, the owner may elect to waive the tort, and affirm the sale and claim the price received; but for a mere detention of the goods, in such case, or a conversion of them, assumpsit will not lie to recover their value.

Appeal from the Circuit Court of St. Francis County.

S. W. WILLIAMS, for appellant.

BYERS and JORDAN, for appellee.

This cause was argued in this court before the Hon. C. C. SCOTT, Judge, and the Hon. THOMAS JOHNSON, Special Judge—the Hon. E. H. ENGLISH, Chief Justice, and Hon. T. B. HANLY, Judge, not sitting.

Mr. Justice SCOTT delivered the opinion of the Court.

This case was brought here by appeal from the St. Francis Circuit Court.

It was commenced before a justice of the peace, upon an open account, as follows, *to wit*:

"MAY 9TH, 1853.

THOMAS R. BOWMAN,

To EDMOND A. H. BROWNING, *Dr.*

For one bale of cotton, marked A. J. B., weighing in lint cotton 440 lbs., at 10c per pound,	$44 00
For one bale cotton marked A. J. B. weighing 354 lbs., at 10c per pound,	35 40
	$79 40"

Upon a trial before the justice, judgment was rendered for the plaintiff, for the sum claimed; from which the defendant appealed to the Circuit Court, where, upon a trial, *de novo*, the jury found a verdict, and the court overruling a motion in arrest upon the ground that the case made out by the testimony, was not one within the jurisdiction of the justice, judgment was again rendered for the plaintiff for the same sum. The defendant then moved for a new trial, upon the ground that the verdict and judgment were without evidence to support them, and was against the law; and that the case was not within the jurisdiction of the justice, which the court overruled, and the defendant excepted, setting out all the evidence in his bill of exceptions, and appealed to this court.

From this it appears, that after the plaintiff had introduced evidence conducing to show, that at the date of the supposed accrual of the alleged liability, he had, on the bank of the St. Francis river, at the burnt mill landing, two bales of cotton,

marked, and of the weight as is specified in the bill of particulars, and that they, together with a large number of other bales of cotton, had been taken on board of a steam-boat, of which the defendant was, at that time, captain and owner, and had also proved the quality of his cotton, and the value of such, he introduced another witness, who testified, "that he, (the witness) some time previous to the taking of the cotton in controversy, as alleged, instructed Captain Bowman, the defendant, that there would be some cotton sent to the burnt mills landing for Browning, the plaintiff, and that he, (the witness,) as the agent of the plaintiff, *wanted him, Bowman, to take it away*, but that he did not know when said cotton would be at the river for shipment. That he, the witness, was afterwards told by Bowman, that he had taken a large lot of cotton from the burnt mills with various marks and brands, of which he took no memorandum, and taking all the cotton then there, but that said lot of cotton was claimed by Johnson and Seaborn, and that he thought he got no cotton for Browning."

This was all the testimony produced by the plaintiffs, and the defendant offered none at all.

It is stated in the bill of exceptions, that the court gave general instructions, but what these were does not appear, nor does it appear that any special instructions were either given or refused.

This being the whole case, as it appears in the record, it is impossible for us to know whether the jury found that the cotton in question was taken away under any supposed contract, or was merely tortiously taken away, or whether or not as to that point, any misdirection was given to them by the court. And supposing they found the former, then, waiving all other objections, the verdict and judgment are clearly without any support, by the evidence, in material points; because there is none at all to show any stipulation to carry the cotton in question to any place, or to deliver it to any person, or to dispose of it in any manner, or any breach of any such stipulations. The evidence going no

further, as to any supposed contract, than that the defendant should take the cotton away, without any evidence to show further whither it should be taken, or to whom to be delivered, if to any one, or whether the defendant had been called to account, or had in any way broken the supposed contract, or any of its stipulations.

And if it be supposed that the jury found that the cotton was taken away under any contract, it will have to be considered that they disregarded so much of the evidence produced by the plaintiff himself as conduced to show that the defendant did not, in fact, take the cotton away, *as the cotton of plaintiff*, but as the cotton of *Johnson and Seaborn*, under authority from *them*, and therefore did not, in truth, in doing so, act under any authority from the plaintiff, or recognize any such, as an excuse for what would be otherwise a naked tort.

On the other hand, if it be supposed that the jury found the cotton *tortiously* taken away by the defendant, then it is equally clear, that the verdict and judgment cannot be sustained; because, the extent of the rule of waiving torts and bringing assumpsit, *is not* (as between the original parties,) *beyond the limit*, that if the wrong doer has sold the goods, and in any manner received the proceeds, so as to be chargeable as for money, the owner may elect to affirm such sale or disposition, and claim as his own the price so received. His title to the property entitling him to the price received for it, if he so elects, and thus the wrong doer is considered as having received the money for the use of the owner.

But if there has been a mere detention of the goods, or a conversion of them, not going the length indicated, assumpsit will not lie to recover their value. *James vs. Hoar*, 5 *Pick.* 285; *Pritchard vs. Ford*, 1 *J. J. Marsh. Rep.* 543; *Wellitt vs. Wellitt*, 3 *Watts Rep.* 277; *Upchurch vs. Norsworthy*, 15 *Ala. Rep.* 705; *Crow vs. Boyd's adm.* 17 *Ala. Rep.* 51.

The judgment must be reversed and the cause remanded.

SEABORN VS. SUTHERLAND.

17 603
59 259

If a purchaser wishes to rescind a contract of sale, he must put the vendor, or offer to put him in the same situation he was in before the delivery of the property. And so, a plea, that the note sued on was for the purchase money of real estate to which the vendor had no title, must show a return of the property, or an offer to return it.

A plea of fraud, generally, without stating the facts constituting the fraud, is bad.

And so is a plea charging fraud in the representations of the plaintiff in relation to the title to land, but failing to aver that the writing sued on was executed in consideration of such title, or that the plaintiff, in fact, had no title whatever.

On an issue to the plea of "no consideration," the plaintiff read in evidence his deed to the defendant for a tract of land, as the consideration of the note sued on; the defendant offered to read a deed from the Auditor for the same land, as having been forfeited to the State for non-payment of taxes, which was ruled out by the court: HELD, That the defendant was not prejudiced by the action of the court, as the Auditor's deed would not have shown a total want of consideration, the defendant having gone into possession under his purchase, and still retaining it.

Appeal from St. Francis Circuit Court.

Action of debt upon a writing obligatory in the Circuit Court of St. Francis county, before Hon. CHARLES W. ADAMS, Circuit Judge.

The defendant filed four pleas:

1. "That heretofore, *to wit:* on or about the 12th day of March, 1853, at the county aforesaid, the said plaintiff represented to the said defendant that he was the owner in fee of the north-east quarter of section No. 28, in township No. 6 north, and of range No. 2 east, of the 5th principal meridian, situate in said county, and containing one hundred and sixty acres of land, and as such, had full right and authority in law, to grant, bargain and sell the same, assuring the said defendant then and there, that he, the said plaintiff, had derived title to said tract of land through

and under a sale for the non-payment of taxes, and that he would take and receive from the said defendant, the sum of five hundred dollars, the first half to be due and payable 1st January, 1854, which is the writing sued on in this behalf, and the other to be due and payable the 1st January, 1855, and the said defendant avers that, relying on the assurances and representations of the said plaintiff in this behalf, agreed to close the contract for the purchase of said tract of land, on the terms aforesaid, and accordingly on said day, at the county aforesaid, did make, execute and deliver unto the said plaintiff, the writing sued on this behalf, and on the same day agreed to receive from the said plaintiff and his wife, a deed for the said tract of land, containing only a special warrantee of the title of said land as to the said plaintiff, his wife and persons claiming the said land by, through, or under them, or by either of them, and from all encumbrances done or suffered by them, or either of them; and the said defendant further avers, that had it not been for the said assurances on the part of the said plaintiff as to the regularity of his tax title to the land aforesaid, and the repeated and oft asserted declarations that he had title thereto, that the said defendant would never have consented to have taken or received from him a special warrantee deed as aforesaid, for said tract of land, but would have required a deed with full covenants as to seizure and title, or would have declined to have made the said purchase thereof from him. And the said defendant further avers, that a short time after the date of the said deed and the execution of the writing aforesaid, he was informed that the said tract of land had been forfeited to the State of Arkansas for the non-payment of taxes, some time anterior to his purchase thereof from the said plaintiffs, and that the same was, at that time, subject to donation by the Auditor, under the acts in such case made and provided, and thereupon, to save himself and his possession, the said defendant applied to the said Auditor, and obtained from him a donation deed for said tract of land; so that the said defendant, in fact, saith that the said plaintiff had not any right or title to

said tract of land at the time when the sale thereof was made to the said defendant by the said plaintiff, and when the representations aforesaid, respecting the same were so made, and that therefore, the said writing sued on in this behalf, is without any consideration, either good or valuable in law, and was obtained from the said defendant by the said plaintiff by his fraud aforesaid.

2. That the said writing sued on in this behalf was obtained from him by the fraud of the said plaintiff, and without any consideration moving from the said plaintiff to the said defendant therefor.

3. That the said writing in the said declaration mentioned was obtained from the said defendant by the said plaintiff (and others in collusion with him) by fraud, device and misrepresentation, that is to say, by the said plaintiff (and others in collusion with him,) falsely and fraudulently representing to the said defendant that the said plaintiff was the owner in fee of the north-east quarter of section 28, township 6 north, range 2 east, of the 5th principal meridian, containing one hundred and sixty acres of land, and being situate in said county, and that said writing was executed in confidence in the representations, without any recourse to the records or examination into the title of the said plaintiff to said land, *to wit:* at the county aforesaid; wherefore the said defendant saith that the said writing in the declaration mentioned, was, and is void in law.

4. That the said writing obligatory in the said plaintiff's declaration set forth, was executed and made by him without any consideration whatever, *to wit*, at the time when, &c., at the county aforesaid."

Demurrer sustained to the 1st, 2d and 3d pleas—issue to the fourth—verdict and judgment for the plaintiff, and the defendant appealed.

This cause was argued in this court before Mr. Justice SCOTT,

and Hon. THOMAS JOHNSON, Special Judge; Hon. E. H. ENGLISH, Chief Justice, and Hon. T. B. HANLY, Judge, not sitting.

WILLIAMS & WILLIAMS, for appellant.

BYERS and JORDAN, for appellee.

Hon. THOMAS JOHNSON, Special Judge, delivered the opinion of the Court.

The court below decided correctly in sustaining the demurrer to the first three pleas interposed by the defendant. The first was manifestly designed as a plea of fraud, and in case it did not present all the essential elements of such a defence, it was necessarily subject to a demurrer. Fraud was the very gist of the plea. If a purchaser wishes to rescind a contract of sale, he must put the vendor, or offer to put him in the same situation he was in before the delivery of the property. He will not be allowed to retain the property and protect himself against the payment of the purchase money. If he retain the property he cannot treat the contract as void for want of consideration upon the ground of fraud. The defence set up by this plea fails to allege that the defendant below returned, or offered to return the property. It would be unjust to permit the vendee to retain possession and enjoy the benefit of the property, and put his vendor at defiance. This plea, therefore, being one of want of title in the vendor, is no bar to the action; and, consequently, the demurrer to it was properly sustained. See *Hynson et al. vs. Dunn*, 5 *Ark. Rep.* 397; 4 *Ark. Rep.* 470, *Sumner vs. Gray;* and also, 2 *Saunders Pl.* 1*st part*, *page* 61.

The second plea is one of fraud generally. This is unquestionably bad. The party whose conduct is sought to be impeached, has an unquestionable right to be apprized of the facts which constitute the fraud, otherwise he might be taken by surprise on the trial. See same case of *Hynson et al. vs. Dunn*, 5 *Ark. Rep.* 397. The third is a plea of fraud, and is defective for the rea-

sons given against the first, as well as others which do not apply to that. The third charges fraud in the representations made by the plaintiff in relation to the title to the land therein described, but wholly fails to charge that the writing in suit was executed in consideration of said title, or that the plaintiff in fact had no title whatever. The fourth is a plea of no consideration, generally, to which the plaintiff entered his replication, and upon which issue was taken. The parties then went to trial, and after the plaintiff had introduced the instrument sued upon, and the deed executed by himself and wife to the defendant, the defendant proposed to show that there was no title in the plaintiff at the time of the execution of said deed, and in order to do so, offered to read a deed from the Auditor of the State to himself for the same land, which was objected to by the plaintiff, and excluded by the court. To this ruling the defendant excepted, and the point now presented is, whether such ruling was correct or not. There can be no doubt of the relevancy of the Auditor's deed, as it conduced to prove a failure of title; and, consequently, that no consideration had passed between the parties, yet the defendant could not have been prejudiced by the action of the court in ruling it out, as, if admitted, it would not have shown a total want of consideration, as it was already in proof that the defendant had gone into possession under his purchase, and that he still retained the same down to the time of the trial. See *Wheat vs. Dodson*, 7 *Eng. Rep.* 711. Finding no error, the judgment of the court below is, consequently, affirmed.

17 608
166 194
17 608
71 561

LYTLE ET AL. (CLOYES' HEIRS) VS. THE STATE ET AL.

[DETERMINED AT THE JANUARY TERM, 1857.]

The decision of the Supreme Court of the United States in this case (9 *How. Rep.* 314) is the "law of the case," in the ordinary legal sense of that phrase, in all matters decided in the case as then presented: but as to all matters arising in the subsequent progress of the cause—new facts and new parties having been brought upon the record, and new issues made—it will be considered as substantially new for all practical purposes, and be determined as well in reference to known equity law, as to the decision of the appellate court.

Where the payment, under a right of pre-emption, is made before the official plats of survey are filed in the Land Office of the district where the land is situated, though sanctioned by the Commissioner of the General Land Office under directions of the Secretary of the Treasury, it cannot be regarded as a legal payment for the land; but it may be taken as a tender persisted in.

It would seem unreasonable and improbable that Congress should have designed, by the pre-emption act of 29th May, 1830, as to unsurveyed land, that payment should have been tendered previous to the time when, by law, it might be received by the agents of the Government; and a tender made within the twelve months allowed by the act of 14th July, 1832, after the return of the plats of survey, held sufficient.

Where several tenants in common are infants, at the time their cause of action accrues, they have, respectively, the right to bring their action within the time specified in the 4th section of the act of limitation, (*Digest, chap.* 99,) after the removal of the disability: the disability of one of several co-plaintiffs operates neither to the advantage or disadvantage of the others.

The interest of the heirs of a pre-emptor, after proof, adjudication, payment and the issuance of the patent certificate, is a tenancy in common: and a joint action may be brought by all the heirs, and a recovery had by all, or a part of them only, where some of them are barred by the statute of limitations, and others not—being infants when the right of action accrued, and bringing their suit within the time limited by the act after the removal of the disability.

If an action of ejectment be brought by several tenants in common, it must be considered, under our statutory provisions, as on several demises; and if some be barred by the statute of limitations and others not, the latter may still recover their proportion.

The statute of limitations does not commence to run against a pre-emptor until payment of the money according to law, and the issuance of the patent certificate.

The filing of an amended bill, bringing new parties upon the record, will be regarded as the commencement of the suit as to such new parties, upon the defence of the statute of limitation; and not the filing of the bill.

If the statute of limitations commence running against an infant, entitled to bring an action for land, &c., and he die before arriving at age, the statute will be a complete bar against his heirs, though they be infants at the time, unless they bring their action within the time limited by the *5th section of chap.* 99, *Digest.*

An attorney at law may purchase of his client an interest in the subject matter of the suit, in consideration of services rendered and to be rendered in the prosecution of the suit, and become bound for the costs in the prosecution of his own and client's rights, without the violation of any law of *champerty* in this State.

A sale and conveyance of land, *pendente lite*, in this State, is not void: the vendee in such case takes the interest conveyed, subject to every defence against his vendor, and holds it precisely as he held it, in every respect, as to other persons. (*Merrick & Fenno vs. Hutt*, 15 *Ark. Rep.* 344.)

[The above, by the Hon. C. C. SCOTT, Judge.]

Where a pre-emption claimant applies to a court of equity to enforce his pre-emption claim against parties in possession, claiming under a legal title, they may well set up the fraud of the complainants in establishing the pre-emption right, though their interest in the subject was acquired subsequent to the fraud.

On a bill filed by a pre-emption claimant, whose rights are resisted on the ground of fraud in establishing the pre-emption, the court will look to the finding of the Register and Receiver, not to determine whether there was sufficient evidence before them to authorize their finding, but whether their finding was not superinduced by fraud on the part of the pre-emption claimant.

Where the representations, made to the Register and Receiver by the person claiming the pre-emption, and sustained by his other witnesses, were clearly calculated to deceive them as to occupation and cultivation, a court of chancery may, with propriety, disregard the finding of the Register and Receiver, and consider the pre-emption right at large upon the allegations and proof; and in doing so, hold those seeking to set it up against rights fairly and openly obtained, to the *onus probandi*.

Where, upon the whole testimony, a court of chancery finds a claim to a pre-emption colorable, and fraudulent in law, and that it was found in favor of the claimant by the Register and Receiver upon false testimony, this court will not enforce it against the parties holding under a legal title subsequently acquired from the Government.

[By the Court.]

Appeal from the Chancery Court for Pulaski County.

The Hon. HULBERT F. FAIRCHILD, Chancellor.

This cause was argued at great length, before the Hon. C. C. SCOTT and Hon. T. B. HANLY, Judges—the Hon. E. H. ENGLISH, Chief Justice, being disqualified—by Messrs. *Fowler & Stillwell*, for the appellants, and by Mr. *S. H. Hempstead* for the appellees, upon the testimony in relation to the alleged fraud, in proving the pre-emption right; the defence, made by some of the defendants, that they were purchasers without notice; and their claim to compensation for improvements: also by Messrs. *Watkins & Gallagher*, Messrs. *Cummins & Garland*, and Mr. *Bertrand* for the appellees.

FOWLER & STILLWELL, for the appellees.

The idea seemingly entertained by some of the counsel for the defence in this case, and also by the Chancellor, that the former decree in this case, by the Supreme Court of the United States, is *not* "*the law of the case*"—to govern it absolutely, as far as that decree went—because amendments and new parties were subsequently made, is, at least, a *novel* one.

The issue is substantially the same now, as presented before; and such changes as have been made only present the complainants' rights much more clearly and strongly, and render the former adjudication much more emphatically "*the law of the case*," and more conclusive now, than it could possibly have been without such change. For instance, among other new facts of like nature, we now show a regular entry on the *tract-book* and on the *plats* in the Land Office, which was not shown before the former decision.

And the law, in all such cases, is well settled, and without an exception, that an adjudication of the Supreme Court of the

United States is conclusive *down to the very point decided*, and becomes *unchangeably* the "law of the case," and nothing behind that point can ever be opened or revived afterwards. See *Himely vs. Rose*, 2 *Cond. Rep.* 267; *Nelson et al. vs. Hubbard et al.*, 13 *Ark. Rep.* 256; *Fontenberry vs. Frazier*, 5 *Ib.* 202; *Story, Ex parte*, 12 *Pet. Rep.* 339; *Sibbald vs. The United States*, *Ib.* 492; *West vs. Brashear*, 14 *Pet. Rep.* 54; *Porter vs Hanly*, 10 *Ark. Rep.* 191; *Boyle vs. Grundy*, 9 *Pet. Rep.* 290; *Skillen vs. May*, 2 *Cond. Rep.* 367; *The Santa Maria*, 6 *Ib.* 178, 180; *Walker et al. vs. Walker*, 7 *Ark. Rep.* 556; *Pulaski County vs. Lincoln*, 13 *Ib.* 104; *Rector vs. Danley*, 14 *Ib.* 306; *Story vs. Livingston*, 13 *Pet. Rep.* 367.

In this case, then, what can be enquired into under that former decision, but the question of fraud, and purchase, *bona fide*, without notice? And by the well understood principles of equity, we think both of these must be determined against the defence.

As a general principle of law, it is well settled, that where the matter adjudicated is by a court of peculiar and exclusive jurisdiction and where no appeal is allowed, or revising power given by law, such adjudication is final and conclusive upon all other courts and persons, until *successfully impeached upon the charge of fraud. Lessee of Rhoades et al. vs. Selin et al.*, 4 *Wash. C. C. Rep.* 721; *Wilcox vs. Jackson*, 13 *Pet. Rep.* 511; *Gelston vs. Hoyt*, 1 *John. Ch. Rep.* 546; *Voorhees vs. The U. S. Bank*, 10 *Pet. Rep.* 478; *United States vs. Arredondo et al.*, 6 *Ib.* 729; *Blount and wife vs. Darrack*, 4 *Wash. C. C. Rep.* 659; *Foley vs. Harrison et al.*, 15 *How. U. S. Rep.* 448; *Borden vs. The State &c.*, 11 *Ark. Rep.* 547.

And embraced within this general principle are the adjudications of the Register and Receiver of Land Offices, as to the facts of possession, cultivation and other acts essential to the validity of the pre-emptor's right—questions directly submitted to them and adjudicated upon, and within their exclusive jurisdiction. See *Wilcox vs. Jackson*, 13 *Pet. Rep.* 511; *Nicks' heirs vs. Rector*, 4 *Ark.*

Rep. 283; 2 *Laws, Inst. and Ops.*, (*Ed.* 1838,) *p.* 85, *No.* 57; *Gaines et al. vs. Hale*, 16 *Ark. Rep.* 25; *McGhee vs. Wright*, 16 *Ill. Rep.* 557; *Mitchell vs. Cobb*, 13 *Ala. Rep.* 139; *Lytle et al. vs. The State et al.*, 9 *How. U. S. Rep.* 333; *Lewis vs. Lewis*, 9 *Misso. Rep.* 186; *Perry vs. O'Hanlon*, 11 *Ib.* 591; 12 *Ark. Rep.* 21, *et seq.*

And is binding in a court of chancery as well as other courts. 16 *Ill. Rep.* 557.

Even a surveyor appointed by act of Congress, to make a partition of lands, becomes, in that matter, virtually a *judge;* and his act is *final* and *conclusive* in the absence of *fraud.* See *Haydel vs. Dufresne*, 17 *How. U. S. Rep.* 30.

Such judgments, or any other final judgments, may be impeached in equity for *fraud*, but never on account of an *irregularity.* See *Shottenkirk vs. Wheeler*, 3 *John. Ch. Rep.* 275.

And, however grossly ignorant such a court or officer may be of the duties confided, or regardless of the rights of parties, yet this cannot affect the jurisdiction, or impair the judgment, in the absence of fraud. See *Woodruff vs. Cook*, 2 *Edw. Ch. Rep.* 261.

We insist, as to the attempted imputation of fraud, made by wholesale in many of the answers, that *none of them* occupy a position to give them the right, in law or equity, to avail themselves of the charge, even were it as true as it is false.

None of them had any interest in the land, or any claim to it, of any sort, at the time the grant of the pre-emption was obtained: and even were it done by fraud, what right had any of them to complain? Was any one of them injured by it? It was a question between Cloyes and the United States alone; and none but the United States was, or could be injured by it, or have any ground of complaint. After the grant was made, if these defendants thrust themselves in, it was in *their own wrong.* They had not been injured: and if they so came into the controversy, they had *no grievance of their own* to redress; and had no right to intervene as the champions of the United

States, which, itself, was content with the grant to Cloyes, and satisfied that it was *fairly* and legitimately obtained.

Equity never admits of *volunteers* thus bringing up a law suit, and thrusting themselves into the controversies of others.

Fraud must be accompanied by injury, in order to entitle a party to redress. The party seeking relief must be damaged by the alleged act. See *Halls vs. Thompson*, 1 *Sm. & Marsh, Rep.* 489; *Irons vs. Reyburn*, 11 *Ark. Rep.* 389; *Cunningham vs. Ashley, &c.*, 12 *Ark. Rep.* 303, 320; 1 *Story Eq. Jur., sec.* 203; *Co. Lit.* 357, *b.*; *Young vs. Bumpass, Freem. Ch. Rep.* 250; *Juzan vs. Toulmin*, 9 *Ala. Rep.* (*n. s.*) 684; *Conard vs. Nicall*, 4 *Pet. Rep.* 296, 310; *United States vs. Arredondo, et al.*, 6 *Ib.* 716; *Meux vs. Anthony*, 11 *Ark. Rep.* 418; *Clark et al. vs. White*, 12 *Pet. Rep.* 196; *Edmondson vs. Hildreth*, 16 *Ill. Rep.* 215; 2 *Tenn. Rep.* 153.

A party who attempts to set aside the grant of a pre-emption, by the land officers, on the ground of fraud, must show that he was *injured by such fraud.* See *Cunningham vs. Ashley, &c.*, 12 *Ark. Rep.* 303.

And how could a man be *injured* unless he had an *interest* or claim, *at the time?*

If a fraud existed in this case at all, it was as much a *suppressio veri*, or more than an *expressio falsi;* and to constitute a fraud in such cases, the act suppressed must be such as *Cloyes*, one party, was under a legal or equitable obligation to communicate to *the other party*, and which such *other party* (the United States,) *had a right to know from him.* See *Juzan vs. Toulmin*, 9 *Ala. Rep.* (*n. s.*) 684; *Mills vs. Lee*, 6 *Mon. Rep.* 98, *et seq.*; *Taylor &c. vs. Bradshaw*, *Ib.* 149; 1 *Story Eq. Jur. sec.* 197, 207; *Young vs. Bumpass, Freem. Ch. Rep.* 249.

And what right had *any of these defendants* to have facts communicated to *them* by Cloyes about his pre-emption, *when they had no interest in the matter?* and only have come in now as *volunteers*, essaying to redress an alleged wrong inflicted on *another.* They are not even *assignees* of a *trust*, which they seek

to redress. And if they were, equity would order them out of its portals; for it takes cognizance of no such cases, in behalf of *assignees* or *volunteers*.

All of these *defendants*, at the time of the *contract* and *grant*, from the United States to Cloyes, by the land officers as its authorized agents, (for this grant is a contract,) were mere strangers to it, had no vested or other interest to be affected by it; and, in the language of the court, in the case of *Meux vs. Anthony et al.*, "*it is very clear, had no right to interfere with the contract made between them,*" or "capriciously attempt to disturb it, though it might be ever so fraudulent." See 11 *Ark. Rep.* 418, 420, 422; also *Wynn vs. Morris et al.*, 16 *Ib.* 434.

In order to entitle persons to enquire into such alleged *fraud*, they *necessarily* ought to have had (which they had not,) a *vested interest* in the land *at the time of its perpetration.* See *Lightfoot vs. Colgin*, 5 *Munf. Rep.* 71; *Cook vs. Cook et al.*, 12 *Ark. Rep.* 387; 11 *Ib.* 418, *et seq.*; 16 *Ib.* 434; *Steel vs. Worthington*, 2 *Ham. Ohio Rep.* 192; *Coleman vs. Carr*, 1 *Walker Miss. Rep.* 258; 16 *Ill. Rep.* 215, *&c.*

The *grant* of the pre-emption right by *act of Congress* was a *contract:* and its *consummation* by the *land officers a contract.* See *New Jersy vs. Wilson*, 2 *Cond. Rep.* 457; *Fletcher vs. Peck*, *Ib.* 321; *McCracken vs. Hayward*, 2 *How. U. S. Rep.* 613.

And the preceding authorities on this question of fraud, abundantly show that *fraud* in a *contract* cannot be complained of by *third* person, *unless* interested in the *subject* matter of the *contract*, *at the time* of the fraud.

Where a person is actually imposed upon, by *fraud* in a contract, although he might himself have set it aside, yet, if he is content to let it stand, *his assignee* of the contract will not be permitted to come into court to *avoid it.* See 16 *Ill. Rep.* 215, to 217.

And are not every one of these defendants, in the most favorable attitude which can be assigned to them, but the *assignees* of the United States, the pretended party defrauded? And

though the United States might have been heard to complain, these defendants, their assignees, cannot.

Besides, a *decree* was rendered in favor of the complainants' right to the land, by the Register and Receiver, which was *final*, and has been so adjudicated in this case; and they seek no aid from this court to *perfect* that decree or judgment, which is already *perfect in itself*. But, upon that decree or judgment, they are now prosecuting a suit for the *possession of their land;* for rents; to remove the cloud from their title, and to compel the defendants, who have stepped into Governor Pope's shoes, with notice of the trust which he was bound to execute, *to execute it themselves*—as trustees succeeding to the trust, which he ought to have executed by conveying the land to complainants. The decree of the land officers, whilst it stands, is *conclusive* as to the *title* of the complainants. It cannot be assailed *collaterally*. It can *only* be *impeached* for *fraud* in a *direct proceeding*, by either an original or *cross-bill*. And defendants not having so impeached, or attempted to impeach it, they cannot be permitted to speak about *fraud*, as a mere matter of *defence*. Such a thing is unheard of in the annals of chancery. See *Dooley vs. Dooley*, 14 *Ark. Rep.* 124; *Patterson vs. Taylor* 7 *How. U. S. Rep.* 159; *Saunders vs. Wood*, 15 *Ark. Rep.* 26; *Patterson vs. Hull*, 9 *Cow. Rep.* 756.

In the very correct language of this court, in the case of *Dooley et al. vs. Dooley, &c.*, the denial of the truth of the settlement (in this case of the valid allowance of the pre-emption,) "in the answer amounts to nothing." 14 *Ark. Rep.* 125.

In *Wynn vs. Garland*, Wynn claimed the land under the pre-emption act of 1838, and Garland claimed it through Hemphill's pre-emption under the act of 1830. Wynn's pre-emption was first proved up, but was set aside upon Hemphill's making his proof, and the patent was issued to Garland as assignee of Hemphill. It was contended in argument, that as Wynn's settlement and occupation were subsequent to Hemphill's, he could not impeach his title. But this was overruled, and Wynn's right to

impeach was put upon the ground *expressly*, that at the time Hemphill made his proof, "the claim of Wynn had vested in the land. See 16 *Ark. Rep.* 470, 471. This case fully sustains the rule we contend for: and in the case of *Bernard vs. Ashley et al.*, 18 *How. U. S. Rep.*, although the question is not decided in express terms, the view the court took of it appears clear enough.

In *Fermor's case*, 3 *Coke* 77, cited by Mr. Hempstead, the lessor was not only injured by the fraud, but the party committing the fraud was holding under him: and in *Rector vs. Welch*, 1 *Misso. Rep.* 238, the plaintiff's right to impeach the pre-emption certificate, was, by the court, put upon the ground that his title was the oldest of the two. He occupied the position that the appellees do *not* occupy here. They are assailing an *older*, not a *younger* right.

And here we might safely rest our case; because the foregoing principles and authorities, decisions of the highest tribunals in the Union, including this honorable court, *have settled most conclusively that none of the appellants and appellees have any right in this controversy, that can be litigated in this forum*, or which have any claim to its interposition.

Much has been said in this case, on the part of the defence, as to *lapse of time, stale demands*, sleeping on pretended rights, *statute of limitations*, and the like, none of which have any lodgment, whatever, amongst the facts, either alleged or proved.

And first, how could any statute of limitations apply to Fowler, who had no right, until after the suit was commenced? And if he acquired a right, *pendente lite*, from those entitled to protection by minority, does not he step into their stead, precisely as their right stood, when they transferred to him? To present their objection on this point, is a response to it. A purchaser, *pendente lite*, may be made a party to the suit, either plaintiff or defendant, though not often necessary that he should be. See *Carman vs. Watson*, 1 *How.* (*Miss.*) *Rep.* 333; *Story Eq. Pl. sec.* 156, 194; *Sugden on Vend.* (*Am. Ed.* 1828,) *p.* 527, (737.)

Cloyes, the pre-emptor, died *before* the title passed from the United States Government; and the statute could not have commenced running in his life-time, both for this reason, and because he himself had exclusive possession. Because, until the title passes out of the government, the statute never begins to run. See *Bledsoe vs. Doe &c.*, 4 *How.* (*Miss.*) *Rep.* 23; *Lindsey vs. Miller, Lessee*, 6 *Pet. Rep.* 673; *Spellman vs. Curtenius*, 12 *Ill. Rep.* 415.

When the title passed from the government, whether we look to the patent to Governor Pope, or the entry made by Cloyes' heirs, such heirs were *all minors;* so all of them continued to be, until the 17th day of June, 1843, when the eldest arrived at full age; consequently, neither lapse of time, or statute of limitations, as to any intermediate right, or adverse possession, could have any place or begin to run until the 17th of June, 1843, which was after the suit was instituted. Indeed, the law seems to be well settled, and reason is with it, that the statute could not begin to run, until the youngest minor arrived at full age, which was on the 22d of January, 1847, some four years after the suit was commenced, and only about four years prior to filing the amended bill, making new parties.

For, where *all* the complainants are minors, when the cause of action accrued—when possession was taken by defendants—they are within the saving provision of the statute of limitations, and it does not begin to run against them until they all arrive at full age. See *Shute vs. Wade*, 5 *Yerg. Rep.* 9; *McIntire vs. Funk*, 5 *Lit. Rep.* 36; *Carter vs. Cantrell*, 16 *Ark. Rep.* 164.

And, even if all the complainants had been adults, the statute could not begin to run against them, until there was an adverse possession of the land. *Harlock vs. Jackson*, 1 *Const.* (*S. C.*) *Rep.* 135; *Rose vs. Daniel*, 3 *Bre. Rep.* 444; *Brown vs. Kimball*, 25 *Wend. Rep.* 267. And adverse possession, in order to protect a defendant, under the statute of limitations, will never be presumed, but must be proved. *Smoot vs. Mathew*, 8 *Misso.*

Rep. 525; *Jackson vs. Sharpe* 9 *J. R.* 167; *Jackson vs. Waters*, 12 *Ib.* 168.

And each defendant here must stand upon his own possession alone, personal or derived, and cannot protect himself by the separate possession of any co-defendant. For where a tract of land is subdivided into different lots, as this was, the occupancy of one or more of those lots does not give a constructive possession, or create an adverse possession of other parts, or lots, of the tract. See *Jackson vs. Richards*, 6 *Cow. Rep.* 623.

And any adverse possession commenced during plaintiff's infancy cannot affect his rights, until the number of years given by the statute of limitations expire for him to commence suit in, after infancy ceases. *Hudson vs. Hudson*, *Munf. Rep.* 357.

Now, if it has been alleged and proven, (which we deny,) that any of these defendants were in actual adverse possession of part of the land, prior to the enforcement of the limitation act of March 29th, 1839, and for seven years had held such possession, and paid taxes on the land, (which has not been proved,) the plaintiffs would, nevertheless, by the Territorial statute, have been entitled to *seven years* after their disabilities had been removed, within which to sue. See *Steele & McCampbell's Digest*, *p.* 382, *sec.* 3. Consequently, against such occupants, if any, plaintiffs would have been exempt from the statute of limitations until the 22d day of January, 1854—seven years after the arrival of the youngest at age: or, at any rate, until the 17th day of June, 1850—seven years after the eldest arrived at age.

Under the statute, then, it is utterly impossible that any defendant can be protected against the plaintiffs' rights.

And this view of the statute of limitations, which seems to be well settled, as a general principle, is clearly confirmed by our statute of the 20th March, 1839, the one applicable to most of the defendants, and which does not fairly admit of any other construction. See *Ark. Digest*, (*Ed.* 1848,) *p.* 695, *secs.* 3, 4.

This act gives minors five years after they arrive at full age, to sue: which would have protected them until the 22d January, 1852, long after all the bills were filed. Under this statute it cannot be doubted, that *all* the minor children of the pre-emptor must be embraced in the word "person," and *all* protected under it, until *all* arrived at full age.

Again, on the 12th March, 1840, two of the heirs, Mrs. Hooper and Mrs. Lytle, were *feme coverts*, and the other a minor; and those who, on that day, or afterwards, took possession, entered, and the cause of action arose, when all the heirs were minors, and two of them married women: hence, as to them, the statute of limitations has not yet begun to run, and cannot, until all of the disabilities have been removed. Whilst Mrs. Lytle, who still lives, remains a *feme covert*, all are protected against the statute. See *Ark. Digest*, (*Ed. of* 1848,) *p.* 700, *sec.* 30; 5 *Yerg.* 9; 5 *Litt. Rep.* 36; 16 *Ark. Rep.* 164; *Mercer vs. Selden*, 1 *How. U. S. Rep.* 52; *Demarest vs. Winkoop*, 3 *John. Rep.* 138; *McFarland vs. Stone*, 17 *Verm. Rep.* 174.

And as to the statute of limitations, all the rights, benefits, or disadvantages, and all the rules applicable to ejectment, must be applied, in equity, to this case. *Kane vs. Bloodgood*, 7 *John. Ch. Rep.* 113; *Frame vs. Kenny*, 2 *A. K. Marsh. Rep.* 145; *Coulson vs. Walton*, 9 *Pet. Rep.* 82.

Even if true, that Fowler is not properly a party, yet, the complainants, who are rightfully such, cannot be prejudiced by it. They should neither be barred by decree nor turned off to begin a new suit. But on the hearing, the name of any discovered to have no right should have been stricken out, by order of the court, and a decree rendered in favor of the others, who were shown to have title. *Tallmadge vs. Pell*, 9 *Paige Rep.* 412; *Story's Eq. Pl. sec.* 283. And this would be the proper course, in the discretion of the court, in equitable suits at law. *Lillard vs. Rucker*, 9 *Yerg. Rep.* 74; *Carson vs. Smart*, 12 *N. C. Rep.* (*Ire. Law*) 370.

As to the question of the pretended or alleged invalidity of

the deeds made to Fowler, by his co-plaintiffs, it is of very slight importance in this case, except merely to have the law correctly laid down, as the question is, for the first time, presented to this court.

If invalid, it cannot affect the decision or result of the case; because his name would simply be stricken from the record, and a decree rendered in favor of those entitled to it.

And first, who has any right, in law or equity, to question these conveyances, but his co-plaintiffs, who are still co-operating with him? Nobody else.

These conveyances are not illegal, on account of the adverse possession, (as in old times they would have been in England,) because, good sense has repudiated that folly; and so has the Legislature of Arkansas. See *Digest*, (*Ed.* 1848,) *p.* 265, *sec.* 6.

There is no statute here declaring such contracts champerty or maintainance; and, consequently, we have only to look to the common law of England, as liberalized in modern time, and as modified by the statutes of *Edward* and *Henry*, which are, to some extent, in force in Arkansas.

No *penalty* exists against it here; and if declared illegal by our courts, it can only be upon the ancient rule of law, in the dark ages, which has now become obsolete even in England.

Under the common law, as now administered and modified by the two British statutes above referred to, in order to render such a conveyance invalid, the title purchased must be a legal one, from a private person, not at a judicial sale, and must be held adversely. See *Whitaker vs. Cone*, *in note*, 2 *John. Cas.* (*Ed.* 1848,) 59.

Hence, our statute authorizing the sale of lands held adversely, must operate as a repeal of the English statutes.

And where there is no statute against it, it is as competent for a litigant to regulate the amount of his attorney's fees, by the value, or half the value, or any other part of the value of the property in controversy, as in any other mode. *Wilhite vs. Roberts*, 4 *Dana Rep.* 174.

Champerty is defined to be a bargain with the party litigant, to have part of the thing in suit, if he prevail thereon, for the maintainance of the suit. *Williamss vs. Protheroe*, 3 *Younge & Jerv. Rep.* 135.

In these deeds, there is no condition at all for the maintainance of the suit; no money to be advanced; no condition or contingency, whatever; but they are absolute and unconditional, as compensation for his services only, let the suit go as it may. How can such a contract be champertous? See 2 *Yerg. Rep.* 118.

The contract in the above case of *William vs. Protheroe*, was declared not to be invalid; yet, in that case, the vendee agreed to bear the expenses of the suit, then already commenced by the vendor, against the occupant of the land, for by-gone rent, and was to have the rent to be recovered, and was to bring another suit, bear the expenses, and receive the rents in like manner.

Even a fee absolutely and unqualifiedly contingent, and part of the property recovered will be enforced in equity. *Wylie vs. Cox*, 15 *How. U. S. Rep.* 419.

And whatever may have been the ancient or modern views, as to the morality or legality of such contracts, where statutes existed against them; it is clearly settled in law, as well as in morals, that where no such statute is in force, it is considered a grave and highly honorable duty of the profession to investigate the claims, and aid in redressing the wrongs of the indigent and injured; and if such indigent person, who, in the opinion of the attorney, has probable cause of action, employ him and agree to pay a large fee, unconditionally, let the suit eventuate as it may, although the large fee might be wholly worthless unless the suit were gained, yet such contract would not be champertous: and this, although the ability of the client to pay depends wholly on the success of the suit. *Moore vs. McCampbell Academy*, 9 *Yerg. Rep.* 118; *Smith vs. Thompson*, 7 *Ben. Mon.* 310; *Shapley vs. Bellows*, 4 *N. Hamp. Rep.* 355. In such cases the attorney may even lawfully advance money, necessary to the prosecution of

the suit, *on the credit of the cause.* 4 *N. Hamp. Rep.* 355; 3 *Younge & Jervis Rep.* 131.

And that reasonable contracts of the kind, such as this, should not only be tolerated, but encouraged within proper bounds, could not be better illustrated than by the facts of the present case itself.

S. H. HEMPSTEAD, for appellees. The proposition now to be considered is, whether the decree of the Chancellor ought to be affirmed; and I propose to present the various questions growing out of it, reserving for the last the main ground of defence, namely: that the pre-emption of Cloyes was a gross fraud on the law, and was fraudulent in fact.

And first: it appears that one of the complainants, Fowler, is to receive a part of the claim for the prosecution of it; and we are to consider whether this fact falls within the definition and meaning of *Champerty.*

A person is not permitted, either as an attorney or solicitor, or as counsel, to contract with his client previous to the termination of the suit, for a part of the demand or subject matter of the litigation, as a compensation for services. *Thurston vs. Percival,* 1 *Pick.* 415; *Livingston vs. Cornell,* 2 *Mart. La. Rep.* 281; *Key vs. Vattier,* 1 *Ham.* 132; *Rust vs. Larue,* 4 *Litt.* 411; *Caldwell vs. Shepherd,* 6 *Mon.* 389; *In re Beakley,* 5 *Paige* 311; *Merritt vs. Lambert,* 10 *Paige* 355.

No attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. *Hall vs. Hallett,* 1 *Cox's Chan. Cas.* 139, *per Ld. Hardwicke; Miles vs. Esurie,* 1 *McCord's Ch. Rep.* 524.

Hawkins says, champerty is "the unlawful maintainance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it. 1 *Hawk. P. C.* 463; 2 *Inst.* 208; *Co. Lit.* 368; *Stanly vs. Jones, Moore & Payne* 193; *S. C.* 7 *Bing.* 369. All maintainance, says *Hawkins,* is strictly pro-

hibited by the common law as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits which, perhaps, they would not venture to go on in, upon their own bottoms. 1 *Hawk. P. C.* 472.

Maintainance of which champerty is a branch, is an offence at common law. 2 *Inst.* 208; 1 *Russell on Crimes*, 182; 6 *Bac. Abr. Maintainance* (*C.*) 414; *Peckel vs. Watson*, 8 *Mees. & W.* 691.

A contract amounting to champerty is not voidable merely as between the parties to it; but is absolutely void. *Thurston vs. Percival*, 1 *Pick.* 417; *Merritt vs. Lambert*, 10 *Paige* 352; *Arden vs. Patterson*, 5 *Johnson's Ch. Rep.* 44; 18 *Vesey Jr.*, 501.

"The purchase of a law suit by an attorney is champerty," (says Chancellor KENT, in the last cited case, 48,) "in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character, to speculate in law suits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community." And the Chancellor set aside the contract in that case as void in law, and necessarily leading to fraud and corruption.

In *Strachan vs. Brander*, 1 *Eden* 303, the Lord KEEPER ordered a bond taken by an attorney, to be delivered up as unconscionable, savoring of champerty and dangerous to public justice. *Wallis vs. Duke of Portland*, 3 *Ves. Jr.*, 494. There are numerous cases, in which, on principles of public policy, the court will not suffer a contract between an attorney and client to stand. *Arden vs. Patterson*, 5 *Johnson's Chan. Rep.* 49. And in *Wood vs. Downes*, 18 *Vesey* 120, an agreement between the attorney and client was set aside, because it savored of champerty.

In equity, although a transaction may not strictly answer the

definition of champerty, yet, an agreement which savors of that illegality cannot be enforced. *Burke vs. Green*, 2 *Ball & Beat.* 522; *Conny vs. Caulfeild, id.* 268; *Marques Chomondeley vs. Lord Clinton*, 2 *Jac. & Walk.* 136; *Powell vs. Knowler*, 2 *Atkinson* 224.

In *Stevens vs. Bagnell*, 15 *Vesey Jr.*, 156, Sir WILLIAM GRANT, Master of the Rolls, said an agreement which amounted to that species of maintainance called champerty, *viz:* the unlawful maintainance of a suit in consideration of a bargain for part of the thing or some profit out of it, was void from the beginning.

And BLACKSTONE says, champerty signifies the purchasing of a suit or right of suing; and, he adds, "these pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law, and they were punished by the forfeiture of a third part of their goods and perpetual infamy." 4 *Bl. Com.* 135.

The distinction between maintainance and champerty seems to be this: where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintainance only; but where he stipulates to receive part of the thing in suit, he is guilty of champerty. 7 *Dow. & Ry.* 846; 5 *Barn. & Cres.* 188. And any person, not a party, may avoid it, in the same manner as any illegal contract may be avoided. There can be no question that the contracts between Absalom Fowler, the attorney, and the heirs of Cloyes, his clients, were champertous.

Fowler, having no interest recognized by law, improperly made himself a party complainant to the bill; and the only enquiry is, as to the effect of that movement.

It must certainly appear that all the complainants have an interest in the subject matter of the litigation. *King of Spain vs. Machado*, 4 *Russ.* 225; *Cuff vs. Platell*, 4 *Russ.* 242; *Dias vs.*

Bonchand, 10 *Paige* 464; *Clarkson vs. De Peyster*, 3 *Paige* 336. See, also, *Clason vs. Lawrence*, 3 *Edw. Ch. Rep.* 52; *Story's Eq. Pl*, 279, 280; *Yeaton vs. Lenox*, 8 *Peters* 123.

A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court. *Smith vs. Clay*, 3 *Bro. Ch. Rep.* 639, 640. These principles are fully adopted in *Bowman vs. Wathen*, 1 *How. S. C. Rep.* 189. This doctrine of an equitable bar by lapse of time, has been ruled in the Supreme Court, in a variety of cases, and has become the settled law of that court. *Prevost vs. Grats*, 6 *Wheat.* 481; *Hughes vs. Edwards*, 9 *Wheat.* 489; *Miller's Heirs vs. McIntyre*, 6 *Peters* 61; *Piatt vs. Vattier*, 9 *Peters* 405; *McKnight vs. Taylor*, 1 *How. S. C. Rep.* 161.

Courts of equity, by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular claim or demand. *Beckford vs. Wade*, 17 *Vesey* 87; *Mason vs. Crosby*, *Davis Rep.* 313.

In *Harpending vs. The Dutch Church*, 16 *Peters* 486, it was decided that if it appears by the bill that the complainant, by the statutes of the state, has no standing in court, and for the sake of repose and the common good of society, is not permitted to sue his adversary, it is the rule of the court not to proceed further, and dismiss the bill. And this, where lapse of time is not relied on, as it is in the answers in this case, as a substantive ground of defence. And the Supreme Court of Arkansas, in *Taylor vs.*

Adams, 14 *Ark.* 62, acted on the same doctrine, holding that the objection, as to the stalenass of the demand, need not be plead or insisted on in the answer, but might be made at the hearing; and indeed that when the proofs disclosed such a case, the court would of its own motion deny relief to a party who had slept on his right. *Davis vs. Tarwater*, 15 *Ark.* 295.

The lapse of time, sufficient to create a bar, must, in a great measure, depend on the circumstances of each particular case. Less than the period of limitation will sometimes be sufficient; although generally, the court will adopt the period prescribed by the statute of limitations, and hold equitable rights barred in the same time legal rights would be barred at law. *Miller vs. McIntire*, 6 *Peters* 61; *Elmendorf vs. Taylor*, 10 *Wheaton* 152; *Demarest vs. Winkoop*, 3 *Johns. Ch. Rep.* 139.

Every one having a claim is required to bring it forward in a reasonable time. Laches and neglect are discountenanced, and the public good requires that there should be an end to litigation.

It is clear, that laches and neglect have attended the prosecution of this claim. The proof of Nathan Cloyes was filed in the District Land Office at Batesville, on the 23d April, 1831; and the pre-emption allowed on the 28th May, 1831, as to the land in controversy. The defendants claim under a purchase at public sale on the 4th Monday in October, 1833, and possession since that time.

The possession of successive holders of land under the same title may be added together to make out a complete defence under the statute of limitations. *Alexander vs. Pendleton*, 8 *Cranch* 470; *Angell on Limitation*, 446, 447; *Overfield vs. Christie*, 7 *Serg. & Rawle* 177; *Melvin vs. Proprietors of Locks*, 5 *Met.* 15; *Fanning vs. Wilcox*, 3 *Day* 269.

And in Kentucky it has been held, that it can make no difference whether the possession be held uniformly under one title or at different times under different titles, nor whether the possession be held by the same or a succession of individuals, provided

the *claim* of *title* has been *adverse* to that of the plaintiff, and the *possession* has been *continued* and *uninterrupted*. *Shannon vs. Kin ney*, 1 *A. K. Marsh.* 4; *Hord vs. Walton*, 2 *A. K. Marsh.* 620; *Angell on Limitation*, 448.

It is not necessary that the person claiming the benefit of the statute of limitations, should have a good title, or any title but possession. Hence, *color* of *title* even under a *void* and *worthless deed*, has always been received as evidence that the person in possession claims for *himself*, and, of course, adversely to all the world. *Pillow vs. Roberts*, 13 *How. S. C. Rep.* 472; *S. C.* 7 *Eng.* 822.

In this case, the title of defendants had its inception on the 15th June, 1832, the date of the grant of the 1,000 acres. The selection in January, 1833, and the patent in November, 1833, *had relation back to that time, as far as title is concerned.* There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance, shall be taken together as one act, and operate from the substantial part by relation. 5 *Cruise's Digest*, 510, 511; *Jackson vs. McCall*, 3 *Cowen* 80; *Heath vs. Ross*, 12 *Johns.* 140; *Landes vs. Brant*, 10 *How. S. C. Rep.* 372; *Lessieur vs. Price*, 12 *How. S. C. Rep.* 77; *Peyton vs. Stith*, 5 *Peters* 492.

It would seem to be clear enough, that no right could accrue to the heirs of Cloyes before the 5th of March, 1834, when the entrance money was allowed to be received under the direction of the Secretary of the Treasury for the purpose of allowing an asserted right to be tried, and not to give any new right. No right then accrued, as will be hereafter shown. But let us take that, for argument sake, as the proper point of time, and see how the question stands on the score of limitation, supposing that a valid right existed.

By the act of limitation, which went into force 20th March, 1839, every action for the recovery of lands or tenements, or the possession thereof, was prohibited, where the plaintiff, his ancestor, predecessor or grantor, had not been seized or possessed

within ten years before the commencement of suit. It contained a saving in favor of minority, insanity and coverture; and allowed five years after such disability should be removed to sue. *Digest*, 495, 496.

When the cause of action or right accrued, infancy was the only disability. The females subsequently married, but the statute itself forbids the accumulation of one disability upon another, where they do not spring into being at the same time. *Digest*, *secs.* 28, 30, *p.* 700. Were it otherwise, "a right might travel through minorities through two centuries." 3 *J. C. Rep.* 139.

And without any statutory provision this doctrine would be enforced, because it has long been perfectly well settled that disabilities cannot be accumulated upon each other, to save the right when they do not *all exist at the accrual of the cause of action.* And the reason is, that where the statute has once begun to run, it will not be impeded by any subsequent disability; and because, otherwise, there would practically be no limitation at all. This has been the rule from the statute of 21 James I., down to this time—a period of more than two hundred years. *Angell* 520, 521, 522, 523; *Guion vs. Bradley Academy*, 4 *Yerger* 250; *Doe vs. Shane*, 4 *Term Rep.* 307; *Eager vs. Commonwealth*, 4 *Mass.* 182; *Demarest vs. Wynkoop*, 3 *Johns. Ch. Rep.* 135; *Parsons vs. McCracken*, 9 *Leigh.* 495; *McCoy vs. Nicols*, 4 *How. Miss. Rep.* 31; *Hudson vs. Hudson*, 6 *Munf.* 352; *Fitzhugh vs. Anderson*, 2 *Hen. & Munf.* 289; *McDonald vs. Johns*, 4 *Yerg.* 258; *Crozier vs. Gano*, 1 *Bibb* 257.

What, then, is the effect of the bar, operating on some of the complainants, but not upon all? What is the effect on the suit? The following cases will show, that if one is barred all are barred. 3 *Murph.* 577; 7 *Cranch* 157; 3 *Ala.* 747; 1 *Lit. Sel. Cas.* 436; 1 *A. K. Marsh.* 39; 2 *A. K. Marsh.* 384; 3 *A. K. Marsh.* 362, 554; 4 *Day* 310, 265; 4 *Bibb* 412; 10 *Ohio* 11, 135; 2 *Litt.* 109.

In the case in 3 *A. K. Marsh.* 554, just cited, the court said

it was settled that the whole of the plaintiffs must labor under some disability to prevent the statute from operating as a bar, and that when the statute run against one, it run against all. 1 *Litt.* 296.

And so, where there has been an *adverse possession* during the time limited by the statute against tenants in common, one of whom is within the saving of the statute, the right of the others is not thereby saved. And so, if an estate descend to parceners, one of whom is under disability which continues for more than twenty years, the disability of the one does not preserve the title of the other. *Angell* 529, 530.

In *Marsteller vs. McClean*, 7 *Cranch* 156, it was decided in an action of trespass brought by several plaintiffs who were cotenants, and where a disability existed as to some, not all, that when the statute runs against one of two parties entited to a joint action, it operates as a bar to such action. *Lahiffe vs. Smart*, 1 *Bail.* 192.

In this case the right was joint, and no several actions could have been brought by the heirs of Cloyes; they were all bound to unite; and hence, it must follow that the loss of remedy by one is the loss of remedy by all, and that the adverse possession of the defendants is operative against all. Were it otherwise, the law would not be consistent with itself; nor would acts of limitation become acts of repose.

It has been already demonstrated, that among several complainants, all must have right or none can recover; and as there are certainly two of the heirs barred by limitation, it follows, that as to the defendants alluded to, the bill was properly dismissed.

When the proof of pre-emption, supposing it at present to have been entirely sufficient, was taken and filed at the District Land Office at Batesville, on the 23d of April, 1831—the township plat had not been returned, and was not then in the District Land Office. The surveys had not been completed. We take it to be a settled proposition, that, until the public lands

of the United States are regularly surveyed according to law, by the proper authority, the surveys returned to the Surveyor General, and approved by him, and plats thereof filed in the District Land Offices, those officers have no jurisdiction over the public lands for any purpose whatever. Indeed, it is the mode designated by law, and the only one by which they know what are public lands, and what are reserved from sale and entry. They cannot sell or allow entries. The President himself—no department of the government could do it, for the latter are just as much bound by law as subordinates, and can only move in accordance with it.

There was no tender or offer to pay the government price for the land on the day of the allowance of the pre-emption, (28th May, 1831:) the offer to pay and the tender are of the essence of the right. A tender is not a mere formal matter—a ceremony that may or may not be performed at pleasure. Mr. Attorney General BUTLER, in an opinion dated 27th April, 1837, says: "A tender of payment made in due time, and of the requisite amount, is sufficient in ordinary cases between individuals to save the rights of the party making the tender. The same principle, in my judgment, should be applied, by the General Land Office, to cases arising under the land laws." He further says, a person claiming a right to enter several tracts, and making a tender for the whole takes upon himself the duty of showing that he has a legal right to purchase the whole, and if he fails as to one, the whole tender will be vitiated. In other words, the party making a tender in this form, does it at his own peril: and if it proves to be bad in part, it must, as a consequence of the character he has given it, be bad for the whole. 2 *Op. & Ins.* 118. And in this he is clearly sustained by the best authority. 9 *Bac. Abr. Tender* (*B.*) 313. A tender must be unconditional, for otherwise it will be bad; and if bad in part, it is bad as a whole. The money must be actually produced at the time of tender, or the production must be dispensed with expressly, or by some equivalent act. 10 *East.* 101; 2 *Maule & Selwyn* 86; 15 *Wend.* 638.

The tender is a production and manuel offer of the money, and regularly it should be counted down. *Dickinson vs. Shee*, 4 *Esp.* 68; *Brady vs. Jones*, 2 *Dowl. & Ryl.* 305; 5 *Term Rep.* 432.

In *Nicks' Heirs vs. Rector*, 4 *Ark.* 285, it was decided to be necessary to tender the purchase money to the government, before the pre-emption right became complete and fixed. In that case, the land officer refused to receive the moneys when tendered.

In the case of *Cunningham vs. Ashley*, 14 *How.* 277, it is very clear that a tender is held necessary, and without which, indeed, Cunningham never could have succeeded in establishing his pre-emption.

If the land officers were competent to take proof of the pre-emption, they were equally competent to receive the money for the land covered by the pre-emption, and might have held it until a formal entry could have been permitted, if in other respects proper. If one was good, so would the other be against the government.

The payment made by Ben Desha, on the 5th of March, 1834, for the heirs of Nathan Cloyes, cannot relate back to the proof of the pre-emption, because intervening rights had sprung up. Conceding, for the sake of argument, that it would be good as against the government itself; yet, it could not be, as against the government's grantee. But that payment was wholly unauthorized by law; for the reason that the official township plats had not then been returned to the Register's office.

It has been insisted that all the objections made to the pre-emption right of Cloyes have been decided against the defendants, and the claim established by the decision of the Supreme Court, in 9 *How. Rep.* 328, and cannot now be assailed or impeached except for fraud. It is true, that that decision is the law of the case as *then* presented; but it only decides that, on the face of the bill, the complainants appeared to have a valid pre-

emption right; that decision never could have been made on such facts as have now been introduced.

It has been said that, supposing a fraud to have been committed by Cloyes; yet, as the title of the defendants had not accrued at the time that fraud was perpetrated, they cannot, on an after acquired title, contest it, and cannot resist it now.

I understand it to be clear and indubitable law, that the decision of the land officers, allowing a pre-emption, is only conclusive where there is jurisdiction of the subject matter, where they proceed in obedience to, and not against law; and in the absence of fraud or unfairness. 2 *Op. & Ins.* 92; *Wilcox vs. Jackson*, 13 *Peters* 490; *Nick's heirs vs. Rector*, 4 *Ark.* 284; *Lytle vs. The State of Arkansas*, 9 *How. S. C. Rep.* 333. And in the case of *Wynn vs. Garland*, 17 *Ark. Rep.*, a pre-emption claim, which had been patented was set aside, and the patent canceled; because it appeared by proof that the claim was allowed, by the land officers, on evidence as to cultivation, which was either false or mistaken. And that was not as strong a case as that now before the court.

A decision, obtained by fraud or unfairness, may be assailed by any one, who has a right at the time of such assailment, which may be affected by it, whether he had a right or title before or not. It is a rule as old as the law itself, that fraud will vitiate every thing—acts of the legislature—judgments and decrees of courts and solemn deeds and contracts between men. *Fermor's case*, 3 *Co.* 77; 2 *Pickering* 192. It would be strange, indeed, if the *Ex parte* action of land officers, based on *Ex parte* affidavits, without any knowledge, on their part, whether such affidavits were true or false, and without any *litis contestatio*, or means by cross-examination, or otherwise, to ascertain the truth, and the whole truth; I say, it would be strange doctrine, that their action, or decision, if such it may be called, might not be questioned by any one interested, on account of want of jurisdiction, or being against law, or for fraud, or mistake. In *Rector vs. Welch.* 1

Mis. Rep. 335, it was held that the certificate of a land officer of a right of pre-emption, might be shown to have been procured by fraud or imposition, or to have been issued on an insufficient state of facts, and thus destroy its validity.

No argument can be needed to prove that the establishment of a pre-emption claim under the act of 29th May, 1830, without the occupation and cultivation required by that act, was a fraud of the worst imaginable character, and upon which every court and every person should frown with indignation. That the fraud has been shown in this case, by facts, beyond a reasonable doubt, no fair and candid mind can deny; and it cannot be possible that it is to be either covered up or upheld by technical rules or advantages, to the shame and reproach of justice.

Suppose it to be true, that the defendants have no title, or hold under defective titles, does it, therefore, follow that the complainants must succeed? Must they not at last prevail on the strength of their title, if they have any—succeed on their superior equity, if any exists? This is a court of equity, and can they recover without equity? Before the court will look to see whether the defendants have any title at all, it will first determine whether their claim, set up in the bill, is just and equitable; and if it is found to be infected with fraud, the court will remain passive—not move another step—and dismiss those prosecuting an unworthy claim, from its forum, to seek any other remedy they may have. Nothing can call the powers of a court of equity into action but good faith, conscience, and diligence, and when these are wanting, the court does nothing.

In no case, where a right asserted, has its inception in fraud, will a court of equity grant any relief whatever. It makes no difference, whether there is any defence or not; because the court will not outrage all the principles of equity, by lending its hand to consummate a fraud, or enable a party, or those claiming under him, to reap the fruits of it. On this, and other points in the case, I invite attention to the able opinion of the Chancellor, presented and appended to this argument.

Mr. Justice SCOTT:

This cause was brought here by appeal from the Chancery Court for Pulaski county.

The land in controversy is the north-west fractional quarter of section numbered two, in township number one north, range No. 12 west, east of the Quaqaw line, containing, according to the government surveys, thirty acres and 88-100 of an acre.

The original bill sought the recovery of this tract together with other adjoining lands. The allegations of that bill are sufficiently stated in the reports of the case in 7 *Eng. Rep.*, *p.* 9 *to* 21, and in *Howard's Rep.* 315, and need not here be repeated.

That bill was filed on the 23d of May, 1843. The cause having been taken to the Supreme Court at Washington, and remanded to this, the decree theretofore rendered was reversed and set aside in this court, and the case made upon that bill was remanded to the chancery side of the Circuit Court of Pulaski county, in the July term, 1850, with instructions, in accordance with the mandate of the Supreme Court at Washington, to overrule the demurrer to the bill, and give leave to both parties, complainants and defendants, to amend their pleadings, if they should request such leave, that the merits of the case might be fully presented as equity should require.

On the 17th of January, 1851, the parties complainants filed their first amended and supplemental bill, reciting the former proceedings thereon, exhibiting the interest of Absalom Fowler, acquired during the pendency of the original bill, *to wit:* by deeds bearing date, respectively, the first day of May, 1843, the 9th day of June, 1843, and the 10th day of July, 1850, expressing upon their face to have been executed upon the consideration of the "services" of the grantee, "rendered and to be rendered," in a suit or suits for the recovery of the land in controversy—abandoning all claim to the adjoining fractions of land, and confining it to the land now in controversy—alleging the death of some of the defendants, and as to some of whom, seeking an abatement

of their suit, and as to others, a revivor against their representatives; and making Charles P. Bertrand, Elias N. Conway, Thomas D. Merrick, Joseph Fenno, Alexander George, Louis George, Michael Tanti, Lemuel H. Goodrich and John J. Budd, new defendants: alleging that Nathan Cloyes, the elder, died in the summer of 1831; that, after his death, his widow and children resided upon the tract of land in controversy, in the exclusive possession thereof, and without molestation, until after they had paid the money for the same to the Receiver of Public Moneys, when they were unceremoniously put out of possession thereof by Governor Pope, and other influential men. That, at the death of Nathan, the elder, his four children were infants, the eldest of them, Lydia L., having been born on the 7th day of June, 1822, and married to the said Robinson on the 24th of January, 1839; that Mary E. was born on the 17th of April, 1824, and was married to the said Elias on the 12th of March, 1840, and died in September, 1850; that Nathan H. was born on the 22d of January, 1826, and William Thomas was born on the 26th of June, 1828, and died in the year 1840. That the new defendants above named had unlawfully entered upon the land in controversy, on separate plats and parcels thereof, at various and different periods of time, counting from one to twelve years back, with full knowledge of the rights of the complainants, and had so ever since respectively held and enjoyed the same. That the patent issued to Governor Pope, under which they claim title and possession, was issued by mistake or fraud, without any authority of law, and is null and void, and that each of said defendants well knew the same before acquiring any of their pretended rights, interests and title. And praying discovery, and for the possession of the land in controversy; and for a decree for rents and profits, and that the rights, titles and interests of the defendants may be divested and their muniments of title canceled, and that the title of the complainants may be quieted and made perfect, and for relief as prayed in the original bill, and for general relief.

On the 24th day of January, 1853, the complainants filed a fur-

ther amendment to their bill of complaint, which, after reciting the substance of the matters before set out, charges that on the 11th of May, 1833, the Commissioner of the General Land Office decided, and by letter of instruction of that date, communicated his decision to the Register at Little Rock, that no location could be made by the Governor of Arkansas, under the act of Congress making the 1000 acre grant upon lands to which a pre-emption right had been proved and recognized under the acts of the 29th of May, 1830, and the 14th of July, 1832. That on the 2d day of November, 1833, the Commissioner, by a letter of that date, officially instructed the Register and Receiver at Little Rock, in relation to pre-emption claims within the limits of Gov. Pope's location, that under directions to him by the Secretary of the Treasury, such pre-emption claimants, meaning thereby the said Nathan Cloyes's specially, should, at their election, either complete payments or withdraw them if already made: but that patents were not to be issued to them, and that if payments were made, in addition to the ordinary entries thereof made upon the books of the Land Office at Little Rock, and returns to the General Land Office, the officers at Little Rock should note the fact of the interference of such sales with the Governor's locations, and refer to the Secretary's decision, and also make similar entries upon the receipt and certificate of purchase. That afterwards, on the 5th of March, 1834, the heirs of Cloyes paid said Receiver $135 96¼ for the land in controversy, and other adjoining lands specified in the original bill, and received his receipt and certificate of purchase therefor, numbered 663. That, on the same day, the Register made his corresponding entry upon the tract book as made upon certificate no. 663; and, also, noted said entry upon the plats of said land then on file in the Land Office, by marking down in the margin of each of said fractions in red ink, the corresponding number 663; and thereupon he issued to said heirs a patent certificate endorsed as directed aforesaid, for all of said lands. All of which facts, they aver, existed at the time of the filing of the original bill, but were then wholly unknown to

the complainants or were imperfectly known, and had been defectively stated by them. But which matters, they charge, were, in law, constructive notice to all purchasers under the alleged void patent issued upon the locations of Gov. Pope. And they pray that James B. Johnson, and Mary W., his wife, may be made parties defendants, and for relief as before.

The complainants' bills were decreed as confessed against Richard C. Byrd, William J. Byrd, Jacob Mitchell, Henry F. Pendleton, Thomas S. Reynolds, Alexander George, William W. Daniel and John Morrison and Edney his wife. And the executrix and heirs of Chester Ashley, deceased, having filed a disclaimer, the bill was dismissed as to them. All the other defendants answered, upon which issues were formed.

These answers admit the making of the proof at the Batesville Land Office in 1831, and the allowance of the pre-emption claim to the fraction in controversy in that office, the 28th of May 1831, but deny that the claim was a fair and valid one; and aver that Cloyes, the alleged pre-emptor, was not entitled to the same under the act of Congress of the 29th of May, 1830, and the supplemental act of the 14th of July, 1832. That it was proven up by false testimony. That no tender was ever made at the Batesville Land Office, and none at the Little Rock Land Office, until the 5th of March, 1834, when the entry was made under the special instructions of the Commissioner of the General Land Office. That, at that time, the official plats of survey were not at the Land Office at Little Rock, and were not received there, regularly, until 11th day of April following; that the entry was therefore invalid. In a word, these defendants insist that the claim of Cloyes was a gross fraud on the law, and was fraudulent in fact, and that the allowance of it was null and void. They also admit by their answers that Governor Pope, under whom they claim, selected the land in controversy, in pursuance of the two acts of Congress of the 15th June, 1832, and 2d March, 1833, but deny that he did so illegally or by mistate. They also set up in their

answers the statute of limitations and the staleness and fraudulent character of the claim, and lapse of time.

The residue of the case material to be stated, may be presented in the language of the Chancellor, *to wit:*

"The defendants, Elias N. Conway, Woodruff, Watkins and Bertrand, admit notice of the claim; protesting that, with the communication of notice, assurance was always given of its fraudulent and iniquitous character, and they had supposed it to have been long ago abandoned, and that it had for years ceased to be the subject of conversation, or apprehension, till about the commencement of this suit.

"The other defendants, except the *pendente lite* purchasers, and the Trustees of the Real Estate Bank, claimed the protection of the court as purchasers in good faith, for valuable consideration, without notice of the complainants' claim, or of any incumbrance whatever. The Trustees of the Real Estate Bank did the same, except so far as they might be affected by the possible individual notice of some of the Directors of the Bank at the time of their purchase. All the defendants complain that by the delay in the assertion of this claim, and its consequent supposed abandonment, they, and those under whom they hold, have been lulled into security, so as to have made permanent, costly and valuable improvements, while the complainants by themselves, or their agents and attorneys, were consenting to, and conniving at such improvements and expenditures. They maintain that the complainants are estopped from now asserting their claim; or, if not, so far affected, that if the claim be adjudged good they ought to have pay for their improvements, and ask it on principles of equity, and upon a territorial statute of improvements and title. Other defences are set up in some answers, perhaps in all. The foregoing epitome likely embraces most of the causes of defence, that seem to be relied on as substantial.

"The defendant, Bertrand, made his answer a cross-bill, in which he charges that Ben Desha was entitled to one-half of

Cloyes pre-emption right, by deed and contract made to that effect before the claim was proven at Batesvllle; that he is dead, and has heirs; that William Cummins, by contract with, and conveyance from Desha, obtained right and title to the one-half of Desha's interest; that he is dead, has an heir; that he bought and took conveyance of part of the land in controversy from Cummins, and that if the claim be good, Cummins's one-fourth ought to be set-off, so as to include that property and save him, Bertrand, harmless, so far; and he makes the heirs of Desha and Cummins parties, and propounds interrogatories to them and the complainants in the amended bills."

This cross-bill was taken as confessed as against some of the defendants, and the others answered it; upon which latter issues were formed, but in the view we have taken of the case made, it will be unnecessary to state the purport of these answers.

On the 4th of September, 1855, the Chancellor, having fully heard the cause, dismissed the original, amended and supplemental bills of the complainants below, and also the cross-bill of Bertrand.

The complainants below as well as Bertrand, appealed to this court; but the appeal of the latter has not been prosecuted here.

The first point, mooted upon the opening of this record, was, as to the true attitude of the cause; and having considered that preliminary question, we doubt not that, for most practical purposes, it is substantially a new case. Not that the decision of the Supreme Court at Washington, when this cause was there, is not the law of the case in the ordinary legal sense of that phrase——on the contrary, it is in virtue of so much of that decision as allowed the respective parties to amend their pleadings, "that the merits of the case may be fully presented and proved as equity may require," that the case has been so transformed as to give rise to the question mooted—but that having been thus metamorphosed, there is now but little margin for any further application of the matters decided on the former aspect of the case, to any question arising in its present attitude.

And this transformation has been effected as well by the complainants as by the defendants. They, since this was cause remanded to the Chancery Court below, have twice amended their original bill, to present more fully the merits of their case, and have introduced upon the record a new complainant, together with divers new defendants. Thus, presenting new facts, which, in connection with those already alleged, have elicited new defences, whereby, not only the range of investigation has been enlarged, but questions have sprung up materially different from those which arose upon the case originally made and decided.

Hence, although the exposition of the laws under which these complainants claim the land in controversy, as given by the Supreme Court at Washington, when this cause was before that court, is not to be departed from in the decision of the various questions which arise in the case now made by the pleadings and evidence, nevertheless this cause is now to be determined as well in reference to known equity law as to those expositions.

It is the complainants who have brought this alleged pre-emption right into the Chancery Court, asking that it may be recognized as valid, and that it be adjudicated a better claim to the land in controversy than that under which the defendants hold under the highest grade of title from the General Government, under whom both parties claim. The defendants have not come here asking for relief, but having been brought here, they deny the alleged equity of the complainants, and assail it, in divers ways, for illegality, fraud and unfairness. When thus met by charges so serious, if the complainant's alleged equity could not be subjected to scrutiny, the Chancellor might become an instrument for the establishment of fraud. His favorite avocation, on the contrary is its suppression. Hence, even without any special regard for the interest of the defendants, he demands that suitors shall come "with clean hands." And he does this, although infants and *femes covert* may be the parties complainant; because, although the "party, who is to receive the benefit, may have been no party to the fraud," and may be ever so chaste, yet, if it comes

through a polluted channel, it is tainted and infected by fraud, and cannot be upheld. Infancy and coverture furnish no excuse for fraud, and are no protection from relief sought against it. 1 *Fondb. Eq.* 71, 152; *Sug.* 522; 1 *Wash. Rep.* 299; *Marbury vs. Bank*, 11 *Wheat.*

Although, then, the complainants in this cause present themselves with a patent certificate for the land in controversy, which, in a court of law, under our statute, would be received for its apparent value without special regard to its antecedents (*Gaines et al. vs. Hale*, 16 *Ark. Rep.*, *p.* 9,) or the purposes for which it may have been issued, beyond what might appear upon its face, yet, when the claim predicated upon it should be opposed upon the grounds already stated, a Court of Chancery, even for its own protection, might properly look to both, when the objections taken are so strongly sustained by the testimony as in this case.

It appears by documentary testimony in the cause, that after it had been finally determined by the Treasury Department, that the patent should be issued to Governor Pope, for the land in controversy, under the 1000 acre grant to the Territory of Arkansas, the Secretary "feeling unwilling to prejudice any claim" of the heirs of Cloyes to this land under the pre-emption laws, and "that they might be more effectually enabled to maintain their rights before the proper judicial tribunal, concluded to give them the option of completing their payments, or withdrawing them in case payments had been made, as they might elect," "although the department was averse to the issuing of patents to them for the same lands," and requesting that the land officers might be instructed accordingly. (See *Secy. Taney's Communication to Comr. of General Land Office, October* 31*st.*, 1833, 2*d vol. Ins. & Opns., Pub. Lands, p.* 572, *copied in the transcript.*) The Register of the Land Office at Little Rock, having been instructed accordingly by the Commissioner, who directed, also, that in case the parties should elect to make the payment, the Register should, in addition to the ordinary entry upon his books, note

the fact of the interference with Gov. Pope's location and refer to the Secretary's decision, and that similar entries were to be made upon the Receiver's receipt, and the certificate of purchase, and also instructed him that a patent was not to be issued for the land.

Under these instructions payment was made, and the alleged patent certificate issued the 5th day of March, 1834.

Although there is some evidence in the record, that at this time the official plats of survey were in the Land Office at Little Rock, nevertheless, the evidence to the contrary, from the Office of the Surveyor General of Arkansas, and elsewhere, is so entirely satisfactory, that we feel bound to hold, as we do, that such was not the fact; on the contrary, that these official plats were not regularly in the Little Rock Land Office until on or about the 11th of April following. This discrepancy may, perhaps, be accounted for by the fact, that the Office of the Survey General for Arkansas was at Little Rock, and the Land Officers might thus have had access to the plats while in his office; or might have been permitted, informally, to take them to their own, in advance of the time when the Surveyor General might have been prepared to give them his official sanction, in transmitting them regularly to their office, as he seems to have done on the 11th of April, 1834.

Under this state of facts the payment of the money on behalf of the heirs of Cloyes, on the 5th March, 1834, cannot be regarded as a legal payment for the land, although sanctioned by instructions from the Commissioner under directions of the Secretary of the Treasury. According to what we understand to be settled law, and the uniform practice of the Government, public lands are not subjected to sale at all, until the plats of survey are regularly in the District Land Office in which they are situated. Before the public surveys are completed; and the final act connected with this process is the official transmission of the plats of survey from the Office of the Surveyor General to the General Land Office, and the District Land Office in which the land is situate;

the law, as we understand it, does not authorize the sale of public lands by the Government, or any of its agents. Under the pre-emption law "proof of settlement and improvement" was to be made to the satisfaction of the Register and Receiver, "agreeably to rules to be prescribed by the Commissioner of the General Land Office for that purpose." And as held by the Supreme Court at Washington in this case (9 *How. Rep.*, *p.* 332,) as to the point of defective proof in the case, as tested by the general rules prescribed by the Commissioner: "Having power to impose this regulation, the Commissioner had the power to dispense with it for reasons which might be satisfactory to him:" But there was no such power of dispensation with the law prohibiting the sale of the public lands previous to their survey, given by that act, either to the Commissioner or to the Secretary.

It is to be inferred from the documentary testimony in this cause, certified from the Department at Washington, that both the Secretary and the Commissioner had the impression that the official plats were then already in the Land Office at Little Rock, or else took it for granted that the Register and Receiver would not act under the instructions given them until that should be the case. It appears, however, that, either from misapprehension or haste, the payment was in fact prematurely made. And the legal consequence is, as we have already said, it cannot be regarded as such, although it may be taken as a tender persisted in.

The complainants' case, then, must be considered as resting for support upon the alleged cultivation and occupancy adjudicated as sufficient by the Register and Receiver at Batesville, the 28th of May, 1831, upon the evidence adduced before them taken in the regular mode (irregularities in the mode of taking, having been adjudged to have been waived, 9 *How. Rep.* 322,) and a legal tender of the money in March, 1834; because there is no sufficient evidence in the record to induce us to believe that there was any formal tender of the money previous to that time.

It is insisted that this latter is, of itself, a fatal objection to the complainants' case.

We have not been able to take that view of this objection, in the light of the points actually decided by the Supreme Court at Washington, in this case, in connection with the foundation upon which the opinion then delivered manifestly rests, and the reasoning employed to sustain the judgment of that court. 9 *How. Rep.* 328, *et seq.*

Clearly, it was held that the occupancy and cultivation, together with the adjudication of its sufficiency by the land officers, upon proof adduced to them, and a tender of the money, the two latter within the life of the law—so was the averment in the bill admitted by the demurrer—gave to Cloyes a right to the land in controversy, superior to that of the grantees of the government. And this, although it distinctly appeared in the bill, thus admitted to be true, that the surveys had not been made and the plats returned before the law expired. This, then, necessarily overthrows the ingenious position—taken upon the assumption that the act of 1830 applied only to land actually surveyed, and the plats thereof returned within the life of the law—that a pre-emption right, being a right to purchase in preference to another, is the minor: and the right to purchese, the major: and that hence, if there was no right to purchase at all, there could be no pre-emption right; because this is an express adjudication that the act of 1830 did apply to unsurveyed lands: for such the land in controversy emphatically appeared to be. Cloyes, in his original application exhibited with his bill, referred to the the County Surveyor of the Territory for quantity of the tracts applied for, and not to surveys of the Federal Government; and, besides, it otherwise appears in the bill that the surveys were not completed and the plats returned until some three years afterwards.

It is in reference, then, to unsurveyed land that the language of the court, in the opinion delivered, is to be construed, for such was the case before it.

In reference to the grant by Congress, under which the defendants claim, the court say: "Before the grant was made by Con-

gress of this tract of land, the right of Cloyes to a pre-emption had not only accrued under the provisions of the act of 1830, but he had proved his right to the satisfaction of the Register and Receiver of the Land Office." From which it is to be distinctly inferred, that neither proof nor payment was considered to be a pre-requisite of the accrual of the right.

And this is affirmed again in the more recent case of *Bernard et al. vs. Ashley et al.*, 18 *How. Rep.* 43, where the court, referring to Lytle's case, and speaking of Cloyes' claim, say: "This court holding his claim to the land to have been a legal right by virtue of the occupancy and cultivation."

This right, thus springing up under the act of 1830, the court proceeds to hold, (as we understand the opinion delivered,) is in no way revived or created anew by the act of the 14th July, 1832: but that act, simply recognizing it as a subsisting legal one, already vested in the settler, provides the means by which it may be perfected. This is to be inferred from the observations of the court, as to the question mooted touching the supposed necessity for new proof, which are, that "the proof of the pre-emption right of Cloyes having been entirely satisfactory to the land officers, under the act of 1830, there was no necessity of opening the case and receiving additional proof under the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. Under these acts, Cloyes was only required to do what was necessary to perfect his right. But those steps within the law, which had been taken, were not required to be taken again." Also from the additional observation, in connection with the declared effect of the act of 1830, to appropriate the land to the settler for one year, so that, during that time, it was not subject to any other claim, that "the supplemental act, approved the 14th July, 1832, extended the benefits of the act of 1830." And more especially from an examination of the opinion delivered on the part of the dissenting judges, as compared with the opinion, wherein it is manifest that it was, as to this construction, the main point of difference arose—the

dissenting judges maintaining that "the act of 1830, was made a part of the act of the 14th July, 1832; they stood as one act, and took date on the 14th July;" and the majority, the contrary.

In one respect, however, the 2d section of the act of July, 1832, seems to have been considered by the whole court as conferring new rights, and that is as to the privilege of entering adjoining fractions. Hence, as it appears in the dissenting opinion, the court were unanimous, that an entry could not have been allowed for more land than the fraction occupied, without new proof, under any circumstances; and in this case, could not be allowed at all; because the rights of the grantees of the government had intervened as to these new rights before the passage of the law creating them.

Nor was the prospective feature of the act—necessarily prospective to be of general efficiency in reference to the future progress and completion of the public surveys of lands already cultivated and occupied during the period fixed by the act of 1830—to be taken as conferring any new right.

And the same remark is applicable to the remaining new feature, that is, its want of conformity to the act of 1830, in having no day fixed for its expiration, other than that fixed for the forfeiture of each right in succession already vested under the act of 1830, if not proved up and paid out, or tendered for, within the time fixed by the act, after the return of the official surveys, which include the land claimed. Because both features had exclusive reference to the rights that had already accrued under the act of 1830.

In this view of the law, although a tender within the life of the act of 1830, in addition to the proof adduced before the Register and Receiver, might have shown the utmost diligence in presenting the claim, it is not easy to see that a failure to make it was negligence, much less, strong evidence of abandonment.

It is true that the Commissioner instructed all Registers and Receivers, in reference to the act of 1830, that that act contem-

plated payment at the time when the claim might be adjudicated by them in favor of the pre-emptor. But this was upon the hypothesis that the surveys had been completed and the plats returned, and the government, consequently, in a condition to sell the lands. And, besides, this was at a time when the law was, almost universally, understood to apply to none but the surveyed lands of the government; and its equity—if it had any, which was not then clear—of doubtful application to land actually in process of survey. And it is to be borne in mind, also, that this was but a construction of the law made by the commissioner for his own guidance, who had no power given him by the act to construe it, although he had ample power to prescribe rules touching the proof of pre-emption. And this was in harmony, too, with the idea—then as universally understood—of the "shadowy" nature of the right, which no one then supposed could be recognized by the courts, after the expiration of the law, as having a legal existence at all, unless perfected, either in fact or in law, by every imaginable effort within due season, and that was not supposed to be beyond the life of the law.

This was no unreasonable construction, under such an understanding as to the extent of the application of the law, and of the nature of the right it created. Because, if the law applied to none but the surveyed lands, the pre-requisite acts to secure the perfection of the right were practicable, and it implied negligence if they were not performed or offered to be performed. And if the right was not "shadowy" and unsubstantial, having a purely legal existence of the most precarious character, and destitute of merit, so far as the claimant was concerned—being a gratuity to trespassers on the part of the government—it was not unreasonable to apply to it the most rigid rules of construction.

But when it has come to be declared by the proper court of the Federal Government, that the law applied as well to the unsurveyed as to the surveyed lands, otherwise liable to be claimed;

and that "the pre-emption claim is not that shadowy right which by some it is understood to be;" and that "when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it," and that this right springs up "in virtue of the occupancy and possession"—as right springs upon payment of the consideration, although inadequate, we suppose—and that the law itself denounces a forfeiture in terms, only in case of a failure to make "the proof and payment required before the day appointed for the commencement of the sales of lands, including the tract or tracts on which the right of pre-emption is claimed," (*4th sec., Act of 29th May*, 1830,) it would seem unreasonable and improbable that Congress should have designed, as to the unsurveyed lands, that payment should have been tendered previous to the time when, by law, it might be received by the agents of the government; and equally harsh and rigid for the courts, upon such a construction of law—now supposed to have both soul and spirit, as well as body and form—to denounce a forfeiture on account of the failure to make such a premature offer of performance.

Regarding, then, the points of law decided in the case at bar, by the Supreme Court at Washington, and their legal sequences, as of binding authority in its further progress, and so understanding them, we must necessarily overrule the objection urged as to the tender, and hold it good, because it is to be considered as having been made within the twelve months allowed by the act of the 14th July, 1832, after the return of the plats of survey.

"When more is done than ought to be done, that seems to be done which was to be done; so that, if a man tender more money than he ought to pay, it is good enough: for every greater contains the less: and the other ought to accept so much of it as is due to him. See 5 *Coke*, 11.

In taking the complainants' case as resting for support upon the grounds we have stated, we have assumed, that the adjudication of the Register and Receiver, made in favor of Cloyes, the 28th May, 1831, was valid. But we have done so with doubt

as to the legality of that procedure, occurring, as it did, in advance of the public surveys; and, consequently, at a time when it was impossible, in the nature of things, for those officers to determine, with absolute certainty, that the proof they allowed as sufficient to establish the requisite cultivation and occupancy, was applicable to the particular tract of land in controversy. Nor do the instructions of the Commissioner, under which this procedure was had, remove this doubt, because his power, given by the act of Congress, to prescribe rules, would seem to presuppose a subject within the jurisdiction of the Register and Receiver, as their own authority to act in accordance with such prescribed rules, would seem to do also. Nor does the recognition of the validity of the adjudication, by the subsequent acts of the Secretary, come up to the point of difficulty, unless it be supposed, which is not impossible—inasmuch as no time was specified by the act of Congress, within the life of the claim, for the making the adjudication thereon—that the surveys were but the means of identity of the land claimed, which they already had within their jurisdiction under the law; and, consequently, that if, in fact, that identity was truly ascertained otherwise than by the surveys, the adjudication, although prematurely made, was within their powers, because the subject was within their jurisdiction.

AS TO LAPSE OF TIME AND STATUTE OF LIMITATIONS.

But thus considering the complainants' case to rest, their equity arising thereupon, must, of course, prevail; unless their remedy has been barred, or unless the equity of the defendants, upon comparison with theirs, be found superior, either in itself, or by reason that the fraud alleged shall be found upon the testimony in the cause.

We concur with the Chancellor in his opinion, that upon the facts and circumstances of this case, the complainants ought not to be barred of remedy, irrespective of the disabilities upon them

at the time their rights matured sufficiently to authorize them to apply to a court of equity for relief; but have not been able to concur with him—and on the contrary take a different view—as to the effect of these disabilities upon the parties in this cause.

This contrariety, however, arises mainly from an interpretation of the proviso in our statute of limitations, which we shall adopt as the true one, and which seems to be different from that apparently given to it by the Chancellor; but is also the result of different views as to the character of the complainants' rights. It is fair, however, to the Chancellor to say, as appears in his opinion delivered in the cause, that upon this point, it was "not a decided one," and that he gave the complainants the benefit of his doubts, as he expressly says.

It is certainly true, that in several of the States, it has been held, and the doctrine applied in quite a number of cases, that when all the parties in interest labor under disabilities at the time when their right of action accrues to them, the statute does not begin to run against any of them until a fixed time after such disabilities shall have been removed as to all of them. And also the converse, that is to say, if one or more of them be not under disability at the time when the right of action accrues to them, it shall run at once against all of them, notwithstanding the others may then be under disability.

But, upon an examination of the authorities, we have found in the cases which seem to give the initial to these doctrines, and wherein reasons are given for their support, that they are founded upon the particular phraseology of the respective statutes, which are taken to indicate their true meaning and intent. Thus, in the case of *James Dickey vs. Armstrong's Devisees*, (1 *A. K. Marsh. Rep.* 40,) upon the Kentucky statute—wherein, after the enacting clause, it is provided "that if any person or persons entitled to such writ, &c., shall be under the age of twenty-one," &c.—and where the parties complainant were held by the court to have taken by devise a joint estate, and not an estate in com-

mon—as all inheritances in Arkansas are declared to be by our statute of Descents and Distributions, (*Digest, chap.* 56, *sec.* 14,)—the Kentucky court proceeds to say, by Mr. Chief Justice BOYLE: "The opinion of the court below seems to have been predicated upon the idea that the absence of one of the lessors of the plaintiff from the commonwealth, brought him within this clause, notwithstanding the other lessors of the plaintiff did not appear to be within any of the exceptions it contains. This idea would have been correct, no doubt, if the devise to the lessors of the plaintiff had been of an estate in severalty or in common; for in either of these cases, their right or title would have been several, and each of them might have maintained his several action. But as the devise is admitted to have been made to them in general terms, without any modification or restriction, we must assume the estate they took in the land, to be a joint one; and, consequently, that their right and title are joint. It would seem, therefore, that to bring any one of the lessors of the plaintiff within the influence of the clause before recited, the others must also be shown to be within some of the exceptions it contains. For the right to bring an action, or make an entry, after the expiration of twenty years, is granted only upon the condition that the person or persons entitled to such action, or to such right of entry, shall labor under some of the disabilities mentioned; that is, if any person is entitled, where there is but one, having a separate right or title; or if any persons entitled, where there is a plurality of persons having the title, be within some of the exceptions mentioned, in such case, and not otherwise, is the right of action or right of entry saved. The expression, if "any person or persons entitled," &c., were or shall be under the age of twenty-one years," &c., is, in point of grammatical propriety, susceptible of no other construction. Besides, upon any other construction, the term "persons," in the plural, after the expression "any person," in the singular number had been used, would be nugatory and inoperative: and it is a rule in the construction of a statute, that it shall be so expounded, that not

only every clause, but every word, shall have some operation and effect. In fortification of this construction, we may remark, that the saving in the statute, in relation to personal actions, is couched in similar language, and that the Supreme Court in the case of *Marsteller et al. vs. McClean et al.*, 7 *Cranch Rep.* 156, has given to it the same exposition which we have to the clause under consideration."

So, also, in the case of *Perry vs. Jackson*, 4 *Term Rep.* 516, upon the proper construction of the saving clause in the statute of James—which was the only case cited by Judge STORY, in the decision of the case cited from *7th Cranch*, by the Kentucky court—Lord KENYON seems to base his judgment upon a like grammatical foundation. That was a case of co-partners; two of whom had always remained in England, and the other was in America when the action accrued, and until within six years before suit brought. His Lordship said: "Now the words of this clause, grammatically speaking, do not apply to the present case: they only extend to cases where the person, individually, a single plaintiff, or persons, in the plural, where there are several plaintiffs, are not in a situation to protect their interests."

The North Carolina court, in the case of *Ridon vs. Frion*, 3 *Murph. Rep.* 579, upon the proviso of their statute, citing the cases in *7th Cranch* and *4th Term* as authority, harp on the same string, and conclude that "the words of the proviso, relate only to the case where all the plaintiffs are under disability—'that if any person or persons,' &c., mean where either a single plaintiff, or several plaintiffs are under some of the incapacities provided for.

And it is upon like grounds of reasoning, that the Tennessee court proceeds in the case of *Shute vs. Wade*, 5 *Yerg. Rep.* 1, in a very elaborate argument, upon the proviso in the statute of that State, which hinges all throughout on the plural, "they" and "theirs:" in which, upon review of the cases of *Perry vs. Jackson*, *Marsteller vs. McClean*, and *Ridon vs. Frion*, they approve the former, as held, in reference to its facts, "upon the clearest

reason," and pronounce against the two latter in the application of the law legitimately evolved by the reasoning employed, *to wit:* the grammatical chain.

In the mean time the subject had been brought to the notice of Chief Justice MARSHALL, in the case of *Doe, dem. of Lewis et al. vs. Barksdale*, 2 *Brock. C. C. Rep.* 437, upon the proviso in the Virginia statute, which does not employ quite so many plural terms in its phraseology as some others, but does employ as many as the proviso of the Kentucky statute, both being precisely the same in phraseology, upon which the Chief Justice made the following remarks: "If this were an original question, I should feel much difficulty in so construing the first and second sections of our statute of limitations, as to exclude one co-heir from the exception in his favor, in consequence of the omission of another to assert his right within the time to which it is limited. The proviso of the act appears to me to be in favor of each individual who comes within it. It is personal. It applies to him who labors under the disability. It is made in consequence of that disability: and it seems to me that the intention of the act would be defeated by a construction, which denies the benefit of the saving to an individual coming within its words, or would give that benefit to an individual not coming within them."

But in the construction of the savings of our own statute, in connection with its enacting clause, we are not left to choose between the authorities above presented, and those which follow them upon the one side, and those sound common sense views of the Chief Justice upon the other side: because, our Legislature, as if designing still further to disinfect the rights of those under disability, from the malaria of mere verbal criticism and grammatical interpretation, has, as far as practicable, in the phraseology of our act, eschewed the plural, and enacted the singular.

The savings are contained in the 4th and 5th sections of the act. *Digest, chap.* 99, *p.* 695, 696. The latter relating to the happening of the death of a party under disability during its

continuance, and providing that suit may be brought or entry made within five years after such death, and the former is in the following words *to wit:*

"If any person entitled to commence any action in the preceding sections specified, or to make an entry, be, at the time such title shall first descend or accrue—1st, within the age of twenty-one years: second, insane: or third, a married woman, the time during which such disabilities shall continue shall not be deemed any portion of the time in this act limited for the commencement of such suit, or the making such entry; but such person may bring such action, or make such entry after the time so limited, and within five years after such disability is removed, but not after that period."

It seems to us that the intention of the Legislature is very lucidly and distinctly expressed. According to settled law, if, after the enacting clause, this saving clause had not been inserted, all persons, as well minors, married women and insane persons, would have been barred by the lapse of time prescribed. Who then are saved by this proviso? The statute answers, "any person who, at the time such title shall descend or accrue," was a minor, *feme covert*, or insane. Are any others saved? A well settled rule of construction excludes all others from the saving. To what extent are the persons embraced, saved? The statute answers, in what we think is its clear meaning, that each of them, severally, must take the benefit of the saving within five years next after arriving at age, or after discoverture, or after coming of sound mind, and not after that five years. In a word, it is manifest to us that it was the clear intent of the Legislature to save minors, married women and insane persons, and no other person than these, either by direct or indirect means. And, therefore, in the language of Judge MARSHALL, above copied, the intention of the act would be defeated by a construction which denies the benefit of the saving to an individual coming within its words, or would give that benefit to an individual not coming within them.

But the Chancellor seems also to have admitted the correctness of the proposition strenuously contended for by the counsel for some of the defendants, that the right, interest and estate of the complainants were so inseparably joint and consolidated, that no remedy could be sought by them, otherwise than by a joint suit, either in law or equity; and that, in such cases, according to the forms of pleading, all must recover or none. If so, this was an entire mistake as to the first branch of the proposition; and the second, even in courts of law, is now admitted with many exceptions, which greatly modify the rule as it was originally enforced in England, as may be seen by the cases, English and American, cited and examined by this court in the case of *Ferguson et al. vs. The State Bank*, 6 *Eng. Rep.* 516, 517, where it was held, in a suit upon a joint contract, that a successful plea of *non est factum* would not enure to the benefit of a co-defendant, and it was conceded, also, that a plea of the statute of limitations would not, although jointly pleaded, if the issue were found in favor of one defendant and against the other, but that the plaintiff could take judgment against the unsuccessful defendant, and the successful one would be entitled to a judgment of discharge, and for his costs against the plaintiff.

As to the first branch of the proposition: so far from the interest of the heirs of Cloyes—a mere equitable one founded upon the legal rights of their father, which they have endeavored to perfect—being "an estate in joint tenancy, which can only arise by purchase or grant: that is, by the act of the parties, and never by the mere act of the law," (1 *Lomax' Digest—Law of Real Property*, *chap.* 15, *sec.* 3, *p.* 472,) it is certainly to be considered under the provisions of our statute as but a tenancy in common, whatever might have been its common law nature. Because, if considered as derived by inheritance from their father, our statute (*Des. & Dis.*, *chap.* 56, *sec.* 14, *p*, 438,) enacts that "they shall inherit as tenants in common." It is true it is elsewhere enacted in the same act (*Ib. sec.* 1,) that real estates of ininheritance "shall descend in parceny to his kindred," &c., but

this, in that connection, had more especial reference to the common law, *jus representationis*, and is to be considered as controlled by the subsequent express provision as to the nature of the tenure of the estate inherited—a tenancy in common. And if, on the other hand, it be considered as derived by their own purchase from the general government, under the certificate of purchase issued to them by direction of the Secretary of the Treasury, to enable them more effectually to present their alleged rights in the courts of justice, the result will be the same, within the spirit and intent of our statute forever abolishing survivorship in real and personal estates; (*Digest, chap.* 92, *sec.* 6, *p.* 621:) and that other provision enacting that "every interest in real estate granted or devised to two or more persons, (other than executors or trustees as such,) shall be a tenancy in common, unless expressly declared, in such grant or devise, to be a joint tenancy." *Digest, chap.* 37, *sec.* 9, *p.* 265.

Having thus ascertained the nature of the complainants' tenure, we proceed to remark, that so far from its having been necessary for tenants in common to adopt a joint action, at the common law, they were not allowed to recover at all in ejectment on a joint demise. The general rule is well enough stated for our purpose, in quite brief terms, in the case of *Moore et al. vs. Armstrong*, 10 *Ohio Rep.*, *at page* 15, 16. The court say: "The rule with regard to the form of declaration, when joint tenants, co-parceners and tenants in common sue, is sometimes thus expressed; that the two former being seized, *per my et per tout*, derived by one and the same title, and having a joint possession, must join in the action, and that tenants in common, having several and distinct titles and estates independent of each other, must count upon separate demises. *Boner vs. Juner*, *Ld. Raym.* 726; *Morris vs. Barry*, 1 *Wilson Rep.* 1; *Heatherly vs. Western*, 2 *Wilson Rep.* 232. But we have seen that in *Roe vs. Rowlston*, and in *Doe vs. Barksdale*, the demises were separate, and were from co-parceners, and them we held to be the only ones on which they could recover. Perhaps, however, it would

be more correct to say, that joint tenants must join; co-parceners may either join or sever, (1 *John. Cas.* 231, *Jackson vs. Semple;*) and tenants in common (independent of the statute of Ohio, which authorizes them to join,) must sever."

It seems, also, that by special statute, tenants in common may join in Vermont, (*McFarland ad. vs. Stone*, 17 *Verm. Rep.* 175.) In Tennessee, a practice to that effect has grown up, as appears by a remark of Judge CATRON, in the case of *Burrow's Lessee vs. None*, 2 *Yerg. Rep.* 228, where he says: "In this State, the uniform practice has been, for tenants in common in ejectment, to declare as on a joint demise, and recover a part, or the whole of the premises declared for, according to the evidence of title adduced."

In this State, the only provisions of our statute, which would seem to have any bearing on the subject, are those in the statute of ejectment, (*Digest, chap.* 60,) in one of which, (*sec.* 4,) it is enacted that: "the action of ejectment shall be brought and prosecuted in the real names of the parties thereto:" by which, no doubt, the fictitious lease, entry and ouster of the common law are abolished. And in the other, (*sec.* 8,) it is enacted that: "The defendant may plead the general issue, &c., and all pleadings and proceedings in the action shall be conducted as in personal actions, except when it is otherwise prescribed."

This legislation must be construed in reference to the old law, and the supposed mischief, and the remedy. By the old law, although tenants in common had several and distinct titles and estates, independent of each other, they could, by several fictitious demises to a fictitious lessee, so unite their interest as to supersede the necessity of several suits, and enable the party, by means of this fictitious lessee, to recover the whole or less, or a proportion of the land sued for, according to the titles of the several lessors; that is to say, if the suit was for one hundred acres of land, the recovery could be for a less quantity; so if the suit was for an undivided half, the verdict and judgment might be for a less portion. 1 *Burr.* 326. The reason was, that the

action, being fictitious, was moulded to effect the purposes of justice; and it was but just that one should recover provided any, under whom he claimed, had a good title either to the whole or a portion of the land sued for; and that his recovery should be in proportion to that good title. It is evident from the provision, that the suit is now to be brought in the name of the real parties plaintiff, and from what they are to allege and prove, that the Legislature designed only to abolish the fictitious portions of the suit, and to retain the substantial ones, and make these more subservient to justice. If this be so, it cannot be supposed that tenants in common are now to be driven to several actions, or that if they join in one action, that action is any further a joint action, technically, than it was before, and this was so or not, according as it may have been upon a joint, or upon several demises.

Hence, if the action be brought by tenants in common, it must be considered, as it would have been originally, as on several demises; because tenants in commou could only have declared and recovered in that way; and, consequently, the recovery must be according to their several titles, and if some be barred by the statute of limitations, and the others not, the latter may still recover their proportion.

And such seems clearly the idea of the Supreme Court of Vermont, in which State, by special statute, tenants in common are allowed to join, as appears by the following remarks, in the case of *McFarland vs. Stone*, 17 *Verm. Rep.* 175, where all joined in an action of ejectment, and all but two were barred by the statute of limitations. The court say: "As this is not a case of joint tenancy—in which all must join in bringing suit—the rights of some may be barred, and not those of others—as some might have conveyed their interest by deed, or be barred by estoppel—so, also, by the statute of limitations. One tenant in common may recover the whole estate against a stranger; and in Vermont, tenants in common may join by special statute; but it has never been held that the right of one tenant in common being

barred by the statute of limitations, the rights of all were gone, notwithstanding they were under disabilities—and such a doctrine would be strict and unreasonable." *Hicks vs. Hoges*, 4 *Cranch* 165; 1 *Ch. Pl.* 56.

In the case of *Doe dem. Lewis et al. vs. Barksdale*, 4 *Brock.* 444, which was ejectment by co-parceners, in which both joint and several demises were laid in the declaration, Chief Justice MARSHALL concludes the opinion of the court as follows: "The counsel for the defendant contends that the lessors of the plaintiff constitute but one heir, and that as one of them is barred by the act of limitations, all are barred. As one of them cannot be brought within the saving of the act, those who do come within it cannot avail themselves of the exceptions in their favor. It has already been said that this construction would defeat the obvious intention of the act. A person whose right is expressly saved for his own benefit, would be deprived of that right by the negligence of another, over whom he has no control. One of the co-parceners might have been of full age when the cause of action accrued, so as to him the time would run from the entry of the defendant. The exception, then, in favor of the parties, in whose favor the exceptions are made, would be of no avail. According to the principles maintained by the defendant, as they are understood, no partition could be made by the co-parceners while out of possession. Their deeds are mere nullities under the act prohibiting conveyances of pretended titles. This construction would certainly defeat the intention of the law. If it could be sustained, the separate demises laid in the declaration would be erroneous, for one joint demise only could be sustained. But although the title be joint, the interest is, to every intent and purpose, several and does not survive. In reason, then, it would seem that each co-parcener might recover his separate interest. The case of *Roe dem. Langdon et al. vs. Rowlston*, 2 *Taunt. Rep.* 440, is the very case, and must be declared not to be law, on the principles for which the defendant contends. The cases cited from 4 *Term, Durn. & E., p.* 516, and 7 *Cranch* 156, are

not applicable to this. They were decided, not upon the rights of the parties, but the forms of pleading. The parties pleaded jointly, and their plea was good or bad as a whole. The court must either have determined that a party not within the exception was brought within it by being joined with a person entitled to its benefits, or that a person really within it must lose its benefits by having joined in the plea with a person not entitled to the protection of the bar. The plea was not good as to the person who could not bring himself within the exception, and being bad in part, was on technical legal principles declared to be bad in the whole. But this technical rule does not apply to this case. The lessors of the plaintiff claim distinct rights under separate demises. Nothing in the form of the pleadings restrains the court from deciding according to the rights of the parties. The judgment, then, should be according to the legal rights of the parties; that the plaintiff recover six sevenths of the land in the declaration mentioned, and that judgment as to the seventh be entered for the defendant."

This legal technical rule touching the forms of pleading, of which the Chief Justice spoke, was the turning point in the case of *Moore et al. vs. Armstrong*, 10 *Ohio Rep.* 17, which was otherwise so ably considered by that court. There, the demise in the declaration was a joint one only, and on that unsubstantial ground that court felt constrained to decide contrary to the clear legal rights, as they distinctly admit, of some of the plaintiffs, who were not barred by the statute. The courts of Tennessee, however, long before, without the aid of any statute, had ceased to regard the character of the demise in any other light than as a part of the legal fictions of the action of ejectment, as is manifest from the remarks of Judge CATRON, before cited, that: "In this State the uniform practice has been, for tenants in common in ejectment to declare on a joint demise, and recover a part, or the whole of the premises declared for, according to the evidence adduced:" and the further remark of the same eminent Judge, in the same case, *to wit:* "Whether David and Alexander Bur-

row then had, or had not any title in the premises, was immaterial to Mrs. Crabb. She could recover as upon a separate demise; and proceeding upon the principle of disconnection between the tenants in common, the Burrows are barred, the same as if they had not joined with Mrs. Crabb. Such has been the uniform course of legal opinion in Tennessee, with Judges and Lawyers." *Barrow, Lessee vs. Nave*, 2 *Yerg. Rep.*, *p.* 228, 229.

On which we feel disposed to remark, that, in our opinion, no legal view could be more sound; because, when it is remembered that the whole action, in its origin, was fictitious, and was moulded expressly to effect the purposes of justice, nothing could be more consonant with the whole spirit of the scheme than to consider it so flexible as to admit of still further fictions, in an emergency, to subserve, more effectually, the purposes for which the whole was instituted.

But happily, in the State of Arkansas, in our several statutory provisions, as we understand their scope, spirit and meaning above indicated, the knife has gone so deep in extirpating the rotten, that courts of law can scarcely now be perplexed by this technical rule, so far as actions of ejectment may be concerned; much less ought courts of equity, in their anxiety to follow the law, be led to perpetrate injustice in its name, in analogous proceedings before them.

To conclude what we have to say upon this point of defence, we have to do but little more than apply the points of law concerning it, which we have determined, to the facts of the case before us.

At the death of Cloyes, the elder, he left four children, all of whom were then minors, *to wit:* Lydia Louisa, (who married Lytle,) born the 17th June, 1822, and who arrived at age the 16th June, 1843. 2d. Mary E., (who married Hooper,) born the 17th of April, 1824, and who arrived at age the 16th of April, 1845. She afterwards died in the month of September, 1850, and her children were made parties to the suit. 3d. Nathan H. Cloyes, born the 22d of June, 1826, and who arrived at age the

21st of June, 1847. 4th. William Thomas, born the 26th June, 1828, and died without issue in the year 1840.

And, supposing that no right arose to Cloyes, the elder, to resort to a court of equity in his life-time, but that such did arise to his heirs, in April, 1834; and assuming, also, for the present—which we shall more particularly notice hereafter—the requisite adversary possession of the defendants, the result is, that the statute began to run against the first named heir in June, 1843, upon her five years privilege, and run out in June, 1848: against the second named, upon hers, in June, 1845, and run out in June, 1850, as to her and those claiming under her: against the third, in June, 1847, and run out in June, 1852; and against those claiming under the fourth, at the time of his death, in 1840, and run out in 1845.

The original bill having been filed in 1843, was in time to charge all the defendants therein, except Bertrand, as to whom it was dismissed in July, 1844, he having been previously served with process, as is to be seen in the transcript; and no new suit was commenced against him within one year thereafter, so as to affect him by the savings of our statute in such cases provided.

The filing of the amended bill, the 17th of January, 1851, is to be taken and considered as the commencement of the suit as against the new defendants therein, and the statute of limitation will avail them at that period. *Miller vs. McIntyre*, 6 *Peters Rep.* 61; *Alexander et al. vs. Pendleton*, 8 *Cranch Rep.* 470. At that time, all remedy was barred as against these new defendants—some nine or more in number—except on the part of the one-fourth interest of Nathan H. Cloyes: because, not only had the five years privilege of both Lydia and Mary then expired, but also the five years allowed to the heirs of William Thomas, after his death, which occurred in 1840.

When the second amended bill was filed in January, 1853, all remedy was barred against all the complainants in favor of the new defendants therein.

As to the requisite adversary possession on the part of the defendants, which, for the moment, we assumed above, there can be no serious question. Although, until the grant from the government to Governor Pope, there was no title adverse to the claim of Cloyes, that grant constituted such adverse title, and it conferred the seizin of the land embraced therein to the grantee, although at the time of its emanation, there might have been an actual occupation of the land by Cloyes, or his heirs claiming a pre-emption right thereto. That title had its inception the 15th of June, 1832, when the act of Congress was passed, under which the tract of land in question was selected in January, 1833, and patented in November following. Under this grant, Governor Pope, in the latter year, caused the entire tract to be laid off into lots, blocks and streets, and attaching it to the town of Little Rock, sold it out at public auction to divers purchasers, many of whom at once proceeded to build, and otherwise change the natural condition of the lots. Such open, notorious and unequivocal acts of ownership sufficiently indicate exclusive possession, in the absence of proof to the contrary, of which, there is none, except some vague statements of the residence of Mrs. Cloyes, and of a Mrs. Chandler, as her tenant, upon some portion of these lands, for a year or two after the public sales. To what extent, however, if in fact to any, the exclusive possession of the entire tract under the grant may have been prevented for this period by any such actual occupancy by residence, cultivation and enclosure, beyond which it does not extend, does not appear.

As to Champerty.

The defendant, Bertrand, insists in his answer, by way of plea, that the conveyances to Fowler having been made *pendente lite*, are, for that reason, void; and also otherwise void for *champerty* appearing upon their face.

The recitals upon the face of one of the deeds, upon which this

objection is predicated, are to the effect, that the heirs-at-law of Nathan Cloyes, deceased, are entitled to a "pre-emption right" to the land in controversy in this suit, "concerning which the said Fowler, as the sole attorney and solicitor, has been for several years prosecuting a suit in chancery, in the name of said heirs, against the State of Arkansas, and several persons, and which suit has been lately decided by the Supreme Court of the United States in favor of said heirs, but which decision may not be final, and further litigation may be necessary to put said heirs into possession of said tract of land, which is their lawful right. Now, in consideration of the services of the said Fowler, as such attorney and solicitor, already rendered and hereafter to be rendered by him, or his substitute, until the final determination of said litigation, the said party of the first part grants, &c., one undivided fourth part of the entire right, title, interest, &c., in full for such services and the expenses of such litigation, to be borne by the legal representatives of Ben. Desha, deceased, who are also interested in said tract of land." And the same instrument of writing also constitutes Fowler sole attorney and solicitor, and also attorney in fact, with power of substitution, and full authority to institute and prosecute all necessary suits for obtaining possession of the land in question, to final judgment and satisfaction, and to compromise any matters relating to the affairs.

In the other deeds, the recital is merely to the effect that the consideration of the grant of a like interest of one-fourth by the other heirs at law, is the "services" of Fowler already rendered, and to be hereafter rendered.

The question arising upon this state of facts, involves the enquiry, whether the English law of champerty is in force in this State, to such an extent as to invalidate these deeds, and on that ground constitute an answer to the relief sought by the complainants.

The common law, so far as the same is applicable, and of a general nature, and all the statutes of the British Parliament in

aid of, or to supply the defects of the common law, made prior to the fourth year of James the First, (*A. D.* 1607,) not inconsistent with our own constitution and laws, are in force, and the rule of decision in this State, unless altered or repealed by our General Assembly. And when, by our laws, no punishment has been provided for any crimes or misdemeanors under the English law in force here under our statute, the punishment shall be by fine and imprisonment; the one not exceeding one hundred dollars, and the other not exceeding three months. *Digest, chap.* 35, *p.* 255.

It is not to be doubted but that the several English statutes of champerty were in aid of, and to supply the defects of the more ancient general law of maintainance: a law which peremptorily forbids the transfer to another of a right to seek redress in a court of justice. These statutes were designed to render this law of maintainance more efficient and perfect; and was suggested from time to time by the exigencies of the times, as the history of these enactments clearly enough show. The law of maintainance is to be traced no further back, in the history of the common law than to about the close of the eleventh century, when the Norman conqueror, having subjugated the country and despoiled the natives of their property, and dividing the whole Kingdom into sixty thousand Knights' fees had distributed them among his followers. "The first statute against champerty was passed in the year 1275, *Stat. Westm.* 1, *ch.* 25, 3 *Edw.* 1, It provided that no *minister* of the King should *maintain to have part.*" . Upon which Lord COKE says: "Hereby it appeareth that it is no champerty unless the State," &c., (that is, the agreement to divide the estate,) "be for maintainance." See *Bayard vs. McLane*, 3 *Harr. Rep.* 210. The terms of that statute, more fully set out, were: "No minister of the King shall maintain pleas, suits or matters depending in the King's courts for lands, tenements or other things, for to have part thereof, or other profit by covenant made; and he that doth so, shall be punished at the King's pleasure." 5 *Com. Digest, p.* 16, *Main. A.* "Ac-

cording to the commentary of Lord COKE, 2 *Ins.* 208, (by the words, depending in the King's courts,) it is declared that, regularly, champerty is, *pendente placito*, and that within the words of the statute 'or anything,' are included leases for years, and other goods and chattels, debts and duties." See 3 *Younge & Jervis Rep.* 134.

By 2 *Stat. Westm., chap.* 49, 13 *Edw.* 1, the Chancellor, Treasurer, Justices, the King's Counsel, Clerks in Chancery and of the Exchequer, and other officials named, were forbidden to purchase, or to take by gift, lands or other matter in suit, *pendente lite.* 5 *Com. Dig., page* 18. Upon which, Lord COKE, remarks, in his reading upon this act: "True it is, that if any other person, (*i. e.*, than the Chancellor, Treasurer and other persons named in the act) purchase *bona fide*, depending the suit, he is not in danger of champerty, but those persons here prohibited cannot purchase at all, neither for champerty or otherwise, depending the plea." 2 *Inst.* 84, cited in *Stanly vs. Jones*, 7 *Bing. Rep.* 377. These prohibitions—that in the one act, confined to the King's minister, and in the other, extended to certain officials mentioned therein—were afterwards, by statute 28 *Edw.* 3, *chap.* 11, (passed A. D. 1300,) extended to all persons, under still higher penalties, with the following proviso in the body of the act, *to wit:* "But it is not to be understood hereby that one may not have counsel of pleaders, or of learned men for his fee, or of his relations or neighbors." See 3 *Younge & Jervis Rep., p.* 135, for a full copy of this act.

Next in the order of time was the statute, *de definitio conspirat.* 33 *Edw.* 1, *stat.* 2, which declares that: "Champeters be they who move pleas or suits, or cause them to be moved by their own procurement, or by others, and sue at their proper costs, to have part of the land in variance, or part of the gains." 5 *Com. Dig., p.* 16.

Besides these, there were other statutes passed in aid of the law of maintainance, forbidding persons to bind themselves by oaths, covenants or otherwise, to move or maintain pleas for

others, or "by letter or otherwise," to "maintain quarrels in the country to the let of the common law." *Ib.*, *p.* 17, 18.

In Hume's history of England, (*2d vol.*, *p.* 320,) the state of society, out of which sprung these stringent enactments, is referred to in connection with the *Statute of Conspirators*, above cited, and it is stated by this historian, that "Instead of their former associations for robbery and violence, men entered into formal combinations to support each other in law suits: and it was found requisite to check this iniquity by acts of Parliament." It might be worthy of further inquiry, if time would permit, whether this maddened state of public mind must not be legitimately traced to an unsettled state of property, resulting from a greedy assumption of estates by the crown for forfeitures as escheats, and the re-granting of those estates to favorites and followers. At any rate, such inferences seem legitimate as connected with the subsequent parliamentary enactments in aid, and for strengthening the law of maintainance, occurring somewhat over two centuries afterwards, in the reign of Henry the Eighth. It was in the year 1538, that this King had completed the suppression of the monasteries in England, and proceeded to escheat their estates, and grant them to his courtiers and parasites; and in the year 1540, he suppressed the Order of the Knights of Malta, and seized and disposed of their estates and revenues. And it was in the latter year, (38 *Henry 8th*, *chap.* 9,) that by act of Parliament, "all former statutes against maintainance, champerty, &c., were confirmed;" and by the same statute, "that no person should unlawful y maintain or procure maintainance in any of the King's courts, &c., in any of his dominions, which have authority to hold plea of lands, &c., nor retain for maintainance of any sort, &c., on pain, &c., and no person shall buy or sell, or by any means obtain any pretended right or title, &c., to any manor, lands, &c., unless he who sells, &c., his ancestor, or they by whom he claims, have been in possession thereof, or of the reversion, or remainder, or take the rents or profits by the

space of a year before the bargain, on pain to forfeit the value of the lands. &c., so bought and sold." 5 *Com. Digest, p.* 17.

Thus, from time to time, stimulated to preternatural growth in strength, and all for the aid of violence and wrong in possession, the law of maintainance ultimately became monstrous and intolerable, and was destined to wane, if not altogether starve out, wherever justice might have sway, and right might be respected and sustained. And as a general fact, such has been the result both in England and in this country. Justice and right having been found indispensable for the growth of "commerce"—which soon afterwards "became King," and a greater *civilizer* than all the EDWARDS and HENRYS—it was, therefore, her policy to uphold the one, and respect and vindicate the other.

After such a glance as this, at the rise and progress of maintainance, in connection with its ultimate extensive ramification throughout the body of the English law, one can better appreciate some of the cant phrases in the books as to the "odiousness" and "crushing influence," which have come down even to our own day; and may be better able to comprehend the true policy of that law, and thereupon determine more advisedly whether it accords with the policy of the great current of the controlling laws of our own times in this country. And, perhaps, one may better understand, too, why it was, that in subsequent reigns, the English people were so clamorous for the right to resort to the courts of justice for the redress of grievances; and, that to this day, in that country, the public mind is so much engaged with judicial reforms, all having for their end the making of justice of easy access to every man.

At any rate, although it may be true that it is no valid objection to a law otherwise good, that it arose out of rapine and violence, and in its origin was made an instrument of despotism and wrong; still, when it might be made a question, whether a mere ancillary part of such a law was to be regarded as in force in this country, after the main law had been displaced by incon-

sistent affirmative legislation, the entire history of the whole can but throw some light upon the true character of what may be alleged to remain.

In this view, also, it may be seen that champerty, although originally applicable only to land (*campum partiri*,) was soon equally applicable to personal property; and, although, at one time confined to officers of the crown, was soon equally extended to all persons, while at the same time, the general law of maintainance was in a like ratio extended not only by these means, but otherwise by statute. It is also to be seen that unlawful maintainance was at the root of the whole matter, and the distinction between that and lawful maintainance, was never lost sight of.

It is no champerty, (says Lord COKE, already cited,) unless the "State, &c., (that is, the agreement to divide the estate,) be made for maintainance." So it is, in like manner, to be seen, that the proper advocacy of causes by persons belonging to the legal profession was not unlawful maintainance: and, therefore, it is no maintainance if a counsel take fees for his advice and assistance: (2 *Inst.* 564; 5 *Com. Digest, p.* 19:) so if an attorney expends his money for his client, to be repaid." *Ib.*

And in this connection may be noticed a distinction between the English system of administering justice and our own, touching attorneys and counsellors, and their compensation, which is an important ingredient in considering this question of champerty. Under the English law, there was a total incapacity in counsel to make any contract whatever with his client, on account of his professional services, much less a contract for a share of the thing in suit, although he was permitted to accept as a gratuity, a fee. And the same was true of the attorney, who could make no other contract with his client than that which the law had already made for him, in assigning to every service its fixed and appropriate compensation. It was this absolute incapacity of contracting with each other, which placed the attorney and client in the same category with husband and wife, and guardian and ward, between whom no dealing can take place,

having the sanction of legal obligation. Hence, a contract between a counsellor, or an attorney and his client for a share of the thing in suit, under such a state of law, would have been illegal in a three-fold sense—on account of the restrictions upon the sale and purchase of the whole thing—of the part of it—and of the incapacity of the attorney or counsellor to buy.

In this country, there is no distinction in grade between attorneys and counsellors, and there is no distinction, as to this, in reference to compensation for professional services. Both stand on the same footing as to such contracts. And it is not to be questioned that our laws recognize the claim of an attorney at law for professional services, as a legal demand: and, that as such, he can recover a reasonable amount either on the ground of contract, or upon a *quantum meruit*. And physicians' claims, for medical attendance and skill, stand, with us, upon the same general footing: although they also stood in England upon the same footing with counsel in reference to compensation.

The right of making contracts is a high personal privilege of the citizen; and physicians and lawyers claim that privilege in their capacity of citizens, insisting that, by becoming professional men, they have lost no right pertaining to a citizen; at the same time, recognizing the authority of the Legislature to restrain and qualify this privilege as to contracts, in all points, where, in their judgment, the public safety or the public good may require it; but that, until so restrained by legislation, the courts are bound to recognize and protect this privilege, as well as every other personal right pertaining to the right of property, so amply secured to every citizen, whatever may be his calling, under our Constitution and laws.

When the courts hold, in the face of the common law to the contrary—in force in this country by express legislative enactment and otherwise—that such demands are legal ones, their decisions can rest upon no solid foundation, other than the recognition of this claim of right to contract, based upon our Constitution and laws, which, by reason of its inconsistency with the

English law, inhibiting the right to contract, has wrought its repeal, or, more accurately, has prevented so much of the English law from having force in this country. Because, if, by the adoption of the common law, in gross, as the rule of decision in this country, those provisions of that law were in force, which denied to a counsellor any capacity to contract with his client on account of his professional services, and which denied to the attorney any such capacity, beyond that which the law had made for him in assigning to every professional service its fixed and appropriate compensation, the courts could not decide that a recovery could be had for professional services founded upon any agreement as to such services, either express or implied.

These decisions, then, rest upon the ground that the incapacity to contract as to professional services, has been removed by inconsistent legislation in this country. In this State—as, also, perhaps in most, if not all of the other States—there has been no legislation on the subject, except the general provisions contained in the paramount law, that all free men, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of acquiring, possessing and protecting property, and of pursuing their own happiness.

It follows, then, that when the removal of the incapacity to contract for professional services is placed upon the ground of inconsistent legislation in this country, and that legislation, as in this State, is only the constitutional declaration cited, it must be removed without any other qualification or restriction than that which attaches to the privilege to contract enjoyed by citizens in general. The disability under the English law was not, specially, that the counsellor could not contract with his client for a part of the thing in controversy as compensation for his services; but, generally, that in reference to these services, he could not contract at all. There was no provision of the law inhibiting the purchase of a part of the thing in dispute, which was peculiar to lawyers: it was a provision common to all persons. It is, therefore, requisite to know upon what basis that provision

rested in the English law, in order to determine whether, under our legislation, it remains law in this State.

Beyond any reasonable doubt, the root of this doctrine was the principle of the common law, that a right of action could not be transferred by him who had the right, to another. "This principle was interlaced with the doctrines of maintainance and champerty, and was founded upon the same reason." Lord COKE says: "That for avoidance of maintainance, suppression of right and stirring up of suits, nothing in action, entry or re-entry can be granted over, for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed." *McLane vs. Bayard*, 3 *Harr. Rep.* 209. Mr. Justice BULLER says, in the case of *Master vs. Miller*, 4 *Term Rep.* 340, "It is laid down in the old books, that for avoiding maintainance, a chose in action cannot be assigned or granted over to another. *Co. Litt.* 214, *a; Roll.* 245. The good sense of that rule," he proceeds to remark, "seems to me to be very questionable, and in early, as well as modern times, it has been so explained away, that it remains, at most, only an objection to the form of action in any case. It is curious, and not altogether useless, to see how the doctrine of maintainance has, from time to time, been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he, that, by his friendship or interest, saved him an expense which he would otherwise be put to, was guilty of maintainance. *Bro. Tit. Maintainance*, 7, 14, 17, *&c.* Nay, if he officiously gave evidence, it was maintainance; so that he must have a subpœna, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected."

In the case of *Thallhimer vs. Brinkerhoff*, 3 *Cowen Rep.* 645, the Chancellor says: "It was a principle of the common law, that a right of action could not be transferred by him who had the right, to another. When we seek the reason of this rule, we find it in the motive already mentioned, an apprehension that

justice would fail and oppression would follow, if rights of action might be assigned. Nothing says Lord COKE," [as already more fully copied above in the quotation from *McLane vs. Bayard:*] "Feeble, partial and corrupt must have been the administration of justice, when such a reason could have force. In early times, however, the ruly was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole or in part. Hence, the doctrine of maintenance, which prohibits contracts for a part of the thing in demand, was adopted as an auxiliary regulation to enforce the general principle, which prohibited the transfer of all right of action. But the rule of the common law, that rights of action cannot be assigned, has been in modern times reversed. The apprehension that justice would be trodden down, if property in action should be transferred, is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity this rule was never followed; and these courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown, not only that no evil results from the assignments of rights of action, but the public good is greatly promoted by the free communion and circulation of property in action, as well as property in possession."

Hence, it appears, that the basis upon which the doctrine in question rested in the English law, was but that of a mere auxiliary regulation, to enforce the general principle which prohibited the transfer of all rights of action. Upon which the court, in the case of *Bayard vs. McLane*, at *page* 209, proceed to remark: "And upon no other reason can we conceive why a bargain for a part or the whole of a thing in suit, (independently of the maintenance,) should have been an offence at common law. In this country, the rule is actually reversed. The laws of alienation, in respect to every species of property, promote its transfer as more consistent with the condition of things here, and with public policy.

By our laws, the transfer of a thing in action, or of a part of a thing in suit, may be made, and by the common law, it is lawful for attorneys and counsel, in the regular exercise of their professions, to maintain the suits of others. If the service, therefore, be lawful, and the mode of compensation be now lawful, how can such a contract be champertous and unlawful?"

In the States of Virginia, New York, Kentucky, Tennessee, Connecticut, North Carolina, South Carolina, and, perhaps, in most of the other States, the provisions of the *Stat.*, 2 *Westm.*, *chap.* 49, and of 38 *Henry* 8, *chap.* 9, more or less modified, prohibiting the purchases and sale of pretended titles to land not in possession, have been re-enacted. In some two or three of the States, the doctrines of those statutes have been recognized as a part of the common law. See *note F.*, to the case of *Whitaker vs. Cone*, 2*d Ed. of Johnson's cases*, *p.* 60.

But, the provisions of these statutes, upon which so much of the law of maintenance and champerty rests for support in the English law, so far from having been re-enacted in this State, have been met here by directly conflicting legislation, in the several provisions touching the sale of real estate held in adverse possession; whereby the right of "alienation and purchase" of every interest, title and estate therein, "has been enlarged almost to an unlimited extent," as this court said in the case of *Cloyes et al. vs. Beebe*, 14 *Ark. Rep.* 489, where it was held that, "under the several provisions of our statute, any right, title or interest in land, that will descend, may be alienated by deed, although the possession be adverse."

Such legislation must, in the repeal of the law forbidding the sale of real estate held adversely—if, indeed, it ever had any force in this State—also repeal so much of the law of maintenance and champerty as rested upon the old law; and there can be no serious question, therefore, but that, under the present state of the law, any interest title or estate in real estate, can be lawfully sold and purchased for a lawful consideration: and that

the purchase and sale of a moiety, or other part, will stand upon the same footing.

The latter branch of the provision cannot be any more doubted than the former, unless it should be supposed that a vendor could not sell a moiety or other part when in actual possession; because, the statute declared that the sale shall be "with like effect as if he (the vendor,) was in the actual possession thereof."

Hence, although it might be the law in England, in the year 1831, as held by Chief Justice TINDALL, in *Stanly vs. Jones*, 7 *Bing. Rep.* 377, that maintenance and champerty were not so much the buying of the thing, or an interest in the thing in litigation, as it was in the buying of the thing, or an interest in the thing for the purpose of maintaining and taking part in the litigation, it could not be law here, as to real estate held adversely, under our statute; because, it would, in effect, render that statute inoperative, since it would be rare, indeed, that one would buy real estate, so held, with any other than a purpose to go to law upon his purchase.

But another Judge, Lord ABINGER, in a later case, (A. D. 1843,) seems to have a different idea of what remains of the law of maintenance in England, its birth-place. We shall, probably, have occasion to cite him before we are done.

We conclude, then, upon this point, that the interest in the land in question could have been lawfully sold and purchased; and it remains to be considered, whether the professional services of Fowler, under the facts of the case, were a lawful consideration for such sale.

The greatest difficulty in the way of arriving at accurate ideas on this point, is from the habit, that some have, of associating, in a peculiar manner, the idea of champerty with the lawyer and his services, and his client, while, in truth and in strictness, the English counsellor was further removed from champerty, as to his own client, than from his brothers. And, so far from his professional services being procreative of champerty, they could not beget it at all; because they were not accounted of any

value, in point of law, so as to form the consideration of a contract with his client for a part of the thing in suit. It is, in this country, only, that such legal value has been accounted to them by the law, and in awarding that legal value, as we have seen, the courts have proceeded upon the idea that the lawyer's work and labor stood upon the same ground as that of any other citizen; as did his legal capacity, also, to contract in reference to them. If so, it must be as lawful to pay debts, or buy land with, that may be lawfully sold, as that of any other citizen. If the English attorney had, upon the consideration of fees taxed to him, bought from his client an interest in the thing in suit, he would have been guilty of champerty, not because these fees arose from his professional services, or because of the relation of attorney and client, but simply because he had purchased a part of the thing in litigation. And he would have done no less, but precisely the same thing, if he had taken money out of his pocket to form the consideration, instead of resting it upon the costs taxed to him. It is often said in the old books, that champerty was the most odious form of maintenance, and that was, because it was not only a violation of the general law, but also of the auxiliary one, which aggravated the offence. But it is never said, in addition to that, that the offence is still further aggravated in point of law, because committed by a lawyer, or was in any way connected with his professional services, or with his relation to his client.

There is nothing, then, in the common law notions of champerty peculiar to lawyers, or to their professional services, not common to other champertors, except that, as to the general law of maintenance, they stood upon a more favorable footing than other subjects of the King, for as much as they could lawfully maintain their clients' cases with their professional services, while another subject could not maintain a suit at all, without violating the law, unless interested in, or related to, the party whose suit he might maintain. There is, therefore, no foundation for supposing, that by the adoption of the common law, we have adopted

any provision of the champerty law in reference to lawyers, and the relations between them and their client, that is not equally applicable to every person.

When a part of the land in controversy may be lawfully sold, as in this case we have seen it might be, to say that a lawyer in this country cannot take money out of his pocket and buy with it from his client, is to say more than was ever said in England, when the law of maintenance was in its most rampant condition of monstrosity. Because it was then allowed to be so, simply because the law forbade a sale and purchase of the land; not because of any incapacity of the counsellor to buy with his money from his client. If the land had been subject to lawful sale, he could have bought with his money: but, although he could have bought with his money, he could not have bought with his professional services, because they were accounted of no pecuniary value, and he could make no contract with his client in reference to them. But when, as it is allowed in this country, these services are of pecuniary value in point of law, and contracts with reference to them are of as binding force in law, as when made in reference to the services of the citizen, to deny that they are a valid consideration for a purchase and sale, that may be otherwise lawfully made, is to stultify the decisions of all our courts, which have recognized their services as valuable, and subject to contract; and go back to the common notion of the lawyer's incapacity to contract with his client in reference to his professional services. And, if this is not done, then there is but one alternative, and that is to stop short and legislate. And while another department of the government, in doing this, would have ample power to regulate the right of contracting between attorney and client, in points where it might seem proper, all the argument would not be upon the side of an inhibition upon the attorney to become interested in the law suit, and in its result. There is nothing in our policy favoring the hampering of right and justice if presented for investigation within the time limited for legal remedies. And the door of justice is not shut to the poor, who may be oppressed.

On the contrary, they have been the subject of statutory provision. Rights are nothing without the means of enforcing them. The subject matter of the suit may be all the property to which the suitor can lay claim. Whether plaintiff or defendant, his credit may be based upon nothing else. The courts of chancery are ever open for relief against fraud and oppression, and they look with a scrutinizing eye to contracts which savor of either. If just suits are stimulated by such a policy, unjust ones are checked by the punishment affixed by our Legislature to the offence of barratry, which is a fine in "any sum the barrator may be able to pay, not less than one hundred dollars, with imprisonment for six months." *Digest, chap.* 51, *sec.* 16, *p.* 362. And this, at least, does not seem to place us in a condition, as to these doctrines, far different from that of the English notion at the present day, if Lord ABINGER is to be received as authority for the present condition of the law of maintenance in that Kingdom. He says, in the case of *Findon vs. Parker*, (11 *Mees. & Wel.* 682,) decided in the Exchequer of Pleas, in the year 1843: "The law of maintenance, as I understand it, upon modern constructions, is confined to cases where a man improperly, and for purposes of stirring up litigation and strife, encourages others to bring actions, or to make defences which they have no right to make."

The truth is, this whole law of maintenance, with its appendant law of champerty, has been in a very great degree displaced in modern times by the invention of statutes of limitation, which the States, generally, have adopted, as well as the English people, of which our ancestors had no knowledge.

Perhaps we could not conclude this part of the subject better than by some further remarks of the Chancellor, in the case of *Thallhimer vs. Brinkerhoff*, 3 *Cow. Rep.* 643: "The excitement of suits, is an evil when suits are unjust; but, when right is withheld, and the subject of a suit is just, to promote the suit is to promote justice, where the administration of justice is firm, pure and equal to all; and where the laws give adequate redress

for groundless suits, it is not easy to conceive that mischief can arise from opening the courts of justice to all suitors; or, from contracts by which the fruits of the suit may be divided between him who has the right of action, and him who has contributed advice, expense or exertion to institute the suit, or prosecute it to effect. If principles are to be consulted, it seems to be of little moment whether he who maintains the suit of another receives his reward from the subject of the suit, or from any other property of the suitor. Champerty is one species of maintenance: but the authorities do not declare contracts for a part of the thing in demand universally unlawful. The distinction made by the books between interference which is illegal, and that which is lawful, consists in the rule and the exceptions stated: and where maintenance is lawful, as in the case of interest in the subject, or relation to the suitor, a contract to divide the subject of the suit, which is maintenance in a particular form, is also lawful."

Holding the purchase and sale to have been lawful, it but remains to be considered whether the liability of Fowler for costs as a party to the amended and supplemental bill, predicated upon his purchase, and his subsequently becoming a party to the suit, rendered him obnoxious to the objection of unlawful maintenance. We have seen that he might lawfully maintain the suit of his clients with his professional services: but, according to the common law rule, he could not go beyond this and support his clients' cause, at his own proper costs. "In the payment of the costs, or by agreeing to pay them, he acts out of his character as a professional man, and maintains the suit in a way which that character does not justify. But, so long as his contract stipulates only for such services as he may lawfully render without being guilty of maintenance, it is not vitiated on any ground of champerty, because those services are to be requited out of the thing in suit, which, by our law, is a proper subject of contract." *McLean vs. Bayard*, 3 *Harr. Rep.* 212. Clearly, as to this point, Fowler is to be considered as incurring costs, not for his clients, but on account of his legal interest, and for himself. If he could

not go to law, and incur costs in respect to his purchase, it would be nugatory, as we have already said. The subject of his purchase having been held adversely, the law authorizing the purchase and sale, must have contemplated that the purchaser would go to law to recover it.

We conclude, then, upon the objection of champerty, that it cannot be sustained, and affords no answer to the relief sought by the complainants.

In passing upon the objection for champerty, we have, also, in effect, passed upon the other objection, that the sale and conveyance were made *pendente lite:* because the doctrine, that a sale and conveyance of land, made *pendente lite*, are void, was founded exclusively upon the several acts of Parliament against maintenance and champerty.

In the case of *Jackson vs. Ketchum*, 8 *John. Rep.* 479, B. purchased the lands in controversy of C., pending an action of ejectment for the recovery of their possession, and it was held that the deed was void, under the statute of New York, "to prevent and punish champerty and maintenance." That enactment, the court said, contains the substance of the English statutes of *Westminister* 1, *chap.* 25; *Westminister* 2, *chap.* 49; and of 28 *Edw.* 1, *chap.* 11, and was almost a literal transcript of the last.

In *Parks vs. Jackson*, 11 *Wend. Rep.* 442, it was admitted that the effects of *lis pendens*, upon a conveyance of land, operated harshly, and that the rule was not without exceptions.

In Alabama, in the case of *Camp vs. Forest*, 13 *Ala. Rep.* 120, where the question was made upon a sale, *pendente lite*, by the party in possession of land, the court say: "We have seen no decision resting upon common law principles, which maintains that a sale and conveyance of lands, of which the vendor is in the possession, is void merely because an action is pending for its recovery, and we are aware of no principle of policy in this country, which would invalidate a transfer of land under such circumstances. We may add, that we find many cases in

which the effect of *lis pendens* to impart notice of the matter in controversy is considered: but in none that has come under our observation, has the pendency of a suit for the land been held to take from the party in possession the right to sell it, in the absence of a statutory provision," (like 32 *Hen.* 8, *chap.* 9). That court accordingly held that the sale and conveyance was valid. And this authority is the stronger, because, by a number of decisions of the Alabama court, the English champerty and maintenance laws are held to be in force in that State.

So far from there being any prohibitory law in Arkansas, our statute expressly authorizes a sale of any interest in land, as we have seen, although the possession thereof be adverse, "with like effect, as if he (the vendor,) was in the actual possession thereof." *Digest, chap.* 37, *page* 265, *sec.* 6.

In Virginia, where the statute, 32 *Hen.* 8*th*, is in force, the courts hold distinctly, that it does not have the effect to make the sale and conveyance void. 1 *Rand. Rep.* 98; 3 *Call Rep.* 481. And besides, that the sale of an equitable interest in land is not within the statute. 1 *Leigh Rep.* 248.

We think, therefore, that the sale and conveyance in question were not void because of its having been made *pendente lite.* Of course, the vendee took the interest conveyed to him, subject to every defence against his vendor, and holds it precisely as he held it, in every respect, as to other persons. *Merrick & Fenno vs. Hutt*, 15 *Ark. Rep.* 344.

Before proceeding to consider the only remaining question, which involves the entire cause—as it was contended in argument, that the questions did which we have determined—we will remark, that there are two other subjects discussed by counsel at full line, which it will not be necessary to investigate and determine, unless this remaining question shall be found for the complainants. The one subject relating to rents and profits of the land in controversy, and the right to set-off improvements against them; and the other, to a defence of purchaser, for a

valuable consideration, without notice, interposed by a part of the complainants.

As to the first subject, should it become necessary to consider it, a reference would have to be made to the master to ascertain facts which do not appear in the record; and, in connection with the order of reference, and the master's report, the question discussed will be more properly considered. And, as to the latter, although upon that defence some of the defendants may be entitled to a final discharge, irrespective of the validity of the pre-emption claim in question; nevertheless, should that claim be found invalid upon the grounds remaining to be examined, they would, on that account, be decreed to go hence without a resort to this more special defence.

These matters will, therefore, be reserved until it may become necessary more particularly to examine and adjudicate upon them.

AS TO THE FACTS IN REFERENCE TO VALIDITY, AND TO FRAUD.

Having considered these questions, it remains to be determined, whether the fraud, alleged by the defendants, can be found upon the testimony in the cause. If it be found, it is not to be doubted that it will reach even that part of the complainants' case, which lies behind the finding of the Register and Receiver, although the act of Congress, of the 4th of July, 1836, (1 *Land Laws and Opinions*, *page* 553,) had not then been passed.

It is objected, however, that the defendants have no right to interpose that defence; that fraud and injury must concur to entitle a party to redress; that, although Cloyes may have defrauded the Government, these defendants were not then interested, and could not thereby have been injured. And as they have since acquired an interest in the subject of the alleged fraud, they ought to be regarded as mere volunteers, who have thrust themselves into a controversy properly belonging to other parties.

This objection has already been substantially responded to; but, in order to ascertain more distinctly the attitude of the parties, which seems proper before going at large into the question now to be determined, that answer will be still further amplified.

The defendants are not seeking redress: nor have they come into this court as volunteers, to assail any supposed rights of complainants—on the contrary, the complainants have come here to assail the defendants' title for illegality, and have brought the latter here on compulsion. And, in order to show the illegality of the defendants' title to the land in controversy, the complainants allege the legality of their own rights thereto, which the defendants denying, in their turn allege fraud in the complainants in support of their denial, and insist that, upon the whole evidence in the case, it ought to be found.

If, under the circumstances in this case, the complainants had had the legal title to the land, instead of the defendants, and the parties were reversed, there would have been something in the objection to be considered: there is nothing in it, however, as the case actually stands.

In examining this question of fraud, our attention, in the first place, will be turned to the finding of the Register and Receiver, not to determine whether or not there was sufficient evidence before them to authorize their finding, but whether or not, from all the testimony in the case, their finding was not in truth superinduced by fraud, on the part of the pre-emption claimant.

According to the act of Congress, granting the pre-emption right in question, "proof of settlement or improvement, shall be made to the satisfaction of the Register and Receiver, agreeably to rules to be prescribed by the Commissioner of the General Land Office, for that purpose. See *section* 3 *of the act of* 1830. The Commissioner, by his circular, No. 479, dated the 10th June, 1830, (*Instructions and Opinions*, *part* 2, *page* 539,) prescribed as to that, that the fact of cultivation in 1829, and the possession of the land applied for on the 30th of May, 1830, must be estab-

lished by the affidavit of the occupant, supported by such corroborative testimony as may be entirely satisfactory, &c., and be in answer to such interrogatories as may be best calculated to elicit the truth."

Cloyes, the claimant, after having been interrogated, and answered as to what tract of land he claimed a pre-emption, was further interrogated thus: "Did you inhabit and cultivate said fraction of land (meaning the tract in controversy,) in the year 1829; and, if so, what improvement had you in that year in cultivation? Answered—"I did live on said tract of land in the year 1829, and had done so since 1826, and in the year 1829 aforesaid, I had in actual cultivation a garden, perhaps to the extent of one acre; raised vegetables of different kinds, and corn for roasting ears; and I lived in a comfortable dwelling, east of the Quapaw line, and on the before named fraction."

Interrogatory 3d.—"Did you continue to reside and cultivate your garden aforesaid, on the before mentioned fraction, until the 29th of May, 1830?

Answer.—"I did, and have continued to do so until this time," which was April 23d, 1831.

Interrogatory 4th.—"Were you, at the time of the passage of the act of Congress, under which you claim a right of pre-emption, a farmer: or, in other words, what was your occupation?"

Answer.—"I was a tin plate worker, and cultivated a small portion of the fraction before named, for the comfort of my family, and carried on my business in a shop adjoining my house."

The corroborating testimony was from John Saylors, who answered to interrogatories propounded him, as to Cloyes' settlement and cultivation, as follows, *to wit:*

Answer.—"I know that, in the year 1829, Nathan Cloyes lived below Little Rock, near the river, on the Quapaw lands, and am satisfied that it is the fraction which the claimant, "Cloyes," has stated in his deposition above. I further state said claimant was living on said fraction with his family in a house, and cultivated a small piece of ground, about one acre, near to house, and raised

during that year, corn, and different kinds of vegetables, and that said claimant, Cloyes, continued to remain on said fraction for that year until the present time, and under the same cultivation each season; and I further state, that the said claimant is a tinner, and did, in the year 1829 aforesaid, carry on his business at the improvement before named, and continued so to do until this time."

Maynor and Bussey also swore, that Saylors' affidavit "contains the truth, as they are knowing to all the facts."

With regard to the affidavit of Cloyes, it is plain enough, when the questions propounded to him are considered in connection with the answers given by him, that he did represent on oath, that from the year 1826, up to the 23d of April, 1831, he had lived on the tract of land in controversy; and that in the year 1829, he cultivated about one acre of the land for the benefit of his family, and "lived in a comfortable dwelling house" thereon, "and adjoining the shop," in which he carried on the business of a tin plate worker, and continued so to reside and cultivate up to the 23d of April, 1831. He did not state where the cultivation was, in point of locality, beyond that it was on the fraction in question. The shop and comfortable dwelling house, he said, were adjoining each other. But Saylors says, however, that it was near the house in which he was living on said fraction with his family, in the year 1829. So, that the shop and comfortable dwelling house were adjoining, and the cultivation was near the latter. Saylors, however, does not say that the family remained on the land the whole of the year 1829, or ever afterwards lived on it: but that Cloyes, the claimant, did, and up to 23d April, 1831, "and under the same cultivation each season," and "continued to carry on his business at the improvement before named by him."

With regard to Cloyes' representation as to his residence upon the land in question, there is not one single witness in the whole case that sustains him. It is probable that the Register and Receiver regarded Saylors' affidavit as doing so; but, from the light

now derived from the mass of the testimony in this cause, taken in connection with Saylors' guarded expression as to the occupancy of the land in the year 1829, and up to the time when he swore, it is manifest, that he and his supporting witnesses do not sustain Cloyes as to this: although it is entirely probable that it was their design that it should be so regarded by these officers. And it is utterly impossible to resist the conclusion that Cloyes, knowing the falsity of his representations on this point, must have intentionally deceived the officers as to this matter; while it is equally evident, that Saylors and his supporting witnesses, Maynor and Bussey, with equal knowledge, were consenting to, and aiding in, this deception: and they were enabled to do so with some plausibility, by the fact deposed to by Calloway, that in the latter part of 1829, or first of 1830, Cloyes, in anticipation of the passage of the pre-emption law, and for the purpose of obtaining the benefit of the same, moved his family to his tin shop, where they remained a short time, with the convenience for residence of some loose plank set up for shelter, at the end of the shop, with some little bedding therein: and by Baker, that about a month after the news reached Little Rock, in 1830, of the passage of the law, the family resided at the tin shop for a month or two after having removed there in the night. And these fraudulent removals are corroborated by Jenkins, in his statement as to his removing for Cloyes certain articles of furniture in 1829 or 1830, from the tin shop to his family residence, across the town branch.

And, with regard to the alleged continued cultivation, sworn to by all these witnesses, it is manifest, from the whole testimony in the cause, that this was represented to the Register and Receiver with as little regard to truth as the residence of Cloyes was, and with equal tendency to deceive those officers, and mould their judgment as to the *bona fides* of Cloyes' alleged cultivation and occupancy. Cloyes swore that he continued to cultivate the garden, which he had represented he cultivated in 1829, not only until the 29th of May, 1830, but also up to the 23d of

April, 1831: and Saylors, and his supporting witnesses, say that Cloyes continued to remain on the land in question during the year 1829, up to the 23d of April, 1831, and "under the same cultivation each season."

Whether, in point of law, it was, or was not necessary for Cloyes to have resided with his family upon the land in question in 1829, and afterwards, as he represents: and to have continued to cultivate in 1830 and 1831, up to the 23d of April, as all these witnesses represent, is not material in the aspect of our present enquiry; because, although unnecessary, these misrepresentations did not the less tend to deceive the Register and Receiver as to the true character of the alleged cultivation and occupancy, upon the ground of which they based their judgment, that he was entitled to a pre-emption to the land in controversy. Unquestionably, if these officers had, from the testimony before them, come to the conclusion that the alleged cultivation and occupancy was but colorable, and not substantial and *bona fide*, they could not have allowed the claim under the law. Hence, the instructions to them before alluded to, were to the effect, that the evidence in support of a pre-emption claim, was to be "in answer to such interrogatories as may be best calculated to elicit the truth."

And, clearly, such representations as Cloyes made of his actual residence upon the land in controversy, in a comfortable dwelling for his family, adjoining his shop, so artfully sustained by the other witnesses; and such representations as they all made as to his cultivation in the year 1829, 1830, and up to the 23d of April, 1831, went, at once, strongly and powerfully to exclude any idea of fictitious and colorable occupancy and cultivation, and to establish such, as *bona fide* and substantial.

Under such circumstances, a court of chancery may, with propriety, find reason to disregard the finding of the Register and Receiver, and to consider the alleged pre-emption right, at large, upon the allegation and proof. And, in doing so, hold the complainants, who are seeking to set it up against rights fairly and openly obtained, to the *onus probandi*.

And certainly, these same circumstances are not of a character to bespeak favor for the complainants' case, as it must now be considered. And there are other circumstances which can but give rise to doubt and suspicion as to its validity. Of this nature is the contract of Cloyes with Desha, bearing date the 17th of April, 1831, by which he stipulated to convey "to the latter one-half of his pre-emption right in consideration of Desha's defraying the necessary expenses incident to proving up and establishing said right in the Land Office at Batesville, and of clearing the same out of said office by paying the minimum price per acre therefor." Considering the local situation of the land, immediately adjoining the town of Little Rock, then the seat of Government for the Territory, embracing the steam-boat landing, and a part of the bluff upon which the town was built, adjoining the point of rocks, in the immediate vicinity of which the principal business of the town was then transacted, it was a very extraordinary contract on the part of Cloyes, provided his claim was a valid one, to say nothing of its direct tendency to defraud the pre-emption law.

Of this same nature, is the great lapse of time which intervened between the point of time when the Secretary of the Treasury, "unwilling to prejudice any claim of the heirs of Cloyes under the pre-emption law, and that they might be more effectually enabled to maintain their rights before the proper judicial tribunals," authorized the money to be received, and a certificate of purchase to be issued to these heirs, to enable them to appeal to the courts, and the point of time when judicial proceedings were first commenced in their behalf—a period of upwards of nine years—the certificate having been issued to them on the 5th March, 1834, and the first bill of complaint was filed 23d of March, 1843.

It is true, that the heirs of Cloyes were, during this interval, minors, under the age of twenty-one years. But it appears in the evidence, that Desha, on the 11th of March, 1834, in consideration of two hundred dollars, and of professional services

then already rendered, and to be afterwards rendered, in advancing and defending Desha's interest therein, conveyed to William Cummins one-half of his (Desha's) interest in the pre-emption claim. Cummins, it appears from the evidence, was a lawyer of ability and prominence, and resided at Little Rock, and did not depart this life until April, 1843. His name appears frequently in the voluminous documents certified from the General Land Office, as the advocate of the heirs of Cloyes, and as their lawful guardian. His professional character forbids the inference that he could have been ignorant of the legal rights of his wards; and a court of chancery would have secured him, by a lien upon the land recovered for them, whatever he may have advanced for the just prosecution of their rights, as well as just compensation for his professional services in their behalf, to say nothing of the additional stimulant to action, on his part, as the counsel of Desha, and to forward his own interest, derived by that retainer. Nevertheless, for all this, although the courts were open to him for a period of over nine years before his death, up to which time he was in the actual practice of his profession, he does not appear to have commenced any proceedings in the courts of justice. It is true, that these heirs, in a legal point of view, would not be prejudiced by the laches of Mr. Cummins, their guardian; still, these circumstances are not without some significancy in repelling inferences, in their favor, arising from their minority.

There are other circumstances, however, more favorable to the complainants, which, as they have been specially urged by their counsel, may be considered here, and those are the statements of Gov. Pope, and his successor in office, Gov. Fulton, in their correspondence with the Commissioner of the General Land Office, and the Secretary of the Treasury, conceding cultivation and occupancy, but urging the invalidity of the pre-emption claim upon the ground that Cloyes was the tenant of Ashley, under a written lease: in which lease, the house and gardens leased are stated to be on the Quapaw reservation, immediately east of Little Rock.

It appears from the testimony in the cause, that Governor Pope

did not come to the Territory until the fall of 1832, and could not, therefore, have had any personal knowledge of any cultivation and occupancy in 1829 and 1830; nor does he pretend to have had any such knowledge. On the contrary, from his whole statement taken together, it is manifest he was proceeding upon the information of other persons, which led him into errors of date, at least as to the lease from Ashley to Cloyes. And the same remark, as to hearsay, is also applicable to the statements of Governor Fulton, as is equally apparent when taking his whole statement together. And his statement about the house in question having been removed across the Quapaw line, ten or twelve years before—which, by mistake as to the true line, was not effected or fully effected as it otherwise appears in the record—in connection with the fact that the Point of Rocks, which was the river terminus of the Quapaw line, was not an acute point terminating in the river, but an irregular mass of rock, allowing of scope for the line to vary fifty feet or more, and the fact, testified to by Doctor Cunningham, that the timber near this place, had been cut off for building and domestic purposes at an early day, will, in some measure, account for the conflict in the evidence as to the locality of the house and garden in question, in reference to the Quapaw line.

Crittenden's unsworn and unguarded statements, made in a political publication during a canvass, are also urged by the complainants' counsel. These, according to the rules of law, can be of no weight against any unimpeached and sworn testimony with which they may come in conflict; and in this very statement he says, "from distance of time there may be some unintentional errors," and that he was interested in the claim of Cloyes, under his bond to him for the ferry privilege of the margin of the river, and had also a verbal promise of a half acre of land eligibly situated in case of success in the establishment of the pre-emption claim. If Mr. Crittenden had had a personal knowledge of the matters stated in his publication, which that does not purport, Cloyes could have had the benefit of his tes-

timony with apparent convenience, at the time he proved up his pre-emption right at Batesville, in lieu of that of Maynor, Saylors and Bussy, who with Cloyes, according to the deposition of Mrs. Stevenson, "were all drinking, and hanging about the door of the Land Office"—because Mrs. Stevenson says, that at the same time, Mr. Crittenden was at Batesville, and was one of the corroborating witnesses as to her pre-emption claim, then also established at that Land Office.

Although all these several matters, in themselves, are of no controlling import, yet, in considering the complainants' case at large upon the facts, they must be brought into the estimate, while considering the whole testimony, in order to determine whether the complainants have made out their case over the testimony brought against it. And while looking into this, we have found the Chancellor's condensed statement of the testimony touching the alleged cultivation and possession so accurate, and his comments thereon, and in that connection, so apposite, that we shall adopt and incorporate the following portion of his opinion, with the further remark, that after a careful comparison of that statement, with the version of the same testimony given by the counsel upon the opposite sides of the case, in their printed briefs, verified by the manuscript transcript as we progressed, we have found all the errors against the complainants far more than compensated by errors in their favor, *to wit:*

"The act under which Cloyes claimed his pre-emption required him to be a settler or occupant of the land: to have had some part of it in cultivation in 1829, and to be in possession of it at the date of the act, 29th May, 1830.

"To be a settler, or occupant, he need not reside on the land, though residence on, and deriving a support from it, or using it in tillage would have been satisfactory, and the highest proof of settlement or occupancy. But cultivation of the land, wherever a man resided, was sufficient under the act. And the cultivation should be such as would be made in raising a crop for farming purposes, whether that be of grain, esculents, or whatever is raised

from the ground by tillage. But, amid all the instructions and opinions of executive officers and judicial constructions of the act, I cannot find that occupying a building alone, and for mechanical purposes, solely, has been pronounced a settlement, or occupation under the act, and I do not think it is. I shall hold the mere use of the building by Cloyes, as a tin-shop, an insufficient compliance with the act. It clearly cannot be taken as cultivation in 1829. I shall require something else to constitute possession on the 29th May, 1830. And there is much greater propriety in doing so in this case, when the precise locality of the shop belongs as well to another tract of land as to the one in controversy.

"A condensed statement of the testimony upon the cultivation of Cloyes in 1829, and possession 29th May, 1830, will be given—the depositions to be taken up in the order they fall into my hands, without regard to conclusiveness, or clearness of the testimony, or whether adduced by the complainants or the defendants.

"*Burke Johnson* says, he arrived at Little Rock, 27th May, 1829, when Cloyes and family lived just below the point of rock, where they continued to live till the latter part of 1830, or early part of 1831. Cloyes cultivated a garden of vegetables in 1829 and 1830.

"Although Johnson does not, in terms, confine the locality of the garden to the place at the point of rock, I take him to mean so, and he has well enough expressed it to require me to consider him as having sworn to the cultivation and possession below the Quapaw line. And he is one witness that has done so.

"*Robert A. Calloway* says, from the time he came to the State, in the fall of 1825—he knew Cloyes and his family well; was in the constant habit of visiting Cloyes and his family, during the time when these facts of cultivation and possession should exist; that, during that time, Cloyes lived one hundred yards or more south of Daniel Ringo's brick residence, and never resided any where else, except, that in the latter part of 1829, or first of 1830,

he moved down to the tin-shop, with part of his moveables only, and was there but a short time; that the tin-shop was on lot 1, in block 35, of the old town, a little west of the Quapaw line. Cloyes never cultivated the ground, nor enclosed, nor made any improvements. His testimony is as positive as need be, and I take it as full, in disproving of the facts of cultivation and possession.

"*George Ellison* states, he knew Nathan Cloyes from 1826 or 1827, till his death; that, as well as he recollects, Cloyes was living on the bluff, east of the Quapaw line, and cultivated a garden there in 1829 or 1830, or both of those years. His testimony is too indefinite to prove anything about the essential facts of cultivation in 1829.

"*Stephen Cotter* says, from 1826 to 1831, the time of Cloyes' death, the principal part of the time he lived immediately above the steam-boat landing, and east of the Quapaw line: that in 1829 and 1830, and how much longer he does not recollect, Cloyes lived and cultivated a garden there; that Mrs. Cloyes, with her family, after her husband's death, removed to the same piece of ground, but not to the same house they occupied in 1829 and 1830. In the identity of the ground this witness is mistaken, as he refers to the *Hutt* place, which is not on the fraction in controversy, but I do not consider that as detracting from the positive testimony given about the cultivation and possession in 1829 and 1830, and I class him as the second witness who proves those facts.

"*Matthew Cunningham* states, he was acquainted with Nathan Cloyes and his family in 1828, and thence till Cloyes' death; that, during that interval, except, perhaps, a part of 1828, they lived on the Fulton and Hutt places; that Cloyes occupied the tin-shop, which he locates west of the Quapaw line; that there was no cultivation of the soil or improvement about the tin-shop in 1829 or 1830.

"*Asa G. Baker* deposes, that in 1826, Cloyes and family lived near the point of rock, in a house which stood on, or west of the

Quapaw line, a part of the shop being east of it, and after a year removed to the Fulton house, at which, and the Hutt place, they lived till news was received of the passage of the pre-emption law of 29th May, 1830, when he moved down to the tin-shop, staying there some two or three months, or less. Except this interval, the family, from 1828, was always at the Hutt place till Cloyes' death: and that he never knew Cloyes to cultivate any land. This witness disproves the cultivation in 1829, by inference, and possession 29th May, 1830, positively; and I take him as a good witness for defendants on both points.

"*B. F. Owen* says, that in the spring of 1829, Cloyes and family lived near the point of rock: does not recollect whether there was any garden or improvement about the claim. This witness does not prove either of the essential facts—cultivation in 1829, or possession 29th May, 1830.

"*Louisa Carr* proves, that Cloyes and family lived near the point of rock, in October, 1829. Her testimony does not touch either of the facts, and is not taken into consideration.

"*Charlotte Cady* says, that in 1829 and 1830, Cloyes and family lived near steam-boat landing, below the town: that he cultivated a garden there in 1829: she is the third witness that proves both facts for the complainants.

"*William Flynn* states, that in 1828 or 1829, and probably in both years, Cloyes and family lived at steam-boat landing, just below point of rock, near the Quapaw line, and had a garden in cultivation and vegetables growing in it: does not know whether the garden was above, below or back of the shop or cabin. This testimony does not come up to the points to be proven.

"*Joseph Bone's* testimony cannot be taken to establish the date of either fact; as his recollection of dates is too inaccurate for reliance upon it; notwithstanding the facts of intimacy, and residence at the tin-shop, at some time, may be established by it.

"*Robert Allcorn* says, that in 1829, Cloyes and family lived on the bluff below Little Rock, as he supposes, from seeing the family at the tin-shop; does not recollect of seeing any furniture

there. He proves no cultivation in 1829, nor possession 29th May, 1830.

"*Caleb Ricketts* states, in 1829 as well as in 1828, Cloyes and family lived below the Quapaw line, and had a garden there, in both of these years—the garden extending round the house in the shape of an "*ell*" towards the Quapaw line—a turnip patch in the garden. This witness is so much mistaken about other important facts in his deposition, namely: about the sole steamboat landing of the place being above the point of rock, and the Quapaw line running through a house across the road from the tin-shop, that he cannot be taken as a reliable witnes to prove the localities of the time and place he was testifying about. And if he be right about the situation of the garden with the house, according to the indisputable testimony of the location of the house, the garden must have been partly west of the Quapaw line. I shall consider his testimony as tending to prove one of the facts—cultivation in 1829; but shall not give much weight to it.

"*Benjamin Clemens* says, that from 1827 to 1831, Cloyes and his family did not live at any place but the Fulton and Hutt places. In 1829 and 1830, there was no cultivation or improvement about either the Thornhill house, or the tin-shop: it stood without any enclosure: that there was a little rail pen south of the shop when Thurber lived there, before Cloyes had his shop there, to protect the pots and kettles; that Cloyes never did live at the tin-shop, nor in the neighborhood of the point of rock.

"*Hezekiah Jenkins* came to Little Rock about the last of November or first of December, in the year that Governor Pope came to Arkansas, and Cloyes was then living at the tin-shop near the Quapaw line, below where he had been shown the line was. From the location this witness gives the garden and the tin-shop, as compared with George's store, his testimony cannot be taken to establish, or deny either of the two important facts. It would show cultivation, late in the fall, by Cloyes, west of the Quapaw line.

"*Ezra M. Owen* says, Nathan Cloyes occupied a small house, and cultivated a garden near the bank of the river, east of the Quapaw line, in 1829 ,and so did, till his death, the garden adjoining the house, south-east of it, and Cloyes had possession of the house and cultivated the garden during May, 1830: identifies the land. This witness proves the facts of cultivation and possession.

"*Robert A. Watkins* says, in 1829 and 1830, he attended Cloyes' family, as a physician, by the year—quite certain never attended them but at Fulton and Hutt places, and that they never lived at any other place, during these years. This witness disproves the possession in 1830; but not the cultivation in 1829: says nothing about it.

"*Noah H. Badgett:* From March, 1830, Cloyes' family resided at the Hutt place: no fence or improvement about the shop in May, 1830, and till Cloyes' death—Cloyes' family never lived there from that time. Mr. Badgett disproves the possession in 1830, and by inference, the cultivation in 1829, as there was no sign of improvement about it in 1830.

"*John C. Heilman:* No family lived at the tin-shop in 1829 or 1830: Nathan Cloyes, according to his recollection, then in neighborhood of Fulton place: his impression that no improvement about the shop in 1829 and 1830: it stood vacant, and was occupied as a store-house would have been.

"*William Field:* In the spring of 1830, Cloyes and family lived at the Hutt place, to the best of his recollection: never saw or heard of any family in the tin-shop.

"The two preceding witnesses are not positive in their testimony: but that of Mr. Field, supports the negative of possession in 1830; and that of Heilman is stronger in disproof of both possession and cultivation.

"*Richard Fletcher:* Cloyes had a tin-shop in 1829 and 1830, between Judge Ringo's and the river, near the Quapaw line—was frequently at shop in those years: have no knowledge of his family being there then; and in those years, visited his family

at the Fulton and Hutt places: a very small enclosure about the tin-shop in 1825: do not recollect of any fence or cultivation about the building in 1829 and 1830.

"*Jacob Reider:* Came to Little Rock, 18th May, 1828: Cloyes had a tin-shop back of Judge Ringo's residence, nearly west of Quapaw line: no improvement or cultivation about the shop in 1829 and 1830—stood a naked house—nor did Cloyes' family live there.

"*Jacob Tutewiler:* Nathan Cloyes and family lived at Hutt place three or four years before he died—Cloyes' tin-shop, which he kept from about two years after the Quapaw line was run, [at which, witness assisted in carrying the chain and marking,] in 1826, till his death—there was no fence or cultivation about the house, it stood as a vacant house.

"*Samuel Floyd* says, he came to Little Rock, in May, 1829, became acquainted with Nathan Cloyes, among the first with whom he made acquaintance: he, with his family, lived on the bluff of the Arkansas river, below Little Rock, near the lower steam-boat landing, perhaps a little below the point of rock—lived in a cabin near his shop; but in what direction, cannot say positively—thinks rather below—well remembers the garden near the cabin, and cultivated—lived there in 1830.

"Of the last four witnesses, Floyd proves the cultivation and possession. Fletcher, Reider and Tutewiler disproves both: Fletcher and Floyd testifying with less certainty than the other two.

"*John M. Richardson:* In 1829 and 1830, Cloyes and family lived just below what was called the Quapaw line—not positive they lived there before or after—Cloyes had a tin-shop and house under the same roof, adjoining—does not recollect of any cultivation about the house, but a small piece of ground fenced in at south-west end of house. Richardson is a good witness for complainants to prove possession in 1830, if proveable by residence of Cloyes at the tin-shop, and good for defendants to prove no cultivation in 1829.

"*Hardy Jones:* Thinks, in 1829 and 1830, Cloyes lived near the lower steam-boat landing—not positive—but so to the best of his recollection—his family lived in same cabins with the shop, and afterwards in another cabin lower down: but only at short distance—had a little garden near the house—cultivated it—does not know that Cloyes and family lived there in 1829 and 1830—thinks they did, about that time.

William H. Keltner: Came to Little Rock 2d July, 1829—stopped in house below steam-boat landing, near the point of rock. Nathan Cloyes was carrying on tinning trade in shop across the road, about eighty feet from house I lived in—his family lived in a cabin one hundred yards, or more, back of the shop, rather quartering down the river from it—he had a garden down the river from the shop, adjoining it—cabbages, lettuce, mustard and onions growing in it—the cabbages very fine—saw Miss Cloyes frequently come from house to garden to get vegetables—stayed six days—did not come back to Little Rock till 1831.

"The last witness proves cultivation in 1829, of cabbages and vegetables: proves nothing about possession in 1830: but Jones proves nothing, only that Cloyes, at some time, either in 1829 or 1830, or before, or after, lived near the shop.

"I have thus given an abstract of all the testimony before me upon the facts on which the validity of the pre-emption depends. I began the labor of examining the testimony, without any definite opinion of what would be the rusult of the examination. I admit myself much disappointed, that in the immense mass of evidence on file, I have not found more pertaining to the particular facts on which the search has been made for proof. Other depositions and parts of the depositions, above abstracted, may relate to other parts of the case, as understood by the parties, proper to be proven: but it still remains true, that much of the testimony derived from witnesses, so far as it has any perceivable connection with the case, was auxiliary to the production of proof of the conditions of occupancy and settlement.

"The result is, that the complainants have produced witnesses, who, in greater or less degree, have given testimony to the effect, that Nathan Cloyes had a garden near his shop, on the piece of land in controversy, in 1829, and that he was living on it, in a cabin adjacent, at the date of the passage of the act of 29th May, 1830.

"On the other hand, the defendants have shown, by witnesses exceeding in number, that Cloyes did not cultivate any ground on the piece of land in controversy, in 1829: and he was not in possession of it on the 29th May, 1830: unless the occupancy of the tin-shop, in carrying on his trade, be a possession under the act. These witnesses are, Robert A. Calloway, Matthew Cunningham, Asa G. Baker, Benjamin Clemens, Robert A. Watkins, Noah H. Badgett, John C. Heilman, William Field, Richard Fletcher, Jacob Tutewiler and John M. Richardson, as to the cultivation.

"Of these witnesses, it might be remarked of some, on each side, that they testify with indistinctness, as to the particular facts required to be made out, and that others show exact and perfect method and completeness in detail. Allowance is to be made for both classes of witnesses. We naturally expect witnesses, in giving in circumstantial accounts of events that happened twenty and thirty years back, in which they were not personally and vitally interested, to present imperfect, disjointed and confused statements, while of facts, that require no such particularity, their testimony is entirely satisfactory.

"And we also know, from observation, that there are men of such tenacity and minuteness of memory, that so long as they have its use, they can give as full, exact, and apparently, as correct accounts of remote facts, as if the impression had just been made on their senses. And some men, we see, testify so carelessly about dates and minute facts of detail, that no dependence can be put on their testimony, although it may not be subject to any severe remark.

"I see nothing in the testimony of these witnesses, from which I can draw less or more favorable conclusions than would be expected from the narration of incidents that happened twenty and more years before the statements: these incidents being evidently, at the time, unimportant to the narrators. Nor need I make any distinction, as a class, for, or against the witnesses examined on the part of either party. Both parties have strenuously insisted that their own witnesses, for reasons they have urged, were better entitled to credit, as to these circumstantial matters of locality, date and observation of improvement, than those of their adversaries, but I cannot say that those arguments have made much impression upon my mind from their foundation in sound philosophy: from my knowledge with human nature, or from any legal rules of application to the depositions on file.

"The defendants' witnesses are insisted to have the advantage of long acquaintance and entire familiarity with the subjects and characters about which they are called to depose: and that, from such premises, the conclusion is inevitable, that they can testify with more intelligence and probable correctness than the complainants' witnesses, who, as a class, have had a more limited knowledge of the place, and Cloyes and his family, and their general history. There might be force in the argument, if it was general history that was wanted in this case: but we can do as well without as with the connected narratives, we have had given, provided the proof of the particular facts and dates is afforded. I do not see why *Keltner*, who was here only six days, cannot as well tell where Cloyes was living as if he had continued here till this time. Nor on the other hand, can I appreciate the force, or perceive the reasonableness of that conclusion which would hold that *Jacob Reider*, because he was often at the tin-shop, and because it was his daily walk, was thereby less able to disclose, with certainty, whether Cloyes was making a garden, a crop, or improvements of any kind any given season. He, certainly had

the advantage of the vividness of his first impression, as well as the specimen of the other class.

"I come to this conclusion, and am entirely satisfied with its propriety, and that there is no reason why I should not weigh this testimony as that of witnesses of equal intelligence and credibility.

"Doubtless, this case has a different aspect, on both sides, than it would have presented if it could have been sustained by the testimony of others, who were living and acting in the scenes which have been shadowed before us; or, if it could have rested on the statements of the witnesses, whose recollection of the facts is contained in these depositions, when their memories were fresh, and their impressions of the events then recent, could have been spread out into testimony. But time has its mouldering, decaying effect upon all. Both parties are alike affected by its ravages upon the lives and memories of men. And evidence of this sort must operate equally upon parties litigant. It is not philosophical to claim allowance against opposing testimony for its imperfections, on this score, and exemption from the application of the principle.

"Tried by this test, the complainants cannot maintain their suit. The number of the witnesses, the consequent intelligence, credibility and influence of the defendants' testimony overbear that on which the bill rests, and it must fall.

"I have chosen to consider this branch of the case, as if the cultivation, of which the witnesses have spoken, was an actual *bona fide* occupancy, under the pre-emption act. But if severely tried by the authoritative construction of the law—if fairly reduced to a fulfilment of its requisitions—I cannot but think this claim would be out of its range, especially when the situation of the land sought to be recovered is known.

"If it be within the letter of the law to subject this fractional quarter section to its operation, it seems to me it cannot be according to its spirit to make such donation to one, who never expended labor, time or money upon it: who had no character-

istics of that class of persons, for whose recompense pre-emption privileges have been reserved. And if an earnest attempt had been made to have reconciled the conflicting testimony, that of the complainants', I think, might have been reduced from the strength given it: for, I cannot but think that the result would be, that some, which I have allowed, towards proof of the occupancy in 1829, of the vicinity of the point of rock, would fall back upon the Hutt lots, which the complainants admit to be his residence before and after 1829, and the defendants assert was during the whole of that year. In every possible way that I can view the testimony, I seem, to myself, to have given it its full, its greatest efficacy."

We might well enough conclude here, but as the counsel for the complainants seems to make the point, upon the testimony, that the house, which Mrs. Chandler occupied in 1832 and 1833, according to the testimony of Greer and Pope, may have been the same that the family of Cloyes occupied in 1829 and 1830, and thus locate the supposed cultivation thereabout, it may be proper to respond to that position by a reference to the deposition of one of the complainants' own witnesses, Burk Johnson, who says: "There was no person living below the Quapaw line, or point of rocks, but Cloyes and his family, until 1831 or 1832, for a distance of a mile or two, the whole space being covered with bushes and timber, except Cloyes' settlement. I rented the house below the Quapaw line, formerly occupied by Cloyes and family, and took possession on the 6th of November, 1831. I rented it of Emzy Wilson, as agent of Cloyes' widow, and kept the possession until April, 1833, when I paid the rent and moved to Yell county." Thus, according to the complainants' own showing, that theory cannot be maintained, and it is inferential that the log-house, that Mrs. Chandler occupied during the years 1832 and 1833, was built by some one after 1830.

Upon the whole testimony, we come to the conclusion, that the alleged pre-emption right in question, was but colorable, and was not substantial, and was fraudulent in law, and found in favor of

Cloyes, by the Register and Receiver at Batesville, upon false testimony. We shall, therefore, affirm the decree of the Chancellor, dismissing the complainants' bill.

Mr. Justice HANLY: I concur in the *result* of the opinion just delivered; but as there are some positions taken in the opinion, which I do not sanction, as well as reasoning, which I do not subscribe to—not bearing, however, upon the main point upon which the cause is made to hinge—I desire, without attempting to give my views, *in extenso*, upon the subject, to designate the ground upon which I place my concurrence.

I am of opinion, that the question in reference to the fraudulent character of the pre-emption claim of Cloyes to the fraction of land in controversy, was one impliedly left open by the Supreme Court of the United States, when this cause was adjudicated by that court, at their January term, 1850, as manifested by the report thereof in 9 *How. U. S. Rep.* 314, *et seq.*

I am further of opinion, that the testimony, shown by the record, renders it manifest that the claim of Cloyes, to a pre-emption upon the fraction of land in question, was established before the Register and Receiver of the Land Office at Batesville, on the 28th May, 1831, by means of perjury perpetrated by the claimant, and that the allowance and approval of the claim by those officers, as shown by the record at bar, was obtained by the fraud of Cloyes, through the instrumentality of that perjury.

And I am further of the opinion, that the fraudulent character of the pre-emption claim of Cloyes being established, as I conceive it to be, a Court of Chancery could not, upon principle, give the complainants, claiming under that fraudulent pre-emption right, any relief whatever against any of the defendants, though they claim under a patent, issued subsequently to the establishment of the pre-emption of Cloyes to the satisfaction of the Register and Receiver at Batesville. See *Wynn vs. Morris et al.*, 16 *Ark. Rep.* 414; *Wynn vs. Garland, same* 440.

These propositions, and my conclusions upon them, enable me to agree to the result announced in the opinion just delivered. I decline to give any expression upon the other points considered and discussed, further than as hereinbefore intimated, preferring to reserve those questions for a future occasion, when, from the nature of the case, they will necessarily require special notice and direct application.

INDEX:

ABATEMENT.

1. A plea in abatement, in an attachment suit, is not bad on demurrer, because it prays judgment both of the declaration and writ, the matter set up in the plea being to the entire proceedings, and not to so much as is a proceeding, *in rem*. *Edmondson vs. Carnall*, 284.

ACTION, CAUSE OF.

1. An instrument of writing, that the defendant "received" of the plaintiff "one hundred and ten dollars," does not import an admission of indebtedness, and will not, without other evidence, support an action for money lent. *McFarland vs. Shipp ad.*, 41.

ACTION, RIGHT OF.

1. At common law, a party could not maintain an action for damages arising out of a felony, until after a trial upon a criminal prosecution; but our Legislature has changed this rule. (*Dig.*, *p.* 428.) *Brunson vs. Martin*, 270.

   See, also, *Assignor and Assignee*, 2; *Trust and Trustees*, 1.

ADMINISTRATION.

1. To render the title of a legatee to a specific legacy, complete and perfect, previous to the time allowed for the settlement of the estate of the testator, the assent of the executor is indispensably necessary. (*Refeld et al. Exrs. vs. Bellette et al.*, 14 *Ark.* 51; *Carter et al. vs. Cantrell*, 16 *Ark.*) *Ross et al. Exrs. vs. Davis*, 113.
2. If the executor voluntarily assents to a legacy, he cannot, afterwards, retract or withdraw such assent, nor can he, *generally*, pursue the property in the hands of the legatee, even though there may be a deficiency of assets to liquidate the outstanding liabilities of the estate. *Ib.*
3. Where an executor has delivered to the legatee, a specific legacy, within the period of

ADMINISTRATION—CONTINUED.

distribution prescribed by the statute, and taken a refunding bond (*Digest, chap.* 4, *secs.* 130, 131) his remedy, upon ascertaining that there is a deficiency of assets to pay debts, is at law upon the bond, or he may proceed, *generally*, in chancery to compel the legatee to refund. *Ib.*

4. In such case the extent of the right of recovery by the executor, is the value of the specific legacy—where it consists of property—at the time of delivery, with interest thereon: and not—as where the legacy is of a slave—of the increased value and the hire. *Ib.*

5. Under the peculiar system of administration laws of this State, it is inconsistent with the tenor and policy of those laws to hold that any one can make himself, of his own wrong, the executor of another—where one intermeddles with the estate of a deceased person, he is responsible to the rightful executor or administrator, and not to a creditor, as an executor *de son tort*. *Barasien vs. Odum*, 122.

6. According to the common law it is error to render judgment *de bonis propriis* against an executor, in the first instance, except where by failing to plead, or by pleading, he had admitted waste. *Ib.*

7. Under our administration system, an executor *de son tort*, as at common law, is unknown. (*Barasien vs. Odum.*) *Rust ex. vs. Witherington*, 129.

8. The estate of a deceased person, in the hands of his administrator, is not liable to pay for medical services rendered to the family of the deceased after his death. *Bomford et al. vs. Grimes ad.*, 567.

9. It is the right, and duty of an administrator to employ medical attendance for the slaves of the deceased, in his possession, when sick; and it would be the duty of the Probate Court to allow such expenses, as costs of administration. *Ib.*

10. But the employment in such case would be a personal contract, as between the administrator and physician; and compensation therefor could not be recovered in an action of assumpsit against the administrator as such, as upon a promise by the intestate. *Ib.*

11. The administrator applied to the Probate Court for an order for the sale of the slaves or real estate of the deceased, to pay debts, showing that the debts unpaid, of which the amount of a decree against him for the widow's dower formed a part, exceeded the assetts, exclusive of the slaves and real estate: HELD, That as the personal estate, subject to the widow's dower, had been applied to the payment of debts generally, she was equitably entitled to be reimbursed out of what remained of the estate: that neither reason nor equity required her to wait for the accruing rents and hires to pay off the sum decreed to her for dower. *Wells ad. vs. Fletcher, guardian*, 581.

12. In support of such application, the administrator may show, that since his last settlement with the Probate Court, he has paid other debts of the estate duly proven and allowed. *Ib.*

13. It is within the legal discretion of the Probate Court, which ought not to be controlled

ADMINISTRATION—CONTINUED.

unless shown to have been used to manifest injustice, (*Bankhead vs. Hubbard et al.*, 14 *Ark.* 298,) to allow the widow a certain sum, by way of commutation, for the provisions, &c., on hand at the death of her husband, where they have been used by the administrator instead of having been delivered to the widow under *sec.* 56, *chap.* 4, *Digest.* *Green as guardian vs. Ford adx.*, 586.

14. An appeal cannot be taken from the judgment of the Probate Court, allowing a claim against an estate, after the expiration of the term. (*McMoran vs. Overholt*, 14 *Ark.* 245.) *Ib.*

AFFIDAVIT.

1. An affidavit taken within the county of Sebastian, and State of Arkansas, before "John F. Wheeler, Mayor," was taken before one utterly unknown to our laws. *Edmondson vs. Carnall*, 284.
2. An affidavit for attachment, containing all the substantial requirements of the statute, and filed before the issuance of the writ, is sufficient, though not "entitled," nor attached to any of the original papers in the cause. *Kenny & Goodrich vs. Heald*, 397.

AMENDMENTS.

1. The Circuit Court may, under its high equity powers, cause its record to be amended at a subsequent term, in whatever may be necessary to make it speak the truth, whenever the ends of justice require such amendment. (*King & Houston vs. State Bank*, 4 *Eng.* 188.) *Arrington vs. Conrey et al.*, 100.
2. Though such amendments may sometimes be made by interlienation, the more regular mode after the judgment term, is, by an order of court reversing the defective entry, followed by a new one *nunc pro tunc*, such as should have been made in the first instance. But the entry of the new judgment is, virtually, a reversal of the first one. *Ib.*
3. Where it is clearly made to appear that there is an omission or error in the entry of the judgment, as to the amount recovered, caused by the misprision of the clerk of the court, such judgment should be amended. *Ib.*
4. The Circuit Court has power to amend its record, so as to make it speak the truth, &c. (*King & Houston vs. State Bank*, 4 *Eng.* 185; *Arrington vs. Conrey*, *ante*, 100.) *McNeill vs. Arnold et al.*, 155.

ARBITRATION.

1. The terms and subject matter of a submission to arbitration, when not in writing, and not shown by other evidence, can only be gathered from the award and what may

ARBITRATION—CONTINUED.

be shown to have followed: And where the award is of the widow's claims for dower in the personal estate of her deceased husband, and under *sec.* 57, *chap.* 4, *Digest*, the court will not conclude that any other claims, not of the nature of dower, were included in the submission. *Green as guardian vs. Ford adx.*, 586.

ASSESSMENT AND TAX.

1. This court has jurisdiction, on appeal from the Circuit Court, of a cause originating in the County Court, on the petition of a land owner to reduce and correct the assessment of his lands. *Redd vs. St. Francis County*, 416.
2. The 4th section of the act of 1853, (Acts of 1853, page 73,) prescribing the mode of assessing the lands of non-residents, is not in conflict with Article 4, section 2, of the Constitution of the United States, nor of the compact entered into between this State, upon its admission into the Union, and the United States, which forbids non-resident proprietors to be taxed higher than residents. *Ib.*
3. This court will not set aside the assessment of lands made by three house-holders of the vicinage under oath, upon the testimony of witnesses who swear merely as to the value of the lands, generally, in the same township. *Ib.*

ASSIGNOR AND ASSIGNEE.

1. Where the maker of a bond assures the assignee, before assignment, that the bond will be paid at maturity; and afterwards, to an action upon the bond by the assignee, pleads that there was "no consideration," he must prove that, at the time of such assurance, he was ignorant of any fraud or deception in the contract—if he was aware of any equity that would release him from the payment of the bond, and he concealed it, he is forever precluded from setting it up against the assignee. *Brown vs. Wright*, 9.
2. The defendant executed his sealed note, payable to "the order of George S. Bernie, to Messrs. Byrne & Burnside." Bernie endorsed the note to the plaintiff: HELD, That the endorsement vested in the plaintiffs a legal right to sue upon the note. *Pike & Cummins vs. Galloway*, 90.
3. A written endorsement on a note, signed by the payee, and directing payment thereof to be made to a third person, is not sufficient evidence of an assignment of the note, without proof of delivery. *Kirkpatrick vs. Wolfe & Bishop*, 96.
4. The right of action upon an assigned note is in the assignee; and if it passes into the hands of another without assignment or endorsement, he has but an equitable interest, which gives him the right to use the name of the assignee in bringing suit upon the note. *Taylor vs. Coolidge & Co.*, 454.
5. The payee and assignor of an instrument of writing, under seal, for the payment of money, may be sued jointly with the obligor, in an action of debt, by the assignee, on non-payment. *Ib.*

ASSIGNOR AND ASSIGNEE—CONTINUED.

6. The blank endorsement and delivery 'of a promissory note,' constitute such a transfer of the interest in the paper as to vest in the transferee the right of action and recovery. (*Worthington vs. Curd & Co.*, 15 *Ark.* 508.) *Owen vs. Arrington & Co.*, 530.

ATTACHMENTS.

1. A judgment by attachment, before a justice of the peace, without personal service of process upon the defendant, or appearance, is a judgment *in rem;* and cannot be transferred to the office of the clerk of the Circuit Court, for the purpose of constituting a lien upon the realty of the debtor, or of being satisfied by execution or garnishment, out of property or effects, other than the goods attached. *Goodwin vs. Anderson et al.*, 36.
2. The jurisdiction of the court, in a suit by attachment, as between the interpleaders, arises by virtue of the writ of attachment and a valid service thereof. (*Gibson et al. vs. Wilson et al.*, 5 *Ark.* 422.) *Splawn vs. Martin*, 146.
3. Where the transcript of the record of the Circuit Court, filed in this court, fails to show the issuance and legal service of such writ, this court would, for the purpose of affirmance, if there were no other error in the record, issue a special writ of *certiorari* to the clerk of the Circuit Court to certify such writ and service to this court. (15 *Ark.* 396; 13 *Ib.* 745.) *Ib.*
4. An interpleader, in a suit by attachment, levied upon land and cotton, proved that the defendant, who was her son, had executed to her, a deed for the land, purporting to be for a valuable consideration, several months before the attachment issued, and possession of the land from the date of the deed; also that the cotton was the produce of the land and of the labor of her slaves, and was in her sole possession: HELD, That these facts, in the absence of any proof of fraud, render it clear that the title to the property was in the interpleader: that the mere fact of the indebtedness of the defendant to the plaintiff, at the time of the execution of the deed to the interpleader was no evidence of fraud; nor was the fact that the defendant was the son of the interpleader. *Ib.*
5. The plaintiff or his attorney may, under our statute, dismiss, in vacation, any suit pending in any of the courts of this State, except in actions of replevin; but he cannot, by an order to dismiss an attachment suit, relieve himself of the costs incurred in preserving the property attached, where the sheriff cannot deliver such property to the owner and relieve himself from responsibility; and this court will not interfere with the discretion of the Circuit Court in allowing the sheriff his reasonable costs incurred in the preservation of the property under such circumstances. *Roberts et al. vs. Randolph*, 435.

See, also, *Pleas and Pleading*, 15; *Affidavit*, 1; *Abatement.*

AUDITOR'S DEED.

1. The case of *Steadman vs. The Planters' Bank*, 2 *Eng. Rep.* 427, as to the legal effect of the Auditor's deed, for land forfeited to the State and sold for taxes, approved. *Bettison vs. Budd*, 546.

BILLS, BONDS AND NOTES.

1. An action will lie at the suit of a drawer of a bill of exchange, against the acceptor, upon presentment to, and refusal to pay by the acceptor, and payment by the drawer: And such bill, with endorsement of acceptance, is admissible in evidence for the plaintiff. *Kinney & Goodrich vs. Heald*, 397.
2. The maker of a bond, for the payment of money, has the whole of the day on which it falls due to pay it, and cannot be sued until the next day. *Zachary vs. Brown et al.*, 442.

See, also, *Action, cause of.*

BILL OF REVIEW.

See *Chancery* 2, 3, 4.

BOND FOR COSTS.

See *Practice in Circuit Court*, 7, 8.

CERTIORARI.

1. When a case, commenced before a justice of the peace, is brought into the Circuit Court upon *certiorari*, the court can only determine, upon inspection of the proceedings and judgment of the magistrate, whether they were valid, or irregular and void, and quash or affirm. *Hill vs. Steele*, 440.
2. A judgment would hardly be void, though the suit be commenced and prosecuted on a writing obligatory, executed to the wife in her life-time, whether the suit be properly brought in the name of the husband or not—or whether he should have sued as the representative of his wife—such objection should be made, if good, before the justice; and not in the Circuit Court, upon *certiorari*. *Ib.*
3. An application to this court in the first instance, for a writ of certiorari to a justice of the peace, because the Circuit Judge is of kin to the petitioner, and disqualified, should show how he was related. *Allston Ex parte*, 580.
4. A writ of certiorari will not lie to correct errors in the proceedings of the inferior court, which could have been corrected on appeal. *Ib.*

See, also, *Attachment* 3.

CHAMPERTY AND MAINTENANCE.

See *Pre-emptions* 10.

CHANCERY.

1. In a proceeding in equity by the widow, against the heirs and executors of her deceased husband, for dower, an executor, who is a party to the record, liable for cost, and interested in freeing himself from responsibility, and charging the estate in the hands of the heirs, is an incompetent witness for the complainant. *Price and wife vs. Notrebe's heir and Exrs.*, 45.

2. There is no pretence for a bill of review, where the decree is in accordance with the whole scope and tenor of the original bill, in which there was no allegations upon which the decree prayed for in the bill of review, could have been based, and no discovery alleged of any new matter or evidence, which could not have been had when the original decree was passed. *Ib.*

3. A bill of review cannot be maintained upon allegations that the decree, on the origiginal bill, was entered without the assent of the complainant; or through the mistake, carelessness, or unfaithfulness of her solicitors: *Ib.*

4. Nor for the failure of the court to decree to the complainant, on a bill for dower against the heir and executors, her dower in the rents and profits of her deceased husband's real estate, and in the money on hand at his death, where the court had referred the question of such rents and profits to the master—the right claimed as to the money on hand being conceded in the answer, and not decreed against her. This court, in such case, will intend that the question, as to the money on hand, as well as the rents and profits, was reserved by the court, in the original case, until the coming in of the report of the master, and the final decree. *Ib.*

5. The answer of one defendant, is not evidence against his co-defendant, unless upon proof of such an absolute unity and identity of interest and design between the defendants as, under the ordinary rules of law, will make the acts or admissions of one, the acts or admissions of the other, &c. (*Blakeny vs. Ferguson et al.*, 14 *Ark. Rep.* 641.) *Dunn et al. vs. Graham et al.*, 60.

Quere: When, and how far, is the answer of one defendant, when responsive to the bill, evidence in favor of his co-defendant?

6. When the answer of a defendant, in all material points, is responsive to the allegations in the bill and to the special interrogatories based thereon and propounded to him, it must be taken as true, unless disproved under the rule requiring two witnesses, or one with corroborating circumstances. *Ib.*

7. G., as assignee of W. & Co., obtained a judgment against V. and D. and others as his securities, on a note payable to W. & Co., or bearer. The securities file a bill against G., and V. alleging that V. had paid the note, and again put it in circulation, and interrogate G. as to his title to the note: G. answers that he bought the note of the agent of the payees, and that V. was his agent to make the purchase; the complainants prove by one witness, the agent of the payees, that V. paid him, and that he delivered the note to him: HELD, That the answer of G., as to his title to the note, must be taken as true, and that the evidence of the witness is not irreconcilable with the truth of the statements in the answer. *Ib.*

CHANCERY—CONTINUED.

8. It is a rule of chancery practice, that where there is a prayer for specific relief and also for general relief, and the state of the case, as presented by the bill, is not sustained by the evidence, or the court, upon principles of equity, denies the special relief, to grant the complainant, under his general prayer, any relief warranted by the facts set up in his bill, provided the defendant be not surprised on account of such facts not being put in issue. (*Cook vs. Bronaugh et al.*, 13 *Ark. Rep.* 188.) *Ross et al. exr. vs. Davies*, 113.

9. A defendant in chancery having submitted to answer the whole bill, and not having, by demurrer, nor by answer, objected to the jurisdiction of the court over any of the matters set up in the bill, cannot, upon the hearing, nor upon appeal, object to the jurisdiction, unless the court was wholly incompetent to grant the relief sought by the bill. *Mooney vs. Brinkley*, 340.

10. A debtor, having executed a deed of trust for the benefit of his creditors, filed a bill in chancery to enjoin one of the creditors from enforcing his judgment at law, and to coerce his acceptance of the deed of trust, depositing in court the amount then due, according to its provisions, for the payment of the judgment: the creditor refused to receive the money, except as an unconditional payment, or to accept the deed of trust, or to become a beneficiary under it: upon the hearing, the bill was dismissed: HELD, That the complainant had a right to withdraw the money so deposited. *Cummins vs. Rapley et al.*, 381.

11. A court of equity is competent to relieve against an ordinary judgment obtained in a court of record by means of fraud; and the statutory judgment springing into being upon the forfeiture of a forthcoming bond, cannot stand upon any higher ground: And so, where there is fraud in procuring an execution to be levied upon property not subject to execution; and in procuring the bond given for its delivery, to be forfeited, and so returned by the sheriff, the court will grant relief by perpetual injunction. *Nunn et al. vs. Matlock*, 512.

CHARITABLE USES.

See *Trust and Trustee* 3, 4.

COMMISSIONS.

See *Office and Officer* 2, 3.

COMMON CARRIER.

1. Where the defendant is sued for the value of cotton shipped by him under a contract, the plaintiff must prove a stipulation to carry the cotton to some place, or deliver it to some person, or dispose of it in some manner, and a breach of such stipulation. *Bowman vs. Browning*, 599.

COMMON CARRIER—CONTINUED.

2. Where a person has tortiously obtained the possession of the goods of another, and sold them and received the proceeds, the owner may elect to waive the tort, and affirm the sale and claim the price received; but for a mere detention of the goods, in such case, or a conversion of them, assumpsit will not lie to recover their value. *Ib.*

CONSIDERATION.

1. Under a special plea of *no consideration*, it is incumbent upon the defendant to prove every material fact set out in his plea, and a failure to do so, will determine the issue against him. *Brown vs. Wright*, 9.
2. A plea of *no consideration*, is sustained by proof, that the consideration of the bond sued on, was the sale of a "*patent right*" to make, use, and vend a certain medicine, represented as being patented, and that no patent had ever been issued for such medicine. *Ib*,
3. The defence of partial want or failure of consideration, may be interposed to a note or bond, when the facts, constituting the defence, are specially pleaded, or set out by way of recoupment, or as a bar to so much of the demand as may be thus answered. (*Wheat, use &c. vs. Dotson*, 7 *Eng.* 708.) *Keller vs. Vowell*, 445.
4. The defendant employed the plaintiff to purchase an improvement upon the public land; the plaintiff made the purchase, but fraudulently represented to the defendant, that he gave for the improvement, $100 more than its actual cost; the defendant gave his note, the one sued on, to the plaintiff, for a balance due him on the purchase, including the $100 so falsely represented to have been given for the improvement: HELD, That there was a partial want of consideration to that amount, of which the defendant could take advantage by plea. *Ib.*
5. On an issue to the plea of "no consideration," the plaintiff read in evidence his deed to the defendant for a tract of land, as the consideration of the note sued on; the defendant offered to read a deed from the Auditor for the same land, as having been forfeited to the State for non-payment of taxes, which was ruled out by the court: HELD, That the defendant was not prejudiced by the action of the court, as the Auditor's deed would not have shown a total want of consideration, the defendant having gone into possession under his purchase, and still retaining it. *Seaborn vs. Sutherland*, 603.

See, also, *Pleas and Pleading* 2; *Deed* 1; *Recoupment* 3; *Contracts, rescision of*, 1, 2.

CONSOLIDATION OF SUITS.

See *Practice in Circuit Court* 7.

CONSTITUTIONAL LAW.

See *Assessment and Tax*, 2.

CONTRACTS, RESCISION OF.

1. A party to a contract will not be allowed to repudiate or rescind it, where the failure of performance by the opposite party was but partial and without fraud, leaving in his hands a subsisting and executed part performance; nor where it is impossible for both parties to be restored to the condition in which they were before the contract was made. *Desha's exrs. vs. Robinson ad.*, 228.
2. And even in cases of fraud, the party seeking to rescind a contract, must, within a reasonable time after the fraud comes to light, make his election and proceed to rescind by a return or offer to return whatever he may have received under the contract of any value whatever to either party. *Ib.*

CORPORATION, POWERS OF.

1. The corporate authorities of a city, having the right, by their charter, to pass an ordinance providing a tribunal before whom contested elections, under it, should be tried, and providing the course of procedure in such cases, may pass such ordinance after an election has been held, and invest such tribunal with power to determine contests arising out of such previous election. *The State vs. Johnson*, 403.

COSTS.

See *Practice in Supreme Court* 5, 7; *Attachment* 5.

COURSE OF TRADE.

See *Usage.*

CRIMINAL PROCEEDINGS.

1. The issue to a plea of not guilty to an indictment for *assault and battery*, cannot, by consent of parties, be tried by the court. (*Wilson vs. The State*, 16 *Ark. Rep.*) *Bond vs. The State*, 290.
2. On the trial of a *scire facias* on recognizance for appearance in a criminal case, the bail bond and record entry of forfeiture are competent evidence, and sufficient to fix the bail, if the recognizance be in form, and taken by the proper officer, and the *scire facias* follows, substantially, the recognizance. *Cannon et al. vs. The State*, 365.
3. To a plea of former recovery to a *scire facias* on recognizance, the State replied, in substance, that the trial and former recovery pleaded by the defendant, was not a trial and recovery upon the merits, but was only a judgment in bar, rendered upon a question of law, not involving the facts or the merits of the cause: HELD, That the replication was a good response to the matter of the plea. *Ib.*
4. A substantial compliance with the statutory form (*sec.* 61, *chap.* 52, *Digest*,) in a *scire facias* on recognizance of bail in criminal cases, sufficient. *Ib.*

CRIMINAL PROCEEDINGS—CONTINUED.

5. The provision of the statute, that the recognizance of bail, for the appearance of a party, to answer for a criminal offence, shall name the nature of the offence charged, is sufficiently complied with, by stating that he shall appear and answer the "State upon a charge of *killing* one Thomas Wheeler:" which will be construed to mean a *felonious killing*. *The State vs. Williams et al.*, 371.
6. It is not necessary that a recognizance of bail should recite all the facts, which prove that the officer, before whom it was acknowledged or executed, had jurisdiction to act in the particular case, if it is conditioned to do some act, for the doing of which, such an obligation may properly be taken. *Ib.*
7. As to the form of a recognizance and *scire facias* thereon, see *Cannon et al. vs. The State, ante. Ib.*
8. Where the *scire facias* purports to issue upon a recognizance taken before one justice of the peace, and the recognizance given on oyer, appears to have been taken before two justices of the peace, it is a fatal variance—the demurrer presenting the variance being treated as a plea of *nul tiel record. Ib.*

Quere: Is a demurrer the proper mode of taking advantage of a variance between a recognizance of bail and the *scire facias* thereon?

9. A constable in the execution of civil process, is not restricted to the township in which he resides: and it is sufficient in an indictment for resisting process in the hands of a constable, that it state that the resistance was made in the county where he resides. *Oliver vs. The State*, 508.
10. An indictment for resisting an officer in the execution of process is sufficient if the charge be made in the language of the statute (*Digest, page* 359,) without stating the manner of resistance. *Ib.*
11. As to the necessary averments of an indictment descriptive of the offence charged, see the case of *Slicker vs. The State*, 13 *Ark.* 397. *Ib.*
12. We have no law authorizing the court to sit as a jury in the trial of a criminal case (*Wilson vs. The State*, 16 *Ark.; Bond vs. State*, at the present term.) *Ib.*
13. It is not necessary, in all cases, that a man should be actually present in this State to make him amenable to our laws for a crime committed here, if the crime is the immediate result of his act. *The State vs. Chapin*, 561.
14. An accessory before the fact, in another State, to a *felony* committed here—as where an agreement or conspiracy is entered into in another State, to commit the felony in this—is guilty of a crime in the State where he becomes an accessory, and is answerable there; while the principals, who commit the felony, are indictable here. *Ib.*

See, also, *Jurisdiction.*

DEED.

1. A party offering a deed, purporting to have been executed for a valuable considera-

DEED—CONTINUED.

tion, as evidence of title, may prove the actual payment of the consideration, although such proof is cumulative of that *prima facie* established by the deed itself. *Splawn vs. Martin*, 146.

2. A deed executed in another State, in the absence of any testimony that the laws of the State authorized its registration, is not admissible in evidence, merely upon certificates of its acknowldgement and registration, without other proof of its execution. *McNeill et al. vs. Arnold.* 155.
3. If a deed be duly executed, &c., in another State, according to the laws thereof, it is unnecessary, to protect the rights of the grantee, that it should be recorded in this State, upon the removal of the parties and the property. (*O'Neill vs. Henderson*, 15 *Ark.* 235.) *Ib.*
4. Where a deed or instrument of writing is read in evidence, without competent proof of its execution, and such proof is afterwards made, though it was irregular to permit it to be read, the irregularity is cured by the proof afterwards made. *Ib.*

See, also, *Evidence* 11, 12, 13, 14.

DELIVERY.

See *Assignor and Assignee* 2.

DOWER.

See *Administration* 14.

EJECTMENT.

See *Sheriff's Deeds* 1.

ELECTION.

See *Office and Officer* 2.

ESTRAY.

See *Replevin* 1.

EVIDENCE.

1. The acts, declarations, and admissions of a person, who has sold and transferred an article, or a right or privilege, made subsequent to such sale, are not admissible in evidence in a suit between others, growing out of a contract in relation to the same subject. *Brown vs. Wright*, 9.
2. When the question propounded to a witness, indicates the answer it is desired he should make, or furnishes him with one favorable to the point sought to be established by the examiner, it is leading. (*Clark ad. vs. Moss et al.*, 6 *Eng.* 741; *Pleasant vs. State*, 15 *Ark.* 624; *Rogers vs. Diamond*, 13 *Ib.* 473.) *McNeill et al. vs. Arnold*, 155.

EVIDENCE—CONTINUED.

3. Where a party suing for a chattel proves that he purchased it from one in possession, he makes a *prima facie* case of title, and the *onus probandi* is shifted to the opposite party. *Ib.*

4. After the plaintiffs had proved, by the agent of the person under whom they claimed title to the personal property, that he, as agent, had purchased the property for his principal, the defendant, by the same witness, on cross-examination, proved that, at the time of the purchase, a bill of sale was taken: HELD, That the plaintiffs were not required to produce the bill of sale. *Ib.*

5. If the authority of the agent is shown to be in writing, the writing must be produced and proved, or its non-production accounted for, in order to admit of secondary evidence of the agency. *Ib.*

6. Where a bill of sale of personal property, expressed to be for a money consideration, contains a special warranty of title, warranting and defending against all claims in, through or by the vendor, he is an incompetent witness, on account of his interest in the result, to sustain the title of his vendee, in a suit between him and others also claiming under the vendor. *Arnold vs. McNeill et al.*, 179.

7. The magnitude or degree of interest, nor the probability of the warranty being enforced, nor any supposed prejudice or bias on the mind of the vendor, is regarded in estimating the effect of the interest upon his mind; he is incompetent if his interest be direct, certain and vested, however small. *Ib.*

8. Where a person has executed a deed of trust, making a gift of property, but reciting, among others, a money consideration, and then executes a bill of sale with special warranty, he is not a competent witness to defeat the title under the deed of gift, in favor of the bill of sale, upon the principle that his interest is balanced. *Ib.*

9. The rule in England, that no party who has signed a deed, shall ever be permitted to give testimony to invalidate the instrument which he has so signed, has been overturned there, and our decisions favor the competency of the witness.

10. Where a statute, providing for the recording of a deed (not acknowledged by the grantor,) upon its being proved by the witnesses, makes no provision for reading such deed, or a copy from the record, in evidence, a certified copy thereof may be read, if not as primary, at least as secondary evidence, on a showing that the original is lost, or not within the control of the party. *Trammell et al. vs. Thurmond et al.*, 203.

11. When a deed or bill of sale (not acknowledged) is attempted to be proved, so as to authorize its being admitted to record, it is not sufficient for the officer to certify, in general terms, that it was proven, it should appear from the certificate that the witness was sworn, and that he stated that the party, whose name appears to the deed, signed it, or executed it, or acknowledged that he had done so, or some such language amounting to proof of the execution of the deed. And it must appear that such proof was made by one of the attesting witnesses, unless it is made to appear that the subscribing witnesses are dead, or cannot be had. *Ib.*

EVIDENCE—CONTINUED.

12. It is a general rule, that a record not made in accordance with the law relating to the recording of instruments, is incompetent evidence to prove the original: and so, *a fortiori* as to a copy thereof. *Ib.*
13. The rule making deeds admissible in evidence in consequence of their antiquity, is understood to apply to the original deed, and not to the copies. But where the original deed is lost, and the subscribing witnesses dead, after the lapse of many years, an exemplification of an unauthorized record has been admitted as a link in a chain of corroborating circumstances tending to prove the execution of the deed. *Ib.*
14. The application of a witness to explain his testimony, after he has given it in and retired, is addressed to the discretion of the Circuit Court. *Lindsay vs. Wayland*, 385.
15. Where the defence, to an action on a note is, that it was given for the purchase money of a slave, and that the slave was unsound at the time of the purchase, there is no objection to proof that the slave was sound at some time prior to the sale, provided the jury clearly understand that his soundness, at the date of the sale, and not at a prior time, is the matter in issue. *Ib.*
16. Where a party, in a suit before a justice of the peace, or on appeal from such justice to the Circuit Court, is made a witness, under the statute, by the opposite party, he may give evidence as well for, as against himself—as where a defendant files a set-off, and is called by the opposite party to prove the cause of action sued on, he may also give evidence to prove his own set-off. *Adkins vs. Hershy*, 425.
17. In an indictment for resisting process, the justice, who issued the process, is a competent witness to prove his own official character. *Oliver vs. The State*, 508.
18. On the trial of an indictment for resisting process of execution, upon which the officer has made return of "no property found," it is not contradictory of the return—in the sense in which the truth of a return of an officer is not permitted to be disputed—to prove acts of the defendant preventing the levy of the execution. *Ib.*
19. The defendant may well prove, in such case, that the property upon which the officer attempted to make the levy, being in his possession, was his own, and not the property of the defendant in the execution. *Ib.*
20. A party, who calls his adversary as a witness, under *section* 108, *chap.* 95, *Digest*, has no right to be sworn as a witness himself, unless his adversary refuse to testify. *Kowanachi vs. Askew ad.*, 595.

See, also, *Chancery* 5; *Trust and Trustees* 2; *Usage; Sheriff's deeds* 5; *Deed* 1, *New Trials* 2, 5.

EXECUTIONS.

1. It is not necessary that an execution should issue within a year and a day to keep the judgment alive. (*Hanly vs. Carneal*, 14 *Ark.* 527.) *Jordan vs. Bradshaw et al.*, 106.

EXECUTIONS—CONTINUED.

2. The issuance of an execution by a justice of the peace, upon a judgment rendered by him, and a return of *nulla bona* thereon, are pre-requisites to the filing of a transcript of such judgment in the Circuit Court and the issuance of execution therefrom: but a failure to comply with such pre-requisites, cannot affect the rights of strangers when brought up in a collateral proceeding, and can be taken advantage of by the defendant, only, in a direct proceeding. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See *Administration.*

EXECUTOR, DE SON TORT.

See *Administration* 5, 7.

FOREIGN LAWS AND STATUTES.

1. The statute law of another State can be proved only by the production of the statute, and not by parol; but the unwritten laws, custom, usage, practice, &c., of other States, may be proved by the testimony of witnesses skilled therein. *McNeill et al. vs. Arnold,* 155.

FRAUD AND FRAUDULENT CONVEYANCES.

1. An interpleader, in a suit by attachment, levied upon land and cotton, proved that the defendant, who was her son, had executed to her, a deed for the land, purporting to be for a valuable consideration, several months before the attachment issued, and possession of the land from the date of the deed; also that the cotton was the produce of the land and of the labor of her slaves, and was in her sole possession: HELD, That these facts, in the absence of any proof of fraud, render it clear that the title to the property was in the interpleader: that the mere fact of the indebtedness of the defendant to the plaintiff, at the time of the execution of the deed to the interpleader was no evidence of fraud; nor was the fact that the defendant was the son of the interpleader. *Splawn vs. Martin,* 146.
2. It is the intent that makes a conveyance of property fraudulent as to creditors; and this intent must be participated in by both parties; by the grantee as well as the grantor. *Ib.*
3. By an arrangement entered into between Richard Thurmond and Oakley, in the absence, and without the consent or knowledge of Thomas Thurmond, for the purpose of putting his slaves out of the reach of his creditors, executions are issued on certain judgments against him, which had been paid, the slaves levied upon, sold and bought in at nominal prices by Oakley, who conveys them to Richard Thurmond: HELD, That these proceedings were a fraud upon Thomas, and void. *Trammell et al. vs. Thurmond et al.,* 203.

FRAUD AND FRAUDULENT CONVEYANCES—CONTINUED.

4. Where a contract is obtained from a party, who is unable to read or write, by fraud, the jury may disregard it. *Jones vs. Austin*, 498.
5. To procure the execution of an instrument of writing by a party, who is unable to read or write, without his knowing its contents, or when he believed its contents were different from what they, on account of the fraudulent representations of others, really were, is such a fraud as would avoid the instrument. *Ib.*

See, also, *Non est factum* 1.

GARNISHMENT.

1. It is error to join several garnishees in the same writ of garnishment, without allegations of joint liability or indebtedness. (*Thorn & Robins vs. Woodruff et al.*, 5 *Ark.* 55; *Moreland et al. vs. Pelham*, 2 *Eng.* 338.) *Cincinnati and Little Rock Slate Co. vs. Bridge et al.*, 364.
2. Where a garnishee has had reasonable time to ascertain whether his creditor still holds, or has parted with, the evidence of his indebtedness, he will not be allowed, after judgment of garnishment has been rendered against him, a new trial, unless he shows that he has used due diligence. *Dunnegan et al. vs. Byers*, 492.
3. Our statute of garnishment is broad enough to cover debts due after the issuance and service of the writ; and if not due at the time the garnishee answers, the court would have the power to continue the case until maturity of the debt, or render judgment with stay of execution. *Ib.*

HUSBAND AND WIFE.

1. Where the wife has a separate estate in slaves, and the husband and wife live together, the possession of the husband is the possession of the wife. *McNeill et al. vs. Arnold*, 155.
2. Where the husband and wife bring an action of replevin for the slaves of the wife, and they are taken under the writ and delivered by the sheriff to the husband, this is such a reduction into possession by the husband as, for the purposes of the suit, will perfect his title to the slaves, in the event of the wife's death after the seizure and delivery, and before judgment. *Ib.*
3. At common law, the legal existence of the wife is merged in that of the husband by the marriage, and as a general rule, her contracts are void, and cannot be enforced against her in a court of law. *Dobbin and wife vs. Hubbard*, 189.
4. But it is a rule in equity that a *feme covert*, in regard to her separate property, is considered a *feme sole*, and may, by her contracts, bind her separate estate. *Ib.*
5. Where a married woman has created a charge upon her separate estate, as by executing a bond, bill, note, &c., the creditor has, as a general rule, no remedy, in a court

HUSBAND AND WIFE—CONTINUED.

of law, against her, but he must proceed in equity: and even in equity, she is not personally responsible. *Ib.*

6. In order to charge the separate property of the wife, it is not necessary that she should execute an instrument expressly referring to it. It is sufficient that she professes to act as a *feme sole:* and shows an intention to charge her separate estate. *Ib.*
7. A bond executed by a *feme covert*, where the authority to do so is reserved by marriage contract, being void at law during the lifetime of the husband, is equally void upon his death, and enforcible only in equity against the separate estate of the wife upon the faith of which the bond was executed: and so upon the second marriage of the wife. *Ib.*

ILLITERATE PERSONS.

See *Non est factum* 1.

INDIANS, CONTRACTS WITH.

1. The latter clause of the 3d section of the act of Congress, approved 3d of March, 1847, amendatory of acts in relation to the Department of Indian Affairs, and to trade and intercourse with the Indians, is too broad and comprehensive, in its terms, to be restricted to contracts for spirituous liquors. *Clark vs. Crosland*, 43.

INSTRUCTIONS.

See *Practice in Supreme Court* 1.

JUDGMENTS AND DECREES.

1. A decree is conclusive, only between the parties or their privies, and in relation to the same subject matter of litigation. *Trammell et al. vs. Thurmond et al.*, 203.
2. A judgment cannot legally be rendered against a steam boat, as a substantive party, and the owners, upon confession by the master. *Wassell vs. English et al.*, 480.

JUDGMENTS DE BONIS PROPRIIS.

See *Administration* 6.

JUDGMENTS OF JUSTICES OF THE PEACE.

See *Executions* 2.

JURISDICTION.

1. The Circuit Courts of this State have jurisdiction of offences if committed within the county, and of the persons of those committing them, when brought into court, whether voluntarily or by legal coercion. *The State vs. Chapin*, 561.

See, also, *Attachment* 2; *Assessment and Tax* 1; *Justices of the Peace* 2.

JUSTICES OF THE PEACE.

1. Where a judgment, rendered by a justice of the peace, is brought into the Circuit Court by appeal, and that court adjudges that the appellant had lost his right of appeal by his own laches—as by permitting a judgment to be rendered against him by default, and failing to appeal within fifteen days—and dismisses the case, there is no mode provided by our law, by which the appellant can obtain a trial *de novo*. *Hill vs. Steel*, 440.
2. Where the matter in issue arises out of the sale of an improvement upon the public land, there is not such question or controversy in respect to the title to land, as would, under the decision in *Fitzgerald et al. vs. Beebe*, 2 *Eng. Rep.* 308, exclude the jurisdiction of a justice of the peace, where the sum in controversy is less than one hundred dollars. *Jones vs. Austin*, 498.

See *Executions* 2.

LANDLORD AND TENANT.

1. The rule, that a tenant shall not be allowed to dispute the title of his landlord, does not reach beyond the particular title under which he enters into possession; and if the landlord is divested of his title, the defendant may make it appear, and protect himself in a suit by his landlord for possession of the premises. *Bettison vs. Budd*, 546.
2. A tenant is not bound, in virtue of his relation to his landlord, to see that the taxes assessed upon the land are paid: and if the land be forfeited for non-payment of taxes, and offered for sale by the Auditor, and the tenant become the purchaser, he may set up such title against his landlord. *Ib.*

LAPSE OF TIME.

See *Presumption of payment* 1.

LEGACY.

See *Administration* 1, 2, 3, 4.

LIMITATIONS, STATUTE OF.

1. The act of limitation of 19th December, 1846, (*Digest, page* 943,) makes no reserva-

LIMITATIONS, STATUTE OF—CONTINUED.

tion in favor of non-residents or *femes covert*, and the courts can make none. (*Pryor & wife vs. Ryburn.*) *Machin vs. Thompson*, 199.

2. Where a slave is taken off and sold, without the knowledge or consent of the owner; and the vendee purchases in good faith, for a fair price, without any knowledge of the adverse claim of another, the fraud of his vendor does not attach to him and prevent the operation of the statute. *Ib.*
3. A continuous, peaceable, adverse possession of slaves, for the period of five years, vests title im the possessor. (*Pryor and wife vs. Ryburn, present term.*) *Crabtree et al. vs. McDaniel*, 222.
4. The two years statute of non-claim, and not the general statute of limitation, gives the rule of limitation to claims against the estates of deceased persons, not barred at the time of the death of the debtor. (*State Bank vs. Walker ad.*, 14 *Ark.* 236; *Walker vs. Byers, Ib.* 259.) *Biscoe et al. vs. Madden ad.*, 533.
5. And so, to a claim against the estate of a deceased person prosecuted in the Probate Court, a plea, that the cause of action did not accrue within three years (the period of the general limitation as to such claims,) before the commencement of the suit, is no answer to the demand. *Ib.*
6. Where the plaintiffs, to the plea of the statute of limitations, reply that they instituted suit within the statute bar, suffered a non-suit, and again sued on the same cause of action within the year, it is no objection to the plea, nor to the proof in support of it, that the first suit was an erroneous proceeding; nor that other persons were plaintiffs therein—as where the first suit was brought by the original Trustees of the Real Estate Bank, after an assignment of the note sued on to the residuary Trustees, and the second was by the residuary Trustees alone. *Ib.*

See, also, *Pre-emptions* 4, 5, 6, 7, 8, 9.

MORTGAGES.

1. A mortgager having the right of possession of the mortgaged premises, under the terms of the mortgage, until the time of payment limited thereby, cannot be dispossessed by an action at law before the time limited for payment. *Mooney vs. Brinkly*, 340.
2. But if the mortgager of real estate acts so improperly as to cause damage or waste, whereby the debt of the mortgagee may be jeoparded, the remedy of the mortgagee would be by a bill in equity, to place the mortgaged property in the hands of a receiver, and not by an action at law of forcible entry and detainer. *Ib.*
3. And if he resorted, illegally, to such action at law, and thereby subjected himself to an action of trespass; and to relieve himself from liability for such tresspass, had to ask the interposition of a court of equity, he should bear all the costs growing out of such illegal action on his part. *Ib.*
4. Where a mortgagee, for the purpose of taking care of mortgaged property, incurs expenses after he comes ligitimately into possession, he will be allowed them in the

MORTGAGES—CONTINUED.

settlement; but if he obtains such possession illegally, and thereby unnecessarily incurs such expenses—as where, by an illegal action of Forcible entry and detainer, the mortgagee obtains possession of a tannery and incurs expenses in working out the hides in tan, which was the proper business and trade of the mortgager—he ought not, in equity, to be allowed such expenses, at the cost of the mortgager. *Ib.*

NEW TRIAL.

1. Where a party moves for a new trial, he waives all prior exceptions not incorporated in his motion for a new trial. (*Nevill vs. Hancock & Ewing*, 15 *Ark.* 511.) *Kirkpatrick vs. Wolfe and Bishop*, 96.
2. A party will not be entitled to a new trial on account of newly discovered evidence, where it is merely cumulative; nor unless he shows that he has used due diligence to procuere it at the former trial. *Ib.*
3. Where a motion for a new trial was filed in the court below, and overruled, and all the proceedings are put upon the record and brought before this court for review, the reversal or affirmance of the judgment does not depend upon the question, whether the court below did or did not err in some of its decisions; but upon the question, whether the decision of the court, overruling the motion for a new trial, was right. *Abraham vs. Wilkins*, 292.
4. The cases of *State Bank vs. Conway*, 13 *Ark.* 344; *Jones et al. vs. Gatlin*, 16 *Ark.* cited. *Kinney & Goodrich vs. Heald*, 397.
5. Newly discovered evidence, to afford a ground for new trial, must have been discovered since the fomer trial; must be such as reasonable diligence could not have secured at the former trial; must be material, and not cumulative; must be such as ought to produce on another trial, a different result, on the merits, and must go to the merits. *White et al. vs. State*, 404.
6. A motion for new trial, in general, will not be granted unless accompanied by the affidavit of the newly discovered witness. *Ib.*
7. Where there is a total want of evidence to support the verdict and judgment, this court will award a new trial. (*Russell vs. Cady*, 15 *Ark. Rep.* 552.) *Wallace vs. Brown*, 449.

See, also, *Practice in Supreme Court* 8.

NON-CLAIM.

See *Limitation* 4, 5, 6.

NON EST FACTUM.

1. A sheriff, having in his hands a writ, issued in a chancery cause, commanding him to

NON EST FACTUM—CONTINUED.

take into his possession certain property, then in the possession of the defendant in chancery, and to keep the same until the final decree, unless the defendant should enter into bond, with sufficient security to abide the decree, &c., upon application to F. who was illiterate, and could neither read nor write, to become security in such bond, assured him that it was a *delivery bond*, and that his obligation, upon it, would cease upon delivery of the property at the then next succeeding term of the court; upon which assurance, F. executed the bond, protesting that he would not execute a bond for any other purpose:

HELD, 1st: That the facts set up inducing the execution of the bond, if the representations, as to its character, had been made by the obligees, were a good defence under a special plea of *non est factum.*

2d. That the plaintiffs in the chancery cause, the obligees in the bond, were as much bound by the representations made by the sheriff to the obligor, as to the character of the bond, as if made by themselves.

3d. That the bond, when returned and filed in the chancery cause, was not a record, in such sense as would estop the obligor from denying the obligation for fraud in its execution. *Fenter et al. vs. Obaugh et al.*, 71.

NON-RESIDENTS' LANDS:

See *Assessment and Tax.*

OFFICE AND OFFICER.

1. The appointment of a deputy sheriff continues no longer than the term for which his principal was elected; and if the principal sheriff be re-elected, it requires a new appointment, and approval under the statute, to continue in office his former deputy. *Greenwood vs. The State*, 332.

2. A candidate for an elective office, receiving a majority of the votes polled, where there were but two persons voted for, but not a majority of the votes of the qualified electors, is not legally elected to the office, though so proclaimed by the judges of election, and commissioned by the Governor—the authority to fill the office being derived from the free choice and election of the qualified electors, not from the proclamation of the judges of election, nor the certificate of election, nor the commission of the Governor. *The State vs. Johnson*, 407.

3. A commission is, simply, evidence of a right to hold an office, gives color to the acts of the incumbent, and constitutes him an officer *de facto;* but invests him with no right to the office, and it becomes destroyed, canceled and superseded, upon the issuance of a commission to another, who has been legally elected to fill the office. *Ib.*

See, also, *Affidavit* 1.

ONUS PROBANDI.

See *Pleas and Pleading* 2, 3;

PARTNERS AND PARTNERSHIP.

1. An instruction, in a suit by a surviving partner, on a writing obligatory given to the firm, to which the defendant pleaded that the bond was not given to the firm, but to the deceased partner, by the firm's name; "That if the jury believe, from the testimony, that the bond in evidence was given for a debt contracted prior to the dissolution of the partnership, the name of the partnership could be used after the dissolution, and the suit maintained by the surviving partner," is not calculated to mislead—being stated hypothetically: nor abstract—there being some evidence conducing to prove the hypothesis; and is good law—one of the firm, having authority to use the firm name in the settlement of its concerns, after dissolution. *Stillwell vs. Gray, surv.*, 473.

See, also, *Pleas and Pleading* 5.

PLEAS AND PLEADING.

1. Where the declaration upon a bond contains two counts, one in the usual form; the other, also, in the usual form, but setting up matter intended to meet the defence, a plea, that there was no consideration for the bond, but failing to notice the matter set up in the second count, will be intended to apply to both counts. *Brown vs. Wright*, 9.
2. Where the defendant pleads, generally, that there was "no consideration for the bond sued on," the burden of the issue is upon the plaintiff; but if he pleads, specially, the matters showing a want of consideration, he thereby assumes the proof of the issue. *Ib.*
3. The burden of the issue being assumed by the defendant, by pleading specially, it is not removed from him to the plaintiff by a replication averring that there was a "valuable consideration for the bond"—such averment will be taken as a simple traverse of the plea, or treated as surplusage. (*McDaniel vs. Grace et al.*, 15 *Ark. Rep.* 490.) *Ib.*
4. The allegation, in the body of a declaration upon a promissory note, that the defendants "at New Orleans, to wit: at the City of New Orleans, in the State of Louisiana, made their promissory note in writing," &c., is immaterial, not traversable, and may be treated as surplusage. The venue in the margin, if necessary at all, is sufficient. *Swinney et al. vs. Burnside & Co.*, 38.
5. It is sufficient, in a declaration upon a promissory note signed by the defendants, by their firm name, to allege that they made the note without stating that they were partners, or setting forth in the body of the declaration, the manner or style in which they executed the note. *Ib.*
6. A plea, to an action of replevin for an animal, that the defendant took it up as an estray, and regularly posted it as such, as required by law, and that the plaintiff did not prove property in said estray, and pay or tender the necessary fees as required by law, is sufficient, without setting forth a compliance in detail, with all the steps required by the statute in posting a stray animal. *Davis vs. Calvert*, 85.

PLEAS AND PLEADINGS—CONTINUED.

7. A plea in bar is sufficiently certain, if it sets forth the subject matter of the defence relied upon, so that it may be fully understood by the adverse party, the counsel, the jury, and the court. *Ib.*

8. A plea setting up a defence under a public and general law, need not recite the provisions of the statute, if the allegations are sufficient to advise the plaintiff of the grounds and nature of the defence, and tender matter responsive to the declaration and susceptible of an issue. *Ib.*

9. The defendant cannot take advantage of a variance between the declaration and writ, after a plea in bar to the action. *McNeill et al. vs. Arnold*, 155.

10. Each party's pleading is to be taken most strongly against himself; but pleas in bar are not to be construed with the severity which is applied when testing dilatory pleas, and will be deemed sufficient, if by rational intendment they meet the cause of action in matter of substance. *Desha's exrs. vs. Robinson ad.*, 228.

11. To an action upon a note payable to the Real Estate Bank and assigned to the plaintiff, the defendant pleaded that the consideration of the note was the transfer and assignment of the control and management of an execution, then in the hands of the sheriff, and of all executions to be issued thereafter, on a judgment in favor of the Bank against S. and R.; that the execution was returned unsatisfied, except as to a partial payment made out of the property of one of the defendants; that another execution was issued upon the judgment, of which the Bank, subsequently, while it was in the hands of the sheriff, took the control and direction, and caused it to be returned, while it was unsatisfied and the money still due and unpaid, without the consent and against the will of defendant, whereby the consideration of the note sued on had failed—in all which the plaintiff, as agent of the Bank, participated:

HELD, That as the plea did not negative the fact, that the money made on the execution was paid to the defendant, the rule, that all pleadings will be construed most strongly against the party pleading, will so intend. *Ib.*

12. Where a part of the plaintiff's declaration is unanswered by the plea, he may take judgment therefor, but if he fails to do so, it is his own laches, and this court will not reverse the judgment for that cause. *Ib.*

13. To an action upon a promissory note, the defendant pleaded that it was given for the purchase money of a tract of land; and that, by agreement, a deed was to be made for the land, on payment of the note, averring that the payee had not made or offered to make such deed: upon demurrer, *held*, that the contract, or agreement, set out in the plea, must be taken to be an obligatory one, and being within the statute of frauds, and not averred to be in parol, must be intended, against the pleader, to be in writing, and it ought to have been so alleged with profert. *Duncan et al., vs. Clements*, 279.

14. Such plea, as it impeaches the consideration, in the allegation that the party had failed to make the deed, should be sworn to. *Ib.*

15. A plea, that the affidavit filed by the creditor before the issuance of the writ of at-

PLEAS AND PLEADING—CONTINUED.

tachment, was not taken before any judge, justice of the peace, or clerk of any of the Circuit Courts within and for this State, is good on demurrer. *Edmondson vs. Carnall*, 284.

16. Where one of several defendants interpose a demurrer, going to the right of the plaintiff to recover and not to the personal discharge of the party pleading, and it is adjudged in his favor, it enures to the benefit of his co-defendants. *The State vs. Williams et al.*, 371.

17. The questions of law arising upon a demurrer to the declaration, which has been overruled by the court, will be considered as waived by filing a plea in bar.

(The case of *State Bank vs. Conway*, 13 *Ark.* 354, and subsequent cases, as to new trials.) *Hicks vs. Badham*, 403.

18. A plea, that the note sued on was procured by the covin and fraud of the plaintiff, without setting out the facts constituting the fraud, is bad on demurrer. *Keller vs. Vowell*, 445.

19. It is error in the court to render judgment, by *nil dicit*, against the defendant, without disposing of a demurrer interposed to the declaration. *Taylor et al. vs. Coolidge & Co.*, 454.

20. The defendants demurred to the declaration; their demurrer was overruled; they craved oyer of the instrument sued on; and again demurred, and set down for cause, that the declaration did not allege a delivery of the writing obligatory sued upon: HELD, That, as this cause did not grow out of the oyer granted, it should have been set down in the first demurrer. *Ib.*

21. The cases of *Byrd vs. Cummins*, 3 *Ark.* 394, and *Cummins vs. Woodruff*, 5 *Ark.* 117, as to the effect of oyer of the instrument sued on, and the right of the defendant to take advantage of a variance between it and the note as described in the declation, cited. *Ib.*

22. The prayer and grant of oyer of the instrument of writing sued on, do not bring the assignments on the note, &c., upon the record: and if the defendant would take advantage of any defence, growing out of the assignments, he must crave oyer of them. *Ib.*

23. In an action of debt, by an executor or administrator, upon a note executed to the testator or intestate, in his life-time, the declaration may be either in the *debet et detinet* or in the *detinet* alone: *Fowler vs. Keatts surv.*, 469.

24. And where, in such case, one of the obligors hath departed this life, before suit brought, the breach may negative the payment by the deceased obligor, not sued, as well as by the defendant; or by the defendant alone. *Ib.*

25. Pleas to the merits are a waiver of the necessity of proving the representative character of the plaintiff, in a suit by an administrator. *Kowanachi vs. Askew ad.*, 595.

26. The breach, in a declaration in debt, that the defendant had not paid the plaintiff,

PLEAS AND PLEADING—CONTINUED.

"or any other person whomsoever," is not objectionable as too broad. *Pike et al. vs. Fraser & Co.*, 597.

27. Every intendment must be taken against the pleader; and so, a plea, that the consideration of the note sued upon was, that the plaintiffs would pay off certain bills of exchange drawn by the defendants, averring non-payment, but failing to allege that the time fixed by the contract for payment had arrived—held insufficient. *Ib.*
28. If a purchaser wishes to rescind a contract of sale, he must put the vendor, or offer to put him in the same situation he was in before the delivery of the property. And so, a plea, that the note sued on was for the purchase money of real estate to which the vendor had no title, must show a return of the property, or an offer to return it. *Seaborn vs. Sutherland*, 603.
29. A plea of fraud, generally, without stating the facts constituting the fraud, is bad. *Ib.*
30. And so is a plea charging fraud in the representations of the plaintiff in relation to the title to land, but failing to aver that the writing sued on was executed in consideration of such title, or that the plaintiff, in fact, had no title whatever. *Ib.*

PRACTICE IN THE CIRCUIT COURT.

1. The plea of *non detinet* is inappropriate in an action of replevin in the *cepit;* and, upon motion, should be stricken out. *Davis vs. Calvert*, 85.
2. Where the defendant pleads the general issue; and, also, interposes a special plea, amounting to no more than the general issue, or setting up matter that might be given in evidence under some other plea interposed, the proper mode of raising the objection to the pleading is not by demurrer, but by application to the court to compel him to elect upon which plea he will rely. *Ib.*
3. It is error in the court to render judgment, by *nil dicit*, against the defendant, without disposing of a demurrer interposed to the declaration. *Pike & Cummins vs. Galloway*, 90.
4. To a *scire facias* to revive a judgment, a plea, that the judgment was rendered more than ten years, and that no execution, or other process for its satisfaction, or *scire facias* to revive it, had issued within ten years, may be stricken out on motion. *Rector et al. vs. Morehouse*, 131.
5. It is within the power of the Circuit Court, in the exercise of a sound discretion, to disallow to the plaintiff any costs which he has caused unreasonably and unnecessarily to be accumulated, and the judgment of the court below, in the exercise of such discretion, should not be overruled by this court, except in cases of manifest error and abuse of power. *Meadows vs. Rogers*, 361.
6. It is the duty of the clerk of the Circuit Court, to embrace in one subpoena all the witnesses directed by one party to be summoned. But this rule is not absolutely man-

PRACTICE IN THE CIRCUIT COURT—CONTINUED.

datory—as where the party, after ordering a subpoena for witnesses, ascertains that it is necessary for him to have others summoned. *Ib.*

7. The plaintiff, for whose use a suit is brought, is liable under the statute, for the costs; and, if a non-resident, is required to file a bond for cost before the institution of the suit. *Palmer use, &c., vs. Hicks*, 505.

8. Where a non-resident plaintiff brings a suit without filing bond for costs, and the defendant pleads that fact in abatement, but cannot prove the non-residence of the plaintiff, he is entitled to discovery from the plaintiff. *Ib.*

PRACTICE IN SUPREME COURT.

1. Though the court may have erred in giving an instruction at the instance of one party, yet, if it be neutralized by one, at the instance of the other, it is not an error for which the judgment will be reversed. *Abraham vs. Wilkins*, 292.

2. This court will not set aside the verdict of a jury upon the *weight of evidence.* (14 *Ark.* 419; 13 *Ib.* 285, 236, 712; 7 *Eng.* 43.) *Moss vs. State*, 327.

This court will presume in favor of the verdict and judgment, where the bill of exceptions fails to state that *all the evidence* is put upon the record. (2 *Eng.* 348; 3 *Ib.* 429; 4 *Ib.* 478.) *Ib.*

4. Where it appears from the transcript that there is a conflict between the statements in the record entry, and in the bill of exceptions, this court will disregard the statement contained in the bill of exceptions. (*State vs. Jennings, use &c.*, 5 *Eng.* 449.) *Greenwood vs. State*, 332.

5. Where the record states that the jury were "duly elected, tried and sworn herein," this court will hold that it is shown with sufficient certainty, by intendment, that the jury were properly sworn in the cause. *Ib.*

6. Where the defendant interposes a demurrer, which was argued and submitted, and the record then states, "that the parties came by their attorneys, and the plaintiff saying nothing further in reply to the defendant's demurrer, the court doth render judgment against said plaintiff," and then follows a final judgment in the cause, this court will hold, that the demurrer was disposed of before final judgment was rendered. *The State vs. Williams et al.*, 371.

7. It is by no means certain that *sections* 132 *and* 133, (*chap.* 126, *Digest*,) were intended to apply to cases pending in the Circuit Court on appeal from a justice of the peace; and where, in such case, the court, upon consolidating several suits, upon which one action might have been brought, refuses to tax the plaintiff with the costs in all the cases but one, this court will not control the discretion of the Circuit Court in that respect. *Lindsay vs. Wayland*, 385.

8. It is not the province of this court to disturb the verdict of a jury, if it be not totally unsupported by evidence, although inclined to think the weight of evidence is against the verdict. *Ib.*

PRACTICE IN SUPREME COURT—CONTINUED.

9. Where there is an exception to the instructions given by the court below, and all the testimony saved by bill of exceptions, but no motion for a new trial, this court will consider the testimony only so far as it may be necessary to do so, in order to test the correctness of the instructions. *Stillwell vs. Gray surv.*, 473.

10. In ordinary suits at law, where a motion for a new trial is overruled, and the party making the motion does not except, he is presumed to have acquiesced in the decision, and will not be heard to question its correctness on error or appeal. *Quere:* Does not the same rule apply in garnishment cases? *Dunnegan et al. vs. Byers*, 492.

11. Where the verdict is not entirely without evidence to support it, and the evidence is applicable to the instructions, which are not contrary to the law, the verdict and judgment thereon will be sustained. *Jones vs. Austin*, 498.

12. This court will not reverse a judgment, for the failure of the record to state that a motion, in the court below, to set aside the judgment, had been disposed of; but will presume in favor of the regularity of the proceedings of the Circuit Court, that the motion had been abandoned. *Owen vs. Arrington & Co.*, 530.

13. Independent of the ordinary presumption, in favor of the regularity of the proceedings of the Circuit Court, this court will presume that the cause was regularly tried by the court on all the issues — being issues of fact — though not so stated of record, where the judgment recites a finding by the court of all the facts necessary to sustain the judgment. *Ib.*

14. The case of *Miller vs. Ratliff*, 14 *Ark.* 419, and other decisions, that this court will not interfere with the finding of a jury upon the weight of evidence, approved. *Houck vs. Lynch*, 478.

15. This case comes within the rule laid down in *State Bank vs. Conway*, 13 *Ark.* 344. *Memphis and St. Francis Plank Road Co. vs. Sullivan*, 529.

PRINCIPAL AND AGENT.

1. As a general rule the possession of the agent is the possession of the principal. *McNeill et al. vs. Arnold*, 115.

2. After the plaintiffs had proved, by the agent of the person under whom they claimed title to the personal property, that he, as agent, had purchased the property for his principal, the defendant, by the same witness, on cross-examination, proved that, at the time of the purchase, a bill of sale was taken: HELD, That the plaintiffs were not required to produce the bill of sale. *Ib.*

3. If the authority of the agent is shown to be in writing, the writing must be produced and proved, or its non-production accounted for, in order to admit of secondary evidence of the agency. *Ib.*

PRE-EMPTIONS.

1. The decision of the Supreme Court of the United States in this case (9 *How. Rep.* 314) is the "law of the case," in the ordinary legal sense of that phrase, in all matters decided in the case as then presented: but as to all matters arising in the subsequent progress of the cause—new facts and new parties having been brought upon the record, and new issues made—it will be considered as substantially new for all practical purposes, and be determined as well in reference to known equity law, as to the decision of the appellate court. *Lytle et al. vs. The State et al.*, 608.
2. Where the payment, under a right of pre-emption, is made before the official plats of survey are filed in the Land Office of the district where the land is situated, though sanctioned by the Commissioner of the General Land Office under directions of the Secretary of the Treasury, it cannot be regarded as a legal payment for the land; but it may be taken as a tender persisted in. *Ib.*
3. It would seem unreasonable and improbable that Congress should have designed, by the pre-emption act of 29th May, 1830, as to unsurveyed land, that payment should have been tendered previous to the time when, by law, it might be received by the agents of the Government; and a tender made within the twelve months allowed by the act of 14th July, 1832, after the return of the plats of survey, held sufficient. *Ib.*
4. Where several tenants in common are infants, at the time their cause of action accrues, they have, respectively, the right to bring their action within the time specified in the 4th section of the act of limitation, (*Digest, chap.* 99,) after the removal of the disability: the disability of one of several co-plaintiffs operates neither to the advantage or disadvantage of the others. *Ib.*
5. The interest of the heirs of a pre-emptor, after proof, adjudication, payment and the issuance of the patent certificate, is a tenancy in common: and a joint action may be brought by all the heirs, and a recovery had by all, or a part of them only, where some of them are barred by the statute of limitations, and others not—being infants when the right of action accrued, and bringing their suit within the time limited by the act after the removal of the disability. *Ib.*
6. If an action of ejectment be brought by several tenants in common, it must be considered, under our statutory provisions, as on several demises; and if some be barred by the statute of limitations and others not, the latter may still recover their proportion. *Ib.*
7. The statute of limitations does not commence to run against a pre-emptor until payment of the money according to law, and the issuance of the patent certificate. *Ib.*
8. The filing of an amended bill, bringing new parties upon the record, will be regarded as the commencement of the suit as to such new parties, upon the defence of the statute of limitation; and not the filing of the bill. *Ib.*
9. If the statute of limitations commence running against an infant, entitled to bring an action for land, &c., and he die before arriving at age, the statute will be a complete

PRE-EMPTIONS—CONTINUED.

bar against his heirs, though they be infants at the time, unless they bring their action within the time limited by the *5th section of chap.* 99, *Digest. Ib.*

10. An attorney at law may purchase of his client an interest in the subject matter of the suit, in consideration of services rendered and to be rendered in the prosecution of the suit, and become bound for the costs in the prosecution of his own and client's rights, without the violation of any law of *champerty* in this State. *Ib.*

11. A sale and conveyance of land, *pendente lite*, in this State, is not void: the vendee in such case takes the interest conveyed, subject to every defence against his vendor, and holds it precisely as he held it, in every respect, as to other persons. (*Merrick & Fenno vs. Hutt*, 15 *Ark. Rep.* 344.) *Ib.*
[The above, by the Hon. C. C. SCOTT, Judge.]

12. Where a pre-emption claimant applies to a court of equity to enforce his pre-emption claim against parties in possession, claiming under a legal title, they may well set up the fraud of the complainants in establishing the pre-emption right, though their interest in the subject was acquired subsequent to the fraud. *Ib.*

13. On a bill filed by a pre-emption claimant, whose rights are resisted on the ground of fraud in establishing the pre-emption, the court will look to the finding of the Register and Receiver, not to determine whether there was sufficient evidence before them to authorize their finding, but whether their finding was not superinduced by fraud on the part of the pre-emption claimant. *Ib.*

14. Where the representations, made to the Register and Receiver by the person claiming the pre-emption, and sustained by his other witnesses, were clearly calculated to deceive them as to occupation and cultivation, a court of chancery may, with propriety, disregard the finding of the Register and Receiver, and consider the pre-emption right at large upon the allegations and proof; and in doing so, hold those seeking to set it up against rights fairly and openly obtained, to the *onus probandi. Ib.*

15. Where, upon the whole testimony, a court of chancery finds a claim to a pre-emption colorable, and fraudulent in law, and that it was found in favor of the claimant by the Register and Receiver upon false testimony, this court will not enforce it against the parties holding under a legal title subsequently acquired from the Government. *Ib.*
[By the Court.]

RECORD.

See *Non est factum.*

PRESUMPTION OF PAYMENT.

1. After the lapse of ten years from the date of a judgment, the law presumes that it is paid, (*Woodruff vs. Sanders, ad.*, 15 *Ark.* 143;) and this presumption is conclu-

PRESUMPTION OF PAYMENT—CONTINUED.

sive unless the plaintiff, in the absence of any effort to enforce payment of the judgment, shall show such facts and circumstances as will satisfy the minds of the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment. *Reclor et al. vs. Morehouse*, 131.

RECOUPEMENT.

1. To an action upon a note payable to the Real Estate Bank and assigned to the plaintiff, the defendant pleaded that the consideration of the note was the transfer and assignment of the control and management of an execution, then in the hands of the sheriff, and of all executions to be issued thereafter, on a judgment in favor of the Bank against S. and R.; that the execution was returned unsatisfied, except as to a partial payment made out of the property of one of the defendants; that another execution was issued upon the judgment, of which the Bank, subsequently, while it was in the hands of the sheriff, took the control and direction, and caused it to be returned, while it was unsatisfied and the money still due and unpaid, without the consent and against the will of defendant, whereby the consideration of the note sued on had failed—in all which the plaintiff, as agent of the Bank, participated:

HELD, That the facts set up in the plea did not show a total failure, nor a total want of consideration; nor do they constitute a bar to the action, upon the principle of rescision of contracts; but as the assignee was entitled to a cross action for damages for the breach of the contract on the part of the Bank, in taking control of the execution and causing it to be returned, the defendant might recoupe such damages *Desha's exrs. vs. Robinson ad.*, 228.

2. In all that class of cases, commonly called failure of consideration, whether involving bad faith or not, or where fraud has intervened, or there has been a breach of warranty, fraudulent or not, or of any other stipulation of the contract sued upon, entitling the defendant to a cross action against the plaintiff to recover damages for such failure, fraud or breach, he may, instead of resorting to such cross action, recoupe the damages sustained by him. *Ib.*

3. The cases of *Wheat et al. vs. Dotson*, 7 *Eng.* 699; *Smith vs. Capers*, 13 *Ark.* 9: and *Robinson vs. Mace*, 16 *Ib.* 97, as to recoupement, approved; also the cases of *Clark vs. Moss et al.*, 6 *Eng.* 736, and *Ware & Miller vs. Pennington et al.*, *Ib.* 745, as to the assignment of judgments by parol. *Ib.*

4. A defendant may recoupe the damages sustained by failure of consideration, as well where the action is brought upon an instrument given to secure the payment of the purchase money, on a contract of bargain and sale, as where it is brought upon the original contract. *Key et al. vs. Henson ad.*, 254.

5. A court of law can properly afford no relief, upon the principle of recoupement, where the failure of consideration is not of the quantity or quality of land purchased and sold, but of the title, unless amounting to an entire failure of the whole considera-

RECOUPEMENT—CONTINUED.

tion—the party's remedy is in equity. (*Wheat vs. Dotson*, 7 *Eng. Rep.* 699; *McDaniel vs. Grace*, 15 *Ark.* 487.) *Ib.*

6. In an action upon a promissory note, the defendants pleaded that the consideration of the note was the purchase money of a tract of land bought of W. & T., by consent of plaintiff's intestate, who held an incumbrance on the land: that by consent of all the parties, the note sued on (being for part of the consideration,) was given to plaintiff's intestate, he promising to release his incumbrance, which he, and his administrator since his death, had refused to do: HELD, That the plea is not good by way of recoupement; nor in bar of the action—the contracts to release the incumbrance and to pay the purchase money being independent covenants, and the former not a condition precedent. *Ib*,
7. Where a defendant elects to use his claim against the plaintiff for damages, by way of recoupement, he cannot have a balance found in his favor, as in case of set-off. *Brunson vs. Martin*, 270.
8. To an action by an overseer and manager of a plantation and negroes for his wages as such, the employer may recoupe any damages he may have sustained by an imperfect performance of the contract on the part of the overseer—as where he has violated the contract in its terms and spirit. *Ib.*
9. In such action the claim for damages being on account of the killing of one of the slaves of the employer by the overseer, to authorize recoupement for such damages, it must appear, from the evidence, that the killing arose from the overseer's mismanagement—that he killed the slave negligently and without necessity. *Ib.*

See, also, *Consideration.*

REGISTRATION.

See *Deeds* 1, 2.

REMITTANCE OF MONEY.

1. A remittance of money by mail, is at the risk of the party mailing it, unless there be an express direction to remit in that mode, or a usage or course of dealing from which the authority so to remit may be inferred. *Burr & Co. vs. Sickles & Co.*, 428.
2. The fact that a previous remittance had been made by mail, and the mode of remittance not objected to, is not an authority or direction to adopt that mode at the risk of the creditor, to whom the remittance is made: nor is the letter of the creditor requesting remittance, but specifying no mode. *Ib.*

REPLEVIN.

1. Before the owner of an animal posted as an estray, can maintain replevin therefor, he

REPLEVIN—CONTINUED.

must appear within the time prescribed, prove his claim to the property before a justice, and pay or tender to the person posting, the cost thereof. *Phelen vs. Bonham*, 4 *Eng.* 389. *Davis vs. Calvert*, 85.

2. A plea, to an action of replevin for an animal, that the defendant took it up as an estray, and regularly posted it as such, as required by law, and that the plaintiff did not prove property in said estray, and pay or tender the necessary fees as required by law, is sufficient, without setting forth a compliance in detail, with all the steps required by the statute in posting a stray animal. *Ib.*
3. The plea of *non detinet* is inappropriate in an action of replevin in the *cepit;* and, upon motion, should be stricken out. *Ib.*
4. Where property is in the possession of another, who has purchased and uses it as his own, the owner may bring replevin for it without a previous demand. (*Prater ad. vs. Frazier*, 6 *Eng.* 257; *O'Neill vs. Henderson*, 15 *Ark*, 235.) *McNeill et al. vs. Arnold*, 155.
5. Before the defendant in an action of replevin, where the plaintiff has failed to prosecute his replevin suit with effect, can maintain a suit upon the bond against the security, he must obtain some judgment in the action, against the plaintiff; and an execution must be issued thereon and returned unsatisfied in whole or in part. *Cornish as ad. vs. Keesee*, 391.
6. The owner of a slave, hired for a term or period of time, cannot bring an action of replevin for the slave, until after the expiration of such term. *Wallace vs. Brown*, 449.
7. To support replevin there must be shown an actual taking or an actual detention—a constructive detention, by the exercise of acts of ownership respecting the goods, not accompanied by manual possession of the defendant, or his agent, will not suffice. *Ib.*

See, also, *Husband and wife* 2.

SCIRE FACIAS.

See *Practice in Circuit Court* 4.

SHERIFF'S DEEDS.

1. A sheriff's deed is evidence, under the statute (*sec.* 60, *chap.* 67, *Digest,*) of the facts recited in it; but if such deed fail to recite all the facts required by the statute—as where it fails to recite the judgment under which the property was sold—it can furnish no evidence of the existence of such facts: and the party claiming under the deed, must prove them aliunde. *Jordan vs. Bradshaw et al.*, 106.
2. A sheriff's deed for land sold under a judgment of a justice, need not recite the issuance of an execution by the justice and a return of *nulla bona* before the filing of the transcript of the judgment in the Circuit Court. Such facts may be proved by the

SHERIFF'S DEEDS—CONTINUED.

certificate of the justice, to that effect, accompanying the transcript without the production of the original execution and return, or a certified copy thereof. *Ib.*

3. A sheriff's deed to the purchaser of land sold under execution, together with the Auditor's deed to the judgment debtor for the same land conveying a tax-title, sufficient evidence of the right of possession to maintain ejectment. *Ib.*
4. It is not essential that the sheriff, in returning an execution under which real estate has been levied upon and sold, should endorse thereon the levy and sale, where he has executed, &c., a deed to the purchaser reciting these facts—such recital in the deed, being *prima facie* true. *Bettison vs. Budd*, 546.
5. A sheriff's deed for land sold under execution, reciting the execution under which the land was sold, but not the judgment on which the execution was issued, is admissible in evidence, in a suit by the grantee for the land, upon proof of a judgment corresponding and harmonizing with the recital in the execution, so far as the names of the parties are concerned, but differing in some slight particulars in respect to the amounts constituting the sum for which the judgment was rendered. *Ib.*

STATUTES, CONSTRUCTION OF.

1. The act of 2d January, 1849, to aid in the collection of debts due from certain resident in the Indian country, is perfect and complete in itself; and not to be construed, as if in *pari materia*, in connection with *section* 25, *chapter* 126, *Digest;* and the Circuit Court has no power to cancel a bail bond taken under the provision of the said act of 2d January, 1849, unless the *capias* were issued contrary to the true intent and meaning of the act. *Sutton et al. vs. Hays*, 462.
2. The act of 2d January, 1849, does not require that an affidavit, charging fraud against the debtor, should be filed before the issuance of a writ of *capias*. *Ib.*
3. The affidavit of an agent or attorney, made conformable to the statute, is sufficient to warrant the issuance of a *capias* against the debtor. *Ib.*
4. The act does not violate any provision of the Constitution of the United States, or of this State. *Ib.*
5. The act of the 7th December, 1854, entitled "An act further to regulate the manner of bringing suits against the State," is constitutional and within the competent powers of the Legislature. *Platenius as ad. vs. The State*, 518.

See, also, *Assessment and Tax* 2.

SWAMP LANDS.

1. Crise presented his petition for a mandamus to compel the Auditor to issue his warrant in payment of the damages, assessed by a jury of inquest under the swamp land act, in locating a levee upon his land, averring that the levee was placed under contract and was in process of construction: The auditor responded:

SWAMP LANDS—CONTINUED.

st. That the inquest did not identify the lands.

2d. That he did not find sufficient evidence that the levee has been or will be constructed.

3d. That he has been unable *to find in his office* any evidence that the petitioner was the owner of any land in the county at the time: HELD, That the response was insufficient. *Crise vs. The Auditor* 572.

TENANTS IN COMMON.

See *Pre-emptions* 4, 5, 6.

TRUST AND TRUSTEES.

1. Slaves are conveyed to a trustee for the separate use of the wife, and upon her death to be divided among her heirs; upon the death of the wife, the trust is executed, and an action for the recovery of the slaves must be brought in the name of the heirs, and not of the trustee. *McNeill et al. vs. Arnold*, 115.
2. A trustee, after the trust is executed and his interest in the trust property is terminated, is a competent witness in a suit affecting the title. *Ib.*
3. It is not against public policy, nor the spirit of our laws, to donate, in perpetuity, a lot of ground for charitable purposes—as for the use of a religious denomination as a place of worship: and deeds for such purposes should be liberally construed, in order to uphold the trust. *Grisson vs. Hill*, 483.
4. The trustees under such a deed, which provides that the "lot of land is never to be sold, or to be used in any other way, only for the use of a church," cannot create a charge upon the lot by a contract for the erection of a house thereon, so as to authorize the mechanic to obtain a lien and sell the lot in payment thereof—they cannot do indirectly that which they are prohibited from doing directly. *Ib.*
5. And if the trustees permit such a lien to be created upon the lot, and suffer it to be sold, thereby defeating the object of the grant, the grantor, though there be no clause of forfeiture in the deed, may apply to a court of equity to set aside the sale, and divest the title and possession of the purchaser. *Ib.*

USURY.

1. The defence of usury cannot be interposed, by the statutes of this State, under the plea of the general issue, in actions of debt or assumpsit founded on contracts in writing, (*Howell vs. Vansant*, 2 *Eng.* 146), but if the action is founded on a promise not in writing, the defence, of usury, may be set up under the general issue, whether in debt or assumpsit. *Ambler vs. Ruddell*, 138.
2. The plaintiff and defendant entered into a usurious contract for the loan of money, for which the defendant gave his writing obligatory; the plaintiff sued upon the written

USURY—CONTINUED.

instrument, embracing in his declaration the common money counts; pending the suit, the writing obligatory was declared void by a court of chancery, and the plaintiff injoined from proceeding upon it: HELD, That he could not recover the money actually loaned, under the money counts. *Ib.*

USAGE.

1. A usage is not proved by a single, isolated instance: nor is a course of trade or dealing proved by a custom on the part of one person. *Burr & Co. vs. Sickles & Co.*, 428.

VARIANCE.

See *Practice in Circuit Court* 9, 20.

VENUE.

See *Pleas and Pleading* 4.

VERDICT.

See *Practice in Circuit Court* 8.

WILLS.

1. Where another person signs the name of the testator to his will, thus: "A. B. by C. D., in his presence and at his request," without other signing as a witness to the will, it is a sufficient attestation, under *secs.* 4 *and* 5, *chap.* 170, *Digest*, though not a literal compliance with the statute. *Abraham vs. Wilkins*, 292.
2. The declarations of a deceased attesting witness, made after the probate of a will, may be given in evidence, on an issue to try the validity of the will, to disparage the weight to be attached to his affidavit in the Probate Court. *Ib.*
3. It is competent for witnesses to a will to give their opinions as to capacity or incapacity, when the facts or circumstances are disclosed, on which their opinions are founded. (*Kelly's Heirs vs. McGuire et al.*, 15 *Ark. Rep.* 601.) *Ib.*
4. The capacity to make a will, is such a degree of reason and judgment as enables the party to comprehend the subject; (*Kelly's case*, 15 *Ark.* 556,) but there may be incapacity without a total deprivation of reason and understanding. *Ib.*
5. The statute does not require that the witnesses to a will shall subscribe it in the presence, actual or constructive, of the testator, according to the construction in *Rogers vs. Diamond*, 13 *Ark.* 487. *Ib.*
6. Where the jury has found against the validity of a will, upon the ground of the mental

WILLS—CONTINUED.

incapacity of the testator, and it appears from the evidence, that he was laboring under delusion at the time—that he had lost the power of discriminating objects, and of combining and arranging ideas, &c., this court will not set aside the finding. *Ib.*

WITNESSES, COMPETENCY OF.

1. One of several defendants in an indictment, still pending against him for the same offence, is not a competent witness for his co-defendant. *Moss vs. State*, 327.

See, also, *Chancery* 1; *Trust and Trustees* 2; *Evidence* 2, 6, 7; *Foreign Laws and Statutes.*

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