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REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

AT THE

JUNE AND DECEMBER TERMS, 1862 AND 1863, DECEMBER TERM, 1865,
JUNE AND DECEMBER TERMS, 1866, AND
JUNE TERM, 1867.

L. E. BARBER, REPORTER.

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OFFICERS OF THE SUPREME COURT.

HON. E. H. ENGLISH, *a Chief Justice.*
" F. W. COMPTON, *a* } *Associate Justices.*
" H. F. FAIRCHILD, *a* }
" T. D. W. YONLEY, *b Chief Justice.*
" ELISHA BAXTER, *b* } *Associate Justices.*
" C. A. HARPER, *b* }
" DAVID WALKER, *c Chief Justice.*
" F. W. COMPTON, *c* } *Associate Justices.*
" J. J. CLENDENIN, *c* }

JAS. D. WALKER, ESQ., *Solicitor General, d*
W. W. WILSHIRE, ESQ., " " *vice* Walker, *resigned.*
PLEASANT JORDAN, ESQ., *Attorney General,* Elected in 1861.
S. W. WILLIAMS, ESQ., " " " 1862.
C. T. JORDAN, ESQ., " " " 1864.
L. E. BARBER, *Clerk and Reporter.*
THOMAS FLETCHER, ESQ., *Sheriff,* " 1862.
J. R. R. ADAMS, ESQ., " " 1864.
THOMAS FLETCHER, ESQ., " " 1866.

CHANCELLOR OF PULASKI COUNTY.

HON. U. M. ROSE, *a*
" LAFAYETTE GREGG, *e*
" T. D. W. YONLEY, *f*

---

a Elected under the constitution of 1836, and office vacated by the constitution of 1864.
b Elected under the constitution of 1864, and resigned.
c Elected in August, 1866.
d Resigned in May, 1867.
e Appointed by the Governor but not confirmed.
f " " " " and confirmed February, 1867.

JUDGES OF THE CIRCUIT COURTS.

1st	Circuit,	Hon.	EARL C. BRONAUGH, *a.*
"	"	"	JAMES M. HANKS, *b.*
2d	"	"	JOHN C. MURRAY, *a.*
"	"	"	W. M. HARRISON, *b.*
3d	"	"	WILLIAM R. CAIN, *a.*
"	"	"	L. MACK, *b.*
4th	"	"	JOSEPH J. GREEN, *a, c.*
"	"	"	YANCY B. SHAPARD, *a, d.*
"	"	"	THOMAS BOLES, *b.*
5th	"	"	JOHN J. CLENDENIN, *a.*
"	"	"	LIBERTY BARTLETT. *b.*
6th	"	"	LEN B. GREEN, *a.*
"	"	"	JOHN T. BEARDEN, *b.*
7th	"	"	R. H. POWELL, *c.*
8th	"	"	ELIAS HARRELL, *b.*
"	"	"	WILLIAM STORY, *e.*
9th	"	"	A. N. HARGROVE, *b.*
"	"	"	E. J. SEARLE, *f.*

a. Elected under the constitution of 1836, and office vacated by adoption of constitution of 1864.
b. Elected under the constitution of 1864.
c. Died in 1862.
d. Elected in place of Hon. J. J. GREEN, deceased.
e. *Vice* Hon ELIAS HARRELL, impeached.
f. *Vice* Hon. A. N. HARGROVE, impeached.

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NOTE.

The cases reported from page 371 to 477, were pending before the ratification of the constitution of 1864, and opinions were delivered, afterwards, by the judges of the supreme court elected under the constitution of 1836 and continuing to act as such. The cases having been re-docketed and considered, the opinions then delivered were adopted, and ordered to be recorded as the opinions of this court, but are credited to the gentlemen who prepared them.

REPORTER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

JUNE AND DECEMBER TERMS,

1862 AND 1863.

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24 78 1 448

DANLEY AND JOHNSON, EX PARTE.

Upon the adoption and ratification of a constitution by the people of a territory, or of a new constitution by the people of a state, as the fundamental law, no person can exercise any official function in the executive, legislative or judicial departments, otherwise than is provided for by such constitution: and if no provision is made therein for the continuance of existing officers, they cease to be such.

It is not a question for judicial determination, or for that peculiarly, to hold that a proposed constitution has been ratified or adopted as the fundamental law—that being the exercise of a political power, which the judicial department alone is not competent to declare other than as a matter of political history or cognizance: but as a matter of political cognizanee this court knows that it exists by virtue of the constitution adopted by the convention of the people of this state, on the 1st June, 1861, and must take notice that all the departments of the government are acting solely under the authority of this constitution.

The constitution adopted on the 1st June, 1861, being, then, the constitution of this state, and the governor, at that time, being continued as governor, by force of the constitution, only until the next general election, to be held on the first Monday of October next, it is the duty of the sheriff to advertise an election for governor according to law; and the mandamus should have been granted.

Petition for Mandamus to Hon. J. J. Clendenin.

GARLAND & RANDOLPH, for petitioners.

Mr. Justice FAIRCHILD delivered the opinion of the court.

At the general election of 1860, a governor of this state was elected, whose term of office, under the constitution then in force, would have continued till 1864. But Christopher C. Danley and Richard H. Johnson, residents and voters of Pulaski county, supposing that the constitution adopted by the state convention on the 1st of June, 1861, required the election of a governor on the first Monday of October, 1862, and ascertaining from Thomas Fletcher, sheriff of the county, that he would not advertise such an election unless compelled thereto by legal authority, applied to the judge of the circuit court of Pulaski county for a mandamus against the sheriff, commanding him to make such advertisement. Upon the avowal of the sheriff not to give public notice, by proclamation, throughout the county, that a governor of the state was to be elected, the petition should have been sustained if the new constitution so abridged the term of office of the governor that was elected in 1860, as to require a governor to be elected at the general election of 1862. The circuit judge did not, however, think it clear that this was the effect of the constitution of 1st June, 1861, and refused to grant the prayer of the petitioners, whence the subject has been properly referred to this court: and it is here to be ascertained and declared whether the governor that was elected in 1860, and to continue such till 1864, is, before the expiration of his original term of office, liable to be succeeded by a governor that may be elected on the first Monday of October, 1862.

The question pending is to be decided solely upon view of the terms and meaning of the new constitution, for beyond that, and unsupported by it, no person can be governor, or exercise any official function in the executive, legislative or judicial departments of state authority, if that constitution be the fundamental

law of the state. And that this constitution is the foundation and cause of the exercise of all authority, cannot be denied by a court that is created by the constitution, and is continued by its permission. We may decide upon the legality of acts, and pronounce upon the validity of laws, the test being whether the act or the enactment is conformable to the constitution: we may declare what is the meaning of the constitution, according to the fair and legal rules of construction, where the meaning is not so obvious as to preclude an attempt at construction; but a constitution is not to be declared by a court to be valid or invalid for the reason that it is the beginning of authority, and is itself the standard by which offices, privileges and rights are to be exercised and determined. This may be plainer by supposing the new constitution to be the origin of our existence as a state. In that case it would be evident that no one could fill the office of governor without being made so under and in accordance with the provisions of the constitution, for without the constitution there could be no governor. So, when the former constitution was displaced by the existing one, the latter became the source and measure of all offices, and of their extent and continuance, as if there had been no state government prior to the constitution of 1861. For this reason it was provided in the old constitution that "all officers, civil and military, now holding commissions under authority of the United States, or of the territory of Arkansas, shall continue to hold and exercise their respective offices until they shall be superseded under the authority of the state." So, the new constitution provides that "all officers, civil and military, now holding commissions under the authority of this state, shall continue to hold and exercise their respective offices until they shall be superseded under the authority of this state, in pursuance of the provisions of this constitution, or the ordinances passed by this convention." Without the first provision the United States and territorial officers could not have held and exercised their offices after the adoption of the constitution of 1836: nor could the officers of the state, at the date of the

adoption, by the state, of the constitution of 1861, have been held to be officers under the constitution without the provision above quoted, that continued their offices and authority. When the constitution of 1861 became the constitution of the state, the governor elected under the constitution of 1836, ceased to be such by virtue of his election in 1860, but must have since remained governor by virtue of some clause in the constitution that continued his office and authority till they should be suspended under the authority of the state, in pursuance of the provisions of the constitution, or of the ordinances of the convention. The governor will, then, continue to be governor so long as the constitution of 1861 authorizes him to hold and exercise his office, and no longer, if that constitution be the constitution of the state. This latter condition, and the duration of the authority of the governor under the constitution of 1861, remain to be considered.

It is not a question for judicial determination, or for that peculiarly, to hold a proposed constitution to be a ratified, an adopted constitution, the existing fundamental law. If this court were sitting under the constitution of 1836, and the question was whether the constitution of 1861, proposed by the convention, had been ratified by the state and adopted as its constitution, and the decision should affirm the validity of the new constitution, the decision would be made by a tribunal not authorized to exercise judicial authority: for, upon the principle of the decision, no pretended court would be a court unless constituted by, and acting under, the new constitution. So, if this court be a court provided by the constitution of 1861, it cannot entertain the question, as one of judicial enquiry, whether that constitution be the constitution in force, for, unless it be so, this court is not a judicial tribunal, and cannot decide any question of constitutional, statutory, or common law. It must follow that the recognition of the fundamental law of a state is an exercise of political power which the judicial department alone is not competent to create nor to declare, other than as a matter of political history or

cognizance. But as a matter of political cognizance we know that this court is acting as a tribunal created by the constitution of 1861, that its members have sworn to support it as the constitution of the state: and as a matter of political information we must take notice that all the departments of the state government have been and are acting solely under the authority of this constitution: and no question can be made but that it is the ratified constitution of the state, and adopted as such, by its sovereign power.

The constitution proposed by the convention, from its adoption by that body on the 1st of June, 1861, being then the constitution of this state, and the governor, at that time, being continued as governor only by force of the constitution, and as long as it provides, we have only to ascertain, from the constitution, the term of continuance. No provision is made in the new constitution for the continuance in office of the governor for the term for which he was elected. In this particular the constitution deals differently with him than with some other officers of the state. For by the 7th section of article VI. of the constitution, it is provided that the first appointment of judges of the supreme court, shall be made at the session of the general assembly next before the expiration of the terms of the judges then in office. The 9th section of the same article directs that the first election of clerks of the circuit court shall be held at the general election next before the expiration of the commissions of the present incumbents. The same provision is made concerning presiding judges of the county court by the 12th section of the same article. Respecting justices of the peace, the 16th section of the same article holds this unmistakable language: "The first election for justices of the peace under this constitution shall take place at the next general election, and those in office at this time shall continue in office until their successors are elected and qualified." So, by the two following sections it is declared that: "The constables now in office shall continue until their terms expire, and the first election under this constitution shall be held at the

next general election," and "the qualified voters of each county shall elect one sheriff, one coroner, one treasurer, and one county surveyor, for the term of two years, at the election next before the terms of those now in office expire."

Why special recognition was thus made of these existing terms of office, and provision made for their continuance to specific times, while the office of governor, the offices of secretary of state, of auditor and treasurer, and perhaps of other offices, should be passed by without mention, must remain a matter of speculation. Though private interest and feeling might excite curiosity, an enquiry would not likely be of public interest, and is not a subject for judicial investigation. But it is evident that the convention realized the distinction, for the 5th section of the schedule is: "The next general election for officers of this state, under this constitution, not otherwise herein provided for, shall be held on the first Monday of October, A. D. 1862, in the manner now prescribed by law."

The governor is an officer of the state under the constitution of 1861, whose election was not otherwise provided for than that it should be had on the 1st Monday of October, 1862, and it is the duty of the sheriffs of the several counties to advertise such election according to law. Sufficient ground was shown in the petition to the judge of the circuit court of Pulaski county to require him to compel the sheriff of that county to make the advertisement, and a mandamus will be issued by this court to the circuit judge, commanding him to grant the prayer of the petitioners.

DELONY VS. DELONY ET AL. EX'RS.

Deed of gift of slaves to B, to be held for the use of the grantor during life, then for the support of B and his children during his life, and upon his decease to belong to such child or children as survived him; and if no child or children survived him, then to the plaintiff. B died leaving a child surviving him: *Held*, that the property vested absolutely in such child at the moment of the death of B.

Deed of gift of slaves and other personal property to M, to be held for the use of the grantor during life, and if at the decease of M, she should have no child or children surviving her, then all the property to belong to the plaintiff. M died without issue surviving her: *Held* that upon the death of M the property vested in the plaintiff, the limitation over not being upon an indefinite failure of issue.

Where it is shown by competent proof that the attesting witness to an instrument of writing is out of the jurisdiction of the court, or dead, the hand-writing of the maker may be proved—the attesting witness having subscribed his name by making his mark, which it is presumed cannot be proved or identified, like the hand-writing of an attesting witness. But where a witness merely states that he had heard that the attesting witness had gone to another state, and had since heard that he was dead, this is not sufficient to admit secondary evidence of the execution of the instrument.

Appeal from Sevier Circuit Court.

HON. LEN. B. GREEN, Circuit Judge.

GARLAND & RANDOLPH for appellant.

JENNINGS, WATKINS and KNIGHT for appellees.

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

On the trial of this cause in the court below, the plaintiff, Alchymy Delony, introduced in evidence, without objection, the following deeds, under which he claimed the two slaves in controversy, *Joe* and *Jack:*

1st Deed—"Be it known that I, Ann Delony, of Madison

county, Alabama, influenced by parental affection for my son and grandchildren herein named, do give to my son, Henry R. Blount and his personal representatives or legal successor, my negro boy *Joe*, about seven or eight years old, as and for a slave for life, yet on the uses following: *First*, that during my life, he shall permit me to enjoy the services or hire of said boy as I may direct for my own subsistence and support, or so much thereof as I may deem needful: *Secondly*, that at my decease he hold the said slave for the support and education of his daughter and such other child or children as may be born to him and his own support during his life: *Thirdly*, that at his decease then the said slave is to belong to said Maria Ann, his daughter, and such other child or children to be to him born and who shall survive him: *Fourthly*, if at his decease there be no child or grandchild or children of his surviving, then the said slave is to belong to my grandchild *Alkomy* Delony, son of Lewis H. Delony. Witness my hand and seal, this 15th day of March, 1834."

2d Deed—"Be it known that I, Ann Delony, of Franklin county, Alabama, influenced by the affection that I have for my grandchildren herein named, do give to my granddaughter, Maria Ann, (wife of William R. Bross) and her bodily heirs or children my negro man *Joe*, about twenty-six years of age, and also my negro man *Jack* aged about thirty years, also all my household and kitchen furniture, and whatever else of personal or real property I may have at the time of my death, yet on the uses following: *first*, that during my life I am to be permitted to enjoy the services or hire and use of all the above-mentioned property as I may direct, for my own subsistence and support, or as much thereof as I may deem needful: and *secondly*, if at the decease of my said granddaughter, Maria Ann, (wife of William R. Bross) she should have no child or children surviving her, then all of the aforementioned property to belong to my grandchild *Alkomy* Delony, son of Lewis H. Delony. Witness my hand and seal this 21st day of October, 1852."

It was proven that Mrs. Ann Delony, the maker of the deeds,

remained in possession of the slaves until the time of her death, 4th November, 1854; after which her son, Edward B. W. Delony, against whom this suit was commenced, obtained possession of them. He died while this cause was pending in the court, and his executors were substituted as defendants.

It was also proven that Henry R. Blount died about the year 1852, leaving him surviving his only child, Maria Ann, and that she died without issue 16th July, 1856.

The court below, in refusing instructions moved by the plaintiff, and in giving others proposed by the defendants, involving the construction of the two deeds, misapplied the rule established in *Moody vs. Walker*, 3 *Ark.* 146, and approved and followed in *Watkins vs. Quarles and wife*, 23 *Ark.* 192, that a limitation over upon an indefinite failure of issue is void.

By the terms of the first deed, Maria Ann, who was living at the time of the death of her father, Henry R. Blount, took the slave *Joe* absolutely. The contingency upon which the plaintiff, Alchymy Delony, was to have the negro, never happened, according to the proof. He was to take the slave, under the fourth provision of the deed, not upon an indefinite failure of Blount's issue, but if at the time of his death there was no child or grandchild of his surviving. But his child, Maria Ann, was at that time living, and at the moment of his death the property vested absolutely in her, by the terms of the deed.

The counsel for the plaintiff, (appellant here,) insists, in argument, that the first deed had become inoperative at the execution of the second, but no such question is presented, by the record, to be determined by us. Both deeds were introduced by the plaintiff; and the first instruction moved for him covered both deeds. If the second instruction was framed with the intention of having the court to declare that Mrs. Ann Delony, by remaining in possession of the slave, *Joe*, for many years after the execution of the first deed, re-acquired title to him, by lapse of time, the court properly refused it, because her possession was consistent with the provisions of the deed, as by it she retained the use of the

slave for her life. But we suppose that such was not the design of the instruction, as it covers both slaves. The instruction was perhaps intended to counteract the effect of an instrument which the defendants were permitted to introduce, against the objection of the plaintiff, which will be noticed below.

The language of the second deed, second provision, is, that "if *at the decease* of my said granddaughter Maria Ann, etc., she should have no child or children surviving her, *then* all of the aforesaid property to belong to my grandchild Alkomy Delony, etc."

Here the limitation over to the plaintiff was not upon an indefinite failure of the issue of Maria Ann, that is, upon the failure, or dying out of her issue at any future period of time, however remote, but he was most clearly to have the property if she had no child surviving her at the time of her death. See *Slaughter vs. Slaughter*, 23 *Ark.* 356; *Robinson vs. Bishop*, *Ib.* 375. And it was proven that she left no child.

On the trial, the defendants offered in evidence the following instrument.

"I do not lay any claim to Rachel, Jack and Joe, only when Rachel and Cate were sold by James H. Harrison, deputy sheriff, they were sold to pay my debts: Charles Malone bought them at my sale, and when E. B. W. Delony bought the said negroes back from Malone, he Malone made said E. B. W. Delony agree that I should keep them in possession as long as I lived, and at my death said negroes are to return to E. B. W. Delony or his heirs. May 15th, 1828.

ANN DELONY. [Seal.]

DANIEL his mark ⋈ MORGAN."

To prove the execution of the instrument, defendants introduced Wm. H. Turner, who was asked if he knew where Daniel Morgan, the attesting witness, was? and he said that he did not know of his own knowledge, but had heard that he went to North Carolina several years ago, and had since heard that he was dead.

Whereupon he was permitted by the court, to state, against the objection of the plaintiff, that he was acquainted with the hand-writing of Mrs. Ann Delony, and that the signature to the instrument was in her hand-writing. Upon this proof of its execution, the defendants were permitted to read the instrument in evidence, against the objection of the plaintiff.

It was not sufficiently proven that the attesting witness was out of the jurisdiction of the court, or that he was dead, to admit secondary evidence of the execution of the instrument. Turner had heard that he went to North Carolina; and he had afterwards heard that he was dead. But how, or of whom he heard this, he does not state. It is not shown that any diligence was used to ascertain where the witness was, or whether he was in fact dead or living. No inquiry appears to have been made for him at his residence, or at any other place. It does not appear that his relations, or other persons, supposed to have knowledge of him, were applied to for information. See 1 *Greenlf. Ev.*, *sec.* 574.

Had it been shown by competent proof that the attesting witness was out of the jurisdiction of the court, or dead, the instrument might have been admitted upon proof of the signature of the maker; for the attesting witness being an illiterate person, as it may be inferred, and having subscribed his name by making his mark—a simple cross mark—it is not to be presumed that his mark could be proven or identified like the hand-writing of an attesting witness. 1 *Stark, Ev.*, (*Notes by Shars.*) 519; *Carrier vs. Hampton*, 11 *Fredell*, 311; *Woodman vs. Segar*, 25 *Maine*, 92; *Valentine vs. Piper*, 22 *Pick.*, 90; *Morgan vs. Curtinius*, 4 *McLean*, 368.

The appellant, for the errors above indicated, should have been granted a new trial.

The judgment must be reversed, and the cause remanded with instructions to the court below to grant the appellant a new trial.

BERRY VS. LATHROP & WILLIAMS.

The declarations and representations of one person, that another was his partner in the purchase of goods, are not admissible to charge the latter, unless there be a sufficient foundation laid for the admission of such declarations. (*Berry vs. Barnes et al.* 23 *Ark.*, 411.)

Appeal from Drew Circuit Court.

Hon. JOHN C. MURRAY Circuit Judge.

HUTCHINSON, for appellant.

HARRISON, for appellees.

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

Lathrop & Williams, merchants and partners, brought assumpsit against James D. Berry, in the Drew circuit court.

There were two counts in the declaration: the first upon a note which the count alleged to have been made by the defendant Berry and one Allen M. Scott, as merchants and partners in trade, by their firm name and style of A. M. Scott & Co. The second count was for goods, wares, and merchandise, alleged to have been sold by the plaintiffs to the defendant and Scott.

The case was tried upon issue to the plea of non assumpsit, sworn to, and a verdict in favor of the plaintiffs upon the first count, for the amount of the note, and in favor of the defendant on the second count. A motion for a new trial was overruled, and the defendant excepted and appealed.

The evidence in this case was not materially different from the evidence in *Berry vs. Barnes et al.*, 23 *Ark.*, 411, and the principles of law applied to that case govern this.

There was really no competent proof that Berry was a partner of Scott, or that Scott was authorized to purchase goods upon the

credit of Berry, or to bind him as a partner, or otherwise, by note.

The court erred in admitting in evidence, so much of the depositions of Snedeker and Burr as related to the declarations and representations made by Scott, in their presence, to the effect that Berry was his partner, there having been no sufficient foundation laid for the admission of Scott's declarations to charge Berry.

It is not deemed material to decide any other question presented by the record.

The judgment must be reversed, and the cause remanded with instructions to the court below to grant the appellant a new trial.

COWSER VS. TATUM.

A note payable to A. B. or Bearer, and endorsed in writing by the payee to a third person, may pass by delivery, and the holder may sue the maker in his own name as such.

Appeal from Union Circuit Court.

Hon. LEN B. GREEN, Circuit Judge.

GARLAND & RANDOLPH, for appellant.

Mr. Justice COMPTON, delivered the opinion of the court.

This suit was brought by Tatum, the holder, against Cowser, the maker of a promissory note, payable to James Grambles or *bearer*, and transferred by endorsement in writing to William J. Locke.

It is insisted for Cowser, that although the note was transferable by delivery merely, and might have so passed to Locke, yet, having been transferred to him by indorsement, it could not after-

wards pass by delivery to Tatum so as to enable him to sue in his own name. To this proposition we do not assent. It is the better opinion, both upon principle and by authority, that where a note, as in this case, is originally payable to bearer, and is indorsed, the holder may, as against the maker, declare upon it as bearer, or as indorsee, at his election. (*Story on Prom. Notes* (*4th ed.,*) *sec.* 132; and if, as bearer, he may sue the maker, no good reason is perceived why he may not, as bearer, transfer the note by delivery. The indorsement of such a note does not destroy its negotiability by delivery. The holder may, at his option, act either as indorsee, or as bearer, in suing the maker, or in transferring the note to a subsequent holder.

The principle in *Block vs. Walker*, 2 *Ark.* 4, has no application to this case. There, the instrument sued on was not a promissory note payable to bearer, but was a common money bond, which, under our statute, was transferable by assignment only.

WATKINS VS. MARTIN.

Where a party has recovered a judgment and received the amount of it from the defendant, he will not be permitted to reverse the judgment on error.

Motion to quash Writ of Error.

STILLWELL & WOODRUFF, for plaintiff.

WILLIAMS & MARTIN, for defendant.

Mr. Justice COMPTON delivered the opinion of the Court.

The plaintiff in error seeks to reverse a judgment which he recovered against the defendant in the court below, for $1,140, residue of debt, with damages and costs: and the defendant pleads in bar that the plaintiff caused an execution to issue on

the judgment, which was afterwards, and before the issuance of the writ of error, fully paid off and satisfied.

It is insisted, on demurrer that the matters alleged in the plea, are not sufficient to bar the writ. We think they are. Where a party has recovered a judgment, and received the amount of it from the defendant, he will not be permitted to reverse the judgment on error. *Laughlin vs. Peebles*, 1 *Penn.* (*Penrose & Watts*,) 114. The counsel for the plaintiff has referred us to *Barthelemy vs. The People*, 2 *Hill*, (*N. Y.*) 248, but there is nothing decided in that case which conflicts with the view taken in this. There the judgment was against the parties seeking the reversal. They had been sentenced to confinement in the penitentiary, and it was insisted that the sentence of the court was satisfied, because it appeared on the face of the record that the term of confinement had elapsed. To this objection the court said there were two answers: first, they were not only sentenced to confinement, but each was also fined, and it was not apparent on the record that the fine of either had been paid: and second, the payment or satisfaction of an erroneous judgment *against* a party could never be allowed as a bar to a writ of error, even in a case where no restitution could follow as a legal consequence, and the reason given by the court is, that such a judgment against the party "is an injury *per se*, from which the law will intend he is, or will be damnified by its continuing against him unreversed." In the case before us the judgment is not only satisfied, but it is also *in favor* of the party seeking the reversal.

The demurrer is overruled.

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CLAYTON VS. STATE USE, ETC.

Whether an officer will be permitted, in all cases, to amend his return on a writ of execution, after proceedings against him for false return or negligence, it is unnecessary to decide in this case: because the proceedings had been quashed before the motion to amend was filed: and the attitude of the parties, then, was as though none had been commenced.

No very definite rule can be laid down as governing amendments, in all cases; but an officer should always be permitted, in furtherance of justice, to amend his return on an execution, according to the facts, unless, by the allowance of the amendment, manifest injustice would be done.

Where the return upon a writ of execution showed a levy upon slaves, and a delivery bond taken and forfeited, the sheriff is permitted to amend by striking out the return and inserting *nulla bona.*

Error to Monroe Circuit Court.

Hon. EARL C. BRONAUGH, Circuit Judge.

CLAYTON, for plaintiff.

GARLAND & RANDOLPH, for defendant.

Mr. Justice COMPTON, delivered the opinion of the court.

The writ of error in this case is prosecuted to reverse a judgment of the circuit court refusing to permit the sheriff of Desha county to amend his return on an execution.

The execution was issued on the 30th July, 1859, and returned to March term, 1860. The return shows that it was levied on two slaves, and that a delivery bond was taken and forfeited. At the return term, the delivery bond was quashed, on motion of the principal in the bond; and afterwards, at March term, 1861, the plaintiff in the execution, having giving previous notice, moved for summary judgment against the sheriff and two of the sureties in his official bond, under the provisions of *Ch. 97, of Gould's*

Digest. At the same term of the court, the proceedings for judgment were quashed for irregularity; and thereupon, the sheriff suggesting that the return on the execution was made under a mistake of the facts, moved for leave to amend it by striking out that which was made, and inserting in lieu thereof, "no property of the within named defendants to be found in my county," which the court refused. After the motion to amend, and before it was determined, the plaintiff in the execution served one of the sureties in the sheriff's official bond with notice, that at September term, 1861, he would again move for judgment.

Amendments are within the sound discretion of the court, and though there are cases where it has been held, in some of the sister states, that the exercise of this discretion will not be reviewed on error, the practice with us has been otherwise. *Thompson vs. Bremage*, 14 *Ark.*, 59; *Thompson vs. McHenry*, 18 *Ark.*, 537; *McLarren vs. Thurmond*, 3 *Eng.*, 313.

But it is insisted, on the authority of *Brinkley vs. Mooney*, 4 *Eng.* 445, and *Mullens vs. Johnson*, 3 *Humph.*, 396, that an officer will not be permitted to amend his return after proceedings against him for false return, or negligence in the execution of the writ. Whether this is so, or not, in all cases, we need not enquire. It is sufficient to say that the case before us does not come within the rule laid down in the cases cited. True, there had been proceedings against the sheriff for negligence in executing the process, but they had been quashed—leaving nothing pending at the time the motion to amend was made. After the quashal, the attitude of the parties toward each other was as though no proceedings had been commenced; and the fact that pending the motion to amend, the plaintiff in the execution gave notice that the proceedings would be renewed at the succeeding term of the court, does not affect the case.

It is also insisted that the amendment should not be allowed, because it goes to the extent of striking out the whole return, and making, in its stead, a totally different one. We have been referred to no authority that supports this proposition: and we can

preceive no good reason for such a restriction on the privilege to amend. In *Smith vs. Daniel*, 3 *Murph.*, 128, decided by the supreme court of North Carolina, the return showed a levy and sale, and the court permitted the sheriff to amend, by striking out the return, and inserting in lieu of it, one of *nulla bona*. A similar amendment was allowed in the subsequent case of *Dickinson vs. Lippett*, 5 *Iredell*, 560. And in *Brinkley vs. Mooney*, 4 *Eng.*, 445, this court said: "The sheriff will always be allowed to amend his return (before suit brought for a false return) so as to make it conform to the truth of the case, for the correctness of which he is responsible." Here, the rule would seem to be too broadly stated. Cases may occur where the amendment would be disallowed, though no proceedings for false return had been instituted, as for instance, in *Miller et al. vs. Shackleford*, 4 *Dana*, 264. Indeed, no very definite rule can be laid down, as governing all cases—the most that can be said is, that, in furtherance of justice, an officer should always be permitted to amend his return, according to the facts, unless, by the allowance of the amendment, manifest injustice would be done.

As regards the propriety of the amendment in the case under consideration, we think there can be no serious question. In a proceeding for negligence—and the plaintiff in the execution has evinced a disposition to take steps in that direction—the return, as made, could be used against the sheriff to fix his liability under the statute, for the amount of the execution; and to disallow, under such circumstances, an amendment that would protect him, would be unjust. On the other hand, we do not see how the plaintiff in the execution can be prejudiced by the amendment, because, if the return, as amended, should be false, he will in that case, have his remedy against the sheriff.

Let the judgment be reversed and the cause remanded to the court below with instruction to allow the sheriff to amend his return.

HARVILL AND WIFE VS. HOLLOWAY, AD.

A widow is entitled to dower in the undivided estate of her deceased husband, held by him and others as tenants in common—and so if the estate be a joint tenancy, as held in *Menifee vs. Menifee*, 3 *Eng.*, 50.

HARVARD LAW SCHOOL LIBRARY

Appeal from Ashley Circuit Court.

Hon. JOHN C. MURRAY, Circuit Judge.

WADDELL, for the appellant.

Mr. Justice COMPTON delivered the opinion of the court.

In this case Robert C. Harvill and Mary M., his wife, filed their petition in the probate court of Ashley county for assignment of dower to the said Mary M., in the estate of her former husband, Berlin V. Holloway, deceased, who, at the time of his death, was a minor, and whose estate consisted of the one-fourth part of certain property belonging to himself and his three brothers, and which remained undivided in the possession of James L. Holloway, their guardian.

The probate court decided that Mrs. Holloway was not entitled to dower, upon the ground that the property had not been divided, and the share of Berlin V. set apart to him in severalty. On appeal, the circuit court affirmed the judgment of the probate court, and in doing so erred. Berlin V. and his brothers were tenants in common; and at common law the widow is dowable of an estate held by her husband and others as tenants in common. *Co. Lit.*, *book* 1, *chap.* 5, *secs.* 44, 45, *title*, *Dower*. Even if Berlin V. had held as joint tenant with his brothers—and he did not—still, under our statutory provisions, the widow would be dowable, as held by this court in *Menifee's adm'rs vs. Menifee et al.*, 3 *Eng.*, 50.

The judgment must be reversed, and the cause remanded to the circuit court, with instructions to reverse the judgment of the probate court, and try the case *de novo*.

SCARBOROUGH VS. STATE USE, ETC.

The failure of an executor or administrator to present his account, annually, for settlement in the probate court, as prescribed by the statute, is a breach of the condition of his bond, for which any person interested in the estate may maintain an action: but by no rule of construction can it be held, that the statute fixes the measure of damages at the entire value of the estate in the hands of the executor or administrator.

A person interested in the estate may recover such damages as he has sustained by the failure of the administrator to make his settlement. If no special damage is alleged and proven, he can then recover only nominal damages.

Error to Chicot Circuit Court.

Hon. JOHN C. MURRAY, Circuit Judge.

GARLAND & RANDOLPH, and STILLWELL & WOODRUFF, for plaintiffs.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of debt for the use of the distributees of William Scarborough, deceased, on an administration bond.

At the trial in the court below it was proven that the administrators filed in the probate court, on the 29th day of January, 1857, their account current for settlement, which, after being continued as prescribed by law, was confirmed by the court, showing a balance in their hands of $2,843.33 3-4; and that up to the time of the trial—a period of four years—no other settlement had been made. Upon these facts, the circuit judge instructed the jury that if they believed from the evidence that the administrators did not make annual settlements of their administration, they must find for the plaintiff the amount of the estate shown to be in their hands. This instruction was erroneous. By *sec.* 122, *chap.* 4, *Gould's Dig.*, it is made the duty of every executor or administrator, at the first term of the probate court,

after one year from the date of his letters, and at the corresponding term of the court every year thereafter, to present to said court an account current, in which he shall charge himself with the whole amount of the estate, and credit himself with all sums of money lawfully expended in settling the same; and though an omission to discharge this duty is a breach of the condition of his bond, for which, under sections 139 and 191, of the same chapter of the Digest, any person interested in the estate may maintain an action, only such damage as may have been sustained by reason of the failure to settle, at the stated periods prescribed by law, can be recovered. We know no rule of construction that would warrant us in holding that the statute, above referred to, fixes the measure of damages at the value of the entire estate ascertained to be in the hands of the executor or administrator. If no specific amount of damage is shown to have been sustained, the party injured is entitled to nominal damage only. There was no breach assigned in the declaration, alleging mismanagement and waste of the estate; but if there had been, and the jury had found the breach true, the value of so much only of the estate as was mismanaged and wasted, could have been recovered.

The instruction moved in behalf of the defendants, had no application to the case made upon the pleadings and evidence, and was, therefore, properly refused.

For the error indicated, the judgment must be reversed, and the cause remanded for further proceedings.

WHITNEY VS. PEAY, REC'R, ET AL.

The state issued her bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof: the agents of the bank hypothecated or pledged them to the North American Trust and Banking Company for less than their par value, and the money advanced upon them was appropriated by the bank: the company transferred them, for an advance upon the amount for which they were pledged, to Holford & Co.: afterwards, in a proceeding against the company for insolvency, the debt due from the bank to the company for the money advanced on the bonds, was sold: by the receiver in chancery, under the direction of the court, to the complainant: the bonds were in the possession of Holford & Co., under the transfer to them, and they were charged with their estimated value in the settlement of their claims against the company. *Held:*

1. That, under adjudications entitled to respect, the disposition of the bonds at less than their par value, might be declared illegal and void; but as the bank appropriated to its use the money advanced upon them, it is but just to conclude that she in bound in equity and good conscience to repay the money, with interest, upon a re-delivery of the bonds.
2. *Hypothecation*, which is a term of the civil law, is that kind of pledge in which the possession of the thing pledged remains with the debtor, and in this respect, is distinguished from *pignus*, in which possession is delivered to the creditor or pawnee; and so the contract in this case was a pledge, and if valid in equity, the company held the bonds in pledge for the repayment of the money advanced, and the bank is entitled to have the bonds re-delivered on payment of the debt.
3. A pawnee may sell or assign all his interest in the pawn—in which case the pawnee's lien cannot be separated either from the possession of the goods or the debt, and passes with the possession to the assignee; and so when the North American Trust and Banking Company transferred the bonds to Holford & Co. in pledge, the debt due the company from the bank passed by the transfer, and could not be sold as the debt of the company.

Appeal from Pulaski Chancery Court.

Hon. H. F. FAIRCHILD, Chancellor.

WATKINS & GALLAGHER, for appellant.

The ground relied on for the appellant in this case is, that although it might be true that by the hypothecation of the 500 Real Estate Bank bonds by the North American Trust and Banking Company, to Holford, he became subrogated in equity to any claim of the Trust Company against the Real Estate Bank, for moneys advanced upon them in the first instance; yet Holford was a party to the suit brought in New York for marshaling and administering the assets of the Trust Company, among its various creditors, and was bound by any decree and order made during the progress of the cause. He appeared and proved his claims, including those 500 Real Estate Bank bonds, and got his dividend. The court there set aside as a fraudulent preference, a conveyance made to him by the Trust Company of various assets, including the claim of the Trust Company against the Real Estate Bank for this $125,000, advanced in order to secure Holford for the advances he had made to the Trust Company on these same bonds. So that Holford stands on this record in the attitude of getting his pro rata of the proceeds of the sale of that claim to Whitney, and yet claiming that he is entitled to the entire fund.

HEMPSTEAD, and GARLAND & RANDOLPH, for appellees.

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

On the 1st of January, 1840, the state issued to the Real Estate Bank, in pursuance of its charter, 500 bonds for $1000 each, bearing interest, etc., to be sold at par, for the purpose of procuring banking capital, etc.

On the 7th of September, 1840, the cashier of the bank, with the approval of two of the bond commissioners, entered into a contract with the North American Trust and Banking Company, of New York, by which that company agreed to loan to the Real Estate Bank $250,000, upon a pledge or *hypothecation* of the bonds above referred to, which sum was to be advanced by installments and repaid at stipulated periods, with interest, etc.

In pursuance of this contract the bonds were delivered to the

North American Trust and Banking Company, and it is admitted that the Real Estate Bank received, through its agents, and appropriated to its use, the sum of $121,336.59. No further sum was advanced.

About the 1st of December, 1840, the North American Trust and Banking Company pledged the same bonds to James Holford & Co., bankers of London, for a loan of $325,000. Afterwards, Holford became the sole owner of the debt, and holder of the bonds so pledged, by transfer from his partner.

Afterwards, upon a bill filed in the chancery court of New York, by George Manning Tracy, a stockholder and creditor, against Thomas G. Talmage, president of the North American Trust and Banking Company, alleging its insolvency, etc., it was placed in liquidation; and David Leavitt was appointed by the court, a receiver in chancery, to settle its affairs.

Pending the administration of the trust, James Holford prayed the court, by petition, that the receiver might be ordered to unite with him in a reference, pursuant to the statute of New York, of six claims presented by him against the banking company; and the claims were accordingly referred to three referees, appointed by the court (two counsellors at law and one merchant,) with instructions to ascertain and report, in case they found any thing due from the company upon the claims, what collateral securities had been legally assigned for the security of the sums so found due from the company, and the value thereof; and that the referees deduct from the amount so found due to Holford, the ascertained value of all such collateral securities.

The referees, after a protracted and laborious investigation, reported that the company was indebted to the American administrators of Holford, (he having died pending the investigation,) upon the six claims referred to them, for principal and interest, to 1st October, 1857, in the sum of $895,896.42.

Included in this sum was the amount advanced by Holford to the company, upon the pledge of the 500 Arkansas bonds.

The referees further reported that certain collateral securities, particularly described by them, had been legally assigned by the

company to Holford, to secure the payment of the sum found due to his estate, as above; the aggregate value thereof was ascertained to be $456,200 (the separate value of each collateral security being ascertained and stated,) which being deducted from the sum found to be due to his administrators from the company, left a balance in their favor of $439,696.42.

Among the collateral securities reported by the referees as having been legally assigned to Holford, by the company, were the 500 Arkansas bonds, for $1000 each, which they ascertained to be of the actual value of $425,000, on the 1st October, 1857.

The report of the referees was approved and confirmed by the court, and a decree entered in favor of Holford's administrators for the balance found to be due them upon their claims, after deducting the reported value of the collateral securities, to be paid by the receiver out of the assets of the company. And it was further decreed "that the value of the said collateral securities having been duly ascertained and credited upon their said claim, pursuant to the directions contained in the order of reference, the administrators, etc., have become, and are the legal owners of, and legally and equitably possessed of, and well entitled, as such administrators, to all and singular the following bonds, notes, stock, etc., etc., being the collateral securities in said report particularly mentioned and described, that is to say, 500 bonds of the state of Arkansas, numbered, etc., etc., issued to the Real Estate Bank, etc., for $1000 each," etc., etc.

In the meantime Benjamin D. Whitney made a proposition to David Leavitt, the receiver in chancery, etc., to give $2,500, for the debt of the Real Estate Bank to the North American Trust and Banking Company, for moneys advanced by the latter to the former, under the agreement of 7th Sept. 1840, above stated. The proposition of Whitney was reported to the court superintending the administration of the trust, and the court directed the receiver to accept the proposition, and to assign the debt to Whitney upon his paying therefor the sum proposed. A written assignment was accordingly made by the receiver.

Afterwards, Whitney filed a bill in the Pulaski chancery

court, against Peay, as receiver in chancery of the assets of the Real Estate Bank, and the English executors and American administrators of Holford, accompanied by voluminous exhibits, alleging and showing the facts above stated, praying a decree against the receiver for the amount of the debt, with interest, assigned to him as above, to be paid out of the assets of the bank; and that the administrators, etc., of Holford be required to assert and litigate their claim, etc., to the 500 Arkansas bonds, etc., and that they be compelled to produce and surrender them for cancellation, etc.

Upon the answer of Peay, containing a demurrer to the bill, and a demurrer interposed for the representatives of Holford, the bill was dismissed, and Whitney appealed to this court.

The 9th section of the charter of the Real Estate Bank, prohibiting the sale of the bonds of the state at less than the par value thereof, it might be held, upon adjudications entitled to respect, that the disposition made of the 500 bonds, in question, by the agents of the bank, to the North American Trust and Banking Company, was a transaction illegal and void. See *The State of Illinois vs. Delafield*, 8 *Paige*, 527—affirmed in *Delafield vs. The State of Illinois*, 2 *Hill*, 160; 26 *Wend.*, 209, 221. But the bank having thought proper to receive and appropriate to its use the money advanced to its agents by the New York banking company, upon a pledge of the bonds, it is but just and reasonable to conclude that the bank thereby became bound in equity and good conscience to repay the money so advanced to it, with interest, upon a re-delivery of the bonds.

To this extent the bank appears to have admitted its liability, by its deed of assignment, in designating the order in which its debts were to be paid, by the trustees, out of its assets, thus:—"*Sixth*, in paying the principal of the bonds of the state aforesaid, the same being all the bonds of said state ever issued to said bank, except 500 bonds which were hypothecated to the North American Trust and Banking Company, a corporation in the city of New York: and by said North American Trust and Banking

Company, illegally and in violation of their faith, sold or pledged to Holford & Co., of London: *And Seventh*, in paying the amount which was actually received by said bank on the hypothecation of said last mentioned bonds; but upon the contingency, and only in the event that said last mentioned five hundred bonds can be procured and delivered up to said trustees, upon the payment of said sum so actually received, with interest and exchange, or of whatever other amount may be legally due on said last mentioned bonds."

The contract between the agents of the Real Estate Bank and the North American Trust and Banking Company, was not, strictly speaking, an *hypothecation*. *Hypothecation* is a term of the civil law, and is that kind of pledge in which the possession of the thing pledged remains with the debtor, the obligation resting in mere contract without delivery: and in this respect distinguished from *pignus*, in which possession is delivered to the creditor or pawnee. *Burr. L. Dic.*; *Story on Bail.*, *sec.* 288.

The contract may be properly termed a pledge, which is defined by SIR WILLIAM JONES to be a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged. And by LORD HOLT thus: "When goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor, this is called in Latin *vadium*, and in English a pawn or pledge." In the Roman law, says Story, it is called *pignus*. Negotiable instruments, choses in action, etc., may, by the common law, be delivered in pledge. *Story on Bail.*, *sec.* 286–290.

Assuming the contract between the Real Estate Bank and the North American Trust and Banking Company, to have been in equity, a valid one, the company held the bonds in pledge for the repayment of the money advanced to the bank; and the bank was entitled to have the bonds re-delivered to it on payment of the debt.

After the North American Trust and Banking Company transferred the bonds in pledge to Holford & Co., for a larger sum of money than it had advanced to the Real Estate Bank on the faith

of the bonds, did the company still continue to be the owner of the debt due from the Real Estate Bank, so that it could be sold by the receiver of the company, after it was placed in liquidation, to Whitney, and vest in him a right to collect the debt?

The pawnee may sell or assign all his interest in the pawn. If he transfer the pledge to his own creditor, the latter may hold the pledge, until the debt of the original owner is discharged. *Story on Bail.*, *secs.* 324, 327.

The general rule is, that liens at law on personal property exist only in cases where the party entitled to them has the possession of the goods: and if he once part with the possession, after the lien attaches, the lien is gone. Being in the nature of a security resting on property for the payment of a debt, the pledgee's lien cannot be separated either from the possession of the goods, or from the debt; it is collateral to the debt, and it must accompany the possession. His interest may be transferred: it will pass at his death to his personal representatives, or he may, it seems, assign over his interest in the pawn so that the assignee will take his rights and responsibilities under the contract of pledge. *Edwards on Bail.*, 210; *Jarvis vs. Rogers*, 15 *Mass.*, 408; *Curtis et al. vs. Leavitt*, 1 *Smith* (*New York*) *R.*, 103.

It follows that when the North American Trust and Banking Company transferred the Arkansas bonds to Holford & Co., in pledge, the debt due to the company from the Real Estate Bank, resting upon and adhering to the bonds—the pledge—passed also to Holford & Co., by the transfer.

After the transfer was made, the North American Trust and Banking Company could not have compelled the Real Estate Bank to pay to it the money advanced upon faith of the bonds, because the company had parted with the bonds, and was not in a condition to surrender them to the Real Estate Bank, on payment, as by the terms of the contract of pledge it was obliged to do.

In what better condition does Whitney stand, who purchased

the debt of the receiver of the company, in liquidation? Did he purchase a greater right than the company had? We think not.

After the bonds were transferred in pledge to Holford & Co., the Real Estate Bank had a right to redeem them by paying to them the money advanced to the bank by the North American Trust and Banking Company, with interest, unless indeed Holford & Co., had a right to claim a larger sum by virtue of circumstances connected with the transfer of the bonds to them, which placed them in the attitude of innocent holders, entitled to protection, which is not a question for us to decide in this case.

But the appellant, Whitney, who seems to have been an adventurer in purchasing the debt due from the Real Estate Bank, and who purchased it for a trifling sum compared to the magnitude of the debt and interest, would, if the prayer of his bill was granted, compel the representatives of Holford to surrender the bonds to the receiver of the Real Estate Bank, and receive nothing, while he would receive the full amount due from the bank, though the very court which ordered his proposition to purchase the debt to be accepted, had charged Holford's administrators with the market value of the bonds, and decreed that they had been legally transferred to him, and that his administrators were well entitled to hold them, etc.: and this decree was made after the deed of assignment referred to in the bill, and supposed by appellant's counsel to cut some figure in the case, had been set aside for fraud.

The decree of the court below must be affirmed.

Mr. Justice FAIRCHILD did not sit in this case.

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CLARK ET AL, VS. BARNETT.

C sold to P one half of a parcel of land and mill, for a certain amoumt, part in cash and part on credit, and executed a bond for title on payment of the residue; afterward P agreed to re-convey his interest to C on certain terms, a part of which was performed; and C remained in possession of the property as sole owner: subsequently P conveyed all his interest in the property to the complainant, who filed a bill for specific performance of the first contract; and the heirs of C, who had died, filed a cross bill for specific performance of the second contract.

Held: 1st. That the circuit court erred in vesting title to one half of the land and mill in the complainant, under the first contract, regardless of the second and its part performance.

2d. That the complainants had no right to a decree cancelling the bond for title without showing a full performance of the second contract.

It is the settled practice in this court not to disturb the decree of the court below for errors committed against a party who does not appeal from the decree. (14 *Ark.*, 125; 20, *ib.*, 526.)

Appeal from Independence Circuit Court.

Hon. W. C. BEVENS, Circuit Judge.

FAIRCHILD for the appellants.

BYERS and STILLWELL and WOODRUFF for appellee.

Mr Justice COMPTON delivered the opinion of the court.

On the 21st day of August, 1846, James Clark, who was then the owner of certain saw and grist mills, and nine acres of land adjacent thereto, known as the "mill tract," agreed to sell an undivided half of the same to Thomas S. Palmer for $493.74. At the request of Clark, Palmer paid $100.00 of this sum to John Ringgold, and made his promissory note to Clark for $393.74, the residue; whereupon Clark executed to Palmer his written obligation, commonly called a title bond, in which he bound himself to convey the premises, upon payment of the remainder of

the purchase money. Under this contract Palmer went into possession, and worked the mills jointly with Clark until the 27th January, 1847, when, having become dissatisfied with the business, he entered into another contract with Clark by which, in consideration that Clark would surrender the note of $393.74, refund the $100.00 paid to Ringgold, pay a certain note Willis Brewer held against him, and collect and pay over to him one-half the net profits arising from the mills, while they were run on joint account, he bound himself to reconvey his interest in the mills to Clark. After the making of this latter contract, Palmer ceased to participate in the management of the mills. Clark alone remained in possession and conducted the business on his own account, and for his own use. On the 24th December, 1851, Palmer conveyed his interest to John Barnett, or, as both parties admit upon the record, substituted Barnett to all his rights, whatever they might be, growing out of the transactions in relation to the mills. Clark died in 1849, and on the 5th December, 1852, Barnett, as the assignee of Palmer, filed his bill in chancery against the heirs and executors of Clark, for specific performance of the contract of 21st August, 1846. The bill alleges full performance of the contract by Palmer, but does not mention, or in any way refer to to the subsequent contract of 27th January, 1847, under which Palmer bound himself to re-convey the premises. The heirs and executors of Clark answered the bill, resisting the relief sought, and also filed their cross bill against Barnett and Palmer, setting up the contract of 27th January, 1847, alleging a performance of it by Clark, and praying that the title bond of 21st August, 1846, might be canceled and their title quieted.

In addition to the facts already stated, it was clearly proven that Clark had surrendered to Palmer the note of $393.74, had refunded the $100.00 paid to Ringgold, with the exception of $5.00, and had been left in exclusive possession of the mills, as part performance of the contract of 27th January, 1847.

On the final hearing, the circuit judge, sitting in chancery,

dismissed the cross bill, and decreed for the complainant in the original bill, vesting him with title to an undivided half of the mills, and the nine acres of land, as specific performance of the contract of 21st August, 1846, regardless of the contract of 27th January, 1847, and of its part performance by Clark. How, or on what ground the judge in the court below reached his conclusion, we are not informed. In view of the facts of the case—and as to them there is no room for doubt or controversy—the decree cannot be sustained upon any established principle of law or equity—it is palpably erroneous. Palmer having received back from Clark the entire consideration, lacking the $5.00, above referred to, which he was to pay for the premises, the effect of the decree, leaving out of view the rights of Clark's heirs under the contract of 27th January, 1847, was to divest their title for the sum of $5.00, when they were to have $493.74, according to the terms of the contract upon which the decree of divestiture was founded.

The evidence, however, fails to show full payment of the several sums due from Clark to Palmer, under the contract of 27th January 1847, to the unpaid balance of which—being $5.00 of the $100.00 paid Ringgold, the amount of the note to Brewer, and one-half the net profits of the mills while they were worked on joint account—the complainant in the original bill is entitled; and until payment thereof by the heirs of Clark they cannot have the relief prayed for in the cross bill. The amount, however, of this unpaid balance cannot be ascertained upon the evidence before this court, it not sufficiently appearing what sum was due on the note to Brewer, nor what were the profits of the mills.

Whether the witnesses, Andrew J. Clark and George J. Hodges were competent or not, it is immaterial to enquire. If the court erred in permitting their depositions to be read, the error was against the complainant in the original bill, who did not appeal; and it is the settled practice in this court not to disturb the decree of the court below for errors committed against

a party who does not appeal from the decree. *Stone vs. Ringgold*, 20 *Ark.*, 526; *Dooley vs. Dooley*, 14 *Ark.*, 125.

Let the decree be reversed; and the cause be remanded with instructions, to the court below, to ascertain, by reference to the master, the amount of the unpaid balance due to the complainant in the original bill, as indicated in this opinion, and on payment being made to him of the sum so ascertained, to decree for the complainants in the cross bill, in accordance with its prayer, and dismiss the original bill.

Mr. Justice FAIRCHILD did not sit in this case.

24 33
54 258

McIVOR VS. WILLIAMS.

Where there are two pre-emption claimants of the same tract of swamp land, and one of them is allowed a pre-emption right by the land agent and obtains the legal title, no fraudulent or illegal conduct on his part in obtaining the title can prejudice the other unless the right of the latter was prior in time and superior in equity; and so, in deciding upon the rights of parties in such case, it is the province of the court simply to determine whether, on account of fraud in the one obtaining the legal title perpetrated against the other, the latter was prevented from obtaining the title, which was equitably due to him, without regard to the soundness of the pre-emption claim of the successful party.

To entitle a party to a pre-emption of public land, his improvement must exist at the time of the application, under the law, to make the entry—if an improvement once made be destroyed, it cannot be considered as such.

It would seem to be a perversion of terms to call land improved so as to entitle a party to a pre-emption, where the whole existing improvement was an acre of ground deadened some four years and so grown up with vines and bushes that it would be as much trouble to prepare it for cultivation as if it were entirely wild land.

Appeal from Prairie Circuit Court in Chancery.

Hon. JOHN J. CLENDENIN Circuit Judge.

HEMPSTEAD for the appellant.

WILLIAMS & MARTIN for appellee.

Mr. Justice FAIRCHILD delivered the opinion of the Court.

McIvor was permitted by the state land agent, by virtue of an alleged pre-emption right, to purchase the south-east quarter of section thirty-one, in township one south, range eight west. To divest the legal title thus obtained by McIvor, Williams filed a bill on the chancery side of the Prairie circuit court, on the ground that, having an improvement on the land, he was entitled to be a preferred purchaser under the pre-emption act of 16th January, 1855, upon making proof to the land agent of his right, and offering to pay for the land within sixty days from its advertisement of sale by the land agent. The bill also makes charges concerning the right under which McIvor claimed, and was allowed to purchase the land; but it is well conceded in the argument for Williams, that, as McIvor has the legal title, any fraudulent or illegal course taken by him to obtain his title cannot have prejudiced Williams, unless the right of the latter was prior in time and superior in equity.

It is not insisted for McIvor that his pre-emption right was a very meritorious one, although claimed to be better than that of Williams, and as good as pre-emptions generally have been, that have been allowed as good by the proper authorities. We might fully accord with the estimate that counsel on both sides seem to entertain for McIvor's pre-emption, if this court were a tribunal for deciding, in the first instance, upon the validity of pre-emptions or for sitting as a court of review upon the acts of officers to whom this duty is committed; but our province in this case if only to affirm the decree of the circuit court sitting in chancery, if, on account of fraud in McIvor perpetrated against Williams, the latter was prevented from obtaining the title which was equitably due to him; or, without regard to the conduct of McIvor, or the soundness of his pre-emption claim, reverse the

decree and dismiss the bill, because the claim of Williams is not founded upon equity.

The right of Williams is founded upon an improvement made by Haines, in 1855, and upon one which Haines bought of Gracie about the same time. Gracie's improvement consisted of what the witnesses call a shanty, made by fixing posts in the ground, with pickets of nine or ten feet in length, and in the vicinity of the shanty from one to three trees were deadened. The shanty was thrown down in 1855 or 1856 by a tree falling upon it, and this was the end of the Gracie improvement. It need not be taken into consideration.

The improvement of Haines was made by deadening a piece of ground and piling the brush cut from it around the place where it was cut, but not so as to protect it as a rail fence would do, and stirring the ground and planting it in peach seeds. Dismukes supposed that the ground deadened and stirred for cultivation, was in extent three or four acres. Smither says that in February, 1855, he assisted Haines to deaden and partly enclose about a quarter of an acre, and that after Haines sold the improvement to Williams, some two or three acres were deadened for Williams. Mills was one of the witnesses to establish the pre-emption right of Williams, and, in his affidavit before the land agent, he had described the improvement as a deadening of several acres, but in his deposition taken in this case, he would not swear that the deadening amounted to one acre; but his judgment was that it was more than one acre, that it might be more than two acres, that he supposed it was between one and five acres. Britton estimates the improvement made in 1855, to have been the deadening of about an acre, and says that when he last saw it, in 1857, it was not enlarged. Morris, who, with another person, measured the deadening, found it to extend something over an acre of ground. Brantley estimates the deadening to be about an acre, and he and Gray, who assisted in making the improvement, depose that no addition had been made to it, up to October, 1859. Haines, in his deposition, stated that there

was cleared a quarter of an acre, and that there were deadened, as he thought, about four acres.

Haines sold his improvement to Williams in the fall of 1855, and also agreed to deaden twenty-five acres upon the quarter-section, but failed to do so, and for his failure, was obliged to account to Williams for the amount agreed upon as the price for such deadening.

It thus appears that the improvement upon which Williams bases his pre-emption right is the deadening of the trees on something over an acre of ground of the quarter-section of land in controversy, that this deadening was made in 1855, and it is further shown in proof that when Williams made his claim before the land agent, the ground once cut upon had so grown over with vines and bushes that it was as difficult to prepare it for cultivation as if no work had ever been done upon it; although the deadening would cause the production of a better crop on the first year's cultivation.

From the time of his purchase of the improvement from Haines, in the fall of 1855, Williams continued to claim it till it was offered for sale by the land agent, and his claim seems to have been generally known and respected by those who lived in the vicinity of the land.

Such being the claim of Williams, as shown by the testimony, two main objections are made against its allowance as an equity to prevail over the legal title, that the claim of Haines was personal to himself, and could not be transferred to Williams, to give him any right, and that the alleged improvement of Haines was not an improvement upon which a pre-emption right can be supported.

If the improvement made by Haines had been such as it was stated to be in the bill, or if Williams, through his contract with Haines, had made such improvement as he wished to have made, no objection to the amount of the improvement could have been properly made. The improvement upon which Williams wished to obtain his preference to enter the land must be considered as

it was in March, 1859, when he would have had its benefit in the entry; and the whole existing improvement was of an acre of ground that had been deadened in 1855, but had so grown up with vines and bushes that it would be as much trouble to prepare it for cultivation, as if it were entirely wild land. This acre of land would yield better the first year for having been deadened and been cleared of brush, yet it would seem to be a perversion of terms to call the land improved, so as to withdraw it from the competition of a public sale, by giving it to a preferred purchaser, at a minimum price, as a recompense for labor or cost thereon bestowed.

Haines agreed to deaden land for Williams at seventy-five cents for the acre. Then, allowing to Williams the full value of his alleged improvement, it cannot have been, originally, worth more than one dollar, adjuging the worth by the cost. The Gracie improvement was destroyed by a tree falling upon the hut in 1855 or 1856, and cannot be considered as any part of the improvement of Williams.

Such an improvement cannot be of the kind within the contemplation of the legislature, as fit to confer valuable rights upon its owner; and we are of opinion that it did not confer any strength or validity to the claim Williams extended over the land from 1855 to 1859.

Whether this claim would or not bear a comparison with the improvement of McIvor, allowed to be such by the state authorities, whether it was not as good as many, or most of the improvements upon which pre-emption rights have been based, and have been granted, and whether it was considered good by the land agent, and would have been respected by an appropriation of the land to it for the lowest price, but for the entry of McIvor, are not questions for us to decide, and are certaintly not matters to influence our opinion. Then, without regard to the merit of McIvor's claim, through which he obtained the legal title to the land in controversy, it is sufficient for the court to know that he had the legal title, and that Williams has not shown any equitable right to interfere therewith.

The decree of the Prairie circuit court sitting in chancery, which divested the title of McIvor, and vested the right and title to the land in Williams, is reversed, and the bill of Williams is dismissed —the decree to be entered in this court.

WRIGHT VS. GREEN.

Where the owner of land, in making a deadening upon it, to increase its market value and throw it sooner into market, extends the deadening over his line upon the public land, without any design of settlement upon or improvement of it, especially if the improvement is of little amount and value, he is not entitled, under the act of 16th January, 1855, to be a preferred purchaser of the land.

Appeal from Pulaski Chancery Court.

HON. URIAH M. ROSE, Chancellor.

WATKINS and KNIGHT, for appellant.

GARLAND & RANDOLPH, for appellee.

Mr. Justice FAIRCHILD delivered the opinion of the court.

Joshua F. Green, being the owner of the east half of section twenty-eight, in township one south, of range eleven west, procured Webb, the county surveyor, to lay off two hundred acres, so as to include the north-east quarter of the section, to direct his laborers where to make a deadening, which Green wished to have made, for the purpose of increasing the value and saleableness of a large tract of land which included the half section mentioned.

Beginning at the half mile corner on the line between sections twenty-one and twenty-eight, Webb traced an open line between the north-east and the north-west quarters of section twenty-eight;

and the deadening for Green was made by this line. Green did not own, nor assert any claim to the north-west quarter of section twenty-eight, nor was Webb instructed, nor did he intend to obtrude his line upon that piece of land. It is, however, contended by Mrs. Green, the plaintiff and appellee in this case, that following up the line traced by Webb, Green caused a strip of deadening to be made along the eastern side of the north-west quarter of the section, narrow at first, but continually widening, so that about an acre of ground was deadened west of the correct line of Green's land.

This would be sufficiently established by the testimony of Mrs. Green's witnesses, Worthen and Starbuck, were it not that two other surveyors, Langtree and Martin, were unable to find the deadening upon the north-west quarter section. However the fact may be, and whatever favorable consequences might result to Mrs. Green from a deadening west of the open line, she has failed in showing its existence. For two witnesses against two, all of equal expertness so far as the court knows, are not sufficient to maintain the cause of a plaintiff. And if the testimony of Webb be taken into account, the preponderance of proof is against the plaintiff.

But if we were to hold it certain that the deadening alleged by the plaintiff had been made, made, as it was, to increase the market value of Green's land, and to throw it sooner into market, without any design of settlement upon, or improvement of the north-west quarter, and especially being an improvement of so little amount and value, we should not hold it an improvement under the act of 16th January, 1855, that would give to Green, or his representatives, a right to a preferred purchase of the land.

Upon both these points the chancellor was of a different opinion from that herein given, and he accordingly divested the legal title from Wright, who had obtained it from the state, holding him as a trustee for Green.

For these errors, without regard to the qualities of Wright's

pre-emption, the decree is reversed, and the plaintiff's bill dismissed.

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PATY VS HARRELL.

The court can exercise no jurisdiction in review of the acts of swamp land agents in pre-emption cases: but if a person makes use of an official act to perpetrate a fraud upon another, he shall be deprived of any benefit that has thereby accrued to him to another's prejudice.

Attaching equal credibility to the statements of the witnesses on both sides, the whole testimony does not preponderate in favor of the plaintiff. In such case better is the condition of the defendant, and his legal title having been acquired without fraud upon the plaintiff, must prevail.

Appeal from Pulaski Chancery Court.

Hon. URIAH M. ROSE, Chancellor.

GARLAND & RANDOLPH, for appellant.

Mr. Justice FAIRCHILD delivered the opinion of the court.

Within sixty days previous to the public sale of swamp lands made by the land agent for the Little Rock land district, in May, 1859, both of the parties to this suit produced proofs of a pre-emption right to the north-east quarter of the south-east quarter of section thirty-one, in township two south, of range one west, and each claimed the right to be the preferred purchaser thereof; but as Paty first applied he was the successful claimant, has become invested with the legal title to the land.

Mrs. Harrell, the plaintiff below and appellee here, conceiving her claim to the land to be paramount to that of Paty, filed a bill in the court below, to have the title divested from Paty

and decreed to be in herself, in which effort she was successful, and Paty has appealed from the decree rendered against him.

According to the testimony in the case, which is ample upon both sides, Mrs. Harrell did procure an improvement to be made upon the land in controversy: but upon this, the question arises, whether Paty obtained his title fraudulently and to the injury of Mrs. Harrell. If it were permissible to different parties, having improvements upon the same tract of land, to prosecute their respective claims, every claimant would have the right to prosecute his own claim with all the diligence he could exert, and with all the skill at his command: and his success would not give his adversaries any right to question his title, if he had not acted unfairly towards their pretensions. In such a case as the one before the court, the affidavit required by the law, that there was no other improvement on the land sought for than the one presented by the affiant, would seem to exclude the idea of there being two improvements of sufficient merit to justify the claims of different persons to one piece of land; but it does not appertain to either of the parties to make this objection for each one of them has made the affidavit, and each one has adduced abundant proof of their respective claims, and of their respective improvements.

This court has often held, in this class of cases, generally upon the official acts of swamp land agents and officers, that it can exercise no jurisdiction in their review. But if a person makes use of an official act to perpetrate a fraud upon another person, he shall be deprived of any benefit that has thereby accrued to himself to another's prejudice. This is the only ground upon which courts of chancery can interfere with the legal rights that are contested in these conflicting pre-emption cases.

The present controversy has existed between the plaintiff and the persons under whom the defendant claims, from the time she first attempted to improve the land in question. For when John M. Harrell first essayed an improvement for the plaintiff, he was encountered by Sanders, who forbid him to improve upon the

quarter section of land that included the forty acre tract in dispute, as Sanders claimed the land. Thenceforward, Sanders, Ramsey, and the defendant, persisted in making the same claim till it was recognized as valid by the land agent in his preferred sale of the land to the defendant. Nor is there any fraud apparent in putting forth this claim, unless it result from converting an insufficient improvement into a pre-emption right.

The cases of *McIvor vs. Williams*, and of *Wright vs. Green*, decided at the present term, contain instances of alleged improvements that we held insufficient to attack legal titles, that were complained of as resting upon bad improvements. But in this case, the plaintiff has, by allegation and proof, made a good case so far as concerns the quality of her own improvement, and it may then be insisted with more plausibility that the character of the defendant's improvement shall be taken into consideration, that its comparative insignificance, and beginning after the existence of her own improvement, may impress upon it a fraudulent character, when urged against her better and prior claim.

It is, however, unnecessary to consider this point until it shall be determined that the case of the plaintiff shall be found to stand good against the opposing testimony of the defendant.

The plaintiff claims that her right is prior to the claim of Sanders, and to the establishment of this point her evidence seems to be directed. But the defendant has met this claim with opposing evidence.

Sanders testifies that he claimed the land in controversy in July, 1856, and that, shortly after this, John M. Harrell came on to the land to make an improvement upon it for the plaintiff, when he, Sanders, notified Harrell that the land was his from purchase, and forbid Harrell from cutting upon it, and that Harrell replied, that he had not known that the land belonged to Sanders, and that he would not touch it again. Sharp gives Harrell's reply as being that he did not wish to interfere with the right of any one.

Sanders is positive that Harrell made no improvement in 1856,

and he never knew that she had any claim upon the land. His knowledge extends to July, 1858, when he sold his right to this land, with others, to Ramsey.

Sharp says that in 1856, John M. Harrell had come to the neighborhood of the land to make improvements, and enter land for himself and for his mother, the plaintiff; that when Sanders forbid him from improving on the land in controversy, Harrell asked for some one to show him a corner so that he could run his line correctly without interfering with the rights of any one, and that Sanders showed him a corner and gave him a start on a line. Sharp also stated that Harrell made an improvement on land adjoining that in controversy.

Rice deposed that in November, 1857, he moved down to the neighborhood, where the parties to the suit now live, that he leased lands from Harrell, but not the piece of land in suit, but that in improving upon Mrs. Harrell's land, he ran over on the land in controversy by mistake, and that he so told John M. Harrell. He says, also, that in November, 1857, there was no improvement on the land except one that he understood was made by the defendant.

Williams contradicts the testimony of John M. Harrell in some important particulars, but gives no date to the beginning of the improvement of Sanders, further than to say, that eighteen months before testifying, in July, 1859, there was a turnip patch on the land belonging to Sanders. He shows a continuous claim of the land from the first of January, 1858, by Sanders, Ramsey and the defendant, as a pre-emption right.

Morrison goes further back than Sanders, or the answer of the defendant, in showing an improvement on the land in question, in 1855, and says that no work had been done on the land up to 1858, but what had been done by Lewis, Sanders, Ramsey and the defendant. Lewis was the one from whom Sanders bought his claim to the land.

Ramsey testifies that the only improvement made by Mrs. Harrell on the land was made by Rice, and this could not have been made before the last of 1857.

According to the testimony of the defendant, Mrs. Harrell clearly had no improvement upon the land till after the turnip patch of Sanders had been cleared, enclosed and planted. This is contrary to the case proven by Mrs. Harrell. Attaching equal credibility to the statements of all of the witnesses, Mrs. Harrell's case is neutralized by that of the defendant. She is the plaintiff; the whole testimony does not preponderate in her favor; it makes, at best, for her but a balanced case, and that is not enough. In such a state of things, better is the condition of the defendant. When to this consideration is added that of the defendant having the legal title, and that, as is seems to us, he has obtained this without fraud upon the plaintiff, we are satisfied that Mrs. Harrell ought not to have the benefit of the decree given her by the court below, and it is accordingly reversed, and her bill is dismissed.

MARY VS. THE STATE.

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71 103

The burning necessary to constitute arson of a house at common law, must be an actual burning of the whole or some part of the house; but it is not necessary that any part of the house should be wholly consumed; and our statute (*Gould's Dig. p.* 338,) does not materially change the common law definition of the offence: And so, an indictment merely charging that the defendant set fire to the house is fatally defective as an indictment for arson.

An indictment charging that the defendant set fire to the house, with intent *to injure the owner*, is defective under *section* 7, *p.* 339, *Gould's Dig.* It should charge that the defendant set fire to the house with intent to burn it.

Where a person attempts to burn a house by setting fire to it, but fails to accomplish such a burning as constitutes arson, he is guilty of a misdemeanor.

Appeal from Pulaski Circuit Court.

Hon. JOHN J. CLENDENIN, Circuit Judge.

GARLAND & RANDOLPH, for appellant.

JORDAN, Attorney General, contra.

Mr. Chief Justice ENGLISH, delivered the opinion of the court.

The appellant, Mary, was indicted for arson, in the Pulaski circuit court, as follows:

"The grand jurors, etc., etc., present that Mary, a colored woman, slave for life, the property of Nancy Rider, late of etc., on the 18th day of November, A. D. 1861, at etc., with force and arms, feloniously, wilfully and maliciously, did set fire to a certain dwelling house of William Murray, there situate, with intent thereby then and there to injure the said William Murray, contrary to the form of the statute," etc., etc.

She was tried upon the plea of not guilty, convicted, and sentenced to receive five hundred lashes.

Her counsel moved in arrest of judgment upon the grounds, 1st. That the indictment charged her with no offence, etc.; 2d. That the name of no person was indorsed on the indictment as prosecutor, etc.; and 3d. That there was no averment in the indictment, that her mistress had refused to compound the offence with the injured party, etc.

The motion in arrest was overruled and she appealed.

1. It is insisted that the indictment is fatally defective as an indictment for arson, because it fails to allege that the house was burned.

Arson, *ab ardendo*, (as it stood at common law; and independently of the provisions of acts of parliament,) is the malicious and wilful burning of the house, or out-house of another man.

The burning necessary to constitute arson of a house at common law must be an actual *burning* of the whole, or some part of the house. Neither a bare intention, nor even an attempt to burn a house by actually setting fire to it, will amount to the offence, if no part of it be burned: but it is not necessary that any part of the house should be wholly consumed, or that the fire

should have any continuance; and the offence will be complete, though the fire be put out, or go out of itself. 4 *Black. Com.* 220–3; 4 *Steph. Com.* 141–3; 2 *Russ. Cr.* 548.

Hence, the words, *incendit et combussit* were necessary, in the days of law-latin, to all indictments for arson. *Ib.* And in the precedents founded upon the common law, and not upon statutory definitions, the words set fire to and *burn*, etc., are used. 3 *Greenl. Ev. sec.* 51; *Whart. Prec.* (389.)

Our statute (*Gould's Digest, p.* 338) makes it arson to burn buildings, etc., which by the common law were not the subjects of arson, but does not otherwise materially change the common law definition of the offence. Thus:

Sec. 1. Arson is the wilful and malicious *burning* the house, or other tenements of another person.

Sec. 2. Every person who shall wilfully and maliciously *burn*, or cause to be *burned*, any dwelling house, or other house though not herein specially named, shall be deemed guilty of arson.

Sec. 3. If any person shall wilfully and maliciously *burn*, or cause to be *burned* any state-house, court-house, prison, church, bridge, or any other public building, although not specially named, such person shall be deemed guilty of arson.

Sec. 4. If any person shall wilfully and maliciously *burn* or cause to be *burned* any steamboat, or other vessel, or any water craft whatever, etc., he shall be deemed guilty of arson.

Sec. 5. If any person shall wilfully set fire to his own building or other property, with the intent to burn the property of any other person, and the property or building of any other person shall thereby be *burned*, such person shall be deemed guilty of arson.

It may be seen that in each of these sections *burning* is a material element of the offence; and we think that an indictment founded upon any one of them should aver that the property was burned; and this conclusion is sustained by adjudications

entitled to much respect. *Cochrane vs. The State*, 6 *Maryland Rep.* 404; *Howell vs. Commonwealth*, 5 *Grattan Rep.* 664.

But, as above shown, to sustain the allegation of *burning*, it is not necessary to prove, upon the trial, that any part of the house, much less the entire building, was wholly consumed.

The indictment before us, though it follows a precedent to be found in 2 *Arch. Cr. Prac. & Plead.*, 7 *Ed. by Waterman, p.* 710, is, we think, materially defective in not alleging that the house was burned. The precedent referred to was doubtless framed upon the English statutes.

It has been said that the words "set fire to" mean the same as to burn, (1 *Bishop Cr. L. sec.* 189; 2 *East. P. C.* 1020,) but it has been adjudicated to the contrary, (6 *Maryland*, 405; 5 *Gratt.* 670,) and it is safest to follow the common law precedents.

Where a person attempts to burn a house, etc., by setting fire to it, but fails to accomplish such a burning as constitutes arson, he is guilty, by the 7th section of our statute, as well as by the common law, of a high misdemeanor. The 7th section pro es that: If any person shall set fire to any building or tenement of another with intent to burn the same, although such house or tenement may not be burned, he shall be deemed guilty of a misdemeanor, and on conviction shall be fined, etc.

The indictment before us was manifestly not framed upon this section, for the endorsement upon the indictment and the record entries, show that the prosecution was for *arson*. But if it was framed upon the 7th section, it is materially defective, because it charges that the appellant set fire to the house with intent *to injure the owner*, when it should have charged, in the language of the statute, an intent to burn the house. *Gabe, etc. vs. The State*, 1 *Eng.* 519.

2 & 3. The second and third grounds of the motion in arrest of the judgment are based upon the assumption that the appellant is indicted for a misdemeanor; and her counsel insist that *arson*, when committed by a slave, is not a felony.

Prior to the act of 18th Dec. 1848, *Gould's Dig. p.* 383-4, we

had no statute defining felony, and the courts had to look to the common law to ascertain what offences were to be treated as of the degree or grade of felony, and what were to be regarded as misdemeanors.

By the common law, *felony* is an offence which occasions a total forfeiture of either lands or goods, or both, to which capital or other punishment may be superadded, according to the degree of guilt. *Bouv. Dic.*

In this state there never was any forfeiture, as a consequence of conviction of any crime, the bill of rights prohibiting it: yet the term, *felony*, was used in the statutes, and in criminal proceedings, before the passage of the act of 18th Dec. 1848, defining it, as denoting a grade or class of crime.

But it is argued by the counsel for appellant, that the term *felony*, as defined by the common law, cannot, with propriety, be applied to any offence committed by a slave, because a slave is legally incapable of owning property.

But this objection is obviated, when it is borne in mind that the term felony was used in this state, before the act defining it, as denoting a grade or class of crimes, and not as indicating the character of punishment attached to them.

Thus, it was provided by the Revised Statutes of 1838, p. 281–2, that: "In all trespasses and offences, less than *felony*, committed by a *slave*, on the person or property of another person, the master may compound with the injured person, and punish his own slave, without the intervention of any legal trial or proceeding," etc.

And again: "In all cases of *felony*, the slave committing the same shall be tried in the same court, and the same rules of evidence observed, as in cases of white persons committing the life offence; excepting that slaves may be witnesses for and against slaves."

The act of 18th Dec. 1848, declares that: "The term "*felony*," as used in the laws of the state of Arkansas, is defined to be any crime, or offence, which, by the laws are punishable, either

capitally, or by imprisonment in the penitentiary, or when any portion of the punishment inflicted shall be imprisonment in the penitentiary."

Slaves were expressly excepted out of the penitentiary code (*Gould's Dig. p.* 385, *sec.* 7,) and were not, at the time the act defining felony was passed, and are not now, subject to imprisonment in the penitentiary for any offence. Hence, it is insisted by the counsel for the appellant, that *arson* by a slave, not being punished capitally, is not a felony, but a misdemeanor.

It is probable that the legislature, in passing the act defining felony, had not slaves in their minds, and did not intend to embrace crimes committed by them in the definition. But if it must be concluded that they did, from the scope of the language employed, we think the proper construction of the act is, that it determines the offences that are to be treated as felonies, in criminal proceedings, without regard to the exemption of a particular class of persons from the character of punishment which is made generally the criterion of felony. Thus *arson* is a felony within the definition, because persons generally committing the offence are punishable by imprisonment in the penitentiary; and the class or grade of the offence being thus established, a slave committing arson, must be prosecuted as for a felony, though he is not to be punished by imprisonment in the penitentiary.

Thus, in support of the reasonableness of this construction, arson was classed as a felony at common law, because it was punishable generally by a forfeiture of the property of the criminal, but it was nevertheless a felony in persons destitute of property, and who could not be subjected to forfeiture as a punishment, but were punishable otherwise.

The consequence of a different construction of the defining act than that above indicated, would be to authorize the master to compound offences committed by his slave other than such as are punished capitally, which might not, in many instances, answer the ends of public justice, for there are but few offences punishable with death, under our criminal code.

But the indictment being materially defective in the matter above indicated, the judgment must be reversed, and the cause remanded with instructions to the court below to sustain the motion in arrest of judgment, and hold the appellant subject to answer another indictment.

BRANDENBURG ET AL. VS. STATE, USE OF MONROE COUNTY.

The county court acts judicially in adjusting the accounts of an internal improvement commissioner, and has no power to set aside its judgment after the lapse of the term.

Error to Monroe Circuit Court.

Hon. GEORGE W. BEASLEY, Circuit Judge.

STILLWELL & WOODRUFF, for plaintiff.

GARLAND & RANDOLPH, for defendant.

Mr. Justice COMPTON delivered the opinion of the court.

The account of Brandenburg, one of the plaintiffs in error, as internal improvement commissioner, was audited in the county court of Monroe county, at October term, 1854, and the amount due from him to the county, for and on account of the internal improvement fund, ascertained to be $1,836.05. At a subsequent term of the same court, held in January, 1855, the settlement made at October term was, for error alleged, set aside, and the account of Bradenburg re-audited, showing a balance against him of $1,551.31, which he was ordered to pay over, but failing to do so, suit was brought on his official bond, and the only breach assigned in the declaration, is his failure to pay this latter sum.

As a defence to the action, it was pleaded in bar by Brandenburg and his sureties, who were defendants below, that after the expiration of the term of the county court, held in October, 1854, the court had no power to set aside the settlement made at that term, and make another between the parties concerning the same subject matter; and that, consequently, the action of the court at January term, 1855, was *coram non judice* and void, imposing no obligation whatever on Bradenburg to pay over the sum then found against him. This was a good defence. In the adjustment of Brandenburg's account, the county court acted judicially, and certainly had no power to set aside its judgment after the lapse of the term at which it was rendered. *Reiff et al. vs. Conner*, 5 *Eng.*, 241; *Cossit vs. Biscoe*, 7 *Eng.*, 95; *Brooks vs. Hanauer*, 22 *Ark.*, 174.

The circuit court erred, therefore, in sustaining the demurrer to the sixth plea of the defendants, for which the judgment must be reversed, and the cause remanded for further proceedings.

HARVARD LAW SCHOOL LIBRARY

UNION COUNTY VS. COWSER.

A collector is entitled to commissions only when he collects the taxes; and if he fails to take the tax book, and it is delivered to his successor, he has no claim for commission on the taxes collected by his successor.

Appeal from Union Circuit Court.

Hon. LEN B. GREEN, Circuit Judge.

CARLETON, for the appellant.

Mr. Justice FAIRCHILD delivered the opinion of the court.

At the August election of 1858, Robert Sewell was elected sheriff of Union county, as successor to Cowser, the former sheriff. In October, 1858, the latter gave his receipt for the tax book of that year, but did not remove it from the clerk's office, and did not collect any of the taxes. In January, 1859, Sewell having in the meantime qualified as sheriff, was also required to give bond as collector of the taxes for 1858, and the tax book was given to him by the clerk under the direction of the county court. Sewell collected the taxes and made his settlement with the county court, whereupon Cowser filed an account against Union county, claiming that he was entitled to commissions on the amount collected by Sewell as if he had collected it himself, he being the lawful collector of the taxes for 1858. The claim of Cowser was disallowed by the county court: he appealed to the circuit court, which reversed the judgment of the county court, tried the case anew, and rendered a judgment for Cowser. The county appealed to this court.

The law gives commissions only for the collection of taxes. Cowser did not collect the taxes of 1858, and he had no demand against the county as pay for services he did not perform. Whether Cowser or Sewell was entitled to the tax book of 1858, and, consequent upon the actual collection of the taxes, which of them should have received the pay allowed by the law for such collection, are not questions before this court.

The county court properly rejected the claim of Cowser: the circuit court improperly set aside its rejection, and the judgment of the circuit court is reversed, and the cause is remanded, with directions to affirm the judgment of the county court.

STROUD VS. GARRISON.

The defendant, assisted by the plaintiff and others, apprehended runaway slaves, and the defendant afterwards received the reward for their capture: the plaintiff sued for a proportionate part of the reward. *Held*, that the plaintiff was not entitled to recover, as there was no fact in the case from which it might be inferred that the defendant ever promised to share the reward with the plaintiff.

Error to Drew Circuit Court.

Hon. JOHN C. MURRAY Circuit Judge.

HARRISON, for the plaintiff.

Mr. JUSTICE FAIRCHILD delivered the opinion of the court.

Smith, a wagoner, told Lephew that some runaway negroes passed his camp the evening before. Lephew told the defendant, a negro catcher; and he, with another person, started in pursuit of the negroes. Lephew and the plaintiff also started about the same time, on the same business, and the two parties, of two persons each, met near the place where Smith saw the negroes. The pursuing party, then consisting of four persons, was soon upon track of the negroes, and their whole number, five, were soon caught by the joint efforts of all the negroes engaged in the pursuit, were taken to Monticello and were delivered by the defendant to the jailer of Drew county. The negroes were afterwards taken from jail by their owner, and the reward for their apprehension was paid to the defendant. This suit was brought to recover one-fourth of the reward, to which the plaintiff claims to be entitled from his participation in the capture.

Although the plaintiff assisted in taking the negroes, they were found by instrumentalities belonging to the defendant, and although the evidence induces the conclusion that the defendant alone would have had difficulty in securing all the negroes when overtaken, yet the defendant had with him another person, and

whether with this help the defendant could have apprehended all of the negroes, without the assistance of the plaintiff and of Lephew, we are not informed by the evidence.

Upon trial of the case in the circuit court of Drew county, the court was asked to instruct the jury that the legal result from the foregoing facts was to make the defendant liable to the plaintiff for one-fourth of the reward received for the apprehension and delivery of the negroes. This the court refused, and instructed the jury that if the parties to the suit were not in partnership in catching the negroes, and had not made any agreement about sharing the reward therefor, that they must find for the defendant. The jury found for the defendant, and the plaintiff prosecuted his writ of error.

There is no fact in the case from which to draw an inference that the defendant ever promised to share, or thought of sharing, with the plaintiff, the reward that should be received for the apprehension of the negroes. He delivered them to the jailer, made the affidavit concerning their capture, claimed and received the reward himself. He never bound himself to pay any part of the reward to the plaintiff, nor would the law raise an implied obligation to do so from the facts.

Although the charge of the judge of the circuit court is not correct in its reference to a partnership between the parties, either in its applicability to the case, or in law if applicable, the plaintiff was not thereby injured, and the instruction desired by the plaintiff was properly refused.

The judgment is affirmed.

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PATTERSON VS. THOMPSON.

The right of a parent to maintain an action for the seduction of his daughter, being founded upon loss of service and consequent expense, the action can be maintained only where the daughter, at the time of seduction, is under age and bears to the parent the relation of servant, or, if of age, resides in the parent's family, doing acts of service; and also, where loss of service is sustained or expense incurred by the parent.

In this case, the daughter being over twenty-one years of age, and not a member of her father's family at the time of seduction, and neither loss of service nor expense proven: *Held*, that he could not maintain the action.

The period of limitation in actions for seduction, is one year from the time the cause of action accrued.

Quere. Will a verdict, in a seduction case, be set aside for excessive damages? or should punishment of the defendant enter into the finding?

Appeal from Chicot Circuit Court.

Hon. JOSIAH GOULD, Special Judge.

GARLAND & RANDOLPH for appellant.

YELL and BELL & CARLTON, for appellee.

Mr. Justice FAIRCHILD delivered the opinion of the court.

The record of this suit, which is an action on the case by the appellee for the debauch and getting with child of his daughter, presents for consideration these propositions: Whether the action was barred by limitation; whether the plaintiff had any right of action on account of the intercourse between the defendant and the daughter of the plaintiff; and whether the verdict should not have been set aside for its allowance of excessive damages. All of these propositions, except a branch of the first, which is presented by the plea of limitations of one year, are to be determined upon the evidence, and the legal principles which the evidence makes applicable to the propositions.

It does not seem to be contested, and if it were, the evidence makes it undeniable, that sexual intercourse was had between the defendant and a daughter of the plaintiff; and the latter deposes that it resulted in her pregnancy, and in the birth of a child. This, with the concurrence of other facts, would require a verdict for the plaintiff for some amount. And unless the assessment of damages be so great as to be disproportioned to the injury, the finding of the jury must stand as a proper assessment of damages, at least as one made by the proper tribunal, and that cannot be reviewed by this court. And perhaps a notice of some cases in which courts have declined to set aside verdicts for giving excessive damages may lead to the conclusion that the immunity of a verdict from interference by a court, upon this ground, ought to be expressed in stronger terms.

In the only case in which this court is remembered to have expressed its opinion on this subject, the jury had rendered a verdict of one hundred dollars in damages, for taking hogs that were not proved to be worth over twenty-five dollars. In reply to the point made for the plaintiffs in error, that the damages were excessive, the court said: "Nor are we disposed to set aside the verdict on the ground of excessive damages * * * * The trespass in this case was rather a flagrant one. The plaintiff's premises were invaded, his close broken, entered, his hogs driven off, killed and converted; and on the trial, the defendants proved no color of title to the property. True, the value of the hogs was proven not to exceed twenty-five dollars, but the jury were not confined, exclusively, to the value of the hogs, in determining the amount of damages to be awarded to the plaintiff—they had the right to take into consideration the invasion of the plaintiff's premises, the vexation to his feelings, the inconvenience to him arising from the deprivation of his property, as well as its value, and then to add something by way of smart money, or exemplary damages. Under all the circumstances of this case, we cannot conclude that the verdict for one hundred dollars was so exorbi-

tant as to indicate corruption or bad faith on the part of the jury, and shall not therefore disturb it." *Clark vs. Bales.*, 15 *Ark.*, 458.

In an action for a libel, wherein fifteen hundred dollars damages had been found, when it was contended the plaintiff was entitled to nominal damages only, the supreme court of New York remarked: "The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, we cannot, consistently with the precedents, interfere with the verdict." After citing several old English cases, the court proceeds: "The law has not laid down what shall be the measure of damages in actions of tort. The measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances, as the state, degree, quality, trade, or profession of the party injured, as well as of the party who did the injury. * * * The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line: for they have no standard by which to ascertain the excess." *Coleman vs. Southwick*, 9 *John. Rep.*, 51–52.

Nine hundred and twenty dollars had been rendered as damages in a seduction case, which was claimed to be so unreasonable as to require the interference of the court, but SUTHERLAND, J., responded in this way: "Nor do I think we are authorized to interfere on the ground of the excessiveness of the damages, although they appear to us much larger than they should have been. There were no aggravating circumstances in the case; no acts of seduction were used, for none were necessary. The character of the daughter had long been considered loose and

abandoned. There were no wounded feelings, or blasted reputation to aggravate the moral impropriety of the defendant's conduct, or to call for exemplary damages. We should have been better satisfied with a verdict barely sufficient to remunerate the plaintiff for her actual loss. But the damages are not so flagrantly outrageous and extravagant as necessarily to evince intemperance, passion, partiality, or corruption on the part of the jury; and where that is not the case, the court will not undertake to set their judgment on a question of damages, in an action of this nature, in opposition to the judgment of the jury. It is the judgment of the jury, and not of the court, which is to determine the damages in actions for personal injuries. *Sargent vs. Denniston*, 5 *Cow.*, 118.

It should be remarked of this case, that the court did set aside the verdict, for the reasons that the jury did not intend to give any thing for the alleged seduction, and that the verdict was made up of an allowance of twenty dollars for the plaintiff's loss of service of the daughter, during confinement, and of nine hundred dollars, as the sum estimated by the jury necessary to support the child till it should become of an age to support itself.

In another action for seduction, in which the verdict was for six hundred and fifty dollars, the same court answered, to the same suggestion, that, "The damages appear to be high, but not so excessive as to indicate passion, partiality, prejudice, or corruption, on the part of the jury." *Knight vs. Wilcox*, 18 *Barb.*, 221.

And so the court of appeals of Kentucky, in a case in which eighteen hundred dollars were awarded against the defendant for the seduction of the plaintiff's daughter, held that, when the defendant had admitted the cause of action by default, and was shown upon the inquisition of damages, to be worth eighteen thousand dollars, the verdict was not so flagrantly excessive as to authorize a new trial. *Applegate vs. Ruble*, 2 *A. K. M.*, 130.

Duberly vs. Gunning, 4 *T. R.*, 651, is often referred to as the strongest case on record in which the damages were exemplary, but were allowed to stand, although for the sum of five thousand

pounds, when the plaintiff in the action for criminal conversation, had so acted as to induce the court to believe that he had consented to the prostitution of his wife. BULLER, J., thought that the verdict should have been for the defendant, and wished to have it set aside, and a new trial granted; but Lord KENYON, although he admitted that nominal damages would have satisfied him, and that those given were much larger than they should have been, said that he had never known an instance in which a new trial had been granted in such a case on account of excessive damages, and that he had not courage enough to make a precedent.

In *Lee vs. Hodges*, 13 *Grattan*, 726, the jury awarded damages in the sum of four thousand, five hundred dollars, against the defendant, in an action for seduction, which the defendant moved to set aside. The court, where the case was tried, refused to grant the motion upon a release by the plaintiff in open court of fifteen hundred dollars of the damages. No question was made on this point in the court of appeals, but the opinion of the court refers to the amount of the verdict to infer that the jury considered the case to be of an aggravated character.

Upon a question of this sort in the supreme court of Georgia, LUMPKIN, J., used this emphatic language: "Never, so help me God, while I have the honor to occupy a seat on this bench, will I consent to control the jury, in the amount of compensation which they may see fit to render a father for the dishonor and disgrace thus cast upon his family; for this atrocious invasion of his household peace."

These are but a few, are merely specimens, of the many cases, in which courts have refused to disturb verdicts that have been complained of for being unreasonable, unjust, or outrageous, in their assessments of damages. It is apparent, from a review of the cases under the head of seduction, that the determination of the plea of not guilty, affords but little clue from which to conjecture the amount of damages to which he is to be subjected. The action is sustainable by a father solely because he is supposed

to be injured by the loss of the labor which his debauched daughter becomes unable to perform, and by the expenses which her consequent sickness entails upon him; but damages are given to him regardless of the fact that the services of the daughter are of unfrequent occurrence and of trifling value, and upon the express grounds that his feelings as a father have been outraged, that his family has been disgraced, that his child, from being the ornament of her circle, and the pride of his life, has become, by the defendant's wrong, the shame of his old age, and an outcast from decent associations. In the language of one of the instructions to the jury in this case, submitted on the part of the plaintiff, he goes into court as a master, but goes before the jury as a parent. He must then go out of court with the price which a jury puts upon the chastity of his daughter, with their estimate of what the destruction of the honor of his family, and of his own peace of mind, shall be accounted at in good and lawful money. And if the heart of a parent is made to revolt at the paltry sum by which innocence and happiness are balanced, or to lament that a heavy verdict cannot compensate the loss of character, of respectability, and of fatherly delight, the result is the inevitable consequence of the legal fiction that transforms his case from a statement of slight pecuniary loss to an appeal for satisfaction for the violation of female virtue, and from its submission to a tribunal that has no rules, or limits, or measures, by which to make the required response.

Notwithstanding the evident want of logical principle that marks the practical operation of this action, it has long been well settled that a father may recover damages beyond a compensation for the facts alleged in his declaration, the loss of the services of his daughter, and the lying-in expenses; and that courts disclaim the desire, and sometimes almost the power to interfere with verdicts, however unreasonably large these may seem to be.

Speaking of any action upon the case for debauching and getting with child an adopted daughter, LORD ELLENBOROUGH, in

1809, said "This has always been considered as an action *sui generis*, where a person standing in the relation of a parent, or *in loco parentis*, is permitted to recover damages for an injury of this nature, *ultra* the mere loss of service * * * and, however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice has become inveterate, and cannot now be shaken." *Irwin vs. Dearman*, 11 *East* 23. So, SUTHERLAND, J. justified the departure from strict legal rules in the admission of evidence, because the action itself was not in accordance with legal principle. He says: "The testimony objected to was merely in aggravation of damages, and we all know, that although loss of service must be shown, yet that any considerable damages are given not to cover the actual loss sustained, but for injury to the parental feelings. 4 *Cow.*, 412; 5 *id.* 106; 1 *Wend.*, 447; 3 *Camp.*, 519; 4 *Cow.*, 355; 2 *Phil. Ev.*, 157, *and cases there cited.* The action is altogether anomalous in its character, and the ordinary rules of evidence cannot, in all their strictness, be applied to it, without defeating its essential object." *Stiles vs. Tilford*, 10 *Wend.*, 341.

The law as administered is well stated by Starkie, in his excellent practical work upon evidence. "The jury, in a case of this nature, are not confined in their estimate of damages to the mere amount of the damage from loss of service, and the expenses consequent upon the seduction, but may award a compensation for the loss which the father has sustained in being deprived of the comfort and society of his child, the injury he sustains as the parent of other children, whose morals may be corrupted by her bad example, and for the dishonor and disgrace cast upon the plaintiff and his family by such an injury." 2 *Stark. Ev.*, 7 *Am. Ed.*, *Part II.*, 990. See, also, *Knight vs. Wilcox*, 15 *Barb.*, 280.

But, whatever may be said about damages being given and allowed to stand as a compensation for mental suffering, for social degradation, and for moral injury, in actions for personal injuries, the wrong cannot be measured by money. With a man of deli-

cacy, or of honor, no verdict can be an equivalent for an unprovoked assault, committed under aggravating circumstances of time, place, and association, for a malicious prosecution upon a disgraceful criminal charge; and for the offender to speak of atoning to a husband or father, by submitting to the most extreme verdict in actions for criminal conversation and for seduction, would be adding the greatest insult to the greatest injury.

Another reason is also given in the books for the habit, and perhaps for the encouragement of exemplary damages, namely, to punish defendants for wrongs that the law does not enumerate as crimes. *Bartley vs. Richtmeyer*, 2 *Barb. S. C. R.*, 189; *George vs. Van Horn*, 9 *Barb.*, 527; *Campbell's Lives of Lord Chancellors, Vol.* 5, 207; *Wilson vs. Spreul*, 2 *Penn. R.*, 527. If it be a reproach upon the common law that it has no criminal jurisdiction over seducers and begetters of bastard children, that cannot justify courts and juries, because "ready and eager to punish the violator of female chastity and the peace of families," to "usurp the law making power in order to remedy a real or fancied hardship," or to give, or uphold outrageous damages in cases properly within the rules of civil jurisdiction.

It is with regret that the legal biographer of Lord Camden, whose work has just been cited, notices that so sound a lawyer, and temperate a man as he was, should say that damages were designed, among other purposes, to serve "as a punishment to the guilty, and as proof of the detestation in which the wrongful act is held by the jury." This and similar decisions are attributed to the immense popularity which LORD CHIEF JUSTICE PRATT had acquired by his noble and decided efforts to break up the illegal issue of general warrants from the office of the secretary of state, thereby inclining him, in political trials, to the popular side. If punishment is to be inflicted on culpable defendants for seductions, or for the commission of any public wrongs, it should be held due to the government to whom belongs the redress of such wrongs; should be inflicted under a code that defines the crime without fiction, and confers the benefits of a criminal trial;

and by a responsible tribunal that must affix penalties by known rules, and can be restrained within some limits of punishment moderated by more disinterested authority than the general claim of a plaintiff to damages.

Our own state is free from the reproach of not defining seduction as a crime, and of not providing for its punishment, as appears by the following enactment:

"Any person who shall be convicted of obtaining carnal knowledge of any female, by virtue of any feigned or pretended marriage, or of any false, or feigned express promise of marriage, shall be imprisoned not exceeding two years, in the jail and penitentiary house of this state, and fined in any sum not exceeding five thousand dollars at the discretion of the court or jury before whom such person may be convicted." Yet, there is added this salutary provision: "but no person shall be convicted of said crime upon the testimony of the female, unless the same be corroborated by other evidence." *Ch.* 51, *Art. II.*, *Sec.* 3, *p.* 369, *Gould's Dig.*

And if no provision has been made for the punishment of any seduction that has been encompassed by other means than a false marriage, or false promise of marriage, it must have been because the law-making power has not thought it necessary to make such provision; and it is beyond the scope of the civil administration of our law to make up the deficiencies of the criminal law by punishing a defendant with damages, because he is not visited with fines, forfeitures, imprisonment, stripes or death. Nor is *sec.* 274, *ch.* 52, *Gould's Dig.*, opposed to this, as that preserves a right of action to the party injured, which, in this case, would be the party seduced, when a felony has been committed attended with personal injury.

Though remarks may sometimes have been made by judges in charges to juries, or in the delivery of hastily prepared opinions, favoring the idea that heavy damages may be given to punish, or to reform a defendant, or to express the indignation of courts, or juries, or society, against a particular act, or to deter others from

the perpetration of wrong, no well considered decision has been found that inculcates such doctrines, nor could such decision, if found, be supported by any legal principle. A private action is not the medium for satisfying the demands of public justice, nor an instrument recognized by law to effect individual reformation; and the strongest advocates of vindictive damages generally contend that their office is to make satisfaction by a pecuniary equivalent, as far as that can be done, for actual, though undefinable injuries.

All the cases quoted from above, and all that have come under our notice, in refusing to disturb verdicts, because not flagrantly excessive, nor so outrageous, extravagant, or unreasonable, as to indicate passion, prejudice, partiality or corruption, admit that an opposite kind of verdict should be set aside. As long as courts can see, we suppose, that the judgment of a jury has been honestly and dispassionately exercised, they will not interfere with verdicts for personal injuries, however mistaken or unreasonable they may believe the conclusions of a jury to have been: and that is all that is meant by saying that the judgment of courts ought not to be put in opposition to the judgment of juries in actions of this sort.

Without saying whether the doctrine is not too strongly expressed, and has not been too pertinaciously adhered to by courts in refusing to grant new trials against the large verdicts that have become frequent in actions for seduction, we will test the present case by the doctrine as so declared and applied. But in doing so we shall give only the result of a thorough examination of the testimony, gladly passing by all particulars of alleged misconduct, or of alleged bad reputation of Sallie Thompson. And this result is a difference of opinion among the members of the court, whether the verdict should have been set aside by the circuit court for an excessive finding of damages. And as there are other points in the case which insure its determination, the court makes no decision upon the point under consideration.

Another of the propositions stated in the beginning of this

opinion strikes deeper, questioning the verdict, not because it is an excessive one, but because no verdict should have been given for the plaintiff, on account of the facts in evidence establishing that he has no right of action against the defendant.

For a trespass or injury to a child, an action may be brought against the wrong-doer, but it must be in the name of the child except for the loss of service which the father or person standing in his place may have sustained, or for expenses entailed upon him. *Hartfield vs. Roper*, 21 *Wend.*, 617; 2 *Rob. Pr.*, 555.

This action is not intended to satisfy the seduced daughter for her lost virtue; as for that she had her own right of action, if she did not consent to the seduction, or had not condonated it by voluntary subsequent illicit intercourse with the defendant; but the damages recovered are for the father, for the loss, the injury, the suffering and the disgrace that the seduction and pregnancy of the daughter have produced to himself and his family.

To entitle the plaintiff to any verdict against the defendant, there must be shown a criminal intercourse between the latter and the plaintiff's daughter, that the daughter was the servant of her father when the child was begotten, or when the criminal intercourse was had, and that the intercourse has produced loss of service, or expenses to the father. *Lee vs. Hodges*, 13 *Gratt.*, 737.

The criminal intercourse in this case being without question, the first enquiry is, was Sallie Thompson the servant of her father at the time of such intercourse?

If she had been under twenty-one years of age, unless apprenticed to another, or emancipated from her natural servitude, she would have been his servant whether she was living in his family or not. He would have had a right to command her services, if he had before failed or declined to exercise the right, and could have maintained an action for her seduction, although she may not have been in his actual service. 3 *Ph. Ev.*, 531, *4th Am. Ed.*

In the English courts, it is held, that the daughter, though an infant, must reside with her father, or be absent temporarily with

his consent, and with an intention of returning to her father's house, or the plaintiff cannot maintain the action. *Dean vs. Peel*, 5 *East.*, 45; *Griffiths vs. Twtgen*, 28 *Eng. L. & E. R.*, 371. But in the American courts, the doctrine is not thus qualified, and even if the daughter be absent without the intention of returning to her father's house, he may sue. *Martin vs. Payne*, 9 *John.*, 389; *Nickleson vs. Stryker*, 10 *John.*, 107; *Bartley vs. Richtmeyer*, 4 *Const.*, 44; *Mulvehall vs. Millward*, 1 *Kern.*, 343.

But if the father have bound out the daughter to another, not having the right to her services, he can sustain no injury, and not losing anything, is not entitled to damages. *Dain vs. Wycoff*, 3 *Seld.*, 194; *Keller vs. Donnelly*, 5 *Md. Rep.*, 218.

For the same reason, the relation of master and servant not existing, a step-father cannnt recover, nor a mother, for the seduction of a daughter, in the lifetime of the father, though she incur the expenses of her daughter's confinement. *Bartley vs. Richtmeyer*, 4 *Const.*, 38; *Vassal vs. Cole*, 10 *Misso. Rep.*, 634; *George vs. Van Horn*, 9 *Barb.*, 523.

But if the daughter be of full age, the father has not a right to her services, and he is not legally injured by her seduction, unless she is in his actual service; that is, unless she resides in the family, and does, at least, such slight acts of service as a daughter and member of her father's family is expected to do. The service must be actual, though merely formal. A daughter of full age will not be presumed to be in the father's service, elsewhere than in his family. *Nickleson vs. Stryker*, 10 *John.*, 117; *Miller vs. Thompson*, 1 *Wend.*, 447; *Briggs vs. Evans*, 5 *Ire.*, 21; *McDaniel vs. Edward*, 7 *Ire.*, 408. And though, after the seduction, she return to her father's house, and there be delivered at the expense of the father, he cannot obtain damages if she were absent when the injury was committed. *Bartley vs. Richtmeyer*, 4 *Comst.*, 45, *Postlethwaite vs. Parkes*, 3 *Burr.*, 1878.

All of the above authorities admit, or imply, that when the adult daughter lives in the family, and performs the slightest acts of service, the father, or person standing in the place of a father,

has the same right of action, and may recover the same damages as if the daughter were an infant. Also, *Moran vs. Dawes*, 4 *Cow.*, 412.

Seduction is not necessary to the action, for the consent of the daughter, without the connivance of the father, will not deprive him of his action, though only nominal damages, or actual pecuniary loss could be recovered. *Kelley vs. Haines*, 2 *Caines*, 292. Nor will seduction, or sexual intercourse, unaccompanied by loss of service or expense incurred, give a right of action. After the relation of master and servant is established, and loss of service is shown to have been the result of the intercourse, the plaintiff may recover damages as a father, but he has no place in court till he has shown that he has sustained loss as a master.

"In an action of trespass on the case, for an injury like this, the real cause of action is the expenditure of money, and the loss of service consequent upon the seduction. Hence the action cannot be sustained for seduction, unless it is followed by pregnancy, or loss of health, and consequently of service. The *per quod* is the gist of the action." *Sargent vs. Dennison*, 5 *Cow.*, 116. "But even in the case of an actual parent, the loss of service is the legal foundation of the action." *Irwin vs. Dearman*, 11 *East.*, 23. "It was, undoubtedly, necessary to a maintenance of this action, for the plaintiff to prove a loss of the services of his daughter in consequence of the seduction. The only legal foundation of the action is an injury to him in the relation of master and servant, by a loss of his servant's services. For the injury to the daughter, for the disgrace brought upon her, for the dishonor and mental suffering occasioned to himself and his family, and the deprivation of the comfort of the society of his child, uncorrupted and undefiled, no action is allowed by law. The right of the plaintiff to sue is the same as that of any master, in a case where his female servant, whether connected with him by ties of blood or not, has been debauched, or any wrong has been done to his servant, and no greater." *Knight vs. Wilcox*, 15 *Barb.*, 280. See, also, *Wilson vs. Sproul*, 3 *Penn. R.*, 51. As seduction of a

daughter, without loss of service, will not uphold an action for a father, neither will the loss of service and payment of lying-in expenses be sufficient unless the relation of master and servant existed at the time of seduction. *Bartley vs. Richtmeyer*, 4 *Comst.*, 45. On this principle, mothers, or persons standing in the place of a father, are denied the action, after incurring the expenses and sustaining the loss occasioned by pregnancy, when the intercourse which led to the birth of the child took place before the relation of master and servant existed between a plaintiff and the alleged servant.

The relation of master and servant must exist at the time of the seduction, or illicit intercourse, to enable the father to bring suit; and added to this, loss of service, or payment of money, as the direct consequence of the intercourse, must ensue before plaintiff can call for a verdict. Having obtained this position in court, he may then recover damages as a father, and without regard to the value of the services lost, or money expended, from the pregnancy, confinement or sickness of the daughter.

It is not necessary that a child should be born to the daughter, or that she should be got with child, to sustain the action on the part of the father, provided there be other sickness and expenses that are the direct consequence of the illicit intercourse. Hence, where the daughter became pregnant in October, and the action was brought in December, it was sustained, because, before suit, the daughter had been unable to work on account of her pregnancy, and the subsequent birth of the child and necessary expenses, before the trial, were received in evidence in aggrvation of damages. *Stiles vs. Tilford*, 10 *Wend.*, 339. *Hewitt vs. Prome*, 21 *Wend.*, 79, is another case of the same kind, which has not been overruled on this point.

In *Knight vs. Wilcox*, the sexual connection did not result in pregnancy, nor was the daughter's health affected by it so as to cause any loss of service to her father, but the fact of the intercourse becoming known, the parents and family of the daughter talked much to her, and threatened to prosecute the defendant.

The fear of public exposure, shame at detection, or remorse for her conduct, overcame the daughter's bodily strength: she became too unwell to perform her usual household duties, and the father sued, striving to support the suit by this loss of service. He was nonsuited on trial for not showing any loss of service accruing from the seduction. The supreme court reversed the judgment, and remanded the case. 15 *Barb.*, 279. At the next trial the plaintiff obtained a verdict and judgment, which was affirmed in the supreme court. 18 *Barb.*, 212. But, on final hearing in the court of appeals, it was held that such loss of service would not uphold the action, that it was not caused by the intercourse, but by its detection some months afterward. 14 *N. Y. R.*, 413.

It then appears that seduction is not enough without loss of service, nor will loss of service without seduction at the time the plaintiff stands in the relation of master to the debauched female. Both must conjoin to make a right of action. And in this way is the law laid down as the correct principle deduced from the decision. *George vs. Van Horn*, 9 *Barb.*, 527.

An application of these principles to this case will determine the right of the plaintiff to maintain it.

And as to the loss of service—there is no proof, and can be no pretense, that the plaintiff incurred any expense, or suffered any loss, from Sallie Thompson's seduction and pregnancy, or from Sallie Baker's confinement, or child. She conceived in August, 1852; she says she went to live with her sister in the summer of 1852; another witness puts the time in July, where she remained till Christmas, when the defendant took her to Alabama. There she married before the child was born. Her expenses in Alabama, before her marriage, if any, were not chargeable, by the proof, to the plaintiff; after her marriage, the husband with the wife took her liabilities, and in course of time her child. Before going to Alabama, and after conception, she was no charge to her father, or if she had been, or was in his actual service, no loss of service accrued.

Sallie being over twenty-one when she was seduced, in the spring of 1851, by the defendant, must have been in the actual service of her father; that is, a member of his family, when the injury was committed. Whether the injury refer to the first connection, or to that from which pregnancy ensued, according to Sallie Baker's deposition, she was not, at either period, a part of her father's household. We have not overlooked the statement in Winnie Brown's second deposition, that Sallie made her father's house her permanent home from the time she left teaching at the defendant's till Christmas, 1852; but in this she is contradicted by Sallie herself, and by other witnesses so far as their knowledge extended. Although we were satisfied that the plaintiff was in law the master of Sallie Thompson when she was seduced or impregnated, or if the jury so found, that would not supply the necessity of proof of loss of Sallie's service to the plaintiff, or of his being burdened with expenses for her, growing out of her connection with the defendant.

The instruction to the jury, as well for the plaintiff as for the defendant, conceded that, to find for the plaintiff, the jury must have had it proved to them that Sallie Thompson was a servant of the plaintiff at the time of the seduction, and that loss of service was its result. The evidence not establishing these conditions, the verdict was against law, and against evidence, and upon the motion of the defendant, it should have been set aside, and a new trial granted because the plaintiff had not shown any right of action.

Two pleas of limitations were interposed by the defendant; but that of five years, which depends upon the evidence, and is good or bad as the injury relates to the first debauch of the plaintiff's daughter, or to her conception, need not be considered until it has been found that the circuit court properly sustained a demurrer to the plea that relied upon the lapse of one year as a bar to the suit.

This latter plea was founded upon this law: "The following actions shall be commenced within one year after the cause of

action shall accrue, and not after: First, all special actions on the case, for criminal conversation, assault and battery, and false imprisonment; Second, all actions for words spoken, slandering the character of another; Third, all words spoken whereby special damages are sustained." *Rev. Stat., ch.* 91, *sec.* 7; *Eng. Dig., ch.* 99, *sec.* 8; *Gould's Dig., ch.* 106, *sec.* 11.

It is insisted here for the appellant, the defendant below, that the first specification of the section should be construed as if it read, "all actions on the case, all actions for criminal conversation, all actions for assault aud battery, and all actions for false imprisonment;" and the inference is then made that this, being a special action on the case, is included within the statute; while the argument for the plaintiff maintains that, as no mention is made of an action for seduction, this suit falls within the provision for unenumerated actions, of which the period is five years. *Gould's Dig., ch.* 106, *sec.* 19.

If the statute were written as the defendant would have it construed, it would provide with consistency for similar classes of cases, in forcing an early legal inquiry into initiating causes of action, or in wisely committing to legal oblivion such as should not be made the subjects of prompt complaint, while the literal and technical construction of the plaintiff would keep the door open for vexatious controversies longer than is allowed for actions of trespass upon lands, for taking or injuring goods, for libels, and for actions upon the case founded on a contract or liability, thus reversing the whole policy of our limitation law. And if the construction should be, that the clause under consideration only embraced special actions on the case for the wrongs specified in it, there would be the incongruity of different periods of limitation for the same causes of action when prosecuted in the different forms allowed by the common law; as one year for actions on the case for batteries and false imprisonments, and five years when the same acts were complained of in actions of trespass.

Doubtless, the obvious and natural, and therefore the first construction of any writing, is that of its literal expression; but

in construing a statute, unless its terms are entirely free from ambiguity, regard must be had to its known object, to the mischief intended to be provided against, to its general spirit and intent. The limitation law of the Revised Statutes, in all its sections, is to be construed as one law. *Walker vs. Peay*, 22 *Ark.*, 111. All its parts should be harmonized into one consistent whole. Its object was to provide a limit for the beginning of all common or important actions, although there is a provision for unspecified ones; and its undoubted policy is to close the courts early, against actions that embrace or engender personal strifes and embittered feelings, destroy the peace of families, and disturb the repose of society: and it should have such sensible construction as will accord with its spirit and promote these objects. We therefore hold that an action seeking to recover damages for the seduction or pregnancy of a daughter, must be begun within a year from the time the cause of action accrued.

In sustaining the demurrer of the plaintiff to the defendant's plea of limitation of one year, the circuit court erred; and as this error was assigned as a cause of error for a new trial, the court should have sustained the motion to correct its own error, and, in not doing so, again erred.

There are other errors apparent upon the record, and especially to be observed in the admission of illegal testimony against the objection of the defendant, which are not necessary to be noticed. But because the circuit court refused to grant a new trial for its error in quashing the plea of limitation of one year; and because the plaintiff did not show any right of action, the judgment is reversed, with instructions to grant the defendant a new trial, and, on another trial, to apply the law as herein declared.

BAILEY VS. WRIGHT, ADM'R.

The rule established in England is, that if the complainant means to rely on the admissions, conversations, or confessions, of the defendant, whether oral or written, as evidence of facts charged in the bill, the bill must also specifically charge what those admissions, etc. are and to whom made; but, under the practice in this state, it is not necessary that the bill should contain any specific charge as to such admissions or in any way indicate that they will be relied on as evidence.

The notice to take depositions, to a party non-resident of the state, may, under the statute, be served on his attorney of record, and the fact, that it is inconvenient to the attorney to attend, cannot affect the sufficiency of the notice, or furnish any ground for suppressing the depositions.

Appeal from Union Circuit Court in Chancery.

HON. LEN. B. GREEN, Circuit Judge.

CARLETON, for appellant.

Mr. Justice COMPTON delivered the opinion of the Court.

The bill in this case was brought by Wright against Bailey for an account of their dealings as co-partners in the purchase and services of a stallion. The questions mainly relied on for a reversal of the decree, relate to the admissibility of certain evidence which Bailey, the defendant below and appellant here, moved to suppress, but which was read on final trial.

Bailey, it appears, had the conclusive management of the co-partnership affairs, and his oral admissions as to the amount of business done, were proven by the deposition of the witness McDonald. The bill, however, contained no specific charge as to such admissions, nor in any way indicated that they would be relied on as evidence in the case; and for this reason, so much of the deposition of McDonald as proved Bailey's admissions was objected to as incompetent.

The rule established in England is, that if the plaintiff means to rely on the admissions, conversations, or confessions of the

defendant, whether written or oral, as evidence of facts charged in the bill, the bill must also specifically charge what those admissions, conversations or confessions are, and to whom made, otherwise, no proof of them will be admitted at the hearing. The reason of the rule seems to be, that otherwise the defendant may be surprised, because he cannot know that such evidence is intended to be proved, as, under the English practice in chancery, the witnesses are examined in secret upon interrogatories not previously made known to the other party, and their testimony studiously concealed nntil after publication is authorized by the court. But, in Arkansas, the practice is different. Here, the interrogatories propounded to the witnesses are known to the adverse party either before or at the time of examination; consequently, neither party can be taken by surprise. Why, then, adopt the rule when the reason upon which it is founded in England, does not exist here? We are aware of no general principle upon which it can be maintained. On the contrary, all know that, in general, it is not necessary to state in the bill the materials of proof by means of which the facts charged in the bill are to be supported. This is the general rule, and why admissions or conversations to be used as evidence, should constitute an exception to it, we cannot understand. The English doctrine was ably discussed in *Smith vs. Burnham*, 2 *Sumner Rep.* 612, by Mr. Justice STORY, who questioned its soundness upon principle, and refused to apply it, remarking that so far as his own recollection of the practice in the courts of the United States had gone, he had not the slightest knowledge that any such exception had ever been urged in the circuit courts, or in the supreme court, although numerous cases had existed, in which, if it was a valid objection, it must have been highly important, if not absolutely decisive, and that his impression was, that, in America, the generally received, if not the universal practice was against the validity of the exception. The same learned Judge, in his Commentaries on Equity Pleading (*4th Edition sec.* 265 *a.*) after stating the rule as established in England, says: "Whether the like

rule will be allowed to prevail in America, may be deemed a matter open to much doubt; for the like reason does not here prevail, either to justify or require it, as all the interrogatories and cross-interrogatories, put or intended to be put to the witnesses, are required to be made known to the other party before any of them are examined, or at the time of examination; and thus, neither party can be under any surprise, if the interrogatories point to any confessions, or conversations, or admissions, made to any witness." And by way of annotation, he adds: "The doctrine does not seem to be founded upon any very clear and intelligible principle. A confession, a conversation, or an admission, is manifestly competent evidence of any fact, which is in issue between the parties, to establish that fact. In a trial at law, it is not necessary to give the other party any previous notice that the intention is to rely on evidence of such confession, admission, or conversation. Why the rule should be otherwise in equity, it is not easy to say." We have been referred to no case in this country, nor has one fallen under our observation, in which the rule established in England has been adopted. In the absence, then, of American authority to the contrary, and aware of no principle upon which the doctrine can rest, under our practice, we hold there was no error in the decision of the chancellor overruling the defendant's exception to the evidence.

Nor was there error in refusing to suppress the deposition of the witness, Bustin. The defendant being non-resident, previous notice of the taking of the deposition was served, in apt time, on his attorney of record. This was in strict compliance with the provisions of our statute. The fact, that, at the time of the service, the attorney was about starting to a distant court, from whence he could not return until too late to be present at the examination, and had not time, before starting, to employ a person to represent him, manifestly cannot affect the sufficiency of the notice, or furnish any reasonable ground for the suppression of the depositions.

In the court below, the sum of $375.50 was decreed against the

defendant, which, it is insisted, was erroneous. The answer of the defendant, as copied into the transcript, falls far short of giving a clear and satisfactory account of the co-partnership affairs, and is successfully contradicted as to the amount of the business transacted. Assuming it to be true, however, in all other respects, we have not been able to perceive, upon a careful examination of the evidence in the record, how a less sum could have been decreed.

Let the decree be affirmed.

THORNBERRY, ET AL. VS. BAXTER, ET AL.

Where a debtor had conveyed his property to a trustee for the benefit of his creditors, giving a preference to certain of them, and a portion of the creditors file a bill in chancery to have the deed of trust declared fraudulent and void, all the creditors whose interests are sought to be affected by the decree are necessary parties. So, also, all purchasers, from the trustee, of trust property, unless, perhaps, it is clearly shown that the sales of the trustee would not be disturbed, and that the plaintiffs elect that the proceeds of the sales should go into the fund instead of the property sold.

Appeal from Washington Circuit Court in Chancery.

Hon. JOHN M. WILSON, Circuit Judge.

WATKINS, for the appellants.

Mr. Justice FAIRCHILD delivered the opinion of the court.

On the 21st of April, 1856, Martin W. Thornberry conveyed unto Walter T. Thornberry a large amount of lands, a number of negroes, a stock of merchandize, accounts and evidences of debt, and other personal property, in trust for the payment of all debts which he owed. The debts were divided into two classes, and

those of the first class were to be fully paid, and in the order in which they were specified in the deed, while those of the second class, comprising the residue of his indebtedness, were to be paid ratably as money could be procured for their payment from the property conveyed. The creditors included in the second class were named, but provision was made for any that might be omitted from specification, the expressed intent of the deed being, that all of the creditors of Martin W. Thornberry, except the preferred ones of the first class, should stand upon an equal footing. There were many provisions in the deed which need not be noticed, as the only question now to be considered is, whether the demurrer that was interposed to the bill filed in this case should have been sustained for want of proper parties.

The bill was brought by a large number of creditors of the second class, who had not accepted the provisions of the deed, against Martin W. Thornberry and his wife, the grantors, and against Walter T. Thornberry, the grantee in the deed, and did not attempt to bring before the court other creditors of the second class, or any of the numerous class of preferred creditors. The bill alleged that several of the pieces of land contained in the deed had been conveyed by the trustee to persons named, and that other property, as negroes, had also been sold to persons known to the plaintiffs. Without any recognition of the interests of other creditors, beneficiaries of the deed of trust, or of the claims that could be set up by the vendees and buyers of the trust property, the bill sought to have the deed set aside for being fraudulent and void. If the bill had clearly shown that the sales made by the trustee would not be disturbed, and that the plaintiffs elected that the proceeds of the sales should go into the fund instead of the property sold and conveyed, the plaintiffs might, perhaps, have been excused from making the purchasers of the property parties; but in no event could the preferred and omitted creditors have been passed by without having been brought into court for an opportunity to protect their interests.

The defendant, Walter T. Thornberry, raised these points in a

demurrer as objections to the bill, but it was overruled, and in default of answers, the circuit court of Washington county sitting in chancery, declared the deed to be fraudulent and void, and required Walter T. Thornberry to account for his dealings with the trust property, and turn over that remaining to a receiver appointed by the court.

The demurrer should have been sustained: the decree is reversed: the case is to be sent back with instructions to sustain the demurrer, with leave to the plaintiffs to amend their bill.

STATE VS. CLENDENIN, JUDGE, ETC.

It was within the power of the convention of 1861, to continue in office any or all of the officers deriving their authority from the old constitution until their terms expired, or for any shorter period; or to permit their tenures to expire with the existence of the instrument under which they held them, and to have appointed persons to fill the offices provisionally, until elections could be had and appointments made under the provisions of the new constitution.

Under the present constitution, the state senators in office at the time of its adoption, were to continue to hold their offices until their successors should be elected.

The constitution of 1861 provides for the election of successors of the senators of the first class, on the first Monday of October, 1862, and for the election of the successors of senators of the second class, on the first Monday in October, 1864.

It was an error to elect all the senators at the general election in 1862, when only the successors of the first class should have been elected and vacancies in the second class, if any existed, filled.

Oates belonged to the second class of senators, and his term expired by law in 1864: after the adoption of the present constitution he was not ineligible to the office of secretary of state, by reason of being a state senator.

Application for Mandamus.

JORDAN, Attorney General, for the State.

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

In November 1862, the attorney general presented to the Hon. John J. Clendenin, judge of the 5th judicial circuit, a petition, stating that Oliver H. Oates was, at the general election in August, 1860, elected a senator from the senatorial district composed of the counties of Phillips and Monroe, and qualified and acted as such—that at the session of the general assembly, commencing on the first Monday of November, 1862, he was, whilst legally a senator, his term of office not having expired, elected secretary of state, and entered upon the discharge of the duties of that office—which said last election, the relator alleges, was void, the said Oates being by the constitution ineligible to any office within the gift of the general assembly, during the period for which he was elected a senator. And the relator prayed the judge to grant the writ of *quo warranto*, requiring said Oates to appear and show by what warrant he exercised the office of secretary of state.

The judge refused to grant the writ, and the attorney general applied to this court for a *mandamus* to compel him.

On the 30th of January, 1836, the people of Arkansas, preparatory to their admission into the Union, acting by their delegates in convention assembled, created for themselves a state government, by adopting a constitution. This constitution was the frame work of the government; it carved out the offices, and defined and limited the powers and duties of the agents who were to fill them, and to be entrusted with the administration of the government.

In *Kamper vs. Hawkins*, 1 *Va. Ca.*, 24, Judge NELSON said: "A constitution is that by which the powers of government are limited. It is to the *governors*, or rather to the departments of government, what law is to individuals—nay, it is not only a *rule of action* to the branches of the government, but it is that from which their existence flows, and by which the powers (or portions of the right to govern) which may have been committed to them, are prescribed. It is their *commission*—nay, it is their *creator*.

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On the 6th of May, 1861, the people of Arkansas, being again assembled in convention, by their delegates, abrogated the ordinance, etc., by which they had agreed that the state should become a member of the United States; and resumed to the state such portion of her sovereignty as had been conceded to the federal government on her admission into the union. (*Jour.*, *Con.*, 121.)

Had the convention then abrogated the state constitution, and done nothing more, all of the powers of government exercised by the persons who then filled the offices under the constitution, would have gone back to the people, the source from whence they were derived; the offices would have ceased to exist, and the people of Arkansas would have been left in a state of nature, without a social compact or government. (See opinion of Judge TUCKER, in *Kamper vs. Hawkins*, 1 *Va. Ca.*, *p.* 72.)

The convention did abrogate the state constitution, but at the same moment of time they adopted a *new constitution*—for in legal effect it is a *new constitution*, though most of the provisions of the old constitution were embodied in it.

Had the new constitution made no provision for the officers elected or appointed under the old constitution to continue in office, they would have been stripped of all official power at the very instant of time that the old constitution was repealed by the adoption of the new—the instrument which created their offices, and from which they derived all their right to exercise the powers appertaining to them, being abrogated—in other words, their *commission*, as it is called by the Virginia judge, being revoked by the fiat of the people who granted it—they could not have held their offices for another moment, or legally discharged a single duty attached to them.

Such seems to have been the understanding of all the conventions which have made new constitutions for the states; for they have invariably deemed it necessary to make provision for the officers deriving their powers from the abrogated constitutions, to continue in the discharge of their duties until the offices could be

filled under the provisions of the new constitutions. See *American Constitutions*; *Opinion of Scott, J., in State vs. Scott*, 4 *Eng.* 283; *Watkins vs. Watkins*, 2 *Maryland R.*, 341; *Benton vs. County of Kennebec*, 44 *Maine R.*, 406; *Cigur vs. Crinshaw, La., An. Rep., vol.* 8, 422.

It was within the power and discretion of the convention that framed our present constitution, to have continued in office any or all of the officers deriving their authority from the old constitution until their terms expired, or for any shorter period deemed expedient; or to have permitted their tenures to expire, with the existence of the instrument under which they held them; and to have appointed persons themselves to fill the offices provisionally until elections could be held, and appointments made, under the provisions of the new constitution—just as they appointed delegates to represent the state in the confederate congress, until provision could be made for elections by the people—and just as the convention that framed the first constitution of Virginia appointed a governor and privy council, etc. *Tucker's Blackstone, Appendix, p.* 90.

In *Danley, et al. vs. Clendenin, ante*, we decided that the new constitution made provision for the election of a governor of the state at the general election in October, 1862, and that no provision was made for the person, who held the office of governor at the time the new constitution was adopted, to continue in office for the full term of four years for which he had been elected under the abrogated constitution; but that provision was made for him to hold and exercise the duties of the office until his successor was elected at the time prescribed by the new constitution, and qualified. And by way of illustration of the matter decided, it was shown that the convention had made provision for some of the officers holding under the repealed constitution, to continue in office for the remainder of their terms, whilst the terms of others were abridged. But we did not decide, nor intimate, that the convention had provided for the election of the successors of all of the senators in office at the general election in October, 1862, or

failed to make provision for them to continue in office for the remainder of their terms, but this question was intentionally left open, as one that might probably be brought directly before the court for its opinion, before the general election in October, 1862, took place. But the question was not brought before us until after the election, when the present case was presented.

The constitution of 1836, provided that the senate should consist of members to be chosen every four years, by the electors of the several districts. (*Art. IV, sec.* 5.)

That the state should, from time to time, be divided into convenient districts, in such manner that the senate should be based upon the free white male inhabitants of the state, each senator representing an equal number as nearly as practicable; and until the first enumeration of the inhabitants should be taken, the state was divided into sixteen districts, each of which was to elect one senator, except the first, which was to elect two; seventeen in all.

And it was provided that the senate should never consist of less than seventeen nor more than thirty-three members; and that as soon as the senate met, after the first election to be held under the constitution, the senators should be divided by lot into two classes—nine of the first class and eight of the second—and that the seats of *the first class* should be vacated at the end of *two years* from the time of their election, and the seats of *the second class* at the end of *four years* from the time of their election; in order that one *class of senators* might be elected every *two years*. *Art. IV, sec.* 31.

It was further provided, that an enumeration of the inhabitants of the state should be taken under the direction of the general assembly, on the 1st of January, 1838, and at the end of every four years thereafter; and that the general assembly should, at its first session after the return of every enumeration, so alter and arrange the senatorial districts, that each district should contain, as nearly as practicable, an equal number of free white male inhabitants, etc., etc. (*Sec.* 32.)

That the ratio of representation in the senate should be 1,500

free white male inhabitants to each senator, until the senators amounted to twenty-five in number; and then they should be equally apportioned, upon the same basis, throughout the state, in such ratio as the increased numbers of free white male inhabitants might require, without increasing the senators to a greater number than twenty-five until the population of the state should amount to 500,000 souls; and that when an increase of senators took place, they should, from time to time, be divided, by lot, and classed as prescribed above. (*Sec.* 33.)

Senators were first elected under the constitution at a general election held on the first Monday in August, 1836, (see *schedule, sec.* 7.;) and when the senate met, on the second Monday of September following (*schedule sec.* 8,) the senators proceeded to class themselves, as directed by the constitution—nine in the first class, to hold their office for two years, and eight in the second class, to hold their office for four years, from the time of their election. See *Senate Journal* 1836, *pp.* 7–9.

The first enumeration of the inhabitants of the state was made 1st of January to 1st of April, 1838, (see *Acts of* 1836 *p.* 83;) and by the apportionment act of 10th Dec., 1838, the senators were increased to twenty-one, and the number of districts to twenty. (See *Acts* 1838, *p.* 1.)

At the succeeding meeting of the senate, November, 1840, the four increased senators were classed, by lot, as directed by sec. 33 art. IV, of the constitution, two of them falling to the first class, and two to the second class—to hold for two and four years. See *Senate Journal*, 1840, *pp.* 122, 152.

By the apportionment act of Dec. 29th, 1842, after the second enumeration of inhabitants, the senators were increased to twenty-five, and the districts to twenty-four, (*Acts of* 1842, *p.* 39;) and at the following session of the senate, November, 1844, the four additional senators were classed, by lot, as directed by the constitution, two falling to the first, and two to the second class, etc. See *Senate Journal*, *p.* 39–40.

There was no further increase of senators, but by act of Jan.

uary, 1851, after the fourth enumeration of inhabitants, the senatorial districts were increased to twenty-five. (See *Acts of* 1850, *p.* 91.

So when the new constitution was adopted (1st June, 1861,) there were twenty-five senators, *thirteen* of whom belonged to the first, and twelve to the *second* class.

The senators of the first class were elected on the first Monday of August, 1858, and their terms expired with the Sabbath before the first Monday of August, 1862; and the senators of the second class were elected on the first Monday of August, 1860, and their terms expire with the Sabbath preceeding the first Monday in August, 1864, unless the new constitution has otherwise provided.

The new constitution provides that: The senate shall consist of members, to be chosen every four years by the qualified electors of the several districts, as they are now, or may be hereafter arranged by the general assembly. *The election for senators shall take place at the time now appointed, or which may hereafter be appointed by law.* (*Art. IV, sec.* 5.)

The state shall, from time to time, be divided into convenient senatorial districts formed of contiguous territory, etc., etc., so that each senator may represent an equal number, as nearly as may be, of the free white male inhabitants, etc., etc., and until the next enumeration of the inhabitants of the state, *the senatorial districts as now laid out by law shall continue.* (*Ib. sec.* 30.)

The senate shall never consist of less than twenty-five, nor of more than thirty-five members. The allotment of senators into two classes, as it now exists, shall continue until otherwise directed, and the *successors of those in office* shall be elected in the manner, and *at the time now required by law, and for the term of four years.* (*Ib. sec.* 31.)

The 4th section of the schedule declares that "all officers, civil and military, now holding commissions under the authority of this state, shall continue to hold and exercise their respective offices until they shall be suspended etc., etc., in pursuance of the provisions of this constitution," etc.

The senators in office at the time the constitution was adopted,

were, therefore, to continue to hold and exercise their offices until they were suspended, etc., in pursuance of the provisions of the constitution.

At what time does the constitution provide for their suspension?

At the time fixed for the election of their successors.

At what time does the constitution provide for their election?

Section 5, *of article IV*, providing for the election of senators generally, declares that "the election of senators shall take place at the time now appointed, or which may hereafter be appointed by law."

And *section* 31, of the same article, providing for the election of the successors of the senators in office, declares that they "shall be elected, etc., at the time *now* required *by law*."

"*At the time now required by law*." When was that?

As the law stood when the constitution was adopted (1st June 1861) the successors of the senators of the *first class* were to be elected on the first Monday of August, 1862, and the successors of the senators of the *second class*, on the first Monday of Aug. 1864, (see *Gould's Dig.*, *ch.* 62, *sec.* 1)—the law requiring the general elections to be held on the first Monday of August biennially.

But so much of *section* 31, *of article IV*, of the constitution as declares that the successors of the senators in office shall be elected "at the time *now* required by *law*," is not in harmony with *sec.* 8, of the same article, which declares that all general elections shall be held every two years, on the first Monday of October, until altered by law—the first general election to be held on the first Monday in October, 1862.

As this section was drafted by the committee on the judiciary, and reported to the convention, it provided that the general elections should continue to be holden on the first Monday of August, every two years, until altered by law, the first general election to be held on the first Monday in August, 1862, (see *Journal of the Convention p.* 381–6): and it was in harmony with the provision of *section* 31 in relation to the election of the successors

of the senators in office, but the convention amended it, as above indicated; and in the 5th section of the schedule repealed the provision for the first general election to be held on the first Monday of October, 1862, and these provisions must be construed with, and control so much of *section* 31, as provides for the election of the successors of senators in office at the time then required by law.

The result is, we think, that the constitution provided for the election of the successors of the senators of the *first class* on the first Monday of October, 1862, and for the election of the successors of the senators of the *second class* on the first Monday in October, 1864.

Let it be assumed that the framers of the constitution intended to vacate the seats of all of the senators in office, and to elect their successors, on the first Monday of October, 1862; and then let us see how this hypothesis will harmonize with the provisions of the constitution, above copied, in relation to the election and classification of senators.

Sec. 31, *of art. IV*, provides that the successors of the senators in office shall be elected for the "*term of three years.*"

It also provides that the "allotment of senators into two classes, *as it now exists, shall continue*," etc.

But if it was intended that all of the senators should be elected in October, 1862, and for *four years*, the existing classification could not be preserved, because they could not classify themselves without reducing the terms of one class below four years. Moreover, there is no provision in the constitution for the senators elected as the successors of those in office to classify themselves at all—much less their successors.

But if the framers of the constitution intended, as we have concluded they did, that the successors of one class of the senators in office at the time the constitution was adopted, should be elected at the general election in October, 1862, and the successors of the other class at the next general election, then all of the successors of those in office could hold their seats for four years, and the existing classification be preserved, and continued by the

allotment of any additional senators that may be provided for, from time to time, upon the increase of population, to one or the other class, in accordance with the usage of the senate under the old constitution.

The conclusion which we have reached, harmonizes, we think, with the 5th section of the schedule, which provides that "the next general election for officers of this state, under this constitution, shall be held on the 1st Monday in October, 1862, in the manner now prescribed by law."

Provision being made in the body of the constitution for the election of the successors of the senators in office, of the *second class*, at the general election in 1864, as has been shown above we trust, they were not of the class of officers who were to be elected at the general election in October, 1862, under this section of the schedule—their election having been "*otherwise provided for.*"

We have not overlooked the expression in the 31*st section* of the 4*th article* of the new constitution, that the allotment of senators into two classes, as it now exists, shall continue *until otherwise directed.*

"*Until otherwise directed*"—By what authority is this wise and salutary provision for the classification of senators to be discontinued, abrogated or changed? As to this the framers of the constitution were silent.

The framers of the constitution left some matters, provisionally fixed by them, to be changed at the discretion of the general assembly.

For example, they provided that general elections should be by ballot, and held every two years, on the first Monday in October, "*until altered by law.*"

That the general assembly should be held at the capitol, in the city of Little Rock, "*until otherwise directed by law,*" etc.

These are matters of mere expediency, and might well be left to the discretion of the legislature. But the classification of senators is a fundamental mattter, and we are disinclined to infer

that the framers of the constitution intended to entrust its continuance to the legislature, in the absence of an express provision to that effect. Much less are we inclined to infer that such discretion was intended to be left to the senate acting independently.

Mr. Kent, in his *Commentaries on American Law*, *vol.* 1, *p.* 227, treating of the organization of the senate of the United States, says:

"The senate has been, from the first formation of the government, divided into three classes: and the rotation of the classes was originally determined by lot, and the seats of one class are vacated at the expiration of the second year, and one-third of the senate are chosen every second year. This provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example; and it is admirably calculated, on the one hand, to infuse into the senate, biennially, renewed public confidence and vigor; and on the other, to retain a large portion of experienced members, duly initiated into the general principles of national policy, and the forms and course of business in the house."

Had the language of the constitution been that the allotment of senators into two classes, as it now exists, shall continue until otherwise directed *by law*, or by *the general assembly*, or by *the senate*, then the whole subject would have been under the control of the legislature, or of the senate. But in the absence of any expression indicating that the one or the other might exercise such power, we are of the opinion that the allotment of senators into two classes, as it existed at the time the constitution was adopted, must continue until otherwise directed *by an amendment of the constitution*, in the mode prescribed by its framers for amendments to be made, or by a convention represesenting the people. In other words, a power granted to no one, is not granted at all.

We may notice, as a matter of public history, that under a proclamation of the chief executive officer of the state, errone-

ously issued, as we humbly conceive, the senators of both classes were elected at the general election in October, 1862.

When the senate took up the subject of classification, at its session in the following November, it necessarily labored under much embarrassment. The new constitution, as we have shown, provided on the one hand, that the successors of the senators in office should be elected for *four* years; and on the other, that the allotment of senators into two classes, as it existed at the time the constitution was adopted, should continue. The senators finally resolved the difficulty in a mode satisfactory to a majority of them, by declaring that they would all continue in office for the term of four years; and that at the general election in 1856, part of their successors should be elected for two years, and the others for four years, thereby attempting to institute a new classification of the senate, commencing with their successors, but failing to preserve and continue the existing classification as directed by the constitution.

What their successors may think of this arrangement—this attempt to abridge the constitutional terms of part of them—is matter of conjecture. But if the arrangement is upheld, the object of the constitution in providing for a classification of the senators, in order that one class of them—as nearly half as may be—should come fresh from the people biennially, will be defeated for four years at least, and it may be for eight, or for an indefinite period, if the whole matter of classification is within the discretion of the senate. The error began in electing all of the senators at the general election in 1862, when the successors of the first class only should have been elected, and vacancies in the second class, if any existed, filled. Where the error is to terminate must be determined by those who are charged with the control of such matters. Our province is to interpret the constitution when cases coming before us for adjudication involve its construction; and beyond this we cannot go in correcting errors and evils arising in the administration of the government.

Oates was elected a senator at the general election in August,

1860; belongs to the second class of senators, and his term expires in 1864.

By the 5th section of the *schedule* to the new constitution, he was empowered to continue to hold and exercise his office, etc., upon his taking the oath prescribed by the convention. (See *Ordinances of the Con.*, *p.* 28; also, *Const.*, *art. IV*, *sec.* 27.)

If he declined to take the prescribed oath of office, or if he accepted some other incompatible office, or otherwise vacated the office of senator, before the general election in October, 1862, it was proper and legal to order an election to fill the vacancy for the remainder of his term, and for the remainder of his term only, in order that the existing classification of senators might be preserved. But if he had in no way vacated his office, no election for senator from his district should have been ordered.

A clause of the old constitution declares: "That no member of the general assembly shall be elected to any office within the gift of the general assembly during the term for which he shall have been elected." *Amendments* 1848, *sec.* 4.

The new constitution contains a clause in the same language. *Art.*, *IV*, *sec.* 13.

Had the old constitution, under which Oates was elected a senator for four years, not been repealed, he would have been ineligible to the office of secretary of state, during the entire term for which he was elected, that being an office within the gift of the general assembly.

So, it is clear, a person legally elected a senator since the adoption of the new constitution, cannot be elected secretary of state until after the expiration of his term.

But the clause of the old constitution which was in force when Oates was elected a senator, and which fixed upon him the disqualification for the office of secretary of state, was repealed before his election to that office.

The language of the new constitution is "that no member of the general assembly shall be elected to any office within the

gift of the general assembly during the *term for which he shall have been elected.*"

Oates was not *elected* a senator under the new constitution. He was elected a senator for four years under the old constitution, and before the expiration of his term, the convention assembled, and repealed the organic law under which he was elected, by virtue of which he held the office, and which fixed upon him the disqualification to be secretary. The convention declared, in effect, that he might continue to hold and exercise the office for the remainder of his term. In other words, having revoked the commission which he derived directly from the people, when elected a senator, they gave him a new appointment—a new commission—to hold and exercise the office of senator, under the new constitution, for the remainder of his term. But to such appointment made by the convention, the disqualification to be secretary of state does not attach. It attaches to persons only who *shall have been elected* a member of the general assembly under the new constitution.

The writ of mandamus is refused.

BURT ET AL. VS. WILLIAMS.

So much of the act, approved 1st December, 1862, as provides "that all suits at law or equity now pending, or hereafter to be commenced in any of the courts of this state, shall be continued until after the ratification of peace between the United States and the Confederate States," is unconstitutional—the continuance of criminal suits, directed by the act, being in violation of the constitutional right of the accused to a speedy trial, (*Cons. art. II, sec.* 11.) and the continuance of all civil suits being in violation of the constitution (*Ib. sec.* 18.) prohibiting the passage of any law impairing the obligation of contracts.

Granting a continuance is exclusively a judicial act, and is not a proper subject or legitimate use of legislative authority.

Appeal from Hempstead Circuit Court.

HON. LEN. B. GREEN, Circuit Judge.

WILLIAMS & EAKIN for appellants.

JENNINGS, for appellee.

Mr. Justice FAIRCHILD delivered the opinion of the court.

In an act of the general assembly approved 1st December, 1862, entitled "an act to prevent the issuance of executions, it is also enacted, "that all suits at law or equity now pending or hereafter to be commenced in any of the courts of this state, shall be continued until after the ratification of peace between the United States and the Confederate States."

The constitutionality of this enactment is the matter presented for the consideration of the court in this case.

The terms of the law, "all suits in law or equity now pending, or hereafter to be commenced in any of the courts of this state," include every conceivable controversy that parties have brought or shall bring into courts of justice, "until after the ratification of peace between the United States and the Confederate States." Thus, not only are the ordinary actions founded upon contracts broken, and wrongs committed to which persons in life are parties, to be continued, but the same disposition is to be made of all criminal prosecutions promoted by the state, of all contested claims against the estates of deceased persons, of every matter of difference that has been, or may be, brought into any court for judicial adjustment.

Our system of laws and of government has ever been supposed to make it proper and necessary, that justice should be offered to contending parties at places conveniently situated to them, and at times frequently recurring; and as mediums for the prompt and convenient dispensation of justice, courts of different grades and jurisdictions have been constituted, and have been required to be held at stated times and places. But the law under consideration has its foundation in another policy. By it, courts are

not to be places where justice is judicially administered, but where it shall be denied by being deferred to an uncertain time. Although it were incredible to suppose that such was the intention of the general assembly, the manifest effect of this enactment will be, that during the existence of the present war, and beyond the cessation of hostilities, "until after the ratification of peace between the United States and the Confederate States," all of the courts of the state will be shut against any enquiry into the breach of contracts, will not afford any redress to injuries sustained by its citizens, or by persons within its limits, will not attempt to inflict punishment for crimes, or to ascertain if any crimes have been committed, though complaints thereof shall have been made according to law.

If the law be constitutional, it must be observed, regardless of the consequences; if it be unconstitutional, it must be so declared.

Persons that are held to answer criminal charges made by presentment or indictment, have a constitutional right to a speedy trial. *Constitution, art. II. sec.* 11; and this right being disregarded by the law under consideration, the law cannot be enforced in cases of this sort.

Section 18, of the same article of the constitution prohibits the passage of any law that impairs the obligation of contracts, and it is well settled that any law which destroys the remedy for enforcing a contract, or so obstructs the remedy as to make the contract valueless, or greatly lessen its value, impairs its obligation. A right without a remedy to declare it, is not a valuable right: a contract that cannot be enforced has no legal obligation; and one that was enforcible by law when made, but which cannot be compelled to be performed, by the law for its performance being repealed, or being so changed or clogged as materially to diminish its worth, has suffered from unconstitutional legislation. Under the operation of the law we are now considering, every remedy to secure the performance of a contract is taken away until the happening of an event which may never happen; and

as to all contracts made before the passage of the act, the act is unconstitutional, and therefore void.

It may further be enquired whether the law is valid to require the continuance of any suit in any court of the state. And this it is not, if, instead of being an act of legislative authority, it is an exercise of judicial power.

Granting a continuance is either an exercise of judicial discretion upon particular facts, or an application of legal rules to them, the facts being ascertained by the court, and the discretion used, or application of law made by the court; and in either case is exclusively a judicial act. A legislative act is an annunciation by the legislative authority that certain results shall follow particular actions or conditions; but the ascertainment of the act or condition and the application of the consequences belong to the courts.

But by this law, the general assembly, from the fact of war existing between the United States and the Confederate States, has directed that all suits in law and equity in any of the courts of the state shall be continued till the war is ended, till the hostile nations have made a peace, till a treaty of peace shall be ratified. No fact is to be ascertained by the courts, no application of legal principle is to be made to the fact that the legislature has ascertained, but the courts, as registers of the legislative will, are to record its edict, closing indefinitely the temple of justice to all its suitors.

This is not the manner in which courts exercise judicial functions, is not a proper subject, or legitimate use of legislative authority, inasmuch as the powers of the government of this state are divided by the constitution into distinct departments, each of which is confided to a separate magistracy: the legislative powers to the general assembly, the judicial powers to the judiciary. *Constitution, art. III.*

Doubtless, the general assembly conceived that the general interest of the state would be promoted by the continuance of all civil cases till the war was ended, and till peace was made and

ratified by treaty, taking heed to the necessities and ease of defendants, but disregarding the rights of plaintiffs to have payment of debts, performance of contracts, and redress for wrongs done to them. If it were competent for the legislative authority to do this, no examination of the correctness of their basis of action would be proper in this court, for the will of the legislative authority is a sufficient, and the only reason for the exercise of its constitutional power. But when, as in this instance, a law is enacted which passes over the limit assigned to the legislative department by the constitution, it becomes the duty of this court so to declare, and thus to restrain an unconstitutional exercise of power. And especially is this so, when, in the confusion of war, in the excitements produced by sympathy with the wants and distresses of particular classes of the people, the rights of others and the well being of the whole society are likely to be endangered and to be sacrificed. In orderly and peaceful times the state might better trust to laws without constitutional safeguards; but in periods of turbulence, when passion and feeling usurp dominion over reason, infractions upon the constitution should be closely watched, must be firmly restrained. This important, but disagreeable duty is, by our organic law, entrusted to this court in the last resort, and its responsibility must not be avoided when the constitution requires it to be exercised, any more than it should not be assumed without constitutional warrant.

We cannot but think that the comprehensive terms of the law were inadvertently made to cover suits at law in criminal cases.

Circuit courts will, doubtless, in view of the obstacles which the times offer to the progress of judicial business, exercise a liberal discretion in preserving the rights of litigants.

This case was an action of debt brought in the circuit court of Hempstead county. The defendants moved for a continuance upon the law under consideration, which the court refused and gave final judgment, no other question being presented to the court.

The judgment is affirmed.

M., O. & R. R. R. R. Co. vs. GASTER.

The act of January 14, 1857, amending the charter of the Mississippi, Ouachita and Red River Rail Road Company, sanctioning a material and unwarrantable departure from the route of the road as designated in the original charter, having been accepted by the president and directors of the corporation, acting by authority of a *majority of the stockholders*, was binding on such of the stockholders as solicited or assented to the passage of the act; but such stockholders as did not assent to it were released from their contracts of subscription. (*Witter vs. M., O. & R. R. R. R. Co.*, 20 *Ark.*, 490.)

An act of the general assembly altering the charter, to be binding on all the stockholders, must be accepted by a vote of the *majority of the stock*, exclusive of that taken by the state, at a meeting of the stockholders regularly convened for that purpose, as provided by the 21st section of the original charter of the company. *Ib.*

The charter of a private corporation is an executed contract between the government and the corporators, and the legislature cannot repeal, impair or alter it in a matter materially affecting the interest of the corporators against their consent, or without the default of the corporation judicially ascertained.

The board of directors may act for and represent the stockholders in matters within the scope of the powers conferred upon them by the charter; but when they undertake to accept a legislative amendment of the charter, they act beyond the scope of their authority, and their act is not obligatory upon the corporation.

The plea, failing to show that the act of 14th January, 1857, changing the provisions of the charter, as to the location of the road, was so accepted as to make it valid and binding on the corporation, held bad on demurrer.

If the directors were proceding to apply the funds of the company in building the road on a line materially variant from that designated in the charter, the defendant had his remedy by injunction. (*M., O. & R. R. R. R. vs. Cross*, 20 *Ark.*, 443.)

Error to Drew Circuit Court.

Hon. JOHN C. MURRAY, Circuit Judge.

HARRISON, for plaintiff in error.

WINTER, contra.

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

This was an action of assumpsit, by the Mississippi, Ouachita and Red River Rail Road Company against Daniel Gaster, for assessments upon twenty-five shares of the capital stock of the company subscribed by him. The case has been here before. See 20 *Ark. Rep.*, 455–461. After the cause was reversed and remanded, the plaintiff filed an amended declaration; to which the defendant interposed five pleas.

The fourth plea, upon which the case was determined, is as follows:

"That John Dockery and others, on the 29th day of November, 1852, filed in the office of the secretary of state, etc., a charter of the Mississippi, Ouachita and Red River Rail Road Company, drawn under an act entitled, 'an act granting corporate powers for certain purposes,' which charter was drawn up for the purpose of constructing a railroad from a point on the bank of the Mississippi river, at or near Gaines' Landing, in the state of Arkansas, through or near Camden, on the Ouachita river, thence to some point on the Red river at or near Fulton, thence to some point on the boundary line between the states of Texas and Arkansas; which charter, by an act of the general assembly of the state of Arkansas, approved January 22d, 1855, became a public law; and that under the provisions of said charter said defendant became the holder of twenty-five shares of the capital stock of said company; and that on the 23d day of October, 1853, and after said defendant's said subscription of said sums of the capital stock of said company, the said company commenced opening said rail road, by an alleged authorized survey thereof, and to locate and establish the same, beginning at the Mississippi river at Ferguson's point, four miles, on an air line, and about eight miles, by the usually traveled road, north of Gaines' Landing, thence through Camden, thence to a place on Red river, called the Cut-off, twenty-one miles, on an air line, and forty miles, by the usually traveled wagon road, north of said town of Fulton, and thence to a place called *Texarkana*, on the boundary line

between said states of Texas and Arkansas: and defendant avers that a part of the stock-holders of said company, on the 14th of January, A. D., 1857, and after said defendant had become such stock-holder, in said company as aforesaid, procured the passage, by the general assembly of the state of Arkansas, without the knowledge or consent of said defendant, of an act by which said above described location and termini of said rail road was adopted in all respects, and made as valid and binding as if specified at length in said original charter, and that said amendatory act of the 14th January, 1857, was never accepted by a vote of a majority, nor of all the *stock* of said company, or by said defendant; yet the board of directors of said company have adopted the same, and are now building and constructing said rail road on the line and between the termini last aforesaid, and not on the line and between the termini designated in the charter under which he became the holder of said shares of the capital stock of said company mentioned in said plaintiff's declaration, but on a line and between termini materially different, and this he is ready to verify," etc.

To this plea the plaintiff demurred on the following grounds: "It is not alleged in said fourth plea that the said alleged act of the general assembly of the 14th of January, 1857, amendatory of said charter, was procured, accepted or adopted by a majority of the stock-holders of said company, and because the same is otherwise uncertain, informal," etc.

The court overruled the demurrer to the plea, the plaintiff rested, the defendant withdrew his other pleas, final judgment was rendered in his favor, and the plaintiff brought error.

In *Witter vs. Miss., O., & R. R. R. R. Co.*, 20 *Ark.*, 490, we held that the company, in abandoning Fulton, and adopting the Cut-off, as a crossing point on Red river, in the location of the rail road, made a material and unwarranted departure from the route designated in the original charter under which Witter, like Gaster, became a subscriber for shares in the capital stock of the company:

That the act of 14th January, 1857, amending the charter, and sanctioning this change in the location of the road, accepted, as it was agreed in that case, by the president and directors of the corporation, acting by authority of a *majority of the stock-holders*, was binding upon such of the stock-holders as solicited or assented to the passage of the act; but that such of the stock-holders as did not assent to the act were released from their contracts of subscription:

That an act of the general assembly, altering or amending the charter, to be binding upon all of the stock-holders, must be accepted by the vote of a *majority of the stock*, exclusive of that taken by the state, at a meeting of the stock-holders, regularly convened for that purpose, as provided for by the 21st section of the original charter of the company:

That it did not appear in that case that a *majority of the stock* was owned or represented by the majority of the stock-holders who accepted the act of 14th January, 1857, sanctioning the change in the line of the road, etc.

In the case now before us, the plea alleges that *a part of the stock-holders* procured the passage of the act of 14th January, 1857, approving the change in the location of the road referred to above, without the knowledge or consent of the defendant. That the act was never accepted by a vote of a *majority of the stock*, nor of all of the stock of the company, nor by the defendant; but that the board of directors had adopted the same, etc.

The object of the plea was to show that the defendant was legally discharged from his contract of subscription to the capital stock of the company, upon which the suit was founded, by means of a legislative change in the terms of his contract, made without his consent.

The plea sufficiently avers that the act of 14th January, 1857, was not accepted by a vote of *a majority of the stock, etc.*, and consequently was not binding upon all of the stock-holders. It also negatives the defendant's assent to the act, and shows that he

was not bound by it. But the plea fails to show that the act was valid and binding upon the corporation.

It avers that a *part of the stock-holders* procured the passage of the act, and that the *board* of *directors* had *adopted the same.* But it fails to aver that a *majority of the stock-holders* procured the passage of the act, or that the board of directors in adopting the act, acted by authority of a *majority of the stock-holders.*

The British parliament, among other unlimited powers, claims that of altering and vacating charters; not as an act of ordinary legislation, but of uncontrolled authority. It is theoretically omnipotent. Yet in modern times, it has attempted the exercise of this power very rarely. But the king cannot abolish a corporation, or new-model it, or alter its powers, without its assent. This is the acknowledged and well known doctrine of the common law. *Webster, in Dartmouth College, vs. Woodward,* 4 *Wheat.*, 560.

It is a happy feature in the constitution of our own government, says Mr. Angell in his work on corporations, that the power of the legislatures of the different states, resembles in this respect the prerogative of the king of Great Britain, who may create, but cannot dissolve a corporation, or, without its consent, alter or amend its charter.

In the 10th section of the first article of the constitution of the United States, (which was the supreme law of this state at the time the charter in question was granted, and at the time the amendatory act of 14th January, 1857, was passed,) it is declared that no state shall pass any law *impairing the obligation of contracts.* Under this clause, it has been well settled, that the charter of a private corporation, whether civil or eleemosynary, is an executed contract between the government and the corporators, and that the legislature cannot repeal, impair or alter it, in a matter materially affecting the interest of the corporators, against their consent, or without the default of the corporation judicially ascertained. *Ang. on Corp.*, 801; *Dartmouth College vs. Woodward,* 4 *Wheat.*

In Witter vs. M. O., & R. R. R. R. Co., it was assumed in the defence, and not controverted, that the act amending the charter, procured by a majority of the stock-holders, was binding upon the corporation, and we decided that the stock-holders, who did not assent to it, were released from their subscriptions.

But surely, upon general principles, if a majority may, less than a majority of the stockholders cannot accept an act of the legislature making a material change in the provisions of the charter, so as to bind the corporation.

The board of directors may act for and represent the stockholders, in matters within the scope of the powers conferred upon them by the charter, but when they undertake to accept a legislative amendment of the charter, they act beyond the scope of their authority, and their act is not obligatory upon the corporation. They are but the agents of the corporators, acting under limited powers, and when they exceed their authority, their acts are not binding upon their principals, unless they are ratified, or acquiesced in by them.

The plea failing to show that the act of 14th January, 1857, changing the provisions of the charter, as to the location of the road, was so accepted as to make it valid and binding upon the corporation, the defendant was not thereby legally released from his contract of subscription to the capital stock of the company; and if the directors were proceeding to apply the funds of the corporation in the construction of the road upon a line materially variant from that designated in the charter, he had his remedy by injunction, as held in *M. O., & R. R. R. R. Co., vs Cross*, 20 *Ark.* 443.

The judgment must be reversed, and the cause remanded with instructions to the court below to sustain the demurrer to defendant's 4th plea.

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TAYLOR ET AL. VS. ARMSTRONG ET AL.

The interest which the public acquires by the dedication of land for a highway or street, is merely an easement or right of passage over the soil, the original owner still retaining the fee, together with all rights of property not inconsistent with the public use.

After a person has dedicated land to public use, he has no right to erect a building or other obstruction thereon, or to authorize another to do so.

Any person erecting such obstruction upon an easement granted to the public is a trespasser; and the obstruction may be removed at the instance of the public as a nuisance, by indictment or by bill in chancery.

The owner of the fee may maintain ejectment against one who obstructs a highway, and recover the land subject to the public easement.

The presumption is that the owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.

And a grant of land bounded on a public highway carries with it the fee to the centre of the road as part and parcel of the grant.

But if a highway be laid off entirely upon the land of a person, running along the margin of his tract, and he afterwards conveys the land, the fee in the whole of the soil of the highway vests in his grantee.

The same rules are applicable to streets in towns and cities.

Appeal from Pope Circuit Court.

Hon. JOHN J. CLENDENIN, Circuit Judge.

JORDAN for appellants.

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

Armstrong and Rye brought an action of ejectment, in the Pope circuit court, against Taylor and Dowdle, for premises described in the declaration as—

"All that portion of Water street, in the town of Galley Rock, which is situated between Main and Walnut streets, together with the warehouse situated on said street, on the north bank of the Arkansas river."

The case was tried on the general issue, verdict and judgment for the plaintiffs, and an appeal by the defendants, on questions of law, reserved by bill of exceptions taken at the trial.

Upon the trial the following facts were proven:

The town of Galley Rock is situated on the *S. W.* 1-4 *of sec.* 13, *T.* 6, *N. R.* 19 *W.*, in Pope county, on the north bank of the Arkansas river.

This tract of land had been in possession of Daniel Gilmore for some twenty-three years; and about twelve or fifteen years before the trial, he laid off the town, and dedicated the streets, including *Water street*, to public use. (The trial was at March term, 1861.)

Water street lies along the bank of the river, is 140 feet wide, and embraces the space between the south line of the front lots and the edge of the water.

Main and Walnut streets run north from Water street, and embrace block *A*, which is subdivided into lots, nine of which, numbered from 1 to 9, front upon Water street.

On the 14th December, 1860, Gilmore executed to the appellees (Armstrong & Rye,) a deed, reciting that he had theretofore caused the town of Galley Rock to be laid off, and had sold lots therein to divers persons, a number of which were situated on *Water street;* that the lots were sold with the understanding on the part of the purchasers that *Water street* was to be kept open as a public street, it having been dedicated to the use of the inhabitants of the town as such. In consideration whereof, and for the purpose of carrying into effect the object aforesaid, he conveyed to appellees, in fee, all that portion of Water street situated between Main and Walnut streets, reserving ferry privileges, upon trust that they were to hold the legal title to the property conveyed, and permit the citizens of the town to use it as a public street during all coming time, or to use it for such other purposes as the corporate authorities might at any future time direct.

In the fall of 1860, the appellants, (Dowdle & Taylor,) asked

permission of Gilmore to build a warehouse on that portion of Water street in controversy, or if he had any objections to their building it. He told them he supposed there would be no objections—that he had none; but he told them they must not take advantage of the statute of limitations. They then proceeded to build the warehouse—locating it in the street opposite lot 2, in block A, leaving a space of 70 or 80 feet between the warehouse and the north line of the street, for the passage of the public.

Sometime in December, 1860, when the warehouse was nearly finished, appellees gave appellants notice to desist from building, and to remove the house; but they completed the building, and continued in possession of it until suit was brought, February 7, 1861.

From the time Gilmore laid off the town and dedicated the streets, including Water street, to the use of the public, he had not had possession of them, nor used or controlled them, except that he, in common with the other citizens of the town, had used them as public streets.

Since the year 1857, the appellant Taylor had owned, and was in possession of all the lots fronting on Water street, opposite the warehouse. In the plat of the town introduced in evidence, his name is written upon lots 1, 2, and 3, in block A. Appellees admitted that he owned the front lots opposite the warehouse.

The court below gave the jury six instructions moved by the appellees, against the objection of the appellants; and refused to give all but the first of six instructions moved by appellants.

The substance and effect of the instructions moved by the appellees is, that, upon the facts in evidence they could maintain the action of ejectment against appellants for the premises in controversy.

The fact that Gilmore, the original proprietor, dedicated Water street to the public use, at the time he caused the town of Galley Rock to be laid off, is not controverted.

The interest which the public acquires by the dedication of land for a highway or street, is merely an easement or right of

passage over the soil, the original owner still retaining the fee, together with all rights of property not inconsistent with the public use. *Angell on Highways*, 104.

After Gilmore had dedicated Water street to public use, he had no right to erect a building or other obstruction thereon, or to authorize the appellants to do it. They, therefore, acquired from him no legal right to erect the warehouse upon the street in question. They were trespassers upon the easement granted by him to the public, and the obstruction might have been removed, at the instance of the public, as a nuisance, by indictment or bill in chancery. *Ang. on High.*, 254–260; 22 *Wend.*, 115.

In *Goodtile vs. Alker*, 1 *Burr.*, 133, it was held by LORD MANSFIELD, the other judges present concurring, that the owner of the fee may maintain ejectment against one who obstructs a highway, and recover the land subject to the public easement. Though the correctness of this decision was questioned by Mr. JUSTICE THOMPSON, in the case of the *City of Cincinnati vs. the Lessees of White*, 6 *Peters U. S. R.*, 431, yet it has been followed and approved by the American courts and text writers generally. *Ang. on High.*, 305; *Dovaston vs. Payne*, 2 *Smith's Lead. Ca., by Hare & Wal.*, 212, *and cases cited; Cooper et al. vs. Smith*, 9 *Serg. & Raw.*, 31; *Alden vs. Murdock*, 13 *Mass.*, 255; *Bolling vs. Mayor etc. of Petersburg*, 3 *Randolph*, 563; *Thompson et al. vs. Proprietors of And. Bridge*, 5 *Greenleaf*, 48; *Hund vs. Blackman*, 19 *Conn.*, 182; *Chatham vs. Brainard*, 11 *ib.*, 82; *Pearsall vs. Post*, 20 *Wend.*, 115; 3 *Kent's Com.*, 432; *Swift, J., in Peck vs. Smith*, 1 *Conn.*, 132.

And this rule applies to streets in towns and cities as well as to highways.

If therefore Gilmore was the owner of the fee in that part of Water street covered by appellants' warehouse, at the time he undertook to convey it to the appellees, they succeeded to all his legal rights in the soil, and had the right to maintain ejectment against appellants, and recover the land subject to the public easement.

But prior to the time of the conveyance from Gilmore to appellees, Taylor had become the owner of the front lots in *block A*, opposite the warehouse. That is, the east and west boundary lines of Taylor's lots projected across Water street to the river, would include all that portion of Water street covered by appellants' warehouse.

Whether Gilmore had conveyed these lots to Taylor directly, or whether he derived them through an intermediate purchaser, does not appear; but it was admitted in the trial that he was the owner of the lots.

Mr. Kent, (1 *Com.*, *vol.* 3, *p.* 433,) says:

"The law with respect to public highways, and fresh water rivers is the same, and the analogy perfect, as concerns the right of soil. The presumption is that the owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Being owners of the soil they have a right to all ordinary remedies for the freehold. They may maintain an action of ejectment for encroachments upon the road, etc. The freehold and profits belong to the owners of the adjoining lands. They may carry water in pipes under the highway, and have every use and remedy that is consistent with the public servitude or easement of a way over it, and with police regulations. The established *inference of law is, that a conveyance of land bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant.* The idea of an intention in the grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land is never to be presumed. It would be contrary to universal practice; and it was said in *Peck vs. Smith*, 1 *Conn. R.*, 103, that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It would require an express declaration, or something equivalent thereto, to sustain such an inference; and it may be considered as the general rule, that a grant of land bounded upon a highway or river, carries

the fee in the highway or river to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intent. But it is competent for the owner of a farm or lot, having one or more of its sides on a public highway to bound it by express terms on the side or edge of the highway, so as to rebut the presumption of law, and thereby reserve to himself his latent fee in the highway. He may convey the adjoining land without the soil under the highways, or the soil under the highway without the adjoining land. If the soil under the highway passes by a deed of the adjoining land, it passes as parcel of the land and not as an appurtenant."

If a highway be laid out through the land of A, and he afterwards conveys the land, upon one side of the highway to B, and the land upon the other to C, without reservation, they become the owners of the fee in the soil of the highway equally, each owning to the centre.

So if A and B, being the proproprietors of adjoining tracts of land, contribute equal quantities of land to a highway, and afterwards convey their lands respectively, their grantees become the owners of the fee in the soil of the highway equally, each going to the centre.

But if a highway be laid off entirely upon the land of A, running along the margin of his tract, and he afterwards conveys the land, the fee in the whole of the soil of the highway vests in his grantee. *Watrous vs. Southworth*, 5 *Conn.*, 305; *Chatham vs. Brainerd et al.*, 11 *ib.*; *Champlin vs. Pendleton*, 13 *ib.*; *Read vs. Leeds*, 19*ib.*, 187.

The same rules are applicable to streets in towns and cities. *Hammond et al. vs. McLachlan*, 1 *Sandford*, 323; *Pearsall vs. Post*, 22 *Wend.*, 126; *Mayor and Council of Macon vs. Franklin*, 12 *Geo.*, 245; *Trustees of Watertown vs. Cowen*, 34 *Paige*, 513; *State vs. Mayor and Ald. Mobile*, 5 *Porter*, 309; *Ang. on High.*, 293–303; *O'Linda vs. Lothrop*, 21 *Pick.*, 295; *Barclay et al. vs. Howell's Lessee*, 6 *Peters*, 499; *New Orleans vs. United States*,

10 *ib.*, 633; *Dovaston vs. Payne*, 2 *Smith's Lead. Ca.*, 218, *and cases cited.*

Whether Gilmore, when he conveyed the front lots on Water street opposite the warehouse, expressly reserved the fee in the soil of the street, or whether such reservation is to be implied from the descriptive language employed in the grants, we have no means of determining, as the conveyances were not introduced in evidence upon the trial. But it was proven and admitted that Taylor was the owner of the lots, and the presumption follows, in the absence of proof to the contrary, as above shown, that he was the owner of the fee in the soil of that portion of the street upon which the warehouse was situated; not only to the centre of the street but to the margin of the river, there being no opposite proprietor.

Gilmore having no title to that portion of Water street covered by the warehouse at the time he executed the conveyance to appellees, they acquired none from him; and it follows that they could not maintain the action of ejectment therefor.

Upon the facts in proof the court below erred in giving the jury the instructions moved by the appellees, and for this error the judgment must be reversed, and the cause remanded for further proceedings.

It may be remarked that the appellees in taking an order for a writ of possession upon the judgment, in the court below, waived their recovery for so much of the street as was not covered by appellants' warehouse.

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MARLOW VS. ADAMS.

In a suit for title to land, the party in possession failing to make good his title, cannot be allowed for improvements more than the value of the rents.

Appeal from Prairie Circuit Court in Chancery.

Hon. JOHN J. CLENDENIN Circuit Judge.

JORDAN, for Marlow.

WILLIAMS, contra.

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

Marlow and Adams both applied to the land agent of the Little Rock swamp land district, in March 1859, to enter the land in controversy in this case, as pre-emptors. The land agent, upon the evidence produced before him by the parties, gave the certificate of entry to Adams. Marlow filed a bill in the Prarie circuit court to cancel the certificate of entry, etc., and upon the pleadings and evidence the court refused to cancel the certificate of Adams, but decreed that he should pay to Marlow $100 for improvements he had made upon the land; and both parties appealed.

The preponderance of the evidence is in favor of the legality of Adams' entry, but its fairness is more questionable.

The evidence conduces to prove that one Hendricks made the original improvement on the land. That in the year 1852, Stephen Smith purchased the improvement for his son *Levi*, for $17, ten dollars of which was furnished by Levi, and the remaining seven his father paid in shop work. Levi was of age but lived with his father on a neighboring tract, and he, assisted by his brothers, made additional improvements on the land, and the old man and the boys cultivated a small field on the place for several years; but it was always called and known as *Levi's* place.

In the year 1854, Adams, representing to Levi that he had entered the land with scrip, purchased his improvement for $20, and obtained from him a written transfer.

Not long after this, Marlow coming into the neighborhood, obtained permission of Adams to go upon the place as his tenant.

Prior to the time Levi sold the improvement to Adams, Stephen Smith had always called it Levi's place, but disapproving of the sale, he claimed that the place belonged to him—that he intended to give it to Levi, but had not done so—and he afterwards gave it to Marlow, who married his daughter. Marlow continued in the undisturbed possession of the place until the time of the contest before the land agent, making improvements, which were doubtless worth $100; and he seems to have been very earnest in the belief that he obtained a good title to the original improvement from his father-in-law.

Both the land agent and the circuit judge, sitting as chancellor, having decided upon the facts of the case that *Levi* Smith was the owner, and not his father, of the original improvement, and that he made a valid transfer of it to Adams, which gave him a preference to enter the land, we are not disposed to overrule their decisions. And we are as little inclined to disturb the decree in favor of Marlow for $100, as some compensation for improvements, which appear to have been made in good faith, but we know of no law or precedent that would allow him compensation for his improvements over and above the value of rents.

The decree in his favor must be reversed, on the appeal of Adams: and upon his appeal so much of the decree as was against him in the court below must be affirmed; but the costs in both appeals must be taxed to Adams.

FINN, ET AL. VS. HEMPSTEAD, AD. ET AL.

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An admission made by a guardian for infants in one suit cannot be used against them in another.

Crosby died leaving a will whereby he devised his whole estate to Finn, who was made sole executor thereof; Finn having qualified as such executor, the will was set aside by a proceeding at law, and the administrator and heirs of Crosby filed a bill against the administrator, widow and heirs of Finn, he having died, to compel them to account for the estate of Crosby: *Held*, that the widow was not responsible for *waste* committed by her husband as executor of Crosby.

She was only answerable for such of the assets of Crosby's estate as remained unadministered by her husband, and came into her possession after his death.

And for them, she was properly responsible to the administrator of Crosby, and not to his heirs,

Finn having died before the institution of the proceeding to test the validity of the will, while an appeal in that cause was pending in this court, the probate court granted letters of administration *de bonis non* on Crosby's estate: *Held*, that while it would have been more regular for the probate court to have deferred granting letters *de bonis non* until the appeal was determined, yet the executor of Crosby being dead, and the action of the probate court coming before us collaterally, there was no such want of jurisdiction as to render the grant of letters null and void. (*State vs. Richards*, 21 *Ark.*, 515; *Rogers vs. Duval*, 23 *ib.* 79.)

The extent of the power and authority of an administrator *de bonis non*, is simply to collect and administer such property and effects of the deceased unadministered by the former representative, as remain in specie and are capable of being ascertained and identified as the specific property or estate represented by him.

An administrator *de bonis non* cannot maintain a suit against a former executor or administrator, or his representatives, for effects of the estate wasted or converted by him; though such suit may be brought by creditors, distributees, or legatees.

By statute an administrator *de bonis non* may invoke the aid of the probate court against his predecessor or his legal representatives, to obtain possession of effects unadministered, or he may bring suit on the bond of the delinquent predecessor.

But he cannot compel the representatives of such delinquent to account in equity fc effects wasted or converted.

The after declarations of a vendor are worthless to invalidate a sale made or a bill of sale executed by him. (*Gullett vs. Lamberton*, 1 *Eng.*, 110.)

A bill of sale being an executed contract, the sufficiency of the consideration

could not be inquired into by those who claim to stand in the place of the vendor, except for the purpose of conducing to show that it was procured by coercion and fraud.

A slave, the property of Crosby, having come into possession of the widow of Finn, as guardian of her children, upon the affirmance by this court of the judgment of the circuit court in the case contesting the validity of Crosby's will, whereby the same was pronounced invalid, she should have surrendered him to the administrator *de bonis non* of Crosby, and paid to him a reasonable hire for his services from the time he came into her possession.

Certain assets, rents, hires, etc., of Crosby's estate having been administered into the estate of Finn, it is proper that his administrator should account therefor to the administrator *de bonis non* of Crosby.

But the administrator of Finn having distributed nearly all the estate in his hands, it is but just to charge the estate in the hands of the distributees with the payment of the value of the assets of Crosby, that were administered into Finn s estate.

Until the will of Crosby was finally adjudged to be invalid, no cause of action accrued to his administrator *de bonis non*, to recover the goods of Crosby that remained unadministered by Finn, and the statute of limitation would not begin to run until that time.

Appeal from Hempstead Circuit Court in Chancery.

Hon. L. B. GREEN, Circuit Judge.

GALLAGHER, for the appellant.

HEMPSTEAD, contra.

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

About the 10th of October, 1852, Joseph R. Crosby, who had neither wife nor children, died in Hempstead county, leaving a will, in which he named Richard H. Finn, as his executor, and devised to him his entire estate, after the payment of his debts.

The will was duly probated, in the probate court of Hempstead county, and letters testamentary granted to Finn, on the 23d of October, 1852, who qualified as executor.

On the 22d November, 1852, Finn returned an inventory and

appraisement of the personal estate of Crosby, including two slaves, *Dick* and *Nelly*.

On the 1st of April, 1854, Finn died, without having filed in the probate court any annual or final settlement of his accounts, as executor of Crosby, for settlement; and on the 23d of May, 1854, letters of administration upon the estate of Finn were granted to James McDaniel, by the probate court of Hempstead county.

McDaniel, as such administrator, made out and filed in the probate court, for final settlement, a statement of Finn's account, as executor of Crosby, which on the 11th of January, 1855, after due public notice, was approved and confirmed by the court.

On the same day, after the confirmation of the account, the court, upon the petition of McDaniel, made an order that he take possession of Crosby's effects, and administer them as part of Finn's estate, he being Crosby's devisee.

It appears that Finn left a widow, Nancy, and four minor children, Catharine, Frances, John and Mary, and that the widow was appointed guardian of the children.

On the 15th of October, 1855, the probate court, upon the petition of Mrs. Finn, made an order that McDaniel, as administrator, etc., turn over to her, as such guardian, on the first of January following, all the slaves belonging to the estate of Finn (after her dower interest therein was set apart,) to be kept together by her, and worked for the benefit of the children.

At the June term 1856, of the circuit court of Hempstead county, Daniel P. Crosby and others, claiming to be the heirs at law of Joseph R. Crosby, filed a petition against McDaniel, as the administrator, and the widow and heirs of Finn, for the purpose of contesting the validity of Crosby's will. An issue of *devisavit vel non* was made up, and on the 7th of June, there were a verdict and judgment against the validity of the will. The defendants in the petition appealed to this court, and on the 4th of January, 1858, the judgment of the circuit court was affirmed. See *McDaniel, ad. vs. Crosby, et al.*, 19 *Ark.*, 533.

In the meantime, Bernard F. Hempstead applied to the probate court of Hempstead county for letters of administration, *de bonis non*, on the estate of Joseph R. Crosby, and on the 27th of October, 1856, letters were granted to him.

On the 22d of September, 1858, Hempstead, as such administrator *de bonis non*, and Daniel P. Crosby and others, claiming to be the heirs of Joseph R. Crosby, being the same persons who were plaintiffs in the petition to contest the validity of the will, filed a bill in the Hempstead circuit court, against the administrator, widow and heirs of Finn, alleging the facts above stated, and others that will be noticed in the course of this opinion; the object of which was to compel the defendants to account for the estate of Crosby, etc.

Upon the pleadings and evidence, a final decree was rendered against the widow and heirs of Finn, and they appealed to this court.

No decree was rendered against McDaniel, the administrator of Finn, except for costs, and he did not appeal.

A personal decree was rendered against Mrs. Finn, with her minor children; for the sum of $16,664 94, reciting that it appeared from the pleadings that they had assets in their hands, belonging to the estate of Finn, sufficient to pay the same, etc. The amount decreed against them was made up, by a master appointed by the court, of the rents of real estate, the value and hire of the slaves, *Amos*, *Dick* and *Nelly*, and the value of other personal property, and choses in action, alleged to have been the property of Crosby, with interest, etc.

Included in the amount, was the estimated value of goods, choses in action, rents, hires, etc., wasted or converted and appropriated by Finn to his own purposes, while acting as the executor of Crosby.

The decree was rendered in favor of the complainants generally, with direction that when the money was collected, Hempstead, as administrator *de bonis non* of Crosby, retain a sufficient sum to pay some debts which had been allowed in the probate court

against Crosby's estate, and which Finn as executor had failed to pay.

1. It is insisted that such of the complainants as claim to be the heirs of Crosby, were not admitted to be such by the answers, nor proven to be such upon the hearing, and consequently so much of the decree as was in their favor was erroneous.

It is alleged in the bill, in general terms, that they are the heirs and distributees of Crosby, but the relationship between him and them is not stated, and there was no proof upon the hearing that they were his heirs, or in any degree related to him.

The bill alleges, however, that upon the trial of the issue of *devisavit vel non*, it was admitted by the administrator, widow and heirs of Finn, that these complainants were the heirs and distributees of Crosby.

Mrs. Finn, in her answer to the bill, concedes that there was such an admission upon the trial of that issue, and there is a similar concession in the answer of the administrator. The guardian *ad litem* of Finn's heirs filed no answer, but adopted the answer of their co-defendants.

If it be conceded that the adoption of their answers adopted their admissions, the admission in question amounted to this, that in a former suit between the same parties, the guardian *ad litem* of the minor heirs of Finn, admitted that these complainants were the heirs and distributees of Crosby.

But the admission made by the guardian for the infants in that suit, cannot be used as evidence to support a decree against them in this. *Gresley's Eq. Ev.*, 50; *Miles vs. Dennis*, 3 *John. Ch.*, 368; 1 *Greenleaf's Ev.*, *sec.* 179.

So much of the decree therefore as is in favor of these complainants, as Crosby's heirs, against the infant heirs of Finn, is erroneous and must be reversed. *Blakeney vs. Ferguson, et al.*, 14 *Ark.*, 641; *Hardy vs Heard, et al.*, 15 *ib.*, 194; *Roane vs. Bonnell*, 20 *ib.*, 125.

Conceding that the admission was good against Mrs. Finn, the decree against her in favor of the complainants in question, as

the heirs of Crosby, was nevertheless erroneous, because she was not responsible for *waste* committed by her husband as executor of Crosby. She was only answerable for such of the assets of Crosby's estate as remained unadministered by her husband, and came into her possession after his death, and for them she was properly responsible to Hempstead as administrator *de bonis non* of Crosby, and not to the complainants claiming to be his heirs. See *Pope's Heirs, et al., vs. Boyd's adx.*, 22 *Ark.*, 535; *Lenox's Heirs vs. Rector*, 15 *Ark.*, 438.

2. But it is insisted that the grant of letters of administration *de bonis non* to Hempstead, upon the estate of Crosby, by the probate court, pending the appeal from the judgment of the circuit court in the proceedings to contest the validity of the will, was null and void, and that Hempstead, as such administrator, had no legal authority to maintain the bill, or obtain any decree.

The statute provides that, "if any will be proved, and letters testamentary thereon granted, and such will be afterwards set aside. The letters testamentary shall be revoked, and letters of administration *de bonis non* granted." *Gould's Dig.*, *ch.* 4, *sec.* 33.

If Finn had been living, and acting as executor at the time the judgment of the circuit court, pronouncing the will invalid, was rendered, and had appealed therefrom, the probate court would, perhaps, have had no jurisdiction to grant letters *de bonis non* to Hempstead, pending the appeal, because an appeal in such case stays the judgment of the circuit court until the matter is determined by the appellate court.

But Finn had died before the institution of the proceedings to contest the validity of the will, and at the time the judgment was rendered, and the appeal taken, there was no executor or administrator of Crosby's estate, and no one representing the estate except the persons who claimed under Finn as devisee. And though the appeal stayed the judgment, and it would have been more regular for the probate court to have deferred the grant of letters *de bonis non* until after the appeal was determined, yet its

action coming before us collaterally, we think we may hold, consistently with previous decisions of this court, that there was no such want of jurisdiction, under the circumstances, as to render the grant of letters null and void. See *State vs. Richards et al.*, 21 *Ark.*, 515, *and cases cited; Rogers, ex'r, vs. Duval, ad.*, 23 *Ark.*, 79.

3. But it is a well settled principle of the common law, that the extent of the power and authority, as well as of the duty of an administrator *de bonis non*, is simply to collect and administer such property and effects of the deceased, not administered by the former representative, as remain in specie, and are capable of being ascertained and identified as the specific property or estate represented by him. Hence, it has been held that an administrator *de bonis non* cannot maintain a suit at law, or bill in chancery, against a former executor or administrator, or his representatives, for effects of the estate wasted or converted by him, though such suit or bill may be brought by creditors, distributees or legatees. *Coleman vs. McMendo et al.*, 5 *Rand.*, 51; *Stell ad. vs. Alexander ad.*, 2 *Sneed.*, 650; *Thomas vs. Stanley*, 4 *ib.*, 411; *Young vs. Kimball*, 8 *Blackf.*, 167; *Oldham vs. Collins*, 4 *J. J. Marsh.*, 49; *Felts vs. Brownsard*, 7 *ib.*, 147; *Thomas vs. Hardwick ex.*, 1 *Kelly* (*Geo.*) 80; *Oglesby vs. Gilmore et al.*, 5 *Geo.*, 58; *Cheatham ad. vs. Bearfoot*, 9 *Leigh*, 514; *Kelsay vs. Smith*, 1 *How.*, 80; *Stubblefield et al. vs. Raven et al.*, 5 *Sm. & M.*, 140; *Smith vs. Carrere*, 1 *Rich. Ch.*, 123; *Haythrop vs. Hook*, 1 *Gill & John.*, 270; *Hemphill vs. Hamilton*, 6 *Eng.*, 425; *State, use Higginbotham's ad. vs. Watts et al.*, 23 *Ark.*, 312.

In the case of *Coleman ad. vs. McMendo et al.*, above cited, JUDGE CARR, after reviewing the authorities on the subject, said: "To meet this formidable array, what is there on the other side? Not one single case; not the *dictum* of a single judge; not the assertion of one elementary writer, that the administrator *de bonis non*, either at law or in equity, can support an action, or file a bill for account, against the representative of a delinquent executor or administrator."

By statute, an administrator *de bonis non* may invoke the aid of the probate court against his predecessor, or his legal representatives, to obtain possession of effects unadministered, or he may bring suit upon the bond of the delinquent predecessor. *Gould's Dig., ch.* 4, *secs.* 43, 44. But we have no statute authorizing him to compel the representatives of such delinquent to account in equity for effects wasted or converted.

It follows that Hempstead, as administrator *de bonis non* of Crosby, had no legal right to maintain the bill, or to obtain a decree against the widow and heirs of Finn, for the value of so much of the estate of Crosby as was wasted by him, or converted to his own use, while acting as the executor of Crosby.

4. The slave *Amos* was not included in the inventory of Crosby's estate returned by Finn as executor, nor was Finn charged with the value of *Amos* in the settlement of his accounts made with the probate court, by McDaniel as his administrator: and for this cause, as well as upon other grounds, the settlement was impeached for fraud, by the bill, and set aside by the court below; and in the decree against Mrs. Finn and her children, they were charged with the value of *Amos*, hire, interest, etc.

The bill charges that before the death of Crosby, Finn paid an execution against Crosby, with the money of Crosby, and afterwards, by coercion and without consideration, obtained a bill of sale from him for *Amos*. The answers of McDaniel and Mrs. Finn deny that Finn paid the execution with the money of Crosby, or that he obtained the bill of sale without consideration and by coercion; and they allege, on the contrary, that Finn purchased the slave fairly, and paid for him the consideration recited in the bill of sale, etc.

The bill of sale is made an exhibit to the answer of McDaniel, bears date July 6, 1851, and by it Crosby acknowledges that he had received of Finn the sum of $869.39, as the consideration for Amos. It is an absolute bill of sale, with warranty of title, etc.

There was no testimony read upon the hearing to prove that Finn used any coercion, or practiced any fraud upon Crosby to

obtain from him the bill of sale. There were two attesting witnesses to the instrument, (R. R. Conway and George Conway.) Their depositions were not taken, and it was not shown that they were dead, or out of the jurisdiction of the court.

It is to be presumed that they knew something of the circumstances attending the execution of the bill of sale; and if Finn had procured it by force or fraud, it is but reasonable to suppose that their testimony would have conduced to prove that fact. The failure of the complainants to take their depositions, or to account for not doing so, is a circumstance to be considered against them.

The deposition of no witness was taken who professes to have been present when the bill of sale was executed, or to have known the circumstances attending its execution.

Wyatt deposed that he understood from Crosby that Finn paid the execution that was levied upon *Amos* with Crosby's money; but the after declarations of Crosby are worthless to invalidate a sale made, or a bill of sale executed by him. *Gullett and wife vs Lamberton*, 1 *Eng. R.*, 110.

It is true that the depositions of Wyatt and Andrews conduce to prove that Finn may have used the means of Crosby in paying the execution, but there is a want of evidence to prove satisfactorily that there was no other consideration for the bill of sale than the money so paid by Finn. If there was none other, and the money was Crosby's, why, it may be asked, did he execute the bill of sale?

Moreover, the bill of sale being an executed contract, the sufficiency of the consideration could not be questioned, or inquired into by the complainants, who claim to stand in the place of Crosby, except for the purpose of conducing to show that the instrument was procured, as alleged, by coercion and fraud; and we have already stated that the proof fails in this.

The testimony in regard to the matter was too loose and weak to warrant the court below in pronouncing a solemn instrument invalid, and decreeing against Mrs. Finn, etc., for the value of

Amos and his hire, etc., and in this respect the decree must be reformed.

5. The slave *Dick*, it appears, came to the possession of Mrs. Finn, as guardian of her children, under the order of the probate court above referred to, on the first of January, 1856, and she kept and controlled him from that time forward. Upon the affirmation by this court of the judgment of the circuit court (fourth of January, 1858,) pronouncing the will of Crosby invalid, she should have surrendered the slave to Hempstead, as administrator *de bonis non* of Crosby, and paid to him a reasonable hire for his services from the time he came into her possession. In failing to do so, she acted in her own wrong, and is personally responsible for the slave and hire to him as such administrator, and he is entitled to a decree against her for the negro and hire, with a provision that if the property be not surrendered, he recover of her the value thereof as ascertained by the master of the court below.

6. It appears that at the time McDaniel became the administrator of Finn, (May 23, 1854,) he found remaining in specie, and undisposed of by his intestate, besides the slave *Dick*, a negro woman named Nelly, a mule, a sorrel horse, two cows, one yearling, a note on W. & M. Moss, and a note on Brunson, which were of the estate of Crosby, and which, under the order of the probate court, were administered into the estate of Finn by McDaniel.

From the time of the death of Finn, his estate got the benefit of the rents of the real estate of Crosby.

Also, the services of the negro Dick, until he was turned over to Mrs. Finn.

Also, the services of the woman Nelly, until the first of January, 1855, when she was sold by McDaniel, as part of Finn's estate.

These assets, rents, hire, etc., having been administered into the estate of Finn, by McDaniel, as his administrator, it was proper for him to account therefor to Hempstead as administrator

de bonis non of Crosby. (*Marlatt vs. Scantland ad. et al.*, 19 *Ark.*, 444;) and a decree should have been rendered against him, as such administrator, for the value thereof. It appears, however, that at the time he answered, he had very nearly administered or distributed all the assets of his intestate which came to his hands, and consequently the court below rendered no decree against him except for costs. From this decree the complainants did not appeal, nor did he, and he is not therefore before this court, and the decree as to him cannot be changed. But inasmuch as the estate of Finn was enhanced by so much of the estate of Crosby as was administered into it by McDaniel, as above shown, and passed, so increased in value, into the hands of his distributees, (the infant appellants,) we think it is but just and equitable to charge the estate distributed to them, with the payment to Hempstead, as administrator *de bonis non* of Crosby, of the value of the assets of Crosby that were so administered into their father's estate by his administrator; and the decree of the court below as to them must be so reformed.

7. A decree might also be rendered against the distributees of Finn, in favor of the complainants, who claim to be the heirs of Crosby (if not barred by the statute of non claim,) for the value of so much of the estate of Crosby as was wasted or converted by Finn, as executor of Crosby, during the time he acted as such, had they proven, as against the infant distributees of Finn, that they were the legal heirs and distributees of Crosby, but in this they failed, as we have above shown. And this relieves us from the necessity of deciding the perplexing question, discussed at great length by counsel, whether the demand against the estate of Finn for the value of the assets appropriated by him to his own use, or wasted in his life time, should have been presented to his administrator, properly authenticated, for allowance, within the time prescribed by the statute of non-claim; or whether the heirs of Crosby might not delay the institution of any proceedings therefor, without prejudice, until after the will of Crosby was finally adjudged to be invalid; and then proceed against the estate of Finn in the hands of his distributees.

8. We have not overlooked the fact that Mrs. Finn and her children rely upon the *statute of limitations* to bar any recovery against them. It is sufficient to say, as to this, that until the will of Crosby was finally adjudged to be invalid, no cause of action accrued to Hempstead, as administrator *de bonis non* of Crosby, to recover the goods of Crosby that remained unadministered by Finn as executor, etc., and this suit was commenced within less than a year thereafter.

The clerk of this court, as master, will take and state an account between the parties, in accordance with this opinion, and a decree will be entered thereon, and certified to the court below, to be executed.

As to the complainants who claim to be the heirs and distributees of Crosby, the bill must be dismissed without prejudice.

SHAVER & SON VS. SHELL.

Judgment by default having been rendered by a justice of the peace, and it appearing that on the day of trial, the plaintiffs as well as the defendant, failed to appear: *Held*, that the plaintiffs should have been non-suited; and that this error might have been corrected by appeal.

But the justice having jurisdiction of the subject matter and of the person of the defendant, the judgment could not be regarded as null when presented collaterally in a case of garnishment founded thereupon. (*Hill vs. Steele*, 17 *Ark.*, 440; *Alston ex parte, ib.* 580.)

Appeal from Izard Circuit Court.

ROSE and HEMPSTEAD, for appellants.

No appeal was taken on the principal judgment against King; and of course that was a valid and subsisting judgment, and record evidence of the debt, which could neither be enquired into or impeached in any collateral proceedings. *Borden vs. The State*, 6 *Eng.*, 519.

The judgment of the justice having been rendered by a competent court having jurisdiction, and on actual service, could neither be impeached by Shell, the garnishee, nor declared erroneous or void by the court in the proceeding on garnishment.

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

Shaver & Son having obtained a judgment against Eliza King, before a justice of the peace of Izard county, caused to be issued thereon a writ of garnishment against Shell, and upon his answer recovered judgment against him, and he appealed to the circuit court.

Upon a trial *de novo*, the court excluded from the jury the original judgment, on the ground that it was null and void; there was a verdict for Shell, motion for a new trial overruled, and Shaver & Son appealed to this court.

It appears that the original suit was founded upon an open account for $46.33, and that upon the day fixed for trial, the parties failing to appear, the justice rendered judgment, by default, against the defendant for the amount of the account.

The circuit judge held the judgment to be void, and excluded it from the jury, because the entries upon the docket of the justice failed to show that the plaintiffs proved their account upon the trial: in other words, that upon the failure of both parties to appear, the justice rendered judgment against the defendant, without evidence to establish the account.

The suit being founded upon an open account, on the failure of the plaintiffs to appear and prove their demand, on the day fixed for trial, the justice should have non-suited them. *Gould's Dig.*, *p.* 665, *sec.* 87; and it was an error for him to render judgment by default against the defendant, which she could have corrected by appeal; but failing to appeal, the judgment became final.

The justice having jurisdiction of the subject matter of the suit, and of the person of the defendant, by service of process, which affirmatively appears, the judgment could not be regarded as null and void, when presented to the circuit court collaterally,

on account of the error of the justice in rendering it without evidence. *Hill vs. Steel*, 17 *Ark.*, 440; *Alston ex parte*, *ib.*, 580.

The judgment of the court below must be reversed, and the cause remanded, with instructions to the court to grant the appellants a new trial.

PIKE ET AL. VS. UNDERHILL'S AD. ET. AL.

The defendant in chancery must prove all new matter set up in his answer which is not responsive to the bill.

Pike and Underhill entered into a contract by which they agreed to jointly enter swamp lands, Pike making the selections and Underhill furnishing the scrip, and charging Pike with one-half its value, to be paid whenever the lands were sold. Various entries having been made under this contract, Underhill died, and Pike brought a bill for specific performance against his administrator, widow and heirs and Burgett. The latter answered that one-half of a certain portion of the scrip furnished by Underhill belonged to himself, and therefore claimed to be the equitable owner of one-half of the lands so entered, or to have a lien on the lands for the value of so much of his scrip as was used by Underhill in making the entries: *Held*, that the burden of proof was upon Burgett.

Held, further, that in order to make good his claim, Burgett should have set it up in a cross-bill;

And that the allegations of the answer could not bar Pike's claim, because he was not charged with notice of Burgett's interest in the scrip used by Underhill.

It was improper for the court below in assigning the widow her dower to lessen its value by causing it to be scattered in inconsiderable bodies over a great many tracts of wild land.

Where it would be detrimental to the interest of the parties to assign the widow her dower specifically in certain of her husband's lands, the court will direct them to be sold, and that the interest on one-third of the proceeds of the sale of her husband's interest therein, shall be secured to her for life.

But as to other lands where no such inconvenience or difficulty exists, the court will direct that dower be specifically assigned out of the estate.

Appeal from Hempstead Circuit Court in Chancery.

Hon. LEN B. GREEN, Circuit Judge.

WATKINS, for Pike.

The decree assigning dower to the widow in each specific tract of land, is disastrous to her; and Pike is injured by it because it is an unwise restriction, a clog and incumbrance upon the advantageous sale of his share or interest in the land.

It is quite plain that Pike and Underhill entered into a land speculation in partnership. Their agreement constituted them partners *quoad* the proposed land investment. See on this subject, 3 *Kent's Com., p.* 38, *et seq., and notes and cases cited. Smiths' Ex'r. v. Garth*, 32 *Ala. Rep.*, 368, is a case in point to show that they were partners to all intents and purposes.

But whether Pike and Underhill contemplated a partnership in the buying and selling of swamp lands, is not material; because their agreement expressly provides that what Pike should owe to Underhill should be paid out of the proceeds of the sales: that contract became the law of their projected adventure, and any right or claim of either of them, or the representatives of either, must be held in subordination to it: It is clear, therefore, that neither Underhill nor his representatives can have any rights unless in specific performance of that agreement. The lands or a sufficiency of them are to be sold, and Underhill's estate re-imbursed out of that fund, and so far as the decree clogs or hinders that with a claim of dower in wild lands, it is erroneous and ought to be reversed, because in clear violation of the contract.

On the appeal of Burgett, it is sufficient to say, that if his answer were a bill in chancery, and every word of it were proven, or confessed to be true, it would have to be dismissed, because owing to the vagueness of the allegations, no decree could be rendered upon it; and if he had any claim to relief against either party, he should have presented a cross-bill. See *Lube's Eq. Plead., p.* 142, *et seq. and notes.*

JENNINGS and KNIGHT, for Burgett.

The answer of Burgett responds that his interest is as stated in the bill, that is: that he was jointly interested with Underhill in the funds with which the lands were purchased. His answer, then, must be taken as true. 2 *Story's Eq.*, *sec.* 1528; *Fenno vs. Sayre*, 3 *Ala.* 458.

Burgett being equally interested in the funds, that interest could not be divested by the misuse of the funds by his co-partner in the purchase of property for the benefit of himself and a stranger, whether he knew it to be partnership property or not —being joint property it could be transferred or used only for the benefit of the concern. *Story on Part.*, *p.* 220, *n.* 1; *Coll. on Part.* 279; 11 *S. & M.* 326; 24 *Miss.*, 172.

As this case was presented to the chancellor by the bill and answer—the one stating that Burgett asserted a claim and interest in the lands; the other admitting it and setting it up as prayed to be discovered, the court should have adjudicated such claim; but if a cross-bill was necessary, the court should have directed such bill to be filed in order to bring the rights of all the parties fully and properly before the court, before a final decree was rendered. *Daniels Ch. Pl. and Pr.*, *p.* 1745, *and cases there cited in a note.*

Mr. Justice ENGLISH delivered the opinion of the Court.

On the 28th of November, 1852, George W. Underhill, of Crittenden county, and Albert Pike, of Pulaski county, entered into a written contract, by which it was agreed between them, in substance, that they would jointly enter and locate such swamp and overflowed lands of the state, south of Red river, as Pike should select, and furnish the numbers thereof, to the quantity of at least 20,000 acres, and as much more as Underhill might be able to obtain scrip to enter.

That the lands should be selected and entered in certain townships mentioned, and in other townships contiguous thereto.

That the lands so selected should be entered by lists thereof

(furnished by Pike) and annexed to the agreement, signed by the parties.

That all the lands so located should be held and owned by the parties jointly and equally, as tenants in common.

That Underhill should furnish all the scrip, and make all the entries, for which Pike should be indebted to him one half of the value of such scrip, at the price at which entry of the lands should be allowed; and that the amount due by Pike should be paid out of the proceeds of sales of the lands, to be made after they were reclaimed, by assent of both parties. Pike being in no event bound to pay for said scrip any more or other sum than his half of any deficit caused by the sales of the lands falling short of paying the price of the scrip and interest thereon from the time of location.

The contract was signed and sealed by the parties.

In pursuance of this contract, Underhill entered a large amount of lands (over 50,000 acres,) with scrip, and balances due him from the state as a levee contractor, from selections made, and lists furnished by Pike; and through the exertions of Pike, final certificates of purchase were obtained for most of the lands, so entered, from the swamp land commissioners.

Underhill having died, Pike filed a bill in the Lafayette circuit court against his administrator, widow and heirs for specific performance of the contract.

Isaac Burgett was also made a defendant to the bill, upon an allegation that he claimed, as the complainant Pike had lately been informed, an interest in the lands as having been jointly interested, with Underhill, in the scrip and balances with which they were purchased, etc., etc.

All of the defendants answered, and on the final hearing, the bill was dismissed as to Burgett, a decree rendered in favor of the widow of Underhill, (who had intermarried with Wm. E. Jones,) for dower in the lands, and in favor of Pike for specific performance of the contract, etc.

Pike and Burgett appealed.

The subject of Burgett's answer is, that he had no personal knowledge of the contract between Pike and Underhill.

That about the year 1851, he and Underhill having entered into a partnership for that purpose, contracted to construct thirteen miles of levee on the Mississippi river, and were to be equally entitled to the profits thereof. That Underhill drew a large amount of scrip for levee work done by them under their contract, in which they were jointly interested, a portion of which he used in the entry of the lands described in the bill. He therefore claimed to be an equitable owner of one half of the lands so entered, or to have an equitable lien upon the lands for the value of so much of his scrip as was used by Underhill in making the entries.

He does not aver that Pike had any knowledge of the partnership between him and Underhill, or any notice that he was interested in the scrip used by Underhill in the entry of the lands.

The answer was filed, and replication entered thereto, on the 14th November, 1859, and the cause continued with leave for the parties to take depositions.

On the 22d November, 1861, the cause was called for final hearing, and the solicitor of Burgett filed a motion for continuance, on the ground that he desired to obtain the depositions of witnesses to prove that the lands in controversy were entered by Underhill with scrip, etc., which belonged equally to him and Burgett under their partnership levee contract, etc. The court overruled the motion, proceeded to a final hearing of the cause, and dismissed the bill as to Burgett, without prejudice to any claim that he might have to relief as against the repsentatives of Underhill, he having failed to assert such claim by cross-bill.

The matter of defence set up in the answer of Burgett was not responsive to the allegations of the bill, but new affirmative matter, and the burthen of proof was upon him; and he failed to produce upon the hearing depositions to sustain it.

Passing over the questions of diligence, had the court continued the cause to afford him further time to procure depositions

to prove the matter set up in the answer, it would have been of no avail to him, because it is manifest that any equitable claim that he had upon the lands as against Underhill's representatives should have been asserted by a cross-bill, which he failed to file, or to offer to file. And had he been afforded any time that he might have desired to prove every allegation of the answer, it would have been no bar to the relief sought by Pike, as to his interest in the lands, because there was no averment in the answer that Pike had any notice that Burgett had any interest in the scrip used by Underhill in the entry of the lands, or that there was any partnership existing between Burgett and Underhill.

So much of the decree of the court below, therefore, as dismissed the bill as to Burgett must be affirmed.

Pike complains of so much of the decree as gives to the widow of Underhill dower in each specific tract of land.

The court decreed to her one-sixth of all the lands, that being equal to one-third of her deceased husband's half of the lands, and appointed commissioners to lay off her dower accordingly; and decreed to Pike three-fifths of the remainder of the lands, that being equal to one-half of the whole of the lands, charged with the payment to Underhill's administrator of one half of the value of the scrip, etc., expended by him in the entry of the lands; and decreed to Underhill's heirs the remaining two-fifths of the lands with the remainder in the sixth of the lands to be set apart to the widow as her dower interest.

The court appointed a trustee to make sales of so much of the lands as might be necessary to pay the debt due from Pike to Underhill, with directions to the trustee to pay the proceeds of the sales to the administrator of Underhill, and that he credit Pike with three-fifths thereof, until his indebtedness to Underhill should be extinguished, and that the remaining lands be partitioned between Pike and Underhill's heirs in the proportions above indicated.

The decree in favor of the widow was unfavorable to her, and prejudicial to the interests of Pike and the heirs of Underhill.

Her dower, if assigned under the decree would be scattered in inconsiderable bodies, over a great many tracts of wild lands, many of which are the smaller subdivisions of sections, and the value of her dower, by such mode of allotment, would be necessarily impaired.

It would, also, constitute an inconvenient incumbrance upon such of the lands as by the terms of the contract between her deceased husband and Pike, and by the provisions of the decree for specific performance, are to be sold, as well as upon the lands to be partitioned between Pike and her children, after the extinguishment of the debt due from Pike.

We think the more equitable mode of giving her dower will be to direct that one sixth of the proceeds of the lands sold by the trustee be put at interest, upon safe securities, under the supervision of the court, and the interest paid to her during her life, and the principal turned over, after her death, to Underhill's heirs, and that the lands remaining after the making of such sales as may be required to extinguish Pike's debt be partitioned equally between him and Underhill's heirs: and that she be assigned for dower one-third of the lands allotted to the heirs, in a manner most beneficial to her and least incumbering to their lands; and that the remainder of their lands and all of Pike's be disencumbered of her dower.

So much of the decree as relates to her dower must, therefore, be reformed, by a decree entered here, in accordance with this opinion, and certified to the court below to be executed.

So much of the decree as is not reversed, or modified, by the decree to be entered here, must be affirmed.

It may be remarked that it would have been more regular for the widow of Underhill to have made her answer a cross-bill, in order to have her dower rights, as between her and the heirs of Underhill settled, but they did not appeal, and this irregularity in practice is not the subject of complaint on the appeal of Pike.

DANIEL VS. ROPER.

The bill in this case charges that the defendant reduced the plaintiff to slavery, and that she was compelled to bring a suit whereby, after a protracted litigation, she regained her freedom; that when the defendant reduced the plaintiff to servitude he took from her certain personal property; that she brought an action of trover therefor, soon after the judgment was rendered whereby she was finally liberated from slavery: that the defendant offers to plead the statute of limitation at law, from which she prays that he may be injoined: *Held*, that it appearing that the plaintiff recovered her liberty on the ground that she belonged to the white race, the claim of the defendant to hold her in servitude is no excuse to the plaintiff for not bringing her suit at law within the period of limitation.

The judgment in the suit for freedom having decided the fact that the plaintiff is a white woman, it follows that she was never under any disability to sue by reason of the claim preferred by defendant that she was his slave.

Neither her bondage before the institution of the action of trover, nor the restraint by being hired out under the direction of the court pending her suit for freedom, prevented her from bringing her action of trover for damages sustained by reason of the unlawful conversion of her property.

Nor is the alleged fact that she was advised by her counsel not to bring the action of trover until her suit for freedom should be decided, such an excuse for her failure to sue as will displace the statute bar.

Appeal from Ashley Circuit Court in Chancery.

JOHNSTON and HUTCHINSON for appellant.

The plea of the statute of limitations is admissible in all cases, both in law and equity, where the facts support it; and will not be disallowed on account of any supposed odiousness to it in the particular case.

During the pendency of the appellee's suit for freedom, she was a free woman, and might at any time have brought her suit in trover; and as by her laches she has permitted the statute bar to become complete, she must bear the loss.

WADDELL, and GARLAND & RANDOLPH, *contra.*

It is well settled that a slave cannot sue except for freedom. 9 *Lou. Rep.*, 156; 2 *Swan's Tenn. Rep.*, 149. And during the pendency of the appellee's suit for freedom, she was treated as a slave, was to all intents and purposes a slave—was hired out—had no civil rights, and therefore could not sue for the infringement of them. Then had she sued, her suit would have been dismissed. 2 *Swan's Rep.*, 159.

As the statute of three years had run before she could commence her suit, to permit Daniel to have the benefit of the statute would be unjust, and a taking advantage of his own wrong; and in such cases equity will interfere. *Eden on Injunctions, by Waterman*, 14; *Story's Eq.*, *secs.* 903–1521; *Drewry on Inj.*, 320.

Mr. Justice FAIRCHILD delivered the opinion of the Court.

By bill preferred on the chancery side of the Ashley circuit court, Abby Roper represented that, about January, 1856, Daniel, the defendant, took her and her children into custody, claiming them as his slaves; that to obtain relief from the illegal bondage extended over them, they instituted legal proceedings under the statute of this state allowing persons held in slavery to sue for their freedom, returnable to the April term, 1856, of the circuit court of Ashley county, that the proceedings were protracted by appeals to the supreme court, change of venue or mis-trial, till the January term, 1861, of the supreme court, when the judgment of the Drew circuit court, liberating the plaintiff and her children, was affirmed, and they thus finally obtained the freedom to which they were entitled, and of which they were deprived by the defendant. The bill also charges that when the defendant reduced her and her children to slavery, he took from her two mares and a colt, a yoke of oxen and a cart, which were property of her own acquisition, and to which the defendant had no title, and made no claim of any, only that as acquired by her, and she being a slave, it belonged to him; that she sued for the property at the first court after she could do so after the final

decision of the supreme court; that this suit, an action of trover, against the defendant, was then pending in the circuit court of Ashley county; and that the defendant, after having kept her in slavery during the period of litigation, has the hardihood to plead the statute of limitations of three years to her action; that she is advised the case does not present itself within any exception of the statute, but from the defense being against equity, she asks that he be enjoined from interposing the plea.

The bill was presented to the court. The judge, from having advised the plaintiff in relation to the action of trover mentioned in the bill, declined to preside in the case, and under the provisions of the constitution of 1861, a special judge was selected from among the attorneys present, who qualified and took jurisdiction of the case. No demurrer or motion was filed to the bill, but it was immediately taken np by the court; and by the consent of the defendant, as we must suppose, as the order of the court states that argument of counsel on behalf of both parties was heard by the court. Notwitstanding the informality of the proceedings, we shall consider the case as if it were regularly set down for hearing upon bill and answer, or upon demurrer to the bill, as the parties evidently considered that the refusal or grant of injunction as to the use of the plea of limitations in the action of trover, was the only point in the case, and approached it without the formality of technical pleadings and orders. With the same promptness that characterized the whole proceeding, the defendant, when the court awarded the injunction, subject to the bond required by statute being given, took his preliminary order as a decree disposing of the whole of the case, and without showing a disposition to wait further, or wait for the bond to be given, elected to consider it as a final decree, and prayed an appeal to this court. We shall make no objection to the consideration of the case, on account of the manner in which it is presented to the court, but shall proceed to the determination of the only matter involved in it; that is, whether the claim made by the defendant over the plaintiff and her children as his slaves, is an excuse to

the plaintiff for not bringing her suit at law for the property taken from her by the defendant, within three years from the time of its taking or conversion.

Although the bill does not state whether the plaintiff is a white woman, of Indian blood, or of pure or mixed African descent, it alleges she is the person whose case, under the name of Abby Guy, was twice before this court, and at each time she was one of the appellees, and Daniel, the present defendant, was the appellant. The case is reported in 19 *Ark.*, 137, where the evidence adduced upon the trial in Ashley county is set out at large, and in 23 *Ark.*, 50. In the last case the opinion of the court mentions the appellees as having the appearance of belonging to the white race, and of having for many years acted and been treated as a free person. This is a statement of the effect of the testimony as given on the trial in Drew county, while the detailed testimony of the first trial given in the report of the case in 19 *Ark.*, shows that Abby Guy and her children claimed to be free persons solely from belonging to the white race.

Then taking the plaintiff to be what, throughout her protracted litigation with the defendant, she claimed to be, what the juries of two counties found her to be, a white woman and a free person, she was never under any disability to sue from the time the defendant took, and converted to his own use, the property specified in the bill. For the mere claim that a white, or a free person is a slave, a resort to our statutory mode of procedure by the person claimed to be a slave, the bondage before suit and the restraint by being hired out under the direction of the court, while the suit is going on, do not make a person a slave, as the case of this plaintiff and her children abundantly proves.

Nor did the asserted claim of Daniel over Abby Guy, prevent her from beginning her action of trover, or other appropriate action, for the recovery of the property taken from her by Daniel, or for its value, as soon as he took it from her by force, or when he converted it to his own use. Because she was wrongfully subjected to bondage, and obliged to sue as a pauper to be freed

from it, she was not deprived of the ownership of property, or of her right to sue for its conversion. If that were the law, Daniel, or any evil disposed person might claim the whitest, the purest blooded and richest man of the land as his slave, reduce him to a state of slavery, take all his property from him, hold it while the litigation about the right to freedom was proceeding, and so long that the law of limitation would give him the property against any legal claim that the rightful owner could make after the courts had pronounced upon his right to freedom.

But even without adverting to the Abby Guy cases, upon the case made in the bill by Abby Roper, the same conclusion must be reached. The plaintiff does not state whether she is a white or a black woman, or of mixed blood, but she does charge that the defendant wrongfully extended a claim over her and held her in slavery, and that he took from her property of her own acquisition. She must, then, have been acting under the claim of being a free person, must have been recognized and treated as such by others; for otherwise she could not have accumulated horses and oxen. No free person, white or black, can be deprived of the right to appeal to the courts for the restoration, or for the value of his property, because it may be taken from him by violence, and because the wrong doer adds wrong to wrong by falsely claiming the owner of the property to be his slave. The injured person may, at the same time, sue for his property and sue for his freedom, if his adversary have the power to put him under restraint or hold him unlawfully. Commonly, those that sue for freedom are of the African race, in whole or in part, have been held in slavery, and claim their freedom from their ancestors or themselves having been kidnapped, or from being entitled to emancipation by the acts of former owners. In such cases, the claimants to freedom remain in a state of slavery, can have no property to call their own, have not the legal standing to enable them to bring any suit except to claim the right to freedom. But Abby Guy's case was far different from such cases. She must be likened to persons in the enjoyment of freedom, not to those in

the condition of slavery, though claiming freedom and perhaps entitled to it. She could have sued Daniel for her property when she and her children sued for themselves. If she had been able to have withstood Daniel without the assistance afforded by the act under which she sued, she, like any other white person, restrained of liberty, could have sued Daniel in trespass for false imprisonment without alleging that she was free but held in slavery, and could have recovered damages according to her proof, and according to the law administered between free persons in like controversies: always supposing juries to find her condition to be as found by the two juries who affirmed her right to freedom.

The plaintiff alleged in her bill that she was anxious to have sued Daniel for her property, while her suit for freedom was pending, but that her counsel would not bring the suit, on the ground that she had no right to sue till her freedom should be won. If this be so, it is not the first time that this court has been obliged to differ from opinions that have been given by counsel upon the subject of litigation; but mistaken advice, though injurious to the interests of the client, may not cause the courts to swerve from the correct administration of the law.

Holding that the bill has made no case to avoid the plea of limitations apprehended in the plaintiff's action of trover, we reverse the decree without expressing any opinion upon the question mainly argued by her counsel that it is within the province of a court of equity to prevent a defendant in a suit at law from relying upon the plea of limitations. The case must be remanded to the circuit court of Ashley county setting in chancery with instructions to set aside the order for an injunction and to dismiss the bill.

SCHAER VS. GLISTON.

In order to make an improvement on the lands of the state available, there must have been no prior improvement thereupon.

It does not belong to the plaintiff to object to the smallness of defendant's improvement when his own does not largely partake of the qualities of a substantial improvement.

When men fully acquainted with the qualities of objects for which they search, and with the ground where the search is made, do not find them, their testimony is not subject to the suspicion that attaches to negative testimony concerning facts to which their attention has not been directed.

To disturb a legal title acquired under our swamp land laws, the plaintiff must show a prior right and a superior equity. (*McIvor vs. Williams*, 23 *Ark.*; *Wright vs. Green*, *ib.*)

The plaintiff must recover on the strength of his own case, and not on the weakness of that of the defendant.

If the adverse claims of persons having improvements on the same land were not known to each other, the success of one, whether the most or the least deserving, did not clothe it with a trust for the benefit of the losing claim. (*Paty vs. Harrel*, 23 *Ark.*)

Where the equity is doubtful the legal title must prevail. (*Paty vs. Harrell, ubi sup.; Woodruff vs. Core*, 23 *Ark.*)

Appeal from Pulaski Chancery Court.

Hon. U. M. ROSE, Chancellor.

JORDAN, and WILLIAMS & MARTIN, for appellant.

Two points are submitted to the consideration of the court for the reversal of the decree herein:

1st. That the improvement upon which appellee bases his right of pre-emtion was not on the quarter section in controversy.

2d. The accrual of the right of appellant to a pre-emption on the land, is prior in date, and therefore paramount to that of appellee. And no fraud, dishonesty or unfairness being shown on the part of Schaer in selecting the land, making his improve-

ment and obtaining his certificate of purchase, he should not be disturbed in his legal title to the land.

S. H. HEMPSTEAD and J. T. TRIGG, for the appellee, contended that the evidence clearly shows that the improvement of Woodard, from whom appellee purchased, was prior in date to the improvement made by appellant: that the fact that the improvement was not seen by the witnesses of the appellant is not proof of its non-existence; that the improvement of Gliston was a *bona fide*, substantial one—he living on, and cultivating the land; whereas that of appellant could not properly be called an improvement, and should not have been considered as such.

Mr. Justice FAIRCHILD delivered the opinion of the court.

In the spring of 1857, Schaer attempted to make an improvement upon the north-west quarter of section twenty-seven, in township two south, of range ten west, but was afterwards told by Hardy, a surveyor, and who had selected the land for the state, as part of the swamp land grant, that his improvement was not on this quarter section. Hardy was then employed by Schaer to show the land, and to direct where an improvement should be made, and in August, 1857, he, with three other persons, proceeded to the work of running out the land and making the improvement. In tracing the lines, Hardy was the surveyor, his son and another person were the chain-bearers, and Schaer's father was present representing the interest of the son. The lines were ascertained by aid of the compass and chain; but to make the intended improvement available as a pre-emption right, there must have been no prior improvement upon the land. To ascertain this, and also to see the quality of the land, the four persons engaged for Schaer made what Hardy calls a pretty thorough examination of the land, and could not find upon it any improvement.

The claim of Gliston is also supported by the testimony of two witnesses, who prove that, in November, 1857, he bought an improvement which had been made upon the same quarter section

before August, 1857, when Schear's improvement was made. These witnesses, Hester and McCall, both testify that the improvement which Gliston bought of Woodard, and which he afterwards much extended, is on the piece of land mentioned; and they state this from actual knowledge of the lines, from having been often upon the land, and from being familiar with the region of country where the land lies. Woodard's improvement made in the latter part of 1856, consisted of between one and two acres of deadened timber, with some saplings cut, as shown by Hester—as testified to by McCall, of some acre and a-half or two acres deadened. This being the improvement which is claimed to be prior to that of Schaer, is the one taken into consideration by us, passing by the subsequent and enlarged and actual improvements that were made in the fall of 1857, and in the succeeding winter by Woodard and by Gliston. The particular point to which our attention is directed, being, which was the first improvement upon the land in controversy, sufficient to uphold a pre-emption right.

The testimony adduced on the part of Gliston when taken by itself, is abundantly sufficient to show that an improvement was made, or begun, by Woodard, on the piece of land in question in the latter part of 1856, if an acre or two acres of deadened timber be such improvement. And whatever might be our opinion upon this, it does not belong to Schaer to object to the sufficiency of Woodard's improvement, when his own does not largely partake of the qualities of a substantial improvement.

But although Gliston's case is fully made out by his own witnesses, that of Schaer is also well established in relation to there being no improvement on the land in August, 1857, that could be discovered by the four men employed by him to ascertain this particular fact. For it was known to Hardy that it was necessary not only that the improvement should be upon the desired land, but that there should be no other improvement thereon, as appears by his deposition. It is also evident that the improvement proposed to be made for Schaer, was not intended to conflict with any

other; that is, in the words of Hardy, if any improvement had been found on the quarter section, none would have been made on it for Schaer. We cannot see how four men, intent upon finding an improvement upon the land just surveyed by them, on going all over the land, in open woods, could have overlooked such an improvement as Woodward's is shown to have been by his witnesses, it being equal, in amount of labor, to that by which they proposed to secure the land for Schaer, and equal to another made by Hardy which answered its purpose in enabling him to secure the land. When men fully acquainted with the usual qualities of objects for which they search, and with the ground where the search is made, do not find the improvements they are looking for, their testimony is not subject to the suspicion that attaches to negative testimony concerning facts to which the attention may not have been directed, or which may escape notice in the multitude of distracting incidents. Such testimony, confronted by affirmative testimony of the existence of facts that are the subject of inquiry, is far different from the testimony of the two Hardys in this case. Notwithstanding the positiveness with which Hester and McCall depose that Woodard's improvement was on the north-west quarter of section twenty-seven, in township two south of range ten west, we can conceive of their being mistaken in the locality, as well as we could conclude that Woodard's improvement eluded the search of the two Hardys, of Brown and of Schaer, the father of the appellant. Or, observing the different estimates of the amount of the same improvement made by unimpeached witnesses upon opposing sides of a case, as is shown by what is said about Schaer's improvement, we might infer that Woodard's improvement, if upon the land mentioned, would be found to be less than set forth by Hester and McCall, and so not found in August, 1857, by Schaer's improvement hunters. In whichever point of view the case is regarded, or in any way that we can look at it, it is painfully embarrassed by conflicting testimony.

We cannot reconcile the testimony by holding that the Hardys

are mistaken in their identification of the land. For, conceding to Hester and McCall, the advantage of long acquaintance with the land and a habit of tracing lines, their testimony cannot be stronger, nor, we think, as strong to fix the location of the land as that of the two Hardys. George W. Hardy had selected the land for the state, he surveyed its exterior and interior lines, and he had every inducement, in consideration of the former mistake of the chain-carriers, to run out the land for Schaer with exactness. James Hardy, also, assisted his father in surveying the land when it was selected as swamp land, looking at it with a view to its appropriation by himself: he had also traced the lines when helping Brodie to find his lands, so that with the survey made in August, 1857, he had participated in three surveys of the land.

And even if the testimony should be reconciled by supposing that Woodard's improvement was on the land in August, 1857, if it could not be found by such search as was made over the land for Schaer, the case would clearly fall within the principle of the cases of *McIvor vs. Williams*, and *Wright vs. Green*, decided at the term of this court, held in December, 1862; that principle being, that to disturb a legal title acquired under our swamp land laws, the plaintiff must show a prior right and a superior equity. And this is only an application of the maxim recognized in all legal proceedings, that a plaintiff must recover upon the strength of his own case, not upon the weakness of that of defendant.

Gliston's purchase of Woodard's improvement and ample extension of it by his own labor, occurring after the improvement of Schaer was made, which was converted into a pre-emption right by being so regarded by the state land agent, and which has been merged into the legal title, were subsequent claims, and gave no strength to the improvement which Woodard made before August, 1857, and which might be existing at that time.

The evidence also plainly shows that Schaer did not intend to defraud Gliston or any one, as if there had been any improvement found on the land, it would not have been subjected to any claim by Schaer, whence the claim of Gliston could not be con-

sidered as an equitable right. If the two claims were not known to these respective claimants, they were simply statutory claims; and the success of one, whether the most or the least deserving, did not clothe it with a trust for the benefit of the losing claim. *Paty vs. Harrell, Dec.* 7, 1862. Nor can Gliston assert that the affidavit of Schaer before the land agent was so inconsistent with his improvement, then become substantial, as to make Schaer's claim fraudulent any more than Schaer can retort the same charge upon Gliston. *Ib.*

Any possible effort which could be used to make the testimony agree, would result with us, as it did with the chancellor, in a hesitating opinion; yet, the effect of it in this court, unlike its influence with the chancellor in this case, is held insufficient to overcome the better condition of the defendant in a doubtful case, or to divest a title fairly obtained and with the sanction of our system of swamp land laws. *Paty vs. Harrell*, and *Woodruff vs. Core*, 23 *Ark.*, 346.

We think the decree of the court below should have been for the defendant: we reverse it, and decree here a dismissal of the plaintiff's bill.

CHRISTIAN ET AL. VS. ASHLEY COUNTY.

24 142
58 597

24 142
c90 15
d90 197

The county court has jurisdiction to render judgment against a delinquent collector or his sureties, for the county revenue which he has collected and failed to pay over as required by law. (*Gould's Dig., ch.* 147, *secs.* 37–45; *Lawson vs. Pulaski county*, 3 *Ark.; Goree vs. State*, 22 *ib.*, 235; *Jones vs. State*, 14 *ib.*, 172.)

A statement made by the clerk, in the transcript sent to this court, that a notice ordered by the court had been issued, but had been mislaid, is no evidence of that fact.

No notice to the delinquent collector of the preliminary adjustment of his accounts is necessary, but he must have notice before final judgment. (*Trice vs. Crittenden county*, 2 *Eng.*, 162; *Carnall vs. Crawford county*, 6 *ib.*, 623.)

A *scire facias* issued against the collector and his sureties, after a preliminary adjustment of his accounts, commanding them to appear and show cause why judgment should not be rendered against them for the moneys due the county, etc., and duly served before final judgment, is a sufficient notice.

The securities in a collector's bond are liable for the amonnt of the penalties imposed upon him for his delinquencies.

The county court properly imposed the penalty of twenty-five per centum upon the amount of revenue found to be due, and fifty per centum per annum thereon. (*Carnall vs. Crawford county*, 6 *Eng.*, 625.)

The funds arising from county licenses, fines and forfeitures, constitute a part of the revenue of the county; the collector is required to settle with the county court therefor; and on his failure to do so, his securities are liable for the same. (*Lawson vs. Pulaski county, ubi sup.*)

The sureties in a collector's bond given for the year 1859, are not liable for moneys collected for 1860.

It appearing in this case that a part of the moneys had been collected for 1859 and and a part for 1860, and that the collector had paid over an amount exceeding the sum collected for the latter year, which amount was duly credited to him in rendering the judgment: it does not affirmatively appear that the collector and his sureties were charged in the final judgment, with any revenues collected after the year 1859, which was the period of responsibility of the sureties.

There being no evidence as to whether the sums paid by the collector were appropriated in the adjustment of the accounts, to the payment of the amount due for the year 1860, the court must presume in favor of the correctness of the judgment of the county court. (*Lawson, ex parte, ubi, sup.*)

In entering the final judgment, the county court did not credit the collector with the two last payments, but directed them to be credited on the execution. *Held*, That it would have been proper to have given credit for them in entering the judgment; but the direction that they should be credited on the execution was in effect the same, the penalty only being upon the remainder of the judgment after the deduction of these payments.

The sureties were not released by the failure of the county court to compel the collector to settle at the time required by statute. (*Christian, ex parte*, 23 *Ark.*, 641.)

The transcript showing that the proceedings were had "in the county court of the county of Ashley, the Hon. R. T. Harris, judge, etc., presiding, assisted by Esq's. John Hill and Samuel H. Moore," it will be presumed that the two last named persons were the associate justices.

Appeal from Ashley Circuit Court.

Hon. JOHN C. MURRAY Circuit Judge.

GARLAND & RANDOLPH, and HUTCHINSON, for appellants.

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

By a summary proceeding in the county court of Ashley county, a judgment was rendered against James Norris, as a delinquent collector, and Joseph D. Christian and Milton C. Comer, sureties in his official bond, for balance of revenue ascertained to be due from him to the county, with the penalties prescribed by the statute for his defalcations. Christian and Comer removed the proceedings into the circuit court, by certiorari, where the judgment of the county court was affirmed, and they appealed to this court.

The counsel for the appellants have made and discussed nine objections to the regularity of the proceedings and judgment of the county court.

1. The first objection goes to the root of the whole matter. It is that the county court had no jurisdiction to render judgment against the delinquent collector, or his securities, for the county revenue which he had collected, and failed to pay over to the county treasurer, as required by law.

The argument is, that though the constitution confers jurisdiction upon the county court "in all matters relating to county taxes," yet when the collector has collected the taxes, and put the money in his pocket, instead of paying it over to the treasurer, it loses its character as *taxes*, and the county court ceases to have any jurisdiction over it as such, and from thenceforward it is to be regarded simply as a money demand due from the collector to the county, to be recovered by the appropriate action in the circuit court.

If this argument be sound, the statute which authorizes the county court to proceed summarily to ascertain the amount of

revenue due from a delinquent collector, and to render judgment against him and his securities therefor, and which has stood upon the statute book, and been administered for nearly a quarter of a century, (*Gould's Dig.*, 147, *secs.* 37 *to* 45) was a grave infraction of the constitution: and this court has fallen into, and persisted in an unfortunate error, in maintaining the validity of the statute, and asserting the jurisdiction of the county court, in a series of decisions, commencing with *Lawson vs. Pulaski county*, 3 *Ark.*, 1, and coming down to *Goree et al. vs. State, use, etc.*, 22 *Ark.*, 236.

In *Jones et al. vs. the State, use, etc.*, 14 *Ark.*, 172, this court held that an action could not be maintained upon the bond of a delinquent collector, in the circuit court, until the county court had adjusted his accounts, and proceeded to render judgment against him for the amount due, etc.

The court, in that case, said: "The county court is the forum where the liability of the collector, upon which that of his securities depends, is to be ascertained and evidenced by its records. An adjudication in that forum is conclusive evidence against the securities, as well as the collector, in an action upon his bond in the circuit court. There can be no liability upon the collector's bond without such adjudication, unless the circuit court can, in an action upon the bond, draw to itself, in a collateral way, a jurisdiction to investigate and settle the accouts of delinquent officers for the collection of revenne, which appropriately belongs to the county court."

2. The second objection is that Norris had no notice of the adjustment of his accounts by the county court, and that the adjustment rendered against him thereon was void, etc.

At the July term, 1860, the county court made an order that Norris be notified to appear at the next term and settle his accounts, and pay over all revenue in his hands, or that the court would proceed to make settlement thereof, etc.

The clerk states, in a note, that notice was issued in accordance with this order, but that it had been mislaid, and hence could

not be copied in the transcript, etc. But this note of the clerk amounts to nothing, and it may be conceded that no notice was served.

At the October term, 1860, the court proceeded to adjust his accounts, (the record entry reciting that he had been required at the preceding term to make settlement and failed to do so,) and ascertain and state the amount of revenue due from him to the county: and directed that he be allowed no commissions: and that, if he failed to pay over the amount found to be due within ten days, etc., the clerk should charge him with twenty-five per cent. thereon, and upon the motion of the county treasurer, issue a *scire facias* against him and his securities to appear at the next term, and show cause why judgment should not be rendered against them for the moneys due the county, etc. The *scire facias* was accordingly issued, and served upon the parties in due time.

Up to this time no judgment had been rendered against the collector. The adjustment of his accounts was a preliminary proceeding, as was the direction to the clerk to charge him with the twenty-five per cent. upon the amount found due, upon his failure to pay the money over, etc. The account and the penalty, as well as the matter of commissions, remained under the control of the court, and it had the power, at the next term, on the return of the *scire facias*, upon a showing of the delinquent collector, or his securities, to re-adjust the account, remit the penalties, etc.

In *Trice vs. Crittenden county*, 2 *Eng. R.*, 162, it was decided that no notice to the delinquent collector of the preliminary adjustment of his accounts, etc., was necessary; but that before final judgement could be rendered, he must have notice, etc., and this decision was approved in *Carnall vs. Crawford county*, 6 *Eng.*, 623.

In this case, before any judgment was rendered against the delinquent collector or his securities, they were duly served with the *scire facias*, and allowed full opportunity at the return term, in January, 1861, to appear and make defence.

3. The *third* objection is that the judgment against the sureties for the penalties to which the statute subjects the delinquent collector, is erroneous. In other words, that they are only liable, under the condition of the collector's bond, for the amount of revenue which is ascertained to be due from him to the county, and not for the penalties imposed upon him for his defalcations—that he alone is liable for them.

The condition of the collector's bond is "for the faithful performance of the duties of his office, and for the well and truly paying over all moneys collected by him by virtue of his office." *Dig., ch.* 148, *sec.* 52.

It is true that the condition of the bond does not recite that either the collector or his sureties shall be liable for any penalties for his failure to pay over moneys collected by him, but the parties must be understood to contract in reference to the law in force at the time the bond is executed.

The law clearly imposes penalties upon the delinquent collector, and we think it was the intention of the legislature to make the sureties liable for the amount of penalties imposed upon him for his delinquencies. See *Gould's Dig., ch.* 147, *secs.* 37 *to* 45.

The policy of the statute in prescribing these penalties was not to enhance the revenue by collecting them of the officer, but to hold them over him as an inducement to be prompt and vigilant in paying over revenue collected by him. If he be insolvent, he may have no personal dread of the penalties, yet the ordinary feelings of a just minded man, would prompt him to pay over the revenue at the time required by law, to save his sureties from incurring responsibility for severe penalties, if by law they are subject to such responsibility. If the sureties were not liable for these penalties, the motive for them to see that the collector was prompt in paying over the revenue would be lessened: and when the amount due from him was ascertained, in case of his insolvency, they might avail themselves of every means of delaying payment, if by such delay they incurred no penalties. It is of the utmost importance to the public that the revenue should be

promptly paid over by the collector, and the policy of the legislature in prescribing the penalties was to promote such promptness; and we think this policy would be in a measure defeated, if the statute were so construed as to hold that the sureties were not liable to pay the penalties for their defaulting principal.

4. The *fourth* objection is that the county court rendered judgment for the amount of revenue found to be due from Norris, with the penalty of twenty-five per cent. added thereto, and fifty per cent. per annum thereon—thus imposing penalty upon penalty.

This was in accordance with the statute (*sec.* 41) as held in *Carnall vs. Crawford county*, 6 *Eng.*, 625.

5. The *fifth* objection is that Norris was charged, as collector, with the amount of county licenses, fines and forfeitures collected by him.

The argument is, that he was liable as sheriff, and not as collector, for moneys collected from such sources.

The funds collected from county licenses, fines and forfeitures, constitute part of the revenue of the county, the collector is required to settle with the county court therefor, as such, and on failure to do so, he and his sureties are liable to be proceeded against, under the statute which we have been considering, whatever may be the liability, for fines and forfeitures collected by him, upon his bond as sheriff. See *Gould's Dig.*, *ch.* 148, *secs.* 69 *to* 70, *etc.; Lawson vs. Pulaski county*, *ubi sup.*

6. The sixth objection is that the county court included in the judgment rendered against the appellants, the amount of county licenses, fines and forfeitures collected by Norris in the year 1860, when it only appears from the record that they were securities on his official bond, as collector, for the year 1859.

The record entry of the adjustment of the accounts of Norris, made at the October term, 1860, is in substance as follows: "The court has ascertained the balance due the county to amount to the sum of $7,754.07, composed of the following items, to wit: $9,116.34, amount due on tax book for the year 1859, and $1,698.08 for county licenses, fines and forfeitures, due up to June

1, 1860, and $288 for county licenses, fines and forfeitures due from June 1, 1860, to October term of this court, 1860, upon which he has paid to the county treasurer the sum of $3,348.30, leaving balance due as above of $7,754.07."

From this entry it appears that the two sums with which Norris was charged for licenses, fines and forfeitures, amounted to $1,986.03, and it may be taken for granted that both sums were collected by him after the expiration of the time for which the appellants were responsible for his official conduct, as sureties on his official bond for the year 1859.

It appears that he had paid over before the settlement the sum of $3,348.30. How this payment was appropriated does not appear. It is certainly not shown that it was appropriated exclusively to the amount due upon the tax book for 1859, leaving the amount due for licenses, fines and forfeitures wholly unpaid. But for another record entry, to be noticed presently, it might be presumed for the purpose of sustaining the final judgment of the county court in the matter, that the amount due for licenses, fines and forfeitures in 1860, was entirely extinguished by the payment.

But by a record entry made at the January term, 1861, to which term the *scire facias* was made returnable, and at which the final judgment was rendered, it is shown that Norris appeared, and filed two receipts for additional payments made to the county treasurer, dated 30th January, 1861: one for $2,000.00, on account of revenues of the county for the year 1859, and the other for $500.00 on account of revenues collected by him for the year 1860, with which the court directed him to be credited.

The judgment of the county court can only be quashed in this proceeding for errors to the prejudice of the appellants affirmatively appearing upon the face of the record. It certainly does not affirmatively appear that they were charged in the final judgment with any revenues collected by Norris for the year 1860, after the expiration of the period for which they became responsible for his official conduct. They may or may not have been, and the matter being left to presumption, we must presume in

favor of the correctness of the judgment of the county court. *Lawson vs. Pulaski county, ubi. sup.*

Moreover, the record entry of the final judgment states that it appeared to the court that Christian and Comer were the sureties of Norris on his bond as collector for the period in which his delinquency occurred, etc.

The appellants had due notice to appear before the county court and make defence before final judgment. Had they appeared and caused it to be shown of record that they were only the sureties of Norris for the year 1859, and not for 1860, and that in the adjustment of his accounts, he had been charged with revenues for 1860, which were not discharged by the payments made by him, if the county court had refused to correct the error, the judgment might have been subject to quashal, in this proceeding; but they failed to avail themselves of the opportunity thus afforded them to make defence, and if the county court committed an error to their prejudice which does not affirmatively appear of record, they must abide the consequences of their own neglect.

7. The *seventh* objection is that in entering the final judgment the county court did not credit Norris with the amount of the last two payments made by him, but directed the amount to be credited on the execution.

The payments having been made before final judgment, it would have been proper to have given credit for them in entering the judgment, but the direction of the court that the amount of the payments be endorsed, as a credit on the execution is in effect the same; for in collecting the debt, the sheriff will credit the payments upon the amount of the judgment, as of the day on which they were made, and calculate the fifty per cent. per annum penalty upon the remainder, and not upon the entire amount of the judgment, as supposed by the counsel for the appellants.

8. The *eighth* objection, that the sureties of Norris were released by the failure of the county court to compel him to settle at the

time required by the statute, was decided against the appellants by this court in *Christian et al. ex parte*, 23 *Ark.*, 641.

9. The *ninth* and last objection is that the record fails to show that the proceedings were had before a competent county court.

The transcript of the record before us shows that the "proceedings were had before and in the county court of the county of Ashley, the Hon. P. T. Harris judge, etc., presiding, assisted by Esq's., John Hill and Samuel H. Moore."

The argument is that the title *esquire* is not unfrequently applied to officers of all grades, to attorneys at law, and is bestowed upon persons at pleasure as an expression of respect; and that it may have been used in some such sense in the instance in question, and not to indicate that the persons who sat in the county court with, and assisted the presiding judge to hold the court, were justices of the peace.

But looking at the expression in the connection in which it is used in the record entry, we think it will hardly be a violent presumption to conclude that it was meant to indicate that the persons to whom it was applied were the *associate* justices.

The judgment of the circuit court must be affirmed.

LORING ET AL. VS. FLORA.

Where there is no registered contract, the mechanic's lien commences at the time that he files his sworn account in the clerk's office, and causes an abstract thereof to be entered in the judgment docket. (*Gould's Dig.*, *ch.* 112, *secs.* 4–26 *Hicks vs. Branton*, 21 *Ark.*, 188.)

If before the lien is thus fixed a third person obtains a valid title to the property by some legal mode of conveyance, and the mechanic has constructive notice thereof by registration of the conveyance, or actual notice, his lien is defeated.

But the pleas failing to state that the defendant had acquired title by any deed or conveyance whatever, they were bad on demurrer.

A mechanic's lien is only allowed where the demand exceeds one hundred dollars.

A plea alleging that the plaintiff's demand did not exceed one hundred dollars, need not be sworn to.

And in any case the defect that a plea is not sworn to, should be taken advantage of by motion to strike out, and not by demurrer.

One of the defendants in a proceeding to foreclose a mechanic's lien, having been made a party merely because he was alleged to be in possession, claiming by purchase, it was error to enter judgment against him personally for the debt.

Error to Jefferson Circuit Court.

Hon. JOHN C. MURRAY, Circuit Judge.

GARLAND & RANDOLPH, for the plaintiffs.

In this case, there is neither allegation nor proof that Loring had any estate or interest of any character in, or even any possession of the lots on which the building was erected. *Brown vs. Morrison*, 5 *Ark. Rep.*, 217. *Gould's Dig.*, *ch.* 112, *sec.* 1.

The lien given to the mechanic is dependent upon his compliance with the requirements of sections two and three of the statute. (*Gould's Dig.*, *ch.* 112.) And until the account verified by affidavit is filed, no lien attaches. *Hicks vs. Branton*, 21 *Ark.* 186.

The title to the property having passed to Owen, before any lien in favor of Flora had attached, the property cannot be made subject to it. *McCullough vs. Caldwell*, 5 *Ark. R.*, 237; 2 *Smith's* (*N. Y.*) *Rep.*, 583.

The facts stated in the 4th plea were sufficient to defeat the action—no lien being given by the statute where the value of the work, etc., does not exceed one hundred dollars.

The judgment is wholly incorrect—it was a proceeding *in rem*, and no personal judgment could be rendered. *Sec's 9 etc.*, *ch.* 12, *Gould's Dig.*, 5 *Ark. R.*, 237.

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

This was a proceeding by *scire facias* to establish a mechanic's lien.

On the 9th of April, 1860, James Flora, the mechanic, filed in the office of the clerk of the circuit court of Jefferson county, an account, sworn to, against Horace G. Loring, amounting to $116.00, for work done, and materials furnished, upon a house situated on lots 7 and 8, block 46, Woodruff's addition to the town of Pine Bluff.

On the same day an abstract of the account was entered in the judgment docket, and a *scire facias* issued against Loring, the debtor, and Wm. F. Owen, alleged to be in possession of the premises, claiming by purchase, etc.

Owen filed five pleas, the *first*, *second*, *third* and *fifth* alleging, in general terms, that on the 14th March, 1860, and before Flora filed his account in the clerk's office and caused an abstract thereof to be entered in the judgment docket, he purchased the building and lots of Loring for a valuable consideration.

The *fourth* plea alleged that the work and labor and materials furnished were not worth one hundred dollars and over.

The court sustained a demurrer to the pleas, and rendered a personal judgment against both of the defendants for the amount of the account, and ordered that the judgment constitute a lien upon the house and lots until paid, etc.

The defendants brought error.

The object of the first, second, third and fifth pleas was to show that Owen acquired title to the property from Loring before the statutory lien of Flora attached, and thereby defeated it.

Under the statute, where there is no registered contract, the lien of the mechanic commences at the time he files his account, properly made out and verified by affidavit, in the clerk's office, and causes an abstract thereof to be entered in the judgment docket, and not before. *Gould's Dig.*, 112, *sec.* 4, 26; *Hicks et al. vs. Branton et al.*, 21 *Ark.*, 188.

If, before the lien of Flora was thus fixed, Owen obtained a valid title to the property, by some legal mode of conveyance, and Flora had constructive notice thereof by registration of the conveyance, or actual notice, his lien was defeated.

In *McCulloch vs. Caldwell*, 5 *Ark.*, 237, the party contesting the mechanic's lien, alleged in his plea, in general terms, that he purchased the property before the lien attached, "on execution on sundry judgments," etc., and the court held the plea bad because the pleader failed to set out the judgments and executions under which he purchased and acquired title.

In this case the pleas are more general than in that, for they fail to allege that Owen obtained title to the property by any deed or conveyance whatever—and the court properly sustained the demurrer to the pleas.

The statute only allows the mechanic a lien where his demand exceeds one hundred dollars. *Sec.* 1. It was doubtless the object of the *fourth* plea to put in issue the amount of the demand, and to defeat the lien, if upon trial, it turned out not to exceed a hundred dollars as stated in the account filed, etc.

The only ground of objection taken to the plea in the demurrer, was that the plea was not sworn to.

We know of no law requiring such a plea to be supported by an affidavit, and if it were required, the want of it can only be taken advantage of by motion to strike out, and not by demurrer, as has been repeatedly decided by this court.

The rendering of the judgment against Owen personally, for the debt was a gross error. He was in no way personally liable for the demand, and was made a party merely for the purpose of contesting his claim to the property on which Flora sought to fix his lien, and subject it to the satisfaction of his debt.

For the errors above indicated, the judgment must be reversed, and the cause remanded for further proceedings.

24 155
55 305
24 155
57 181

McKenzie vs. Murphy.

An alien domiciled in this state, being a householder or head of a family, is entitled to the exemption of his homestead from sale on execution.

Unless the terms of a statute are entirely free from ambiguity, regard must be had to its known object, to the mischief intended to be provided against, to its general spirit and intent. (*Patterson vs. Thompson*, 23 *Ark.*)

The word citizen is often used as meaning only an inhabitant, a resident of a town, state or county, without any implication of political or civil privileges: and such is the meaning of the word in the homestead law.

Error to Phillips Circuit Court.

Hon. M. W. ALEXANDER, Circuit Judge.

GARLAND & RANDOLPH for the plaintiff

No person but a free white citizen of this state can claim the benefit of the homestead exemption. *Sec.* 29, *ch.* 68, *Gould's Digest.*

We maintain that no one is a citizen unless he is a citizen of the United States. This conclusion is warranted by the provisions of chapter 9, Gould's Digest, which extended to aliens, or persons not citizens of the United States, rights and privileges, which they were already entitled to if citizens of the state. See *secs.* 1, 5, *bill of rights*; *State vs. Penney*, 5 *Eng.* 621; *secs.* 2, 4, 6, *art.* 3, *State Cons.* The definition of the term citizen, would appear to clear up all doubt on the question. It is "one who is in the enjoyment of all the rights to which the people are entitled, and bound to fulfill the duties to which they are subject." *Amy vs. Smith*, 1 *Litt. R.*, 334; *Bouvier's Inst.*, *vol.* 1, *p.* 64. To obtain the benefit of the act the party must show that he is within all its provisions: that he is *free*, *white*, *a citizen of the state*, *a householder or the head of a family*, and *a resident* on the homestead claimed.

The court should have excluded the certificate of the clerk that

Murphy was naturalized. It was not competent evidence of the fact. *Miller vs. Reinhart*, 18 *Geo. R.*, 239; 1 *Williams* (*Verm.*) 621; 2 *Jones* (*N. C.*) *Law R.*, 368.

POPE & NEWTON, *contra.*

The certificate of the clerk of Phillips circuit court, though somewhat informal, was sufficient evidence that Murphy had been fully and properly admitted to citizenship by a court of competent jurisdiction; and was conclusive as to all the facts recited therein or necessarily implied. *Spratt vs. Spratt*, 4 *Pet. Rep.*, 407; *Campbell vs. Gordon and wife*, 2 *Cond. Rep.*, 343; *Towle's case*, 5 *Leigh*, 743; *State vs. Penny*, 10 *Ark.*, 621.

By "citizen" we generally understand a person not only domiciled within a state, but entitled to all the privileges and franchises thereof. But this is not the only sense, even in strict law, in which it is used. In ordinary use, it is frequently taken to mean the residents of a place, and so in law the word means nothing more than domicil: 2 *Cranch.*, 64; 7 *Cranch.*, 308; 8 *Cranch.*, 335; 2 *Gal. C. C. R.*, 268; 6 *Hall's Amer. Law Jour.*

Citizenship of the United States is not necessary to constitute one a citizen of a state. Residence determines state citizenship as distinguished from that of the United States. See *Clark vs. Clark*, 5 *Mason, C. C. R.*, 70; *Cooper's Lessee vs. Galbrath*, 3 *Wash. C. C. R.*, 546. The same distinction is taken in the constitution and laws of this state. *Art.* 4, *sec.* 2, *Cons.*; *ib. secs.* 20, 21, 22; *art.* 2, *sec.* 4. *Gould's Dig.*, *ch.* 9: It is submitted, that it is not necessary, to entitle the defendant to avail himself of the homestead exemption, to show that he was, or is a citizen of the United States. Nothing was necessary but to show that he was a free white citizen of the state. Residence, with the intention to make this his permanent home, constituted him a citizen within the meaning of the act.

Mr. Justice FAIRCHILD delivered the opinion of the court.

This case was tried in the circut court of Phillips county at its

May term, 1860, and was an action of ejectment by the plaintiff in error, against the defendant in error, for a town lot in Helena, long occupied by the defendant, a householder and head of a family, and a free white person; but the question between the parties was, in the court below, and is, in this court, whether the defendant is entitled to the benefit of the homestead exemption act, that would reserve the town lot, the property in suit, from execution, if the defendant, in addition to the characteristics noted, was a citizen of this state. To show this, the defendant was permitted to read in evidence a certificate of naturalization which was not a copy of the judgment of a court, but a statement by the clerk, that, by act of the court, the defendant was admitted to be a citizen of the United States. This alleged error of the circuit court does not affect the validity of its judgment, if another position taken by the defendant and declared by the court to be law and applicable to the case, be correct: which is, that the law in question used the phrase, citizen of the state, not in the political sense of citizenship by the laws of the United States, but simply to signify a resident, an inhabitant of the state. For, if this be the right construction of the statute, the defendant was entitled to judgment without any such testimony as his certificate of naturalization would have afforded, if a legal instrument of evidence, and the admission in evidence of the certificate, though not legal to prove the order of naturalization, would not affect a judgment good without any such record.

We are of the opinion that the circuit court well applied the law on the proposition it announced as the law applicable to the case on trial.

The statute, so far as material to the case under consideration, is as follows:

"Every free white citizen of this state, male or female, being a householder, or the head of a family, shall be entitled to a homestead, exempt from sale or execution . . . . not exceeding one hundred and sixty acres of land, or one town or city lot being the residence of such householder or head of a family, with the appurtenances and improvements thereunto belonging.

"The preceding section shall be deemed and construed to exempt such homestead, in the manner aforesaid, during the time it shall be occupied by the widow, or child, or children of any deceased person, who was when living, entitled to the benefits of this act." *Secs.* 29, 30, *ch.* 68, *Gould's Digest.*

The object of the statute, as is plainly to be seen from reading the foregoing sections, was to afford a home to the family of which the citizen, the householder, was the head, irrespective of his liabilities. The statute intended no individual benefit for the head of the family ; disconnected from the family, the head of it was entitled to no consideration ; but the family, when deprived of its head by death, was to have the protection of the act by holding the land, or town or city lot, upon which the family residence was situated, exempt from execution, so long as either was occupied and used as the residence of the family of which the deceased head was the representative.

Such being the object of the statute, we cannot suppose that the general assembly intended to confer a benefit upon the family of a citizen, native born, or naturalized, which it would deny to that of a domiciliated foreigner, as the one was as likely as the other to need the exemption, and both were in reason and in nature equally entitled to its protection.

An allusion to the facts of this case may afford an illustration of the reasonableness of this conclusion. Murphy, the defendant, was shown, at the trial, to have lived in this state since 1842, except an interval of a few months in New Orleans, in 1850 and 1851, he served as a soldier of the United States for twelve months in its war with Mexico, married in this country, had been the head of a family for ten years, and had a wife and three children at the time of the trial. And by the efforts of both plaintiff and defendant to introduce testimony upon the subject, he endeavored to become naturalized. We cannot preceive any reason why, upon this state of facts, the family of the defendant, or Murphy for it, as its head, is not as fully entitled to the exemption of the statute, as if he had by legal evidence proven a suc-

cessful application for participation in the political rights of citizenship of the United States. Yet, if the words of the statute will not support such a construction, it must not be given. *Branton vs. Branton*, 23 *Ark.*, 578; but as was said, in construing another statute in an important matter, "unless its terms are entirely free from ambiguity, regard must be had to its known object, to the mischief intended to be provided against, to its general spirit and intent." *Patterson vs. Thompson, ante* 55.

The word "citizen" is often used in common conversation and writing, as meaning only an inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges; and we think it is so used in our constitution. In *art. IV. sec.* 2, of the constitution of 1836, it is written, "every free white male citizen of the United States, who shall have attained the age of twenty-one years, and who shall have been a citizen of this state six months, shall be deemed a qualified elector." Besides being a citizen of the United States, a voter or elector in this state must have been a citizen of the state for six months, which can mean nothing else than to have been a resident of the state for that time, an inhabitant, as is the term used in sec. 4, of the same article, in prescribing that, as a qualification of a representative, in addition to being a free white male citizen of the United States. Section 4, of the declaration of rights, article II, constitution of 1836, is thus: "That the civil rights, privileges, or capacities of any citizen shall, in no wise, be diminished or enlarged on account of his religion." An alien has civil rights, though he may not have the civil capacities of conferring or holding offices, and can those rights "be diminished or enlarged on account of his religion?" Or, if an attempt is made to do this by statute, or without law, would it not be void by this section? If so, it must be because citizen is used in the sense of resident, or inhabitant, else a wider rule of construction must be adopted so as to hold that an alien is, by implication, free from gain or loss of civil rights on account of religion, because other persons are expressly saved therefrom, which, if good

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law, would bad logic. So, in sec. 7, of the same article, "every citizen may freely speak, write and print on any subject—being responsible for the abuse of that liberty." A law prohibiting this to an unnaturalized foreigner, would be in danger of falling, when met by this inviolate privilege to every citizen.

In the United States courts, their jurisdiction dependent upon controversies between citizens of different states, is believed to have been often upheld by the mere fact of residence, without the existence of political cifizenship, as being in accordance with the coustitutional provision on that subject, though the authorities are not now accessible.

Upon reason, and upon authority, we think the judgment of the circuit court is right, and it is affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

AT THE

DECEMBER TERM, 1865, AND JUNE TERM, 1866.

RISON ET AL. VS. FARR.

Legislation is the exercise of sovereign power; but that power is defined to a certainty by the written constitutions of the several states, which determine the extent and limit of the powers delegated to the government and retained by the people.

The constitution of this state is the supreme law of the land, under the constitution of the United States; and is of binding force and obligation upon all departments of the government, and assigns the sphere within which each must act, and establishes bounds beyond which neither can go.

The courts of justice have the right, and are in duty bound, to test every law by the constitution as the fundamental and paramount law of the land, and to declare every act of the legislature contrary to the true intent and meaning of the constitution null and void, and of no effect whatever.

Section 2, *Article* 4, of the constitution of this state, fixes the qualifications and determines who shall be deemed qualified voters in this state, in direct, positive and affirmative terms, and these qualifications cannot be added to by legislative enactment.

A law requiring that the voter shall swear to support the constitution of the United States, does not restrict the right to vote, adds nothing to the qualifications required by the constitution, requires nothing more than the voter is required by law to do, and is free from the objections of unconstitutionality, and is a valid law.

But to add to the qualifications prescribed by the constitution—to require that the citizen shall swear that he has not done a specified act—that he shall purge himself by oath, of all crimes or any particular crime; otherwise, to deprive him of the elective franchise, is not within the powers delegated to the legislature; and therefore, so much of the 6th section of the act approved May 31st, 1864, entitled "An Act to provide for the manner of holding elections," as prescribes such oath as a pre-requisite to voting, is directly in conflict with section 2, article 4, of the constitution, and void.

The rights and privileges of the citizen cannot be taken away by legislative enactment, directly or indirectly, or otherwise than by due process of law, that is, by the judgment of a court of competent jurisdiction.

The pardon of the President of the United States relieves the person pardoned from all penalties attached to the specified act, and restores him to his former rights and privileges.

A plea bad in part is bad for the whole.

Error to Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

R. C. NEWTON, for plaintiffs.

In construing the constitution in reference to the qualifications of electors, the intention of the convention may well be inquired into; and the intention of the convention not to confine, absolutely, the qualifications to those enumerated in the constitution may well be inferred from the fact that, in an election directed by the convention, other qualifications were prescribed. *Sec.* 2, *article IV*, *State Constitution.* Also, *Schedule to Constitution*, *sec.* 1.

It is submitted that all persons proscribed by the act—(*Pamph. Acts*, 1864, *p.* 48,) had voluntarily renounced their allegiance to the United States; and had ceased to be citizens thereof; and were not therefore, qualified electors under the state constitution.

But if the law be unconstitutional, still the ministerial officers

were bound to conform to the provisions of the act of the legislature, and are not responsible in damages to the plaintiff—the act of the legislature being presumed to be valid until pronounced unconstitutional by the proper tribunal.

CLARK, WILLIAMS & MARTIN and ENGLISH & WILSHIRE, for defendant.

The constitution, by article III, section 2, having fixed the qualifications of electors, it is not within the power of the legislature to add to or diminish those qualifications. When the requirements of the constitution are passed over, there is no limit to the power of the legislature to prescribe additional qualifications.

That the framers of the present constitution, which was adopted in the midst of the rebellion, did not intend to invest the legislature with the power of adding to the qualifications of electors the provisions of the *test oath* pleaded in defence, is clearly apparent from *sec.* 12, *art. IV*, requiring the exclusion from the *right of suffrage, etc.*, of persons guilty of certain crimes. But before the vote of any one can be legally rejected because of the commission of crime, he must have been duly convicted according to the forms of law. *Amend. Con. U. S., art. V*; 10*th and* 14*th secs., bill of rights*; *sec.* 8, *art. VII, Cons.* A man can be deprived, criminally, of his property, liberty or franchises only by indictment, etc., and trial by jury. It cannot be done by mere act of the legislature, or by test oaths. 1 *Kent's Com.*, 12; 2 *ib.*, 13; *Smith on Cons. & Stat. Law*, 722, *Taylor vs. Porter*, 4 *Hill R.*, 145; *Coke's Inst.*, 45–50; 10 *Yerg.*, 59; 3 *Story on Cons.*, 264–661.

The test oath for the refusal to take which the defendant was deprived, by the judges of election of his right to vote, contains not only a provision that he will support the constitution of the United States, to which there is no objection; but also, that he has not committed acts which would constitute a crime against the United States; for which he can only be held responsible by criminal prosecution in the courts of the United States; and also

that he has not committed an act, which would be a crime against the state, and for which he can only be punished by the laws of the state by a criminal prosecution in her court.

That the act under which the justification is relied on, is palpably in conflict with the constitution of the state and null and void, and should have been so treated by the judges of election, we most respectfully submit, does not admit of a doubt.

An act of the legislature in contravention of the constitution is no law at all, and furnishes no justification to any officer or individual for his conduct. 1 *Cranch.*, 175; 2 *Dallas*, 309.

Mr. Chief Justice YONLEY delivered the opinion of the court.

This was an action on the case, brought by the defendant in error against the plaintiffs in error in the Pulaski circuit court, at the September term, A. D. 1865.

The declaration alleges that John W. Rison, Richard Bragg and Gilbert Knapp were, on the 9th day of October, A. D. 1865, at the county of Pulaski, duly appointed, qualified and acting judges of an election held according to law, at the market-house precinct, in the city of Little Rock, in the county of Pulaski, on said 9th day of October, A. D. 1865, for a member of the 39th congress of the United States, in and for the second congressional district of Arkansas: and that, after the polls had been duly opened for the reception of votes, Farr, the plaintiff below, being a free white male citizen of the United States, and a citizen of the state of Arkansas, more than six months next before said election, over the age of twenty-one years, and a resident of the county of Pulaski aforesaid, and having taken and subscribed the amnesty oath prescribed in and by the proclamation of Andrew Johnson, president of the United States, bearing date the 29th day of May, A. D. 1865, presented himself before the defendants below, while acting as such judges of election as aforesaid, and offered to vote for Lorenzo Gibson, one of the candidates for representative, from the second congressional district; but that the defendants below wilfully and contrary to law,

refused to permit him to vote at said election, whereby he was illegally deprived of the exercise of the elective franchise guarantied to him by the constitution of the state of Arkansas as a citizen thereof and a resident of said county of Pulaski.

The declaration was filed on the 11th day of October, A. D., 1865, by leave of the court below, and on the 12th day of October the defendants below entered their appearance, and interposed the following plea:

"Come the said defendants by attorney, and defend the wrong and injury when etc., and say *actio non* because they say, that when said plaintiff offered to vote, as in said declaration supposed, they as such judges of said election, as in said declaration mentioned, demanded of him that he should, before depositing his vote, take an oath in accordance with the statute in that behalf, that he would support the constitution of the United States and of this state, and that he had not voluntarily borne arms against the United States, or this state, nor aided, directly or indirectly the so-called confederate authorities, since the 18th day of April A. D., 1864, which said oath, the said plaintiff then and there refused to take, wherefore said defendants, as such judges as aforesaid, did then and there refuse to receive said vote of the plaintiff, as they might and as it was their duty to do for the causes aforesaid."

To this plea the plaintiff below demurred and assigned for cause of demurrer, that the statute relied upon by the defendants below, in their plea, is in direct conflict with the constitution of the state of Arkansas, and is null and void and furnishes no legal excuse for refusing the vote of said plaintiff below at said election.

The demurrer, upon argument, was sustained by the court, and the plaintiffs in error electing to rest upon their plea, final judgment was rendered in favor of the defendant in error, by his consent, by the court, a jury having been waived, for one cent damages and cost of suit.

To reverse the judgment of the court below, the plaintiffs in

error have brought the cause before this court by writ of error, and assign for error, *first*, that the court erred in sustaining the demurrer to the defendant's plea, and *second*, a general assignment of error—thus presenting here for adjudication the constitutionality of the 6th section of the act of the legislature of the state of Arkansas, entitled "an act to provide for the manner of holding elections," approved May the 31st, A. D., 1864.

Before attempting to ascertain whether the 6th section of the act above referred to is in conflict with, and repugnant to the constitution of this state, we will attempt to define the limitations which that instrument imposes upon the powers of the legislative and other branches of the government of the state of Arkansas; how far and by what principles, legislative power is controlled under our form of government.

Legislation is the exercise of sovereign power, and under some forms of government, the power of the legislature is supreme, and uncontrolable, knows no limits, and is subject to no restrictions. The power and jurisdiction of parliament, says Sir Edward Coke, are so transcendant and absolute that they cannot be confined, either for causes or persons, within any bounds. In England, the powers of parliament are without limit, and are subject to no check; because, under that form of government, there is no written constitution or fundamental law, by which the validity of a statute can be tested; and all that can be said of it is, that it is an act of parliament and must be obeyed.

But such is not the case in America; for here, every state in the union has a written constitution, which defines to a certainty what the powers of each branch of the government are, and determines what rights the people have delegated to their representatives, and what they have retained or created for themselves by their organic law.

PATTERSON, J., in *Vanhone's Lessee vs. Dorance*, 2 *Dallas*, 308, in defining what a constitution is, says: "It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The

constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the legislature, and can be revoked or altered only by the authority that made it. The life giving principle and the death dealing stroke must proceed from the same hand."

And, in defining what legislatures are, the same learned judge says: "They are creatures of the constitution; they owe their existence to the constitution: they derive their powers from the constitution. It is their commission, and therefore all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves in their original, sovereign and unlimited capacity: law is the work or will of the legislature in their derivative or subordinate capacity. The one is the work of the creator, the other of the creature."

The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, the constitution is the sun around which all legislative, executive and judicial bodies must revolve; and that, whatever may be the case in other countries, yet in this there can be no doubt, that every act of the legislature repugnant to the constitution, is null and void.

The constitution of the state of Arkansas is then, the supreme law of the land, the commission or power of attorney which the people of a state have given to their representatives, defining and limiting the bounds within which they must act, and fixing the power which each department of the government may exercise; and is the supreme law of the land, and is fixed, permanent, uncontrolable and transcendant in its nature and operation, and cannot be revoked or altered except by the power that made it.

The constitution of this state is of binding force and obligation upon all departments of the government, and assigns the sphere within which each must act and establishes bounds beyond which neither can go. It is the work of the people, speaking in their original capacity, and establishes the permanent conditions of social alliance, and furnishes the test by which every act of the

legislative, as well as of the executive and judicial departments must be tried, and to which every act done by either must conform.

The constitution is the fortification within which the people have entrenched themselves for the preservation of their rights and privileges, and every act of the legislature, or other department of government, which infringes upon any right declared in the constitution, whether it be inherent in the people or created by that instrument, is absolutely void.

Rector vs. State of Arkansas, 6 *Ark. Rep.*, 187; *Eason vs. State of Arkansas*, 11 *Ark. Rep.*, 481; *Marbury vs. Madison*, 1 *Cranch*; *Kinnie's Law Comp.*, *vol.* 3, *p.* 314, and the numerous authorities there cited.

In the case of *Houston vs. More*, 5 *Wheaton*, the court said; "The law with us must conform in the first place to the constitution of the United States, and then to the subordinate constitution of this particular state, and if it infringes upon the provisions of either it is so far void."

By a course of judicial decisions reaching from the earliest history of American government to the present day, without a dissenting voice it has been adjudged that courts of justice have the right, and are in duty bound, to test every law by the constitution, as the fundamental and paramount law of the land, governing all derivative power and the exercise thereof. The judicial department with us is the proper power, under the constitution, to declare the constitutionality of a law, and every act of the legislature contrary to the true intent and meaning of the constitution, will be declared by the courts null and void, and of no effect whatever.

To contend that this is not so would be to assert, that the legislative branch of the government is supreme in its authority; that the creature is mightier than the creator; that the agent has greater power than his principal, who has commissioned him and sent him out to transact business under a written authority: that one co-ordinate and concurrent branch or department of the

government, subordinate to the constitution is absolute over the departments, and can control, according to its will and pleasure, all others. It would be to assign limits to legislative power by constitutional provisions, restraining the legislative body within certain bounds, and then to declare, that, although it had passed beyond the limits assigned to its power, and violated the authority designed to govern it, yet that its action is valid and of binding force and obligation upon the other departments of government, and has the effect to take away the very rights from the people, which they have secured to themselves by constitutional provisions. A doctrine too monstrous to be for a moment entertained, and in every way disconsonant to the fundamental principles and theories upon which our government is based, and one which in practice would soon sweep away every vestige of the rights of the people, and reduce them to subjection to absolute power, or what would be worse to a state of anarchy and confusion, where life, property and every right would be left to the mercy of the legislative power.

With these principles before us, we will proceed to determine whether the act of the legislature of the state of Arkansas, under which the plaintiffs in error justify their conduct in refusing to permit the plaintiff below to vote, is a constitutional law; for if so, it is valid and binding, and the plaintiff below had no right to vote, and was deprived of nothing which belonged to him: but upon the contrary, if the law relied upon by the defendants below is repugnant to the constitution of this state, then it is void, and can afford them no justification or excuse for what they did.

Section 2 of article 4 of the constitution of the state of Arkansas, provides that "every free white male citizen of the United States who shall have attained the age of twenty-one years, and who shall have been a citizen of the state six months next preceding the election, shall be deemed a qualified elector, and be entitled to vote in the county or district where he actually resides."

The plaintiff below, by his declaration avers that he was pos-

sessed of all the qualifications required by this section of the constitution, with the additional fact that he had taken and subscribed the oath prescribed by the proclamation of the president of the United States bearing date the 29th day of May last; and the defendants below do not traverse or in any manner put in issue the truth of these allegations, but confess the truth of them by way of confession and avoidance the 6th section of the act of the legislature of the state of Arkansas above referred to, and which is in words as follows:

"That each voter shall, before depositing his vote at any election in this state, take an oath that he will support the constitution of the United States and of this state, and that he has not voluntarily borne arms against the United States or this state, nor aided, directly or indirectly, the so-called confederate authorities since the 18th day of April, 1864; said oath to be administered by one of the election officers; and this act to take effect from and after its passage."

Section 2 of article 4 of the constitution, fixes the qualifications, and determines who shall be deemed qualified voters in this state in direct, positive, and affirmative terms, and these qualifications cannot be added to by legislative enactment

The convention, when it formed the constitution, after having enunciated the time honored principles, found, we believe, in all American constitutions: "That all power is inherent in the people, and all free governments instituted for their peace and happiness," declare by the section of the constitution above quoted, who shall be deemed qualified electors in this state, and have fixed all the pre-requisites necessary to qualify a citizen to exercise the elective franchise.

The framers of the present constitution of this state had in view, and represented all the people thereof, men, women and children, white, colored and Indians, and recognizing, as they declare in the preamble of the constitution, the "legitimate consequences of the existiug rebellion," saw fit to provide that every white male citizen of the United States, over the age of twenty-

one years, and who shall have been a citizen of this state six months next preceding the election, shall be deemed a qualified voter in the county or district in which he actually resides, and no person having these qualifications can be deprived of the exercise of the elective franchise by mere legislative enactment, while the constitution remains unaltered. Indeed the right of those having the constitutional qualifications to vote, is founded in the fundamental law of the land, and cannot be legislated away. The right of suffrage in this state, if not an inherent, is at least a constitutional right, and whoever possesses the required qualification, cannot be restrained from the exercise of that right except by the alteration of the constitution, and any law infringing upon that right as vested by the constitution is null and void.

Then the inquiry is, has the 6th section of the act above copied the effect to abridge the right of suffrage conferred by the constitution—does that law require other and different qualifications than those required by the constitution—in short, is the law repugnant to the constitution? The answer to these inquiries will be arrived at by an examination of the law in question.

The sixth section of the act under consideration has a two-fold operation: one prospective; and the other retrospective.

That part of the law which requires the voter, before depositing his vote, to swear that he will support the constitution of the United States, and of this state, is prospective in its operation, and looks to the future conduct of the voter, and requires nothing more of him than by law he is bound to do. This part of the law does not look into his past history, or scrutinize his antecedents. It does not demand that he shall purge himself of treason against the United States or this state. It does not have the effect to restrict the right to vote as conferred by the constitution, nor does it add to the qualifications required by the constitution; and is therefore free from the objection of unconstitutionality, and is as we conceive, thus far a valid law. *Bank of Hamilton vs. Dudley*, 2 *Pet.*, 526; 2 *Blackf.*, 8.

But, how is it with the residue of the oath required? That

part of the law which requires the voter, before depositing his vote, to swear that he has not voluntarily borne arms against the United States or this state, nor aided the so-called confederate authorities since the 18th day of April, A. D., 1864, is retrospective and calls upon the voter to purge himself of treason against both the United States and this state, before he is allowed to vote: and although this part of the law is professedly enacted, "TO PROVIDE THE MANNER OF HOLDING ELECTIONS," it is, in effect, nothing but a prohibition upon the right to vote as secured by the constitution; and is of the same import as an affirmative provision that no person who has voluntarily borne arms against the United States, or this state, or aided the so-called confederate authorities, since the 18th day of April, 1864, shall be allowed to vote at any election in the state of Arkansas. And to admit that the legislature may do this, would be to declare that part of the constitution which defines the qualifications of a voter, absolutely nugatory, and would turn section 2 of article IV, of our constitution into the merest nonsense. And clearly, if the legislature cannot, by direct legislation, prohibit those who possess the constitutional qualification to vote, from exercising the elective franchise, that end cannot be accomplished by indirect legislation. The legislature cannot, under color of regulating the manner of holding elections, which to some extent that body has a right to do, impose such restrictions as will have the effect to take away the right to vote as secured by the constitution.

The legislature may compel a voter to take an oath to the effect that he possesses the qualifications prescribed by the constitution; and may fix the time of holding elections, and the manner of making returns, etc.; for those things are within the constitutional powers of the legislature.

And again, it is to be observed that that part of the law which requires the voter to swear that he has borne arms against the United States, or this state, or aided the so-called confederate authorities, is punitive in its operation. It is attempted by this provision to ascertain whether the voter has offended within the

meaning of the act; and if by the searching operation of the oath prescribed he is found guilty, the penalty annexed is the loss of the right to vote, and that too by a process entirely unknown to our constitution and laws. So much of the oath as relates to bearing arms against the United States and aiding the so-called confederate authorities, refers directly to offences against the government of the United States, and as such are not within the powers and jurisdiction of this state to punish even by due process of law; and much less can the legislature, by mere legislation, punish such offences, and as a penalty take away the right of suffrage from a qualified voter of this state. These are crimes against the United States, and can only be punished or forgiven by that government; and are not cognizable before any authority or tribunal of a state. And the chief magistrate of the United States, acting upon this principle, by his proclamation of the 29th of May last, in conformity with the authority conferred upon him by the constitution of the United States, and the act of congress made in pursuance thereof, has most graciously extended pardon and amnesty to a large majority of the citizens of this state, who had engaged in the late rebellion, declaring that all persons not excepted by said proclamation from the benefits thereof, who would take and subscribe a certain oath thereby prescribed, should receive full amnesty and pardon.

Within the provisions of which proclamation the plaintiff below has brought himself by the averments contained in his declaration. Hence, whatever might otherwise have been the effect of his having borne arms against the United States, or of his having aided the so-called confederate authorities, he has now been fully pardoned and forgiven, and is no longer amenable to any authority for his acts in that behalf; and to deprive him of his right to vote on account of his participancy in the war against the United States, would be to punish him for a crime of which he has been pardoned; or, in other language, to inflict a penalty where there is no legal guilt.

But if he had not taken the amnesty oath, still his having

borne arms against the United States would not, as we will hereafter show, have worked a forfeiture of his right to vote until he had been convicted thereof by due process of law.

Then as to that part of the law that requires the voter to take an oath that he has not borne arms against this state since the 18th day of April, A. D. 1864.

To bear arms against the state of Arkansas, in the sense of the law under consideration, is to levy war against the state, and is treason, and as such is indictable, and upon due conviction thereof, the offender, by the law of this state, is punishable with death, and in that case there would be an end of his voting. But the offender cannot be convicted by an act of the legislature. That body, by the mere exercise of legislative authority, cannot declare a forfeiture. The legislature cannot enact, apply and execute a law. The same department under our form of government, cannot act as legislator, judge and executioner. Such a course would be in open and palpable violation of section 2, article III, of the constitution of the state of Arkansas, which ordains that, no person or collection of persons being of the one department of the government shall exercise any power belonging to either of the other departments, except in the instances hereinafter expressly directed or permitted: and the exception herein contained refers to trials by impeachment.

How, then, can a right or privilege be forfeited under our form of government?

The constitution of the state of Arkansas answers this interrogatory. Sections 10, and 14, of the bill of rights put the question forever at rest. The 10th section of the bill of rights declares that "no man shall be taken or imprisoned, or disseized of his freehold liabilities or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." And the 14th section of the bill of rights provides that "no man shall be put to answer any criminal charge, but by presentment, indictment or impeachment, except as hereinafter provided,"

which exception refers to petty offences made cognizable before justices of the peace.

The 10th section of our bill of rights is taken, with slight variation, from *magna charta*, and is found, in substance, in all American constitutions, and its meaning is well settled, both in this country and in England, by numerous adjudications. CHANCELLOR KENT says: "It may be received as a proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or disseized of his freehold or estate; or exiled or condemned, or deprived of his life, liberty or property, unless by the law of the land, or the judgment of his peers. The words, *by the law of the land*, as used originally in *magna charta*, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men: and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of *due process of law* is, that it means law in its regular course of administration through courts of justice." 1 *Kent's Com.*, 612; 2 *ib.*, 13; *Story on the Cons.*, *vol.* 3, *p.* 264, *and* 661; *Coke's Inst.*, 45-50.

And Mr. Justice BRONSON, commenting upon the provision in the constitution of the state of New York, which provides that "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," says: "The words, by the law of the land, as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction in the constitution, absolutely nugatory, and turn this part of the constitution into merest nonsense. The people would be made to say to the two houses, you shall be vested with the legislative power of the state, but no one shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you form a statute for that purpose, or in other words, you shall not do wrong unless you choose to do it." *Taylor vs. Porter*, 4 *Hill*, 145.

From these and many other authorities that might be cited, it is plain that no one can be deprived of his rights or privileges, unless the matter be adjudged against him by due course of common law.

Then it is clear that although treason is the highest crime known to the laws of this state, the mere commission of that offence will not in itself work a forfeiture of the rights or privileges of the offender, but before he can be deprived of all or either of them, he must be convicted by due process of law. From this view of the case it is evident that, that part of the 6th section of the act of the legislature of the state of Arkansas, entitled "an act to provide for the manner of holding elections," approved May 31st, 1864, which requires the voter before depositing his vote to swear that he has not voluntarily borne arms against the United States or this state, nor aided the so-called confederate authorities since the 18th day of April, 1864, is repugnant to, and in open conflict with the constitution, and in every point of view is an entrenchment upon the rights secured by the fundamental law of this state, and is therefore absolutely null and void. The constitution having fixed the qualification of an elector in this state, those possessing the qualifications required, can no more be deprived of the right to vote by legislative enactment, than they can be deprived of the right to trial by jury, or the right to worship God according to the dictates of their own consciences.

Part of the law under which the plaintiffs in error justify, being void for unconstitutionality, and their plea being entire, and bad for part is bad for the whole, (*Chit. Plead. vol.* 1, *p.* 146,) and can afford them no justification or excuse for refusing to accept the vote of the defendant in error, at said election.

Finding no error in the proceedings or judgment of the court below, the judgment of that court must be and is hereby affirmed.

GREGORY VS. WILLIAMS.

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Several notes or obligations, each within the jurisdiction of a justice of the peace, are several demands, and cannot be united so as to confer jurisdiction upon the circuit court, as held in *Berry vs. Linton*, 1 *Ark.*, 252; but if the indebtedness is an open account, though composed of several items, of different dates, and arising out of different dealings and transactions between the parties, the aggregate amount constitutes the demand, and if that is within the jurisdiction of the circuit court, the items cannot be separated so as to bring several suits before a justice of the peace.

It may be more regular, where a demand above the jurisdiction of a justice, has been divided and several suits brought, to consolidate the suits, on appeal, in the circuit court, and dismiss for want of jurisdiction; but if the cases be severally dismissed, such practice is not cause of error.

Where a justice of the peace has no jurisdiction, none is conferred on the circuit court by appeal; and it is error in dismissing the case, to render judgment against the appellant for costs.

Error to Dallas Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

WATKINS & ROSE, for the Plaintiff.

1. These several cases were not consolidated in the circuit court, nor before the justice; and were as separate and distinct as if between different parties or in different courts.

2. Each one of these claims seems to be upon a wholly separate and distinct cause of action. *Berry vs. Linton*, 1 *Ark.*, 251.

3. If the justice had no jurisdiction, the circuit court acquired none by appeal, and it was error to render judgment for cost on dismissing the case. 1 *Ark.*, 55; 1 *Eng.*, 182; 4 *id.*, 463.

Mr. Chief Justice YONLEY delivered the opinion of the court.

The plaintiff in error brought his three several suits by attachment, before Thomas Peterson, a justice of the peace in and for Holly Springs township, in Dallas county, on the fourth day of

October, 1865, against the defendant in error, and filed with said justice three separate bills of items, the first for eighty dollars, and the second and third for seventy-five dollars each, for the hire of a negro girl of the plaintiff in error, for the years 1862, 1863 and 1864 respectively.

On the return day thereof, the writ of attachment having been personally served upon the defendant, both he and the plaintiff appeared in person and the said causes were severally submitted to the justice upon the testimony; and judgments were rendered therein in favor of the plaintiff; from each of which judgments the defendant appealed to the circuit court of Dallas county.

At the March term, 1866, of the Dallas circuit court, both parties appeared by their attorneys, and the defendant in error filed his motion in the cause standing first upon the docket of the said circuit court, moving the court to dismiss said cause, and the two others, which are referred to in said motion by their docket numbers, from the docket of said court, because said several suits were instituted before the same justice of the peace, by the said Gregory, against the said Williams, upon three accounts which constituted but one demand, and that the amount in controversy was the aggregate of said several accounts sued upon, which when taken together amounted to the sum of two hundred and thirty dollars, which sum was over the jurisdiction of the justice of the peace; and also filed a like motion in each of the other causes.

The several motions were submitted to the court, and by the court sustained, and a judgment of dismissal and for costs was rendered in each case against the plaintiff in error. To which rulings and decisions of the court Gregory excepted, and has brought the said causes before this court by writ of error.

The errors assigned are: 1st. The dismissal of said suits. 2d. The rendering of judgments for costs against the plaintiff in error.

The jurisdiction of every justice of the peace, as enlarged by the recent constitution of this state, extends to actions of debt and assumpsit and all other actions founded upon contract, where the debt or balance due, or damage claimed, excluding interest, does

not exceed two hundred dollars: and a justice of the peace has no jurisdiction of a demand for a larger sum of money, and the sum in controversy is the criterion of the jurisdiction of a justice of the peace, and not the form of action. *Walker as com. vs. Byrd et al.*, 15 *Ark.*, 33.

The doctrine contended for by the plaintiff in error is, that the amount due him for the service of the negro girl for each year constitutes a separate demand, distinct in itself, and for the recovery of which he had a right to institute a separate and independent action. That the respective sums due him arose upon distinct contracts, and fell due at different times, and do not therefore constitute one debt or demand; but that each is a separate demand, and in support of his position relies upon the case of *Berry vs. Linton*, reported in the 1*st vol. Ark. Rep.*, *p.* 252.

The case of *Berry vs. Linton*, it is believed, does not sustain the position assumed by the plaintiff in error; for, in that case, a suit was brought in the circuit court upon three distinct writings obligatory, amounting to the sum of one hundred and twenty dollars and forty cents; and this court held that the sum of money specified in each of said writings obligatory constituted a separate demand, and that the sum due by each and not the aggregate of all must be looked to to ascertain to what jurisdiction that suit belonged, and that the plaintiff could not confer jurisdiction upon the circuit court by joining in his declaration several distinct demands, each for less than one hundred dollars, although they amounted in the aggregate to over that sum.

The several writings obligatory, upon which that action was brought, were, each in itself, a distinct demand, a separate debt, evidenced by a written obligation, and severed from each other by the act of the obligor, in signing his obligation therefor. *Barns vs. Holland*, 2 *Mo.*, 34. Had that suit been upon an account for the sum of one hundred and twenty dollars and forty cents, composed of three different items, of different dates, and arising out of different contracts, can it be supposed that the court would have held that each item in the account constituted

a separate demand, and should have been declared on as such? Would the court have looked to the items of the account to have ascertained the sum in controversy, or to the aggregate amount of the items contained in the account? We certainly think to the latter only.

A writing obligatory, or a promissory note, as between the parties thereto, is a separate and distinct demand, so made by the parties, and the fact that a plaintiff holds several such instruments against the defendant does not alter the distinctive character of either, and each remains, notwithstanding, a separate demand, and the sum of money specified in each, where several of such writings obligatory or promissory notes are sued upon, and not the aggregate amount of all, is the criterion by which it is to be determined whether the justices' court has jurisdiction.

The case of *Berry vs. Linton* decides that the jurisdiction of circuit or justices' courts of this state is, by law, made to depend upon the amount of each separate demand in controversy between the parties; and that, while it is expressly enunciated that several separate and distinct demands cannot be added together for the purpose of giving the circuit court jurisdiction, the decision is equally as apposite to show that a demand which is over the justice's court cannot be severed and split up for the purpose of conferring jurisdiction upon that court. That decision is to the effect, that it is not the aggregate of separate demands, but each separate demand which determines the question of jurisdiction, and this is the full length to which that decision has gone.

While it is true that every written acknowledgment of indebtness, which may be made the foundation of an action at law, is a separate demand, it is not true, as a proposition of law, that the several items of an open account, although of different dates and arising out of different dealings and transactions between parties, are each separate demands, and can be sued upon as such. All the items of indebtedness, in the nature of accounts, subsisting between the parties at the time of the commencement of a suit for the recovery, constitute the debt, demand, or sum in contro-

versy, and is an entire demand: and if the aggregate of all the items amounts to a sum beyond the jurisdiction of the justice, the difficulty cannot be obviated, and jurisdiction conferred upon that court by bringing suits upon the several items of the account. *Willard vs. Sperry*, 16 *John.*, 111.

This view, we think, is sustained by the principles to be deduced from the decision of this state bearing upon this question, and is in harmony with the provisions of the constitution and laws of this state, which, while they were designed to furnish the plaintiff a cheap and convenient remedy for the collection of small demands, were not intended to afford him the means to vex and harrass the defendant with a multiplicity of suits for the recovery of a single debt.

If the principle contended for by the plaintiff in error can be applied to this case, it is difficult to see why it would not apply to all other cases where there are different items in the account, which arose out of transactions between parties which took place on different days. The merchant, who should sell to his customer, on account, on twenty different days in the year, a bill of goods to the amount of two hundred dollars, could, at any time after the sale of the last bill, institute twenty distinct suits before a justice of the peace, and if his right to do so should be questioned, he could reply with equal force: each is a separate demand. The bill of goods were bought on different days; there was a distinct contract or bargain in respect of each sale and purchase. And this would be equally true in all other instances. If this was declared to be the law of this state, it would soon come to be that all accounts embracing items of different dates would be split up, and separate suits brought in justice's courts upon the fragments, to the great embarassment, inconvenience and costs of the defendant; and many weighty questions of law, involving large sums of money, would thereby be submitted to these inferior tribunals for decision, which by the policy of our law were designed to be determined elsewhere.

The plaintiff in error, at the time of instituting his suits in the

justice's court, did not have three distinct demands, or causes of action, against the defendant. The three bills of items filed by the plaintiff in error constituted but one account between the parties, and the aggregate of these bills constitutes the amount of the demand claimed by him, and is by his own showing over the jurisdiction of a justice of the peace.

It would, perhaps, have been more regular, in point of practice, had the several suits been consolidated, and a single judgment of dismissal rendered; but it is believed that the omission to do this did not vitiate the judgments of dismissal, because it abundantly appears from the transcript of the record that the several judgments of dismissal were rendered in view of the fact that the several sums of money sued for constituted but one demand against the defendant, and that demand was over the justice's jurisdiction.

Upon the whole, this court is of the opinion that the judge of the circuit court did not err in dismissing said suits, for want of jurisdiction in the justice's court.

But since the justice's court had no jurisdiction, the appeal could confer none upon the circuit court. *McKee vs. Murphy*, 1 *Ark.*, 55. The court below manifestly erred in rendering judgments against the plaintiff in error for costs; and for this error the judgments of the circuit court must be reversed, with instructions to that court to set aside said judgments and enter up judgments of dismissal only.

Judgment of the circuit court reversed.

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THE STATE VS. CRYTES.

The verdict of a jury, when not totally unsupported by the evidence, will not be disturbed by this court, (*Lindsay vs. Wayland*, 17 *Ark.*, 385,) though the weight of evidence be against it.

Appeal from Green Circuit Court.

Hon. W. R. CAIN, Circuit Judge.

Mr. Attorney General JORDAN, for the state.

WATKINS & ROSE, for the appellee.

There being no question of law reserved, this court will not reverse the judgment upon the mere weight or preponderance of evidence, unless the verdict shocks one's sense of justice. 15 *Ark.*, 403; 18 *id.*, 598; 19 *ib.*, 559.

Mr Justice HARPER delivered the opinion of the court.

At the September term of the circuit court of Green county, 1865, two indictments were found against the appellee for vending ardent spirits in less quantities than one quart without license. The one, on which this appeal is taken, was against David Crytes alone: the other against David Crytes and one John Crytes, both charging the same character of an offence, but fixing the times, the one in July 1865, the other in September, 1865. It appears from the record that a trial was first had upon the indictment against David Crytes, the appellee, and John Crytes, and that the appellee was acquitted. On the trial of this cause, the aforesaid acquittal was plead in bar, as also the plea of "not guilty:" and the only question appearing from the record was, whether the acquittal in the case of the State vs. David Crytes, the appellee, and John Crytes, was for the same offence charged in the indictment in this case.

On this question, the evidence strongly indicates that two separate offences were contemplated in the two indictments, on which two convictions might have been properly had against the appellee, on sufficient proof. It was for the jury to ascertain and determine the question of fact involved, from the testimony; and it cannot be said that the evidence in the record precludes the possibility that the offence for which appellee had been acquitted was the same charged against him in this case. The jury evidently took that view of the testimony, and found their verdict of "not guilty," on that conclusion. The usual judgment was rendered and the states' attorney asked for a new trial, on the ground that the verdict was contrary both to law and evidence, which the court refused.

The error assigned is, that the court erred in refusing to grant a new trial.

New trials are usually granted where manifest injustice has been done, and reasonable probability exists that, in another trial, the result would be changed.

Though in the opinion of this court the weight of evidence be against the conclusion of the jury, it does not follow that there was error in refusing to grant the new trial by the court below. In the case of *Lindsay vs. Wayland*, 17 *Ark.*, 385, it is held that the verdict of a jury when not totally unsupported by evidence, even though the weight of evidence is against the verdict, will not be disturbed by the court.

Holding this decision to be the correct rule, this court think there is no error in the proceedings and judgment of the court below; and the same is affirmed.

OSBORN, EX PARTE.

Where there does not appear to be manifest error in the circuit court in refusing bail in a criminal case, this court will not grant it.

Petition for Habeas Corpus to admit to bail.

GALLAGHER & NEWTON, for petitioner.

An indictment for a capital offence does not raise a presumption of guilt against the prisoner so strong as not to be rebutted by him; and upon an application to be admitted to bail, the court may go behind the indictment. *White, ex parte*, 4 *Eng.*, 222.

The only capital homicide is murder in the first degree; which is a willful, deliberate, malicious and pre-meditated killing; and the proof of such a killing must be evident or the presumption great; otherwise the prisoner has the right to be let to bail. *Sec.* 16 *bill of rights; sec.* 7, *ch.* 51 *Gould's Dig.* And it is submitted that the facts in this case do not show such a killing as should constrain this court to refuse the application.

The principles decided in *Pitman vs. State*, 22*d Ark.*, a case more outrageous than this, though resembling it in some particulars, are referred to.

The rule laid down in *Good et al. ex parte*, 19 *Ark.*, and *Jones ex parte*, 20 *Ark.*, for reviewing the decision of the circuit court in refusing bail, has been strictly followed in this case.

JORDAN, Attorney General, contra.

Mr. Justice HARPER delivered the opinion of the court.

This is an application to review the decision of the circuit court of Saline county at the March term 1866, refusing to grant the petitioner bail. The case is exhibited here by a duly certified transcript of the record which contains the whole case including

the indictment for murder in the first degree, with the evidence adduced on the motion for bail, and the opinion of the court overruling said motion. The petitioner also alleges that the judge of said circuit court of Saline county is now absent from the state, as petitioner is advised and believes, to remain absent several months.

The case of *Good et al., ex parte*, 19 *Ark., page* 410, is referred to by petitioner in support of his application to review the decision below and grant him bail. In that case it is held that, if upon the hearing of an application for bail, the circuit court or judge refuse to admit the prisoner to bail, upon a proper application to this court, and showing of the facts on which the judge acted, if the showing be deemed sufficient, a certiorari would be awarded to bring up a transcript of the papers and proceedings upon the application for bail, for revision, and if it was determined that the prisoner was entitled to bail, this court might bring him before it by *habeas corpus*, and admit him to bail, or if deemed more convenient, direct the circuit judge by the proper mandate to do so. Regarding this decision as fully sustaining the authority of this court to review the decision of the court below in this case, and to grant bail if there is manifest error, the question for this court to determine is, is there manifest error in the decision of the court below overruling the application for bail.

The offence charged is murder in the first degree, which is not bailable. It is claimed in the petition that the facts do not show that the prisoner had pre-meditated the killing when he went to the house of deceased with his gun; but that the killing was more probably from a sudden determination formed after his arrival there, and brought on by the unfortunate and untimely interference of the wife of the deceased, and that the offence charged can only amount to murder in the second degree at most and therefore bailable.

The case is substantially this. The petitioner, George Osborn is charged with the murder of Joseph Price, on the 7th day of March, 1866, in the county of Saline. They had had a difficulty

of not many days standing. The deceased had accused prisoner of stealing his meat, and with extremely rough language, had declared that he, the deceased, would kill the prisoner before sun-down of the very day on which it turned out that he himself was killed by the prisoner, or before the next morning, saying that prisoner had stolen enough of the deceased's lard to grease his way to hell. One of the witnesses was so impressed with the earnestness of these threats that she even deceived the deceased as to where prisoner then was, giving as a reason for that deception, that she feared the deceased would slip around and kill the prisoner (the petitioner here) before she could put him on his guard. She testifies, however, that she found the prisoner and informed him of these threats by deceased. It is in proof that deceased was fully armed and making visible demonstrations to carry his threats into execution. The prisoner, with full knowledge of these threats and demonstrations, prepares himself with a gun and goes to the house of the deceased, instead of remaining away like one determined to act only on the defensive. He went there too, about sun-down of the day on which, according to the threats, his own life was to terminate. He goes directly to the door of the house in which deceased was sitting down, with his gun in hand raised as if to fire, and says: "Joe, this is the time." Deceased says: "what did you say, George," at the same time rising and advancing towards the prisoner, his pistol being on a table in the room, and gun in rack over the door—the wife of the deceased immediately interposing and getting hold of the gun in the hands of the prisoner: prisoner says: "get out of the way Esther, or I will put this load in you;" and only delaying the shot long enough to push aside the woman, fired the fatal shot. Deceased fell on the fire and expired in a few minutes.

The question is, what did prisoner go to the house of the deceased for? Was it, or was it not to kill the deceased? The question is not whether prisoner thought that, under the law and facts, he would be justified in killing deceased; but whether,

according to the evidence, he went to the house of the deceased on that day determined to kill him.

It is contended that the facts warrant the conclusion that the determination on part of petitioner was only, under a demonstration of arms, to bring about an adjustment, and that the determination to kill was only formed after his arrival there, and precipitated by the foolish and inopportune conduct of the wife of deceased; and that, therefore, the case could only be murder in the second degree and bailable.

The court below thought otherwise and this court is called upon, from the facts stated, to say there is manifest error in the ruling of the court below in refusing bail.

The counsel for petitioner refers, also, to the case of *Pitman vs. The State*, 22*d Ark.*, 364, as a case furnishing authority for the hypothesis that this case is one in which the court below should have granted bail. A close examination shows a very marked difference in the two cases. These threats were mutual, and each party had been seeking the other with deadly weapons, and when Thompson, the deceased in that case, was fired upon by Pitman, he was himself advancing with a double-barrel gun towards Pitman, and as he halted some 40 yards from Pitman, received the fatal shot from Pitman's gun. The cases, then, are entirely dissimilar.

This court, on a careful examination of all the testimony in this case, cannot say that there was manifest error in the court below in refusing bail to petitioner. The motion for habeas corpus is therefore overruled.

HAWKINS VS. DEAN.

The case of *Matlock vs. Purefoy*, 18 *Ark.*, 492, that the omission of the words "for value received," in describing the note, in the declaration, though contained in the note sued on, is not a variance for which the judgment will be reversed, approved.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

GALLAGHER & NEWTON, for appellant.

The words "for value received," were a material part of the note and should have been averred in the declaration, as descriptive of the contract. 10 *J. R.*, 418; *Lawes Assumpsit*, 78–9, 106; 6 *East.*, 567; and especially *Rossiter vs. Marsh*, 4 *Conn.*, 198.

The case of *Matlock vs. Purefoy*, 18 *Ark.*, 493, we respectfully submit, is erroneous. The question is not whether a promissory note imports a consideration, but whether, when the note states that it is given for "value received," those words are not a material part of it, and must be averred.

CLARK, WILLIAMS & MARTIN for appellee.

That the words "promise to pay" in a promissory note, import a consideration received, and that the declaration need not contain the words "value received," even where the note does, has been settled by this court, and is the universally received doctrine in all the courts. See *Matlock vs. Purefoy*, 18*th Ark.*, 492; *Story on Prom. Notes, sec.* 51.

Mr. Justice HARPER delivered the opinion of the court.

This was an action of assumpsit on a promissory note. Defendant below first plead, in abatement, a variance between the writ and declaration; to which the court sustained a demurrer.

Defendant then, on oyer, filed a demurrer to the declaration,

setting out, as causes: 1st. A variance between the note described in the declaration and that exhibited on oyer, in that the latter purports to be "for value received," whereas the former does not. 2d. That the second count in the declaration fails to show *when* the defendant was to pay the said supposed several sums of money, and the said supposed interest therein specified. 3d. That said declaration is in other respects informal and insufficient.

In this case, the only question seems to be, is the omission of the words, "for value received," in the declaration, which words are contained in the note, such an error as will justify a reversal.

It has been held by this court that an appellate court will not disturb or reverse a judgment authorized by law upon the whole record, for any irregularities or errors which do not affect the merits of the case.

In the case of *Matlock vs. Purefoy*, 18 *Ark.*, 492, referred to both by appellant and appellee, it is held that in declaring upon a promissory note it is sufficient to describe the note according to its legal effect; and expressly declared that the words "for value received," though contained in the note, may be omitted in the declaration.

The correctness of this decision is questioned by appellant, and with various other authorities the case of *Rossiter vs. Marsh*, 4 *Conn. Rep.*, *page* 199, is referred to and relied upon. In that case, which was decided many years ago in a distant state, it is as distinctly held, that the omission of said words in the declaration, when contained in the note, is fatal.

It appears to this court that the tendency of modern decisions is in harmony with the doctrine as held in the case of Matlock vs. Purefoy, and that there is no error in the proceedings and judgment below.

The judgment is affirmed.

HUYCK VS. MEADOR.

Though one partner cannot sue his co-partner, at law, in actions *ex contractu*, for matters connected with the partnership, they stand in the same relation to each other as other persons as to all contracts or transactions not connected with the partnership.

A written acknowledgment of indebtedness to the plaintiff, without containing a promise to pay, or time of payment, may well be described in the declaration as a promissory note and due immediately.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

RICE, GARLAND and FARR, for the appellant.

Defendant's special plea was a plea in abatement, (1 *Ch.* 440, 461, *note*; *Steph.* Pl., 49,) and should have been stricken out because not sworn to. 5 *Ark.*, 140, 522; 14 *ib.* 27.

The plea is fatally defective, because it sets up a partnership between plaintiff, defendant and others, but does not state that the note sued on, or the consideration thereof, or the matter set up in the common counts, in any way grew out of, or was then connected with their partnership matters. 6 *Ark.*, 191; 16 *Wendell*, 601; *Story on Part.*, 351, *note and authorities referred to; Collyer on Part.*, *sec.* 268.

One partner can be sued by another to pay a specific balance, *Pain vs. Hatcher*, 25 *Wendell*, 450; 6 *Barb.*, 537; *Story on Part.*, 218–229; 4 *Comstock*, 486; And as to contracts or debts not connected with the partnership, the partners stand towards each other as any other two persons would. *Moody vs. Payne*, 2 *J.C.R.* 548; *Story on Part.*, 372; 1 *Story's Eq. Jur.*, *sec.* 677.

Where no time is fixed for the payment of a note, it is payable immediately. 8 *J. R.*, 191, 291; 15 *Wend.*, 308; 3 *Denio*, 12.

That the instrument sued on is a promissory note. *Johnson vs.*

Johnson, Minor 263; *Smith's Mercantile Law*, 263; *Russell vs. Whipple*, 2 *Cowen*, 536; 1 *Hill* 259; 10 *Wend.* 680; 29 *Barb.* 180; 6 *N. Hamp.* 364; 7 *Verm.* 22. 2 *Hill* 59.

JENNINGS, for appellee.

Hon. JOHN J. CLENDENIN, Special Judge.

The appellant in this court, who was the plaintiff in the court below, commenced his action of assumpsit in the circuit court of Pulaski county. The declaration contained two counts; the first count based on the following instrument in writing:

"Due I. Huyck or order, the sum of three thousand nine hundred and twenty eight dollars, ($3,928,) for value received of him, and on settlement up to date."

C. V. MEADOR.

Little Rock, Ark., Feb. 16, 1865.

[Stamp.]

And the second count being a general assumpsit account for money had and received, money paid, etc. The defendant filed two pleas, the first non-assumpsit, and the second a special plea to the second count of the declaration. The second or special plea is as follows:

"And the said defendant by attorney comes and for further plea to the second count of said plaintiff's declaration, by leave of the court here for that purpose first had and obtained, says *actio non*, because he says that before the making of the said several supposed promises in said second count mentioned, to wit: on the first day of June, A. D. 1864, he, the said defendant, and the said plaintiff, and Erastus Marshall, and Charles Carroll, at the city of Little Rock, in the county aforesaid, entered into copartnership in the theatrical business, and as such partners carried on business together under the firm name, style, and description of "The Varieties Theatre" company in said city, from thence

hitherto, and that there are unsettled accounts growing out of the business of said copartnership, which still remain unsettled and unadjusted, and that a suit in chancery is now pending in the circuit court of the United States for the eastern district of the state of Arkansas, between the said Charles Carroll complainant, and him the said defendant, and the said Huyck and Marshall, defendants, for an account of said partnership dealings, and for a dissolution of said partnership, which he, the said defendant, is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action as to said second count against him."

The plaintiff took issue to the first plea, and filed his demurrer to the second plea to the second count of the declaration. The court overruled the demurrer, and the plaintiff stood on his demurrer. The case was submitted to the court sitting as a jury upon the first count in the declaration and the first plea, and upon the trial found the issue for the defendant; the plaintiff moved for a new trial, which motion being overruled, he excepted to the opinion of the court, and brought his case to this court by appeal.

The first point raised by the record and the assignment of error, for our consideration, is as to the sufficiency of the second plea of the defendant to the second count of the declaration. This plea is unquestionably defective and insufficient, it tenders an immaterial issue, it alleges that a partnership existed between the plaintiff and defendant and other persons, but it does not aver that the matter in controversy in the suit then pending was in any manner connected with that partnership, or was any part of or connected with it.

Now while we admit the proposition that one partner cannot sue another partner at law in actions *ex contractu*, for matters connected with the partnership, we are equally clear that for contracts or transactions outside of the partnership, the parties stand in the same relation to each other in the courts of law as other persons. *Bisset on Partnership*, 78, *to* 86. In the case of

Van Ness vs. Forrest, 8 *Cranch* 30, it was decided that "if one partner give another his promissory note or his separate acceptance for value received on account of partnership, an action will lie on such note or bill. And in the case of *McCall vs. Oliver*, 1 *Stewart*, 510, it is decided "that an action at law lies by one partner against another on a writing ascertaining the amount due from one to the other, on a settlement, though there be no express promise to pay." See, also, 6 *Ark.*, 191; 16 *Wendell*, 601; *Story on Partnership*, 351. Authorities to this point could be multiplied, but we deem those already cited as sufficient.

Testing the plea by these principles and authorities, we are of the opinion that it was materially defective and insufficient, and that the circuit court erred in overruling the demurrer to the plea.

We come now to consider the other objection, raised by the record and the assignment of error. This question grows out of the action of the court below in refusing to permit the plaintiff to read as evidence, on the trial, the writing, (a copy of which is given before in this opinion,) and which writing may be said to be the foundation of the suit. The first count of the declaration avers that the defendant "made his certain promissory note in writing, etc." and that "he promised to pay immediately, etc." The first question to be decided, is, was the instrument offered in evidence a promissory note; and secondly, if it was, when was it payable.

A promissory note is a written promise for the payment of money. (*Bayley on Bills*, 1, 3.) The case of *Russell vs. Whipple*, 2 *Cowen*, 536, was upon a due bill in the following words: "Due Lawson Russell, or bearer, two hundred dollars and twenty-six cents, for value received." The court held in this case that this instrument was a promissory note.

In the case of *Kimball vs. Huntingdon*, 10 *Wendell*, 679–80, the court decided that an instrument similar to the one offered in evidence in this case is a promissory note, as it contains every quality essential to such paper, the acknowledgment of indebted-

ness on its face implies a promise to pay. So in the case of *Franklin vs. Marsh*, 6 *New Hampshire Rep.*, 364, it was held that a writing in these words: "Good to Cochran or order, for thirty dollars, borrowed money," is a promissory note. See, also, *Smith's Mercantile Law*, 263, 1 *Hill*, 259; 7 *Vermont*, 22; 2 *Hill*, 59.

Holding, as we do, that the instrument declared on in this case and offered in evidence is a promissory note, the enquiry next arises, when, by its terms, did it become due and payable. No time of payment being named in the note, it is due immediately, and was so correctly described in the plaintiff's declaration. See *Sacket vs. Spence*, 29 *Barb.*, 180; 8 *Johnson*, 191, 192; 15 *Wendell*, 308; 3 *Denio*, 12.

We are therefore of the opinion that there was no variance between the note offered in evidence, and that declared on; and that the circuit court erred in not permitting the note to be read in evidence.

The judgment of the circuit court must be reversed, the cause remanded, with instructions to the court below to grant a new trial, to sustain the demurrer to the defendant's second plea to the second count of the declaration, and for such other proceedings to be had in accordance with law and not inconsistent with this opinion.

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS.

AT THE

DECEMBER TERM, 1866.

HODGES EX PARTE.

24 197
64 637

24 197
90 277

On a contract for the sale of lands for the price of $30,000, one third to be paid at a short day, the balance in five years with interest, the vendors executed their covenant to the vendee, reciting the contract and binding themselves to make a good title to the lands on payment of the balance of the purchase money, unless the vendee shall then prefer to resell to the vendors; in such case they agree to pay him for the land $50,000, and if they fail or refuse to pay that sum for the land, at the times stipulated in the original sale, then to forfeit and release to the vendee one half of the balance of the purchase money on

their sale to him: *Held*, that the latter portion of the contract, as recited in the covenant, was not an independent and separate contract, but that all its provisions should be taken and held as one contract, made upon sufficient consideration and binding upon the parties.

Where a defense, legally cognizable at law has been unsuccessfully interposed in a suit at law, the defendant will not be allowed to avail himself of it in a court of equity; but where the defence is altogether equitable, though unsuccessfully attempted at law, it may afterwards be interposed in equity, (14 *Ark.*, 363; 22 *Ark.* 282.)

Where a defendant in a suit at law comes into a court of chancery to injoin the proceeding, he must, as a general rule, submit to judgment; and the offer in his bill to make his defense only in equity and abide the decision of that court, is a substantial compliance with the rule.

A vendor who comes into a court of equity to enforce the execution of a contract for the sale of lands, should tender a perfect and unencumbered title; at all events, such a title as he contracted to make.

Application for Mandamus to grant an Injunction.

PIKE & ADAMS, for the application.

The complainant offers in his bill to withdraw all defence at law and submit to judgment for the reason that his relief is alone in equity; and therefore the rule in *Conway vs. Ellison*, 14 *Ark.*, 360, is not applicable in this case.

The contract to re-purchase is not a nude or naked contract, without consideration; but is as valid and binding upon the parties as the original contract of sale. *Silby vs. Silby*, 5 *A. & Ellis*, 548; 1 *Par. on Con.*, 448 *and authorities cited; ib.*, 430. It was part of the consideration for complainant to pay—to enter into the contract.

The contract of sale and re-purchase is one entire contract, made upon and for a large and valuable consideration, paid according to contract,—is an entire contract, good and obligatory in all its parts; and the vendors refuse to re-purchase as stipulated in the contract, or to release the $10,000 and make the vendee a good title to the land.

Mr. Chief Justice WALKER delivered the opinion of the court.

This case comes before us upon petition for mandamus to compel the judge of the first judicial circuit to grant to the petitioner an injunction. Whatever the real merits of the case may be, upon issue and proofs, we must, for the purposes of this application, consider the allegations of the bill as true.

It seems that, on the 5th day of November, 1859, Daniel and James Hughes, for the consideration of $30,000, ten thousand of which were to be paid on the 20th of February, 1860, and twenty thousand on the 1st of January, 1865, and for the payment of which Hodges executed to them his writings obligatory of that date, sold to the said Hodges twelve hundred acres of land, situate in the county of Crittenden, Arkansas; and thereupon executed to Hodges their covenant, reciting the sale of the land, a description of it, the consideration or price to be paid for it, and time of payment; and continuing as follows: "Now, therefore, in consideration of the premises, we the said Daniel Hughes and James Hughes, hereby bind ourselves, our heirs, etc., to the said Hodges, his heirs, etc., as follows: First, to make the said Hodges a good and sufficient title in fee simple to said land with full warranties, to be prepared by us and tendered to said Hodges, on the payment of the balance of said purchase money for said land, unless the said Hodges shall, on the maturity of said balance of said purchase money, prefer to re-sell said tract of land to us; then we agree to pay him for said land the sum of $50,000; and in case we fail or refuse to pay said Hodges or his assigns the said sum of $50,000, one-third cash, on the same terms on which it is now sold, say balance in five years time with interest, for said tract of land at the time appointed above, then we forfeit and release to said Hodges or his assigns the one-half of said balance on said purchase money for said land. Said Hodges is to be allowed, before or after the first day of January, 1865, to make his election whether he will receive a deed for title to said land as aforesaid, or re-sell the same to us at the price of $50,000. And he is not required to give notice of his said election until

said last payment for said land is demanded; and then, notice to the person or persons so making the demand is notice to us both of such election. The said Hodges agrees on his part, if any of the titles fail to said land, and he is evicted from possession of any of said land, to accept, in lieu thereof, acre for acre of the lands adjoining said tract and immediately south of the military road, known as the Hill lease, together with other lands south, east or west of said lease: and said Hodges is to retain possession of said land on the south side of said road, until the title of the entire tract first aforesaid is perfected by us, if the same should not be made perfect at the expiration of the lease of said Hill: said Hodges further agrees, on his part, if he fails to make payment of the said first payment of $10,000, (and we do not accept less) on or before the 20th day of January, 1860, then this contract for the sale of said land from us to said Hodges is void, and not binding on any of the parties aforesaid.

These several mutual covenants were subscribed and sealed by both parties, and in regard to which and the circumstances connected with, and growing out of it, complainant relies for equitable relief.

Amongst the most prominent reasons assigned by the judge for having refused to grant the injunction is, that so much of the contract as relates to the re-sale of the land by Hodges to Hughes is without consideration and void. There are several acts covenanted to be performed by the respective parties, intended to anticipate and provide for contingencies that might or not arise, and to secure an election to Hodges, when the last payment became due, or thereafter, upon request of payment, either to pay the residue of the purchase money and take a deed for the lands, so to be conveyed, or to re-sell or release to the Hughes his claim to the land, giving to them notice at that time of such intention, which re-sale or release the said Hughes agreed to accept, and pay to Hodges $50,000 for the land.

This covenant of the Hughes, by which they bound themselves, upon notice to that effect, to take back the land sold to Hodges

and pay him $50,000 for it, was not an independent and separate contract, but it was part of the original contract, in consideration of which, it may be, that Hodges was induced to make the purchase. The Hughes had secured to themselves the immediate use of $10,000, and the annual payment of the interest on $20,000. In consideration of this and the covenants made by Hodges to them, they agreed with Hodges that, if he preferred doing so, they would take back the land and allow him $50,000 for it, two-thirds of which was not to be paid short of five years thereafter. In view of this contract and its several provisions, we do not hesitate to decide that it should be taken and held as one contract, made and executed for the consideration of the sum agreed to be paid for the land, and the several mutual covenants of the parties.

In this conclusion we are fully sustained by the case of *Stansbury vs. Feringer*, 11 *Gill & Johnson*, *p.* 152, where it is said, that where a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation and forms one of the inducements therefor; and no one stipulation can be supposed to result from, or compensate for the consideration, or any part of it, exclusive of other stipulations, unless the parties have expressly so declared.

So, any benefit accruing to him who makes the promise, or any loss, trouble or disadvantage undergone by, or charge imposed upon him to whom it is made, is a sufficient consideration to sustain the promise. *Smith on Contracts*, *page* 90.

Thus holding the contract upon sufficient consideration and binding on the parties, it becomes our duty, if practicable, to give it effect in all its parts, according to the intention of the parties: and when such intention can be distinctly ascertained, it will prevail. *Story on Con.*, *ch.* 21, *p.* 3.

Under this contract Hodges took possession of the land, and thereafter, on the 9th of January, 1860, by a subsequent agreement, the Hughes conveyed 280 acres of the land embraced in

the covenant to one Reuben Chick, in trust for the use of Hodges' wife, for which he paid to them $7,000 cash, which sum was to have been deducted from the amount due them: That in addition to this sum and $10,000, the first payment on the land, Hodges, on the 1st of January, 1862, paid to them $1,363 40, taken together, making the whole sum paid to Hughes $18,363 40: That at the time the bond for $20,000 became due, Hughes and their representative resided in the state of Tennessee, within the lines of the Federal army and beyond reach with personal safety: That soon after the close of the war, in June, 1865, he gave to the holder of the bond notice of his election to re-sell the lands upon the terms agreed upon, but that the holder of the bond and representative of Hughes utterly refused to comply with their covenant, although he offered at the time to re-sell and convey to them all his title and interest in said lands free from all incumbrance which had been placed upon it either by the deed for 280 acres to the use of his wife, or a deed of trust which had been executed by him to secure the payment of a sum of money; That he now offers to remove all incumbrance which has accrued since his purchase, and convey and deliver to the vendors, Hughes and their representatives, at such time and in such manner as the court may direct.

Complainant insists on his right to a specific performance of the contract under his election: Exhibits and makes part of his bill, the proceedings in the court of law on the bond for $20,000, and several lesser notes given for the payment of the annually accruing interest on such bond: States that he has no valid defence at law, offers to withdraw all defence in that court, and to submit to judgment as the court of chancery may direct, to make his only defence there, and in all respects submit to and abide the final decision of that court.

It will be observed that the defendant had interposed a defence in the suit at law on the bond and notes. What that defence was does not appear from the pleadings. Had the defence been such as might have been legally interposed in either court, after the

defendant in the court of law had elected to make such defence there, he would not, as repeatedly decided by this court, be permitted to abandon such defence and offer it in a suit in chancery upon the same subject matter. But where the defence is altogether equitable, even though unsuccessfully attempted in the court of law, it may afterwards be interposed in equity. *Conway vs. Ellison*, 14 *Ark. Rep.*, 363; *Worthington vs. Curd & Co.*, 22 *Ark. Rep.*, 282.

As a general rule, it is true that, where a defendant in a suit at law comes into a court of chancery to injoin proceedings at law, he must submit to judgment; that is, the plaintiff in the suit at law has a right to be placed in such situation, that when the injunction is dissolved (should such be the case,) he may, without unnecessary delay, have execution of his judgment. This, the complainant expressly offers to permit, to make his only defence in equity and abide the decision of that court, which we think is a substantial compliance with the rule.

The bill seems to have been considered by the judge, to whom application was made for an injunction, as intended to rescind the contract, not, as we have said, to enforce its specific execution: and, therefore, all the questions with regard to the defect of title in the vendor, or the sufficiency of the allegations with regard to conflicting titles need not to have been considered, because, even admitting that the title in the vendor was perfect, which, according to the allegations of complainant, is very questionable, indeed with regard to several tracts much incumbered, still we can see no sufficient reason why the vendor should not be required to take back the land upon the terms agreed upon at the time as part of the contract of purchase. There is nothing in the enforcement of the contract which would be considered oppressive and hard, or against good conscience. But for the derangement in the system of labor and the probable change in the valne of lands, the result of the late civil war, which could not have been anticipated by the parties contracting, it is not improbable that it would have been a matter of speculation and profit for the vendors to have

taken back the land upon the terms agreed upon. They had already received from Hodges $18,363 in part payment of the land. The complainant alleges that he has cleared nearly four hundred acres of land and made other improvements, in all, of the value of $15,000; which, when added to the balance unpaid of about $14,000, would make $47,000. The largely increased value of the lands by improvements made by complainant, the use of which the Hughes were to have for the five years before the payment of the two-thirds of the purchase money, would be considered in the equitable settlement of rents, etc. But, then, if this should prove a hardship, or in the opinion of the Hughes, be oppressive, they expressly reserved to themselves the right to remit $10,000 of the original purchase money.

When the vendor comes into court (as the complainant has in this case,) to enforce the execution of a contract, he should tender a perfect and unencumbered title; at all events a title such as he contracted to convey. In this case, it was contemplated that the title should be such as the Hughes had when they sold to him; and before he can enforce the execution of the contract, the court will see that he remove from the land all incumbrances placed on it since his purchase. Complainant admits that he has encumbered two hundred and eighty acres by deed in trust to the use of his wife, and the other lands by a deed of trust to secure the payment of a sum of money; but says he can and will disencumber the land, and convey it at such time and in such manner, as the court may direct. Whether he can do this or not, or whether the several allegations in the bill are true or not is not for us now to consider.

In view of the whole case, as presented by the bill and the law governing such cases, we are of opinion that the judge of the circuit court for the first judicial district should have granted to the complainant an injunction in accordance with the prayer of his bill. And that a peremptory mandamus be issued requiring said judge to grant to the complainant an injunction herein, in accordance with the prayer of his bill, under the rules and practice governing such cases.

HANGER AND AYLIFF VS. DODGE.

When the maker of a note affixes to it a seal after the statute bar has matured, no question as to validity of the act arises on the plea of the statute of limitations—a special plea of *non est factum* would have been the proper defence.

When one of several makers of a promissory note affixes a seal to it, with the assent of the payee, such instrument of writing will, on the plea of limitation, be held to be his deed, and will be governed by the statute applicable to sealed instruments; but if such sealing was done without any authority on the part of the other maker and he neither recognizes nor affirms such act, he will not be bound by it.

If a petition in debt sets forth two notes of the defendant, each note is, in effect, a separate count for a distinct and independent cause of action; and on issue to a plea answering both counts, the finding may be for the defendant on one count and for the plaintiff on the other, according to the proof.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

CLARK, WILLIAMS & MARTIN, for appellants.

The uniting of two notes in one petition in debt is not authorized by the statute (*Digest*, 838,) and this proceeding being in derogation of the common law, the statute must be strictly construed.

If the two notes could be sued on in one petition, they must be considered as separate counts; and the court erred in instructing the jury that if Hanger applied his seal to either of the bonds they must find the issue for the plaintiff. The instruction should have been to find according to the proof as to each count. 16 *Ark.*, 303; 1 *Ch. Pl.*, 692; 1 *Saund.*, 312, *note* 5.

The proof shows, as to one of the notes, that Ayliff sealed it; and to make it the deed of Hanger, it devolved on the plaintiff to show in evidence the authority of the agent under seal to do so. 12 *Mass.*, 237.

The sealing of a note after it is barred does not revive it. Such act is not a part payment nor a promise in writing to pay the debt.

STILLWELL & WASSELL, for the appellee.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of debt, by petition, upon two writings purporting to be sealed. The first signed by Peter Hanger and Charles Ayliff: the second by Hanger & Ayliff. The petition is, in all respects, in conformity to our statute, and regular.

The defendants filed separate pleas; that of Ayliff was intended as a plea of limitation; the substance of which is, that the second writing set forth in the petition, signed Hanger & Ayliff, was, when executed, a promissory note, and remained such until more than five years from its date, and that, after that time, and after the statute bar had matured, he, defendant, affixed his seal to it.

If the act of Ayliff in affixing a scroll by way of seal to the note was a valid act, that is, one which he might lawfully do, with the assent of Dodge, then it is his deed, and carries with it the legal force of a sealed instrument, which would not be barred short of ten years. But if, on the other hand, the act of making the scroll was not a valid act, it was not his deed: and special *non est factum* would have been his proper defence; and until so avoided, the instrument sued upon must be considered and held as the deed of Ayliff, governed by the statute of limitations applicable to sealed instruments.

The defendant Hanger pleaded special *non est factum* to both instruments, in which he alleged that scrolls had been affixed to his signature to each of them, whereby they were changed from promissory notes to bonds. Upon this plea issue was taken, and tried by jury, who found for the plaintiff, and judgment was entered accordingly.

The defendants moved for a new trial, which motion was over-

ruled, and the evidence and instructions given and refused made part of the record.

After a careful examination of the evidence, we think that it is fully sufficient to fix the liability of Hanger upon the first writing set forth. The signature was proven to be his, and the scroll affixed to it appeared to have been made at the same time, with the same ink and hand. This proof was offered by the plaintiff, and stands uncontradicted by any evidence on the part of the defendant, upon whom, under the issue formed, the burden of proof rested.

The second writing, signed Hanger & Ayliff, was, from the evidence, executed by Ayliff, and for more than five years after its date, had no scroll affixed to the signature. After that time it seems that Ayliff affixed a scroll to it at the instance of Dodge. If Hanger & Ayliff were partners, or were doing business together, or otherwise connected in business, it is no where shown in evidence; nor does it appear that Hanger gave to Ayliff any authority, verbal or otherwise, to affix such seal, or that he recognized or affirmed such act after it was done. Under this state of the case there can be no doubt but that Hanger was not bound by the second writing.

The plea of Hanger was responsive to both notes, which the defendants were called upon to answer as two distinct causes of action, and for every practical purpose, in effect, separate counts, or distinct subject matters of complaint. Thus, in *Saunders on Pleading and Evidence, vol.* 1, *p.* 922, it is said that, "where several debts are alleged in indebitatus assumpsit to be due, in respect to several matters for wages, work and labor as a hired servant, work and labor generally, goods sold and delivered, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, though one promise is alleged in consideration of all the debts." The plea of defendant answered fully each count or cause of action, and if the issue was sustained by the proof on either, he was entitled to judgment upon it. And the court erred in refus-

ing to give this instruction to the jury, at the instance of the plaintiff: "That if the jury should find that Hanger signed either of the notes in evidence, they should find the issue for the plaintiff." This instruction should have been limited to the issue upon the note so found to be executed by him, not the whole issue in the case. There were in fact two distinct independent causes of action set forth in the petition, and the jury were sworn to try them. They could, and we think should, in view of the evidence before them, have found one of the issues for the plaintiff and the other for the defendant; that is: that the first note was the deed of Hanger, and the second was not his deed; and we must believe, but for the instructions of the court, such would have been their finding.

Let the judgment be reversed and set aside, and a new trial had in accordance with law and the opinion herein given.

HANGER & ASHLEY VS. DODGE.

Where the plaintiff, in a suit by petition in debt pursues the form prescribed by the statute, and sets out a sealed obligation purporting to be executed by the defendant by his agent, it is sufficient on demurrer without other allegation of the authority of the agent.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

CLARK, WILLIAMS & MARTIN for appellants.

STILLWELL & WASSELL for appellee.

Mr. Justice COMPTON delivered the opinion of the court.

This was a proceeding by petition in debt, instituted by R. L. Dodge against Hanger & Ashley.

The petition is in the usual form, and sets out a copy of the writing obligatory sued on, which is as follows:

$165.50. LITTLE ROCK, April 23, 1860.

One day after date we promise to pay to the order of R. L. Dodge, one hundred and sixty-five 50-100 dollars, with interest at the rate of ten per cent. per annum from and until paid for value received. HANGER & ASHLEY, [SEAL.]

By J. O. ASHLEY, "

A demurrer to the petition was overruled in the court below, and Hanger & Ashley declining to make further defence, judgment was rendered against them, from which they have prosecuted their appeal to this court.

It is insisted that the demurrer should have been sustained, because it was not alleged in the petition that J. O. Ashley had authority to execute the writing obligatory. The petition alleges that Dodge "is the legal owner of a sealed note against the defendants," and then follows a copy of the instrument which, on its face, purports to be the obligation of Hanger & Ashley, executed by one who purports to be their agent. Admitting these allegations to be true, as the demurrer does, they are sufficient in a proceeding like this, to show a liability on the part of Hanger & Ashley. The statute prescribes the form of the petition, and in this case the pleader has strictly complied with its requirements.

Finding no error in the record the judgment must be affirmed with costs.

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54 528

ROANE VS. GREEN & WILSON.

When a contract is reduced to writing in plain, definite and unambiguous terms, and accepted by the parties as the sole evidence of the contract, neither party will be permitted to introduce parol evidence to alter, or vary its terms or meaning; nor will any conversations, or declarations, either before, at the time, or after the contract is reduced to writing, be admitted to modify or contradict its plain import. (13 *Ark.*, 449–598; 15 *ib.*, 543.)

And so, in a suit upon a note given for the payment of so many "dollars," a plea setting up that the consideration of the note was property to be paid for in Confederate States money, and that when the note was given it was understood and agreed between the parties that the word "dollars" therein should be understood to mean "Confederate States money," held bad on demurrer.

Error to Jefferson Circuit Court.

Hon. W. H. HARRISON, Circuit Judge.

ENGLISH, for the plaintiff.

STILLWELL & WASSELL, for the defendants.

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

This is an action of debt brought by Green & Wilson, in the Jefferson circuit court, against Julia Roane, upon the following instrument.

"On or before the first day of January next, I owe and promise to pay Green & Wilson nine hundred dollars for value received, at ten per cent. from date till paid.

Oct. 24th, 1862. JULIA ROANE."

The defendant pleaded *nil debet*, upon which plea issue was taken, and two special pleas, to which demurrers were interposed and sustained. No further defence was offered, and judgment rendered for the plaintiffs.

The legal sufficiency of the special pleas is the sole question presented for our consideration.

The matter of defence attempted to be set up in bar of the action, was, that plaintiffs had sold to defendant beef cattle, which by express agreement were to have been paid for in Confederate States paper currency; that part of the price agreed to be paid for the cattle was paid in such currency; and that the note in suit was given for the balance due on such purchase: that it was understood and agreed between the parties at the time the note was executed, that the word "dollars," therein should be understood to mean Confederate States money, which was only worth about ten cents on the dollar. There was no allegation of fraud, nor that the cattle, the consideration for which the note was given, had not been received.

This brief statement of the defence attempted to be interposed by these pleas, may suffice without a more detailed reference to the allegations. Because, waiving all consideration of several obvious defects in the form of the pleadings, the facts as set forth therein, when taken in their broadest sense, and if pleaded in the most apt form, would be no bar to the plaintiff's action. Suppose that the defendant should prove, as he has averred, that the contract between the parties was for confederate paper currency, the effect of such proof would be to set up and establish another and different contract from that declared upon; but it would certainly be no answer to a declaration upon a note for the payment of "dollars." Or, if the facts set forth in the plea, had been intended not to set up a new contract, but to vary the terms and legal import of the contract declared upon, if such plea be sustained in proof by parol evidence (which we will presently show cannot be done) the plea would have accomplished its purpose in thus qualifying the terms of the contract; but would offer no matter of defence in bar of a recovery upon the contract even in its qualified state. In short, the whole scope and purpose of the plea upon the state of facts presented would be, either to

set up a new and different contract from that in suit, or to change and modify it in terms different from that which the language used in the contract imports.

Under the circumstances of the case, we think it not improbable that the contract as reduced to writing, does not fully express the terms of the contract as agreed upon and intended by the parties contracting. But whether this be the case or not, when the contract is reduced to writing in plain, definite and unambiguous terms, and accepted by the parties contracting as the sole evidence of the contract between them, they become bound by it, and will not thereafter be permitted to introduce parol evidence to alter, or vary it in terms or meaning. There is, perhaps, no rule of law more definitely settled, or in regard to which the courts have been more unanimous in opinion, than the one now presented for our consideration. If parol evidence can be introduced in aid of a proper understanding of this contract, it must be because there is some latent ambiguity in it, which extrinsic facts, if introduced, would make certain and definite; for when such is not the case, then there is no margin for the introduction of parol evidence. The rule in such case is, that where the language is neither uncertain nor ambiguous, it is to be expounded according to its appropriate import. *Story on Con.*, 14. And all oral conversations, or declarations, either before, at the time, or after the contract is reduced to writing, should be rejected, and the writing, taken as the only and sole evidence of the intention and meaning of the parties. *Hooper vs. Chism*, 13 *Ark. Rep.*, 449; *Jordan et al. vs. Fenno*; *id.*, 598; *Glanton vs. Anthony, et al.*, 15 *Ark. Rep.*, 543; *Jackson vs. Sill*, 11 *John. Rep.*, 201; *Smith's Law of Con.*, 94.

Even though, in reducing the agreement to writing, there was clearly a mistake made, parol evidence is inadmissible to correct it. As in the case of *Jackson vs. Sill*, 11 *John. Rep.*, 201, in which the draftsman of a will, supposing a certain tract devised to be that which the testator occupied, described it as "the farm the testator occupied," without more definite description, which

was in point of fact a mistake, the party was not permitted to give parol evidence to correct such mistake. In regard to which, THOMPSON, C. J., said: "I think it unnecessary to notice particularly the evidence offered; for it is obvious that if it was competent, it would have shown that the premises were intended by the testator to be devised to the defendant Sill. The will was drawn, however, by Mr. Vanvechten under a misapprehension of facts, and under a belief that the testator was in actual possession of the premises. It is, therefore, a clear case of mistake, as I apprehend. And under this belief I have industriously searched for some principle that would bear me out in letting in the evidence offered; but I have searched in vain, and am satisfied the testimony cannot be admitted in a court of law, without violating the wise and salutary provisions of the statute of wills, and breaking down what have been considered the great land-marks of the law upon the subject." In the case of *Bond vs. Haas*, 2 *Dallas Rep.*, 133, the facts were, that in 1777, a contract was made for £250, current money of Pennsylvania, due one year after date. At the date of the contract continental money was rating at three for one. Upon the trial the plaintiff insisted that the whole sum should be paid in specie, and offered parol evidence that such was the understanding of the parties; but the court rejected the evidence upon the ground that it in effect altered the contract.

We have seen that this is not a contract in which any latent ambiguity could exist. The contract has no reference whatever to any extrinsic facts which could be brought to explain it: and the rule in such case is, that the ambiguity must not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which are susceptible of explanation by a mere development of facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words used. And therefore, parol evidence would be inadmissible for any purpose connected with the matter attempted to be introduced.

If fraud or failure of consideration had been the subject of inquiry, or if words or phrases, to which custom or science has fixed a peculiar signification, had been used, a different rule would prevail, which we are not, under the state of case before us, to consider.

We have not overlooked the position assumed in argument by counsel, that the coutract was made (as they assume) in a foreign government, in which the word "dollars," had a fixed and definite signification, different from that given to it in the government of the United States, which should limit and control its meaning and govern in its enforcement. Many of the facts set forth in the defendant's pleas, and referred to by counsel in their argument, are public facts, connected with and growing out of the late civil war, of which this court will take judicial notice, and, after giving to them all due consideration, we are persuaded that no such change of government was either made, or attempted to be made, as in any manner to affect the use or meaning of the word "dollars." Our governments, state and national, have at times thrown such an excess of paper currency into circulation as almost entirely, for the time being, to suppress the circulation of specie; but such excess of paper circulation, so far as we are aware, in no wise affected the meaning of the word "dollars." Both the United States government and the late Confederate States government had, at the time this debt was contracted, put into circulation a very large paper currency, each of fluctuating and uncertain value: and whilst we may well suppose that contracts were daily made with reference to the changing value of such currency, still the language used by the parties contracting, did not fluctuate and change its meaning with it. The word "dollars" without other qualifying language in connection with it, can never be understood to mean Confederate States paper currency. So to hold would be to warp and pervert its meaning. Nor can we permit, by the introduction of parol evidence, the qualifying words "Confederate States currency," to be introduced into the contract, either as a substitute for the word "dollars,"

which if done would leave the contract indefinite as to amount; or if we retain the word "dollars" and add the additional words "confederate money," the contract would be most materially changed, which we have held not to be permissible.

The question under consideration is not a new one. It has been repeatedly decided by this court, and in view of the uniform concurrent decisions in most of the courts in the United States, may be considered as settled. And we have been induced to briefly review the decisions, rather because the rules of evidence, when applied to this case and perhaps many others, may result in hardship and inconvenience, than from any doubts as to the correctness of our former decisions.

The effect which national legislation may have upon paper currency, by declaring it a legal tender, or whether, when so declared, it thereby approximates so nearly in value to specie, as to be, in effect, embraced in the term "dollars," we intend now to express no opinion.

From the conclusion at which we have arrived, it follows that the special pleas of the defendant were insufficient to bar a recovery upon the contract declared upon, and that the demurrers to them were properly sustained.

The note sued upon was competent and sufficient evidence to sustain the issue upon the first plea, upon which judgment was properly rendered.

Let the judgment be affirmed.

HAGAN VS. DEUELL AND VAUGHAN.

Replevin does not lie for property in the custody of the law, (*Goodrich vs. Fritz*, 4 *Ark.*, 525; *Spring vs. Bourland*, 6 *Eng.*, 658;) nor can cross-replevin be maintained, (*Gould's Dig.*, *ch.* 145, *sec.* 2;) but where property has been replevied and delivered to the plaintiff, a stranger may well issue his writ of replevin for the same property without waiting for the determination of the first suit, to which he is not a party.

The remedy provided by the statute (*Gould's Dig.*, *ch.* 145, *sec.* 17 *etc.*) for trial of the right of property when it is claimed by any person other than the defendant in replevin, is not exclusive of any other remedies the party may have.

A motion to quash a writ of replevin, and particularly before the return day, on the ground that the property was *in custodia legis*, is not the proper practice. Such defence should be by plea in abatement, or in bar.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

YONLEY, FARRELLY & KNIGHT, for appellant.

The action of replevin lies in favor of any one having the right of possession; but there shall be no cross replevin, nor for property in the possession of an officer by virtue of any legal authority.

In this case there was no cross-replevin, the plaintiff being a stranger to the other suit. See opinion of PIATT J. in *Clark vs. Skinner*, 20 *John.* 466, *and cases cited.*

If the appellees had a meritorious case their proper proceeding, before the return of the writ, was by petition for supersedeas: or a trial of the right of property before the sheriff, as provided for by statute. (*Gould's Dig. p.* 905.) A motion to quash is proper only where the writ is before the court and for defect apparent on its face, or other alleged irregularity.

When it is said that replevin will not lie for goods taken in execution, the rule is to be taken to be limited to cases in which

the writ of replevin is sued out by the defendant in the execution. 3 *Kent's Com.* 605; 20 *John.* 466: *Ilsley vs. Stubbs*, 5 *Mass.* 280.

FARR & VAUGHAN, for appellees.

The main and, as we conceive, the only material points for the court to consider, are 1st, whether cross-replevin, or replevin for property in the possession of an officer by virtue of legal authority, can be maintained. If not, then 2d, whether this action constituted cross-replevin, or was for property in the possession of the law.

The first question is settled by our statute, (*Gould's Dig. ch.* 145, *Sec.* 2,) which is but a reiteration of the common law principle, as settled definitely in *Goodrich vs. Fritz*, 4 *Ark.*, 525, *and Spring vs. Bourland*, 6 *Eng.*, 658—see also *Ilsley vs. Stubbs*, 5 *Mass.*, 280, that property in the custody of the law cannot be maintained—the remedy being by trespass or trover.

If cross-replevin means a counter replevin by defendant against the plaintiff, the statute is broad enough to have precluded the appellant from instituting his suit—the words are: "no cross-replevin, or replevin for property in the possession of an officer by virtue of any legal authority shall be brought;" and the court in *Spring vs. Bourland, supra*, says it is "broad enough to prohibit all persons whomsoever from bringing the action." The first suit was still pending; and the property was held by the appellees subject to the decision of the court, and their possession was the possession of the law until the determination of that suit: and replevin cannot be maintained for property *in custodia legis* in any case, whether the plaintiff in replevin be the defendant in the execution or not. *Carroll vs. Hursey*, 9 *Iredell*, 89; *Goodrich vs. Fritz, sup.*; *Spring vs. Bourland. sup.*; *Saffell vs. Wash*, 4 *B. Mon.*, 92.

As the law prohibits a writ of replevin in a case like this, the writ was null and void, and a motion to quash could be made at any time. *Shaw vs. Levy*, 17 *Pa. Rep.*, 103; *State Bank vs. Noland*, 13 *Ark.*, 299; *Morgan vs. Avery*, 7 *Barb.*, 659.

Mr. Justice COMPTON, delivered the opinion of the court.

The facts necessary to an understanding of the questions that arise in this case, may be briefly stated as follows:

Hagan, the appellant, filed in the Pulaski circuit court, in term time, his declaration in *replevin* against the appellees, Deuell & Vaughan, and a writ, returnable to the next term of the court, was issued thereon and placed in the hands of the sheriff, who, in obedience to the writ, replevied the property mentioned in the declaration and delivered it to Hagan. Subsequently, at the same term of the court, and before the writ had been returned, Deuell & Vaughan moved the court to quash the writ and cause to be returned to them the property which had been replevied. The ground of the motion was, that on the day previous to the issuance of the writ, Deuell & Vaughan had replevied the same property from one David C. Wilson, and had given the bond required in such cases; and that, therefore, the property was in the custody of the law. The court below sustained the motion to quash, and awarded a return of the property, with judgment for damages and costs.

That replevin does not lie for property in the custody of the law, has been declared by this court in *Goodrich vs. Fritz*, 4 *Ark.*, 525, and in *Spring vs. Bourland*, 6 *Eng.*, 658. Nor can cross-replevin be maintained, because that is expressly forbidden by the statute. *Gould's Dig.*, *chap.* 145, *sec.* 2.) In the case before us there was no cross-replevin, for the reason that the plaintiff in this action was a stranger to that brought by Deuell & Vaughan against Wilson. It is contended, however, that although the property had been delivered by the sheriff to Deuell & Vaughan before it was seized under the writ in the second action, it was, nevertheless, in the custody of the law, the former action being then still pending: and *Goodrich vs. Fritz, and Spring vs. Bourland, supra,* are cited and relied on as authorities in point. In both of those cases, the property was in the possession and custody of a constable who had seized it under an execution; and upon that state of facts, the court decided that the action could not be

maintained. But in the case we are now considering, the precise question is, was the property in the custody of the law? We think it was not. The reason why property *in custodia legis* cannot be replevied is, that to permit it to be done, would be to interfere with the possession before the office of the law had been performed, as to the process under which it was taken. Here, the officer had parted with the possession. When he delivered the property to Deuell & Vaughan, the process was fully executed, his whole duty was performed, and the legal custody necessarily ceased. The fact that Deuell & Vaughan entered into the usual bond in such cases, cannot affect the question. In the event they should not recover against Wilson, the bond requires them to return the property; and if they fail to do so, subjects them to its penalty—this is a matter personal to them, and in no wise concerns the execution of the process under which the property was seized.

True, if Hagan should recover, Deuell & Vaughan could not make restitution to Wilson, should he recover; but this can avail them nothing, because if they recover against Wilson the objection fails; and if they should not, it is their fault to have sued Wilson without a cause of action.

Powell, et al vs. Bradlee & Co., 9 *Gill & Johnson*, 220, decided by the court of appeals of Maryland, is a case bearing directly on the question. There the property had been replevied, and while in the possession of the officer was taken under a subsequent writ of replevin, at the suit of a third party against the plaintiffs in the first action. At the trial, there was evidence conducing to show that the plaintiffs in the first suit, had waived the delivery of the possession to them under their writ, and it was held that the court below did not err in refusing to instruct the jury that the plaintiff could not recover, if they found that such subsequent writ issued while the property was in the custody of the officer. The court said: "the principle is unquestionable, that property while in the cusody of the law cannot be replevied; and the reason is that the law will not be so inconsistent with itself, as to be auxiliary

or lend its aid to an act which would operate to defeat its own purposes. But the court were called upon to instruct the jury, that if they found that the writ of replevin, which issued in this case, was executed before the service of the first replevin upon the same property, and while it was in the custody of the sheriff, then the plaintiff was not entitled to recover. There being evidence in the cause to go to the jury, to prove a waiver on the part of the plaintiffs in the original replevin, of the delivery of possession to them, under their writ against the defendants in that action, the court would have erred in giving a positive instruction to the jury, in the manner required by the defendant's first prayer." Thus showing that when property is delivered by the officer to the plaintiff in replevin, it ceases to be in the custody of the law--indeed, this was conceded, *arguendo*, by the eminent counsel for the defendants in that case, who insisted that it was not competent for the plaintiffs to waive the possession, and that if it was, there was no evidence of such waiver.

In *Ilsley, et al. vs. Stubbs*, 5 *Mass.*, 279, to which we have been referred by the counsel for the appellees, it is nowhere intimated in the opinion of the court, that the property was *in custodia legis*. On the contrary, the inference, we think, is plain that it was not so considered. In that case, the facts were the same as in this, and the question arose upon the sufficiency of the defendant's plea in abatement. The court, after remarking that the Massachussetts statute had authorized replevin against the officer, for chattels which he had attached, or seized in execution, provided the plaintiff in replevin was not the debtor, said: "As a general principle, the owner of a chattel may take it, by replevin, from any person whose possession is unlawful, unless it is in the custody of the law, or unless it has been taken by replevin from him by the party in possession. The plea in this case, does not allege any property in Stubbs; but it alleges that the goods were delivered to him by the officer, in obedience to a replevin sued by Stubbs, not against the plaintiffs, but against Lund. Stubbs' possession was, therefore, so far legal against Lund, that he could

not recover them back again by another replevin, but only on a *retorno habendo*, if he should prevail against Stubbs. But Stubbs cannot, by his own writ, acquire any right of possession against the plaintiffs, who were not parties to it. They could not plead to Stubbs' writ, nor could any *retorno habendo* be awarded them." After further discussion of the question, the learned judge adds: "The court cannot decide that the allegations of the plea are sufficient to abate the writ, without also deciding that the owner of chattels taken from him by a trespasser, finding them in the possession of a stranger, who had taken them by replevin from the trespasser, cannot maintain replevin against the stranger. But the law will not authorize such a decision: for no transaction between the stranger and the trespasser can bind the right of the owner."

Our statute, it is true, makes provision for trial of the right of property, before the sheriff and a judge, where any person, other than the defendant in replevin, claims property in the goods and chattels specified in the writ. (*Gould's Dig.*, *chap.* 145, *sec.* 17 *et seq.*) But this remedy, unsatisfactory at best, is not exclusive: the party may resort to any other remedy to which, by law, he may be entitled.

In any view of the case, we think the court erred in quashing the appellant's writ; and it may be here remarked that a motion to quash was not the proper practice; especially so as the writ had not been returned. The defendants in the action should have interposed their defence by plea in abatement, or in bar. The plaintiff could then have come prepared to meet the defendants on the issue, as to the custody of the property. Such has been the practice in all the cases that have come under our observation, except where otherwise directed by special statutory provisions. *Goodrich vs. Fritz*, 4 *Ark.*, 525; *Spring vs. Bourland*, 6 *Eng.*, 658: *Powell, et al. vs. Bradlee & Co.*, 9 *Gill & Johnson*, 220; *Ilsley, et al. vs. Stubbs*, 5 *Mass.*, 279, *Shaw, et al. vs. Levy*, 17 *Serg. & Rawle*, 103.

For the error above indicated, the judgment of the court below must be reversed, and the cause remanded for further proceedings

LINDSAY VS. LAMB.

Whoever sells personal property in possession is held in law to warrant the title and is incompetent as a witness for his vendee in an action concerning the title.

Fraud may be shown at law as well as in chancery; and is a mixed question of law and fact; and any evidence tending to show that the title of the plaintiff was acquired by fraud, should go to the jury.

Appeal from Lawrence Circuit Court.

Hon. W. R. CAIN, Circuit Judge.

WATKINS & ROSE, for the appellant.

STILLWELL & WASSELL, for appellee.

Mr. Chief Justice CLENDENIN delivered the opinion of the court.

Martin Lamb brought his action of trover in the Lawrence circuit court against John A. Lindsay, for the value of a wagon and a wagon-bed. The defendant plead not guilty. On the trial of this issue, the plaintiff offered as a witness, Archibald Jones, who at the instance of the defendant, was sworn on his *voir dire*, and testified that this suit was brought by the plaintiff to recover the value of a wagon; that witness had sold the wagon to plaintiff: that John A. Lindsay & Co., had levied on the wagon under an execution, issued on a judgment obtained before a justice of the peace in their favor against witness, and sold the wagon thereunder, and that at such sale the defendant Lindsay had become the purchaser. Upon this statement of the witness on his *voir dire*, the counsel of the defendant objected to the introduction of Jones as a witness for the plaintiff, but the court overruled the objection, and permitted the witness to testify, to which the defendant excepted.

This exception thus taken brings up for our consideration, the

question as to the competency of the witness so offered, and who had so testified. The witness clearly showed that he was the vendor of the plaintiff; and we think the principle is well settled, that the warrantor of the 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.

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.

In order to render the witness liable and therefore incompetent, as a warrantor of the title, it is not necessary to show an express contract to that effect, for an implied warranty is equally binding. See *Greenleaf's Evidence, vol. I., p.* 521–522, *and authorites cited.* This principle has been assented to by this court in the case of *Arnold vs. McNeil*, 17 *Ark.*, 186. In *Kent's Commentaries, vol. II., p.* 478, it is said, that whoever sells personal property in possession, is held in the law to warrant the title to the same. Testing the action of the court by these principles of law, we are of the opinion that the witness Jones was an incompetent witness, and that the court erred in permitting him to testify.

There is another point raised by the assignment of errors and the bill of exceptions in this case, which we deem necessary to decide.

After the witness Jones had testified in chief, the defendant, on his cross examination, proposed to examine him as "to the fairness of the sale of the wagon by him to plaintiff," but the court, on the objection of the plaintiff, refused to permit the defendant to examine him. The defendant then proposed generally to prove that the sale of the wagon by Jones to the plaintiff, was a fraudulent sale, but the defendant objecting, the court refused to allow the testimony to be introduced. The defendant proposed to prove by a witness, naming him, specific facts, set out in the

bill of exceptions, relating to the sale of the wagon, and possession by Jones after the sale to plaintiff of the wagon, and which were, in some degree, designed to show the character of the transaction connected with the sale of the wagon, but the court refused to permit the defendant to make such proof. In this the court erred: the evidence should have gone to the jury: it was their province to hear it and to decide whether the sale was a fraudulent one or not. Fraud may be shown at law as well as in chancery, *Phelan vs. Dotson*, 14 *Ark.*, 79; *Ringgold vs. Waggoner*, 14 *Ark.*, 69. It is a mixed question of law and fact, and should have been left to the jury. *Dodd vs. McCraw*, 3 *English* 83.

For these errors, this case will be reversed and remanded for a new trial.

McCarroll et al ads. vs. Stafford.

According to repeated decisions of this court, a party failing to make an erroneous instruction of the court a ground of his motion for a new trial, will be considered as having waived or abandoned it.

Where the verdict of the jury is without evidence, or directly contrary to the evidence, it will be set aside and a new trial granted.

On the plea of not guilty in an action of trover, the issue is sustained by proof that the defendant took the plaintiff's property without authority and sold it; evidence tending to show the motives of the act, as that the owner having left the property liable to waste and destruction, he acted for his benefit, is foreign to the issue.

Appeal from Yell Circuit Court.

Hon. THOMAS BOLES, Circuit Judge.

CLARK, WILLIAMS & MARTIN, for appellants.

Admitting that, as the erroneous instructions of the court were not made the ground of the motion for a new trial, they are not to be considered in this court, the only question is, whether the verdict is without evidence. We submit that the verdict is a palpable and direct violation of law and evidence; that the facts of the taking and sale of the property are clearly and positively proven; that the motives of the defendant, the honesty of his intentions, the fiduciary character assumed without authority, can avail him nothing in this suit.

W. N. MAY, for the appellee.

It is contended on the part of the appellee that the evidence was sufficient to warrant the jury in finding the verdict they did. A civil war, of which this court will take judicial notice, and no courts being then held, the property was wasting and liable to be totally destroyed; that it was entirely abandoned, and the request of the only person interested, was sufficient authority to him to preserve and sell it, and that he should not be held responsible for the subsequent loss, without his fault, of the proceeds.

There being evidence upon which the jury might pass, this court will not disturb their verdict. 14 *Ark.*, 419; 21 *ib.*, 306; 22 *ib.*, 213.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of trover and conversion, brought by the appellants, as administrators of the estate of Thomas Reagan, deceased, against William J. Stafford, for having taken and converted to his own use ten bales of cotton, the property of plaintiffs' intestate. The general issue was plead, and the case submitted to a jury, who, after hearing the instructions of the court, upon consideration, returned a verdict for the defendant, upon which judgment was rendered. And thereupon, the plaintiff moved the court to grant them a new trial:

First. Because the jury found contrary to evidence.

Second. That the jury were instructed by the court that if they

believed from the testimony, that the defendant, W. J. Stafford, took the said cotton, or property in question, without the consent and authority of the owner, and converted the same to his own use, they should find for the plaintiff, which said finding by the jury was in this contrary to the law of the case as given by the court.

Third. That said finding was shocking to the sensibilities of all persons, and contrary to every principle of the law in such case, and wholly contrary to the evidence adduced.

The court overruled the motion for a new trial, and the plaintiffs excepted and and tendered their bill of exceptions containing the evidence and the instructions of the court, which was duly made part of the records in this case.

Upon examination of the several instructions given by the court as well as those asked by the plaintiffs and refused to be given, we feel satisfied that the court erred, particularly in the second instruction asked by the defendant, which was "That if the jury believe from the evidence, that the defendant, in the absence of any one authorized by law to take possession of the cotton, took the same in the capacity of a fiduciary and not for his own use, and the same, without being disposed of, would have been lost or destroyed and valueless to the estate, and in good faith sold the cotton, and was afterwards robbed of the proceeds of said sale, they should find for the defendant." But though the plaintiffs objected to the giving of this instruction, as well as to the ruling of the court refusing to give an instruction asked by the plaintiffs, as they have failed to make this a ground for granting a new trial, according to the repeated adjudications of this court, they cannot avail themselves of any benefit from such erroneous decisions, upon appeal or error to this court. By their omission to make these part of the grounds of their motion for a new trial, they are considered as having waived or abandoned them, and we are limited, in our range of investigation in this case, to the correctness of the decision of the court upon the grounds set forth in the motion for a new trial; which are first, that the jury found contrary to, and without suf-

ficient evidence: second, that they found contrary to the instructions of the court; third, the finding was such as to shock our sense of right.

The decisions of this court upon the questions presented by the state of case before us, are numerous, and the questions too well settle to require more at our hands than to examine the evidence and see whether in view of a settled rule of practice, a new trial should have been granted in this case or not.

The plaintiffs proved, by the admissions of the defendant and other evidence, that defendant took between five and ten bales and parts of bales of cotton, belonging to the estate of the intestate, Reagan, and sold the same for the sum of nine hundred and seventy-nine dollars and fifty cents: that at the same time the defendant admitted that he took the cotton, he stated that the money arising from the sale of the cotton, was stolen for him by soldiers attached to, or persons accompanying the federal army, in a short time after he received it. The defendant then introduced evidence and proved that the cotton taken by him, belonging to the estate of Thomas Reagan, the plaintiffs' intestate, was in a condition liable to be wasted, was unfenced, and fed on by the cattle: that part of the cotton bales were half eaten up by the cattle and destroyed, and unless taken care of would likely have been a total loss to the estate: that the cotton was abandoned by Reagan's family, who had left the premises: that the country was in a state of war, without courts: that there was no person authorized by law to take charge of the cotton, for the benefit of the beneficiaries of the estate, and that defendant took charge of it at the request of the only heir of the estate: that soon after the money was stolen from him, he applied to a federal officer to have search made for the money, which was refused. This is substantially, indeed almost literally, the evidence in the case, and upon consideration of which the jury found the issue for the defendant.

The question is, under this state of case, for the reasons set forth in the motion for a new trial, should the court have set aside the verdict and granted the plaintiffs a new trial?

The rule governing cases of this kind is, that where there is not a total lack of evidence to warrant the finding of the jury, at least upon some material allegation, without proof of which, the party would not be entitled to recover, the verdict of the jury will not be set aside in order to give the party the benefit of a new trial. As an illustration of this rule, may be cited the case of *Bailey vs. Ellis*, 21 *Ark. Rep.*, *p.* 488, where in an action of replevin for cotton, there was no evidence whatever of the value of cotton, and, value being essential to a recovery, the jury had no evidence touching the value, to be wieghed by them, and the verdict was accordingly set aside, and a new trial ordered. If, however, there had been any evidence of such value, we would have left them to weigh the evidence, and determine the value of the cotton. The familiar and well established rule then is: that this court will not reverse the decision of the circuit court for having refused to grant a new trial, upon a mere question of the weight or preponderance of the evidence, but only in cases where they find without evidence, or directly contrary to evidence, unless in extreme cases, where the verdict is so palpably contrary to evidence as to shock our sense of right and justice.

Guided by this rule in determining the case before us, there can be no doubt that the verdict of the jury was wholly unwarranted by the evidence. There was no conflict of evidence whatever, nor was there any lack of full and conclusive evidence upon all the allegations put in issue. The action was trover: the plea was not guilty: the proof was that the cotton was the property of the plaintiffs' intestate, that it was taken by the defendant without authority or color of title, and converted by sale for the sum of nine hundred and seventy-nine dollars and fifty cents. This was the plaintiffs' proof; and by reference to that introduced by the defendant, it will be perceived that so far from contradicting, it but repeats that which the plaintiff had proven. The further evidence introduced, tending to show that the cotton was exposed to waste, had been left by the owner, in time of war, and being in that situation, was taken by him and sold, and the

money received stolen, was altogether foreign to the issue. The cause of action was complete when the defendant (a mere trespasser) took and converted the property to his own use. The motives which may have impelled him to do so, in no wise changed his liability, because when the property was taken and carried off without authority, it was in law a conversion, and the right of action in the plaintiffs as administrators was complete, no matter whether the defendant afterward sold the cotton or not, or what he received for it, only so far as the amount for which the cotton was sold tended to prove its value.

Under all the circumstances of the case, we think it quite probable, that the jury would not have found a verdict for the defendant but for the erroneous instructions given them by the court, but which, owing to the omission of counsel to insert that as one of the grounds for a new trial, we will not in this case consider. But be this as it may, we are satisfied that the verdict was not only rendered without evidence to sustain it, but directly against the most clear and conclusive evidence, in regard to which there was no conflict. Such being the case, the circuit court erred in overruling the plaintiffs' motion for a new trial.

Let the judgment of the Yell circuit court be reversed, and the cause remanded with instructions to grant to the plaintiffs a new trial, and for further proceedings therein according to law.

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DICKENS vs. HOWELL.

It is not a material variance in declaring upon a note, in which no day of payment is specified, to describe it as payable on request: particularly where the pleader does not prefer to set it out *in hæc verba.*

Appeal from Yell Circuit Court.

Hon. THOMAS BOLES, Circuit Judge.

CLARK, WILLIAMS & MARTIN for the appellant.

That there was a variance between the obligation sued on and that given on oyer, referred to *Sackett vs. Spencer*, 29 *Barb.* (*N. Y.*) *Rep.*, 180; *Jones vs. Brown*, 11 *Ohio*, (*N. S.*) 601; *Cornell vs. Moulton*, 3 *Denio*, 12; 8 *John.*, 189, 375; 2 *McCord*, 246.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of debt brought in the Yell circuit court by Howell vs. Dickens. The defendant craved oyer of the writing declared upon, which having been given, he demurred for variance between the writing described in the declaration, and that given upon oyer. The special cause of variance is, that in the declaration, the writing obligatory is described as being payable on request, and that given on oyer is payable on the fifteenth day of October, 1861, the date of its execution. The court overruled the demurrer, and the defendant offered no further defence. Judgment was rendered in favor of the plaintiff, from which the defendant appealed.

The question of variance is the only one presented for our consideration.

The writing obligatory declared upon is in the following words: "For value received I promise to pay Haynes A. Howell eleven hundred and ninety-nine dollars, to bear interest at the rate of ten per cent. from date until paid. Witness my hand and seal this 15th day of October, 1861. SAMUEL DICKENS, [Seal.]" The averment in the declaration is, that the defendant, on the 15th

day of October, 1861, acknowledged himself to be held and firmly bound unto the plaintiff in the sum of eleven hundred and ninety-nine dollars above demanded, to bear interest at the rate of ten per cent. from date until paid, for value received, *to be paid to the said plaintiff when he the said defendant should be thereunto afterwards requested.*

The appellant contends that the contract was due and payable at its date, and that the terms "to be paid upon request," so misdescribed the instrument as to make it payable, not at its date, but upon request; and the question is, do the terms, to be paid upon request, constitute such further description of the contract as to vary it in legal effect, or in other words, to change the time of payment, so as to make the bond payable at another and different time from that at which it was, by the terms of the contract, to have been paid. If it does, then the variance is material, and the demurrer should have been sustained; otherwise, the judgment of the court was correct.

By reference to the authorities upon this subject it will be found that, in contracts like the one under consideration, where no time of payment is mentioned in the note or bond, it is in effect a promise on demand. *Story*, in his work on *Promissory Notes, p.* 29, says: "Where a note does not specify a day or time of payment, it is by law deemed payable on demand, and therefore is construed as if it contained the words, payable on demand, on its face." We observe that *Chitty*, in his forms for declarations in debt upon bonds, has omitted the words: "When he the said defendant should be thereunto afterwards requested," but in a note referring to this part of the declaration, says that "they are usually inserted," but as they "are not usually in the bond, they seem better omitted in the declaration." The form prescribed, and the note in explanation of it, although not of great weight in determining this question, show that it is not a matter of vital importance which form of declaring is adopted, whilst some of the American courts hold it best, where no time of payment is specified in the note, that it should be declared upon as

a note on demand. Thus, in the case of *Green vs. Dribelis*, 1 *Iowa Reps., p.* 552, in an action on a promissory note, in which no time of payment was specified, a demurrer was filed to the declaration, because it was not averred at what time the note was due and payable. The judge, who delivered the opinion of the court, said: "It is very correctly assumed by counsel for the plaintiff in error, that where no time for payment is mentioned in the note, it is, in contemplation of law, payable on demand." The declaration is objected to on the ground that it does not specially describe the note according to its legal effect. The note should, no doubt, be declared upon as a note payable on demand, but it does not necessarily follow that the particular words *on demand* should be incorporated in the declaration, if it alleges, in other terms, the time when the note became due, and in this particular we can but consider the declaration sufficient in law." Thus it will be seen that the ground of objection to the declaration in that case was, that the pleader had failed to do precisely that which he did do in the case before us, that is: allege that the bond was to be paid upon request, which is held by the court to be the legal effect of a promise to pay when no day for payment is specified in the contract. Such being the legal effect of the contract, in the language of STORY, "as much so as if it contained the words, payable on demand, on its face," we think it clear that the pleader in this instance did not err in so declaring upon it, because in so doing he but stated what was true according to the legal effect of the bond, and consequently there was no material variance between the bond as declared upon and that given on oyer.

The rights of the parties are, in no respect, affected by this construction of the legal import of the contract; no demand was necessary to entitle the party to his right of action, which was matured and perfect from the date of the bond. The addition of the descriptive words, "to be paid upon request," used by the pleader, is not understood as altering, or in any manner changing the time when the debt became due, and brings this case within

the rule laid down by this court in the case of *The State Bank vs. Peel et al.*, 6 *English's Rep.*, *p.* 753, in which this court held "that a variance is immaterial when it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration." It should be remembered too, that the pleader did not attempt to set out the bond in *hæc verba*, but only set forth the contract in substance and legal effect, and when such is the case, the same strictness is not required as where the pleader attempts to set forth the contract literally.

We are therefore of opinion that the court did not err, in overruling the defendant's demurrer and rendering judgment for the plaintiff.

Let the judgment be affirmed.

SALLIERS VS. BEVENS.

It is error to entertain a motion to strike a case from the docket, setting up matter of justification in an action of trespass, which can be availed of, if at all, only by special plea.

Appeal from Madison Circuit Court.

HON. ELIAS B. HARRELL, Circuit Judge.

GREGG for appellant.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of trespass with force and arms, brought by Salliers against Bevens and others, for forcibly taking the goods and chattels of the plaintiff. In the progress of the cause all of the defendants, except defendant Bevens, were discharged. Bev-

ens interposed a plea in bar of the plaintiff's action, which seems not to have been further noticed upon the record, and the case was continued. At the next term of the court after the plea was filed, and without making any disposition of it, Bevens moved the court to strike the case from the files, for the reason, as set forth in the motion, that a civil war was, at the time set forth in plaintiff's declaration, pending between the Confederate States (of which Arkansas was one) and the United States; that defendant Bevens was an officer in the service of the United States army in the prosecution of the war, and then acting under and in obedience to the orders of a superior officer: that plaintiff was an enemy to the United States, giving aid to the Confederate States in the prosecution of such war, and that he, the defendant, in obedience to the orders of his superior officer, took the goods of the plaintiff: that defendant claims protection under order number 3, of General Grant. These are substantially the grounds set forth in the defendant's motion, which was verified by affidavit. The plaintiff thereupon filed his motion to strike the motion of the defendant from the files, because the matters set up in defendant's motion (if available for any purpose) should have been presented by special plea. The court overruled the motion of the plaintiff to strike the defendant's motion from the files, and thereupon, without any proof of the facts stated therein, sustained the defendant's motion to strike the plaintiff's case from the files, and rendered judgment dismissing the plaintiff's action with costs.

That the decision of the court, under the state of case presented, was clearly erroneous there can be no doubt. The matter set up in the defendant's motion, if available as a defence, should have been interposed by special plea, that an issue might have been taken upon it, to be tried upon evidence before a jury. Even if there had been ample proof offered, to sustain the matter set up in the motion, it would have been irregular for the court to have heard and acted upon it. It was no ground for dismissing the plaintiff's action, even if valid as a defence in bar, which is not a question now before us for consideration. As a matter in bar,

it could have been only pleaded specially, and the issue tried by a jury. The court had no right to try the merits of this defence.

This motion to strike the case from the docket (for we suppose that is what the defendant meant by striking from the files) was, for the reasons assigned, altogether without precedent and unwarrantable, under any rules of practice known to the courts of law. The case was properly docketed: the matter to be litigated such as the court should hear: the grounds of the motion, matter of defence by special plea, which the plaintiff had a right to contest before a jury.

The court therefore erred in entertaining the motion, and most grossly erred (as appears from the record) in sustaining the motion without evidence. The plaintiff's motion to strike out the defendant's motion thus improperly presented, should have been sustained.

Let the judgment be reversed and the cause remanded for further proceedings therein according to law.

HELLMAN ET AL. VS. FOWLER ET AL.

The statute (*Gould's Dig., ch.* 17, *sec.* 3,) provides that the affidavit in a proceeding by attachment shall be positive: an affidavit, therefore, that the affiant *verily believes* that the defendant is about to remove, etc., is insufficient.

On sustaining a plea in abatement of the writ and declaration in a proceeding by attachment, for insufficiency of the affidavit, the proper judgment is to abate the suit.

Error to Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

YONLEY, FARRELLY & KNIGHT, for the plaintiff.

The objection to the affidavit that it was made on the *belief* of the affiant, is settled by the case of *Heard & Co. vs. Lowry*, 5 *Ark.*, 524–525. All that the statute requires in the affidavit is that the defendant is *about* to remove his goods, etc., not that they *are being removed.* The intention of the defendant to remove is sufficient for the issuance of the writ, and that intention, until the removal is commenced, cannot be absolutely and positively known—is a matter of belief only; and as the law gives a remedy that may be initiated before the goods are being removed, it is clear that the belief that they are about to be removed was all that the statute intended.

There are so many differences in the statutes of the different states that the decisions under them can go no further than to furnish certain general rules; and on a contested point the reason of the rule and the grounds of the decision thereon must be wholly drawn from the statutes under which they originated; for instance: in *ex parte Haynes*, 18 *Wend.*, 611, the affidavit that the witnesses "are informed and believe" is held insufficient; but the statute requires that "the facts and circumstances to establish the ground of the application" shall be proved.

The defendant having given bond to appear and answer the plaintiffs' demand, etc., was not in position to take any advantage of the alleged insufficiency of the affidavit until he had appeared and pleaded to the action. *Gould's Dig., ch.* 17, *sec.* 29; *Didier vs. Galloway*, 3 *Ark.*, 501; *Delano vs. Kennedy*, 5 *Ark.*, 457; *Heard & Co. vs. Lowry*, *ib.*, 522.

The plea in this case was bad because it prayed judgment of the writ and declaration, while it was entirely silent as to any prayer in respect to the affidavit—it pointed out defects in the affidavit, none in the writ and declaration. The demurrer should have been sustained. *Haywood's ex'r. vs. Chestney*, 13 *Wend.*, 495. When the bond was given, the suit ceased to be a proceeding *in rem*; and the giving of the bond was the same as an appearance, 2 *Gillm.* 468; 6 *How. Miss. Rep.*, 193, and appearance cures all irregularity of process; 1 *Curtis S. C.*

Rep., 649; 3 *Ala.*, 43; 3 *Misso.*, 409; 1 *Pet.*, 315; *Watkin's Amer. Law*, 507.

RICE, for the appellees.

The affidavit should have been positive—qualifying the statements therein with "as I verily believe," rendered it bad. The statement in *Heard & Co. vs. Lowry*, 5 *Ark.*, 524, as to the point involved, is a mere *dictum*, and should have no force with this court.

This matter has been fully adjudicated in New York. See *ex parte Haynes*, 18 *Wend.*, 611; *Matter of Faulkner*, 4 *Hill*, 598; *Matter of Bliss*, 7 *Hill*, 187; 6 *Hill*, 228; 6 *Wend.*, 553; 5 *Hill*, 608. See also, 1 *Brown (Pa.) Rep.*, 33; 1 *McLean C. C. R.*, 471; 1 *McCord*, 292; 23 *Ill.*, 340.

When the statute requires a fact to be sworn to in direct terms, it is not complied with by the party swearing that he is informed and believes the fact to exist. *Drake on Attachments*, *sec.* 108; *Dupree vs. Eisenach*, 9 *Geo.*, 598; *Caldwell vs. Colgatt*, 7 *Barb.*, 253.

If the affidavit was insufficient the judgment upon the plea was clearly correct, 9 *Ark.*, 159; 17 *Ark.*, 284.

Mr. Justice COMPTON delivered the opinion of the court.

This was a proceeding by attachment in the Pulaski circuit court. The declaration was filed in assumpsit, and the affidavit, on behalf of the plaintiffs, was as follows:

"STATE OF ARKANSAS, }
COUNTY OF PULASKI, }

I, Myer Harris, do solemnly swear that the defendants in the declaration hereto annexed, are justly indebted to the firm of J. & L. M. Hellman, plaintiffs in said declaration, in the sum of two thousand six hundred and five dollars and sixty-six cents; and that the said defendants, as I verily believe, are about to conceal and remove their goods and effects out of this state.

MYER HARRIS."

"Subscribed and sworn to before me this 23d day of December, A. D., 1865. JOHN W. JAY, Cl'k.,

By THOMAS H. WALKER, D. C.

At the return term the defendants appeared and pleaded in abatement. The plea is in substance, as follows:

And the said defendants pray judgment of said writ and declaration, because they say that no affidavit as the law requires, was filed in said action before the said writ of attachment issued —the affidavit filed being insufficient in this, that the allegations thereof are made upon belief merely, and not from any knowledge of the affiant, and are not positive: and this they are ready to verify, wherefore they pray judgment of said writ and declaration and that they be quashed, etc.

To this plea there was a demurrer, which was overruled, the plea sustained and judgment rendered that the suit abate and that the defendants recover their costs, etc.

Our statute (*Gould's Dig., chap.* 17, *sec.* 3,) provides that "the creditor shall, at the time of filing the declaration of his claim, also file an affidavit, of himself or some other person for him, stating that the defendant in the declaration or statement mentioned, is justly indebted to such plaintiff in a sum exceeding one hundred dollars, the amount of which demand shall be stated in such affidavit, and also that the defendant is not a resident of this state, or that he is about to remove out of this state, or that he is about to remove his goods and effects out of this state, or that he so secretes himself that the ordinary process of law cannot be served on him." And it is insisted for the plaintiff in error that, under the provisions of this statute, the affidavit in the case before us was sufficient, and we are referred to *Heard & Co. vs. Lowry*, 5 *Ark.*, 522, as conclusive of the question. In that case, SEBASTIAN, J., remarking upon the affidavit, said: "Moreover, the affidavit was in substantial compliance with the statute. It stated the sum due and that the defendant, *as he verily believed*, was about removing beyond the state. Had the plaintiff stated it positively, as the statute seems to require, it would have been only a matter of belief, the result of a strong moral conviction from circumstances tending to prove that intention." But it may be observed that no question, as to the sufficiency of the affidavit,

was raised in the argument, or adjudicated by the court, in that case, and that consequently, the remarks above quoted may be regarded as *dictum*, and the question still an open one.

There has been much discussion, both in the English and American courts, as to what shall be considered sufficient evidence to warrant, on an *ex parte* application, the issuance of extraordinary process in proceedings analagous, in many respects, to that now under consideration. Thus, Mr. Justice DANIEL, in his work on Chancery Practice, (*vol.* 3, *p.* 1939,) treating of *ne exeat*, says: "It is also required that the affidavit, on which the application for the writ of *ne exeat regno* is founded, should show that the defendant intends going abroad. It seems, formerly, to have been thought that the affidavit was, in this respect, sufficient, if it merely stated a belief of the defendent's intention to quit the kingdom, without going into circumstances upon which that belief was founded: But this rule has been very properly qualified by later decisions, and it is now held that the affidavit to obtain this writ must be positive as to the defendant's intention to go abroad, or to his threats or declarations to that effect, or to facts evincing it," citing *Oldham vs. Oldham*, 7, *Ves.* 410; *Etches vs. Lance*, 7 *Ves.* 417; *Amsink vs. Barklay*, 8 *Ves.* 597; *Hannay vs. McIntire*, 11 *Ves.* 54; *Jones vs. Alphesin*, 16 *Ves.* 470; *Taylor vs. Leitch*, 1 *Dick.*, 380; *Shearman vs. Shearman*, 3 *Bro. C. C.* 370. And Lord Elden said he would never grant an injunction against waste, on an affidavit of belief that the defendant was going to cut timber, or that the complainant was credibly informed the defendant intended to commit waste. *Etches vs. Lance*, *Hannay vs. McIntire*, *supra.* So in proceedings to hold to bail, the affidavit must be positive, and not on belief merely. *Towers vs. Kingston*, 1 *P. A. Brownes' Rep.*, 33; *Young vs. Corder*, 2 *Miles* 155; *Nelson & Graydon vs. Cutter & Tyrrell*, 3 *McLean's Cir. Rep.*, 326; *Satterlee vs. Lynch*, 6 *Hill*; *Wright et. al., vs. Coggswell*, 1 *McLean's C. Rep.*, 471. And in *Sydner vs. Tatman*, 6 *Texas* 189, where, in a proceeding by attachment under the Texas statute, the affiant stated that he had good rea-

son to believe, and did verily believe that the defendants were about to remove their property beyond the state, the affidavit was held insufficient. The court said: "It has been often declared that process by attachment is liable to produce so much oppression and injury, that a rigid conformity with the law authorizing its issuance will be exacted. And no portion of the statute requires this rule to be more strictly adhered to, than in the affidavit to be made by the plaintiff, as one of the conditions on which the attachment is allowed. If the belief of the plaintiff without facts on which such belief can be reasonably based, should be held a sufficient compliance with the requisitions of the statute, that "the plaintiff shall make an affidavit in writing that he, the defendant, is about to remove his property beyond the state," one of the best assurances against the abuse of the process would be rendered inoperative and entirely useless; because the legal responsibility of the affiant, to a prosecution for perjury, would be, in most cases, destroyed. The language of the statute admits of no equivocation or evasion. A distinct fact must be sworn to by the person who seeks the use of the process of attachment. An evasive affidavit of the party, as to his having good reasons for his belief, which reasons are confined to his own secret keeping, is not a compliance with the statute." It will be perceived, from the language employed by the court, that the provision of the Texas statute, upon which the proceedings in that case were based, is precisely the same as that contained in ours, and on which the affidavit in the case before us, was founded. In the supreme court of Illinois it has been repeatedly decided, that an affidavit for a writ of attachment must allege the requirements of the statute positively, and not on the information and belief of the attaching creditor, or his agent. See *Dyer vs. Flint*, 21 *Ill.*, 80; and *Archer et al. vs. Claflin et al.* 31 *Ill.* 306. In the latter case Mr. Justice BREESE said the affidavit "was defective in failing to aver, in positive terms, the design to depart the state with the intention of taking their property out of the state to the injury of their creditors, in the terms of the statute. These positive

averments seem to be made necessary by the statute, and affidavits ought, and usually do, contain them," citing *White vs. Wilson*, 5 *Gilm.*, 21; and *Walker vs. Welch*, 13 *Ill.*, 674. To the same effect are the decisions in *Denfre vs. Eisenach*, 9 *Geo.*, 598, and in *Clements vs. Casseby et al.*, 2 *Ann. La. Rep.*, 567. And Mr. Drake, in his work on Attachments (*2nd Edition Revised, sec.* 108,) lays down the rule to be, that where the statute requires a fact to be sworn to in direct terms, it is not complied with by the party swearing that he is informed and believes the fact to exist.

Under the statute of the territory of Arkansas, the affidavit of the attaching creditor was sufficient if made upon belief, (*Hughes vs. Martin*, 1 *Ark.*, 386:) but after Arkansas was admitted into the union, the legislature, in enacting our present attachment law, omitted the words, "verily believes" contained in the territorial enactment; and it is reasonable to suppose that something was intended by this omission. The statute, as it now is, requires the affidavit to be positive, and in view of the authorities to which we have referred, and of the great abuses likely to grow out of a less rigid construction, we do not feel authorized to sanction a departure from its requirements. Indeed it is not easy to perceive how the affidavit in this case can be regarded as evidence for any purpose. It cannot be so treated by force of the statute, because not in compliance with it; and it merely states the belief of the affiant without disclosing the grounds of that belief. Suppose the affiant had been called into court as a witness to prove the fact that the defendants intended to remove their property beyond the state, and on being interrogated, he had answered that he believed they so intended, without stating any facts or circumstances upon which his belief was founded, would such a statement have been received as evidence? We find no difficulty in reaching the conclusion that the affidavit was insufficient.

In rendering judgment that the suit abate, and for costs, the court below did not err. The plea in abatement was verified by affidavit, was pleaded in apt time, and went to the entire pro-

ceeding, and not to so much of it only as was a proceeding *in rem*. *Edmondson vs. Carroll*, 17 *Ark.*, 284; *Childress vs. Fowler*, 4 *Eng.*, 159.

Finding no error in the record, the judgment must be affirmed with costs.

VERNON VS. HENSON.

The 5th section of the act approved 31st May, 1864, providing that certain classes of persons therein described, shall be barred from the collection of their debts in this state, is in violation of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts.

Appeal from Washington Circuit Court.

Hon. E. HARRELL, Circuit Judge.

J. D. WALKER, for the appellant, referred to *sec.* 10, *Art.* 2, *Cons. U. S.*; *Art.* 2, *sec.* 18, *Cons. Ark.*; *Blair vs. Williams*, 4 *Litt.*, 35; *Lapsley vs. Brashears*, *ib.*, 47.

GREGG, for appellee.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of debt by Vernon vs. Henson, in the Washington circuit court, on a promissory note. Henson pleaded to the action, and in his second and third pleas alleged facts that brought Vernon within the provisions of the act of assembly, approved 31st May, 1864. To these pleas Vernon interposed a demurrer, which was overruled; and resting on his demurrer, final

judgment was rendered for Henson, to reverse which this appeal is prosecuted.

The act of assembly provides as follows:

"SEC. 5. *Be it further enacted*, That any person hereafter aiding or abetting the rebellion, or that has, or shall hereafter violate his oath of allegiance, and all persons who are now in arms, and all rebels in prison by the federal authorities, and all persons who have abandoned their homes and have fled, and taken protection under the so-called confederacy, shall be forever barred from the collection of their debts in this state, of every description whatsoever, and all courts having jurisdiction in this state are hereby required to dismiss said suits whenever such proof is made, at the plaintiff's costs."

The question presented is whether the section of the act above quoted, violates that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts; and we are clearly of opinion that it does. There has been some discussion in the cases as to the extent to which the legislative action of the state may alter the remedy without impairing the obligation of a contract; but it certainly never has been contended, anywhere, that a state has the power to entirely take away the remedy, as was done by the enactment in question. The rule is, that whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or on the contract; in either case it is prohibited by the constitution. (*Smith's Com. on Const. and Stat. Construction*, 388.) In *Brown vs. Kenzie*, 1 *How. U. S. Sup. Ct. Rep.*, 317, Mr. Chief Justice TANEY, alluding to this rule says: "It is difficult perhaps to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect be destroyed by

denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it." See also *McCracken vs. Hayman*, 2 *How.*, 311; *Blair vs. Williams*, 4 *Littell*, 35; *Lapsley vs. Brashears, et al. ib.*, 47; *Berry & Johnson vs. Randall*, 4 *Metcalfe* (*Ky.*) *Rep.*, 292.

It follows that the court erred in overruling the demurrer, and for this error the judgment must be reversed and the cause remanded for further proceedings.

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

MILLER VS. PHYSICK.

The act of signing and sealing a deed gives it no effect without delivery, which is a substantive, specific and independent act: and so where a deed is executed by several, and found among the papers of one of the obligors, after his death, and delivered to the obligee by a stranger, without explanation, or proof of other delivery, there is no such delivery as will bind the obligors.

Appeal from Hot Spring Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

WATKINS & ROSE, and SMITH, for the appellant.

The whole question is as to the sufficiency of the delivery, which is essential to the validity of the instrument, though the

manner is not material. It is a question of intention, and should be left to the jury. 11 *Verm.* 621. A deed found in the possession of the grantee will be presumed to have been delivered. 1 *McLean*, 321; 6 *Mo.* 326.

A delivery to an agent, or to a stranger for the use of the plaintiff is good. 9 *Porter* (*Ala.*) 650; *Smith on Con.*, 9; and a delivery to the co-obligor for the use of the plaintiff must be equally good. *Brown vs. Brown*, 1 *Wood & M.* 325; *Kent's Com. vol.* 4, *p.* 454, 455, *n.* 1, *n. a.* *See also*, 1 *J. C. R.*, 255; 2 *Gilman*, 557; 9 *Mass.*, 307: 15 *Wend.*, 545.

We think that a careful examination of the cases justify the position that the delivery by Physick to his co-obligor for the use of Miller, was a sufficient delivery.

FLANAGIN, for the appellee, referred to the following authorities to show that the delivery was insufficient: *Maynard vs. Maynard*, 10 *Mass.*, 465; 20 *Pick. Rep.*, 28; 12 *J. R.*, 418; 12 *Wend.*, 105; 9 *Eng. Law & Eq. Rep.*, 507.

Mr. Justice COMPTON delivered the opinion of the court.

Miller, the plaintiff below, sued Physick, in the Hot Spring circuit court, on a writing obligatory for the sum of sixteen hundred dollars. As a defence to the action, the defendant pleaded that the writing sued on was not delivered to the plaintiff. On replication and issue to this plea, a trial was had, which resulted in a verdict for the defendant, and judgment was rendered accordingly, from which the plaintiff has appealed to this court.

The evidence in the record discloses the following facts. The writing obligatory was signed and sealed by J. E. Stribling as principal, and Robert Stribling and the appellee as his securities, for the purchase money of a negro slave which Miller, the appellant, had sold to J. E. Stribling. Afterward, Robert Stribling, one of the obligors, died; and after his death, the writing obligatory was found among his papers—at which time, Miller got possession of it, through the mother of the deceased, who gave it to him at his request.

The circuit judge refused to charge the jury, on motion of the counsel for the plaintiff, that if they believed from the evidence, that the writing obligatory was delivered by the defendant to any of the parties who executed it, or to any person for them, or either of them, for the benefit of the plaintiff, the same was constructive delivery and binding on the defendant. But instructed them, 1st, that unless they believed, from the evidence, that the instrument sued on was delivered by the obligors, or some person authorized to do so, they should find for the defendant; and 2d, that where the obligor dies, leaving a bond among his papers, and the same is delivered, after his death, by an administrator, or custodian, such delivery is not valid: and that if the jury believed that the instrument sued on, was delivered in no other way, the plaintiff could not recover.

Other instructions were asked, some of which were given, and others refused; but it is not deemed necessary to notice them, in order to determine whether the judgment of the court below should be affirmed, or reversed.

A deed to be operative must be delivered. The act of signing and sealing gives it no effect without delivery. The delivery is a substantive, specific, and independent act, which may be inferred from words alone, or from acts alone, or from both together, and though there is no particular form in which to make it, still enough must be done to show that the instrument was thereby considered to have passed beyond the legal control of the maker, or his power to revoke it. *Hughes vs. Easten*, 4 *J. J. Mar. Rep.*, 573; *Dayton vs. Newman*, 19 *Penn.*, 194; *Fris vs. McCarty*, 1 *Stewart and Porter Rep.* 61. It is insisted, however, that delivery may be made to a third person in behalf and for the use of the grantee or obligee, without authority, and if unconditional, the deed will take effect, *instanter*, and be binding if the grantee or obligee can, at any time, and in any way, get possession of it; and that this principle is applicable to the case before us. The principle contended for—which seems to be supported by adjudications, both English and American—may be conceded, but we cannot

admit its application. The fact that the appellee signed the writing obligatory, was established by proving his hand-writing. There was no evidence as to what was said, or done, at the time of signing; nor as to how, or for what purpose, the writing obligatory got to the possession of Robert Stibling. As to these particulars the record furnishes us no information whatever. We only know, from the evidence, that the appellee signed the instrument; that it was in the possession of Robert Stribling at the time of his death, and that, afterward, the mother of the deceased delivered it to the appellant. But suppose it had been shown that, at the time of signing the instrument, it was left in the possession of Robert Stribling, a co-obligor, would such a state of facts have been evidence of delivery, on the part of the appellees? We think not. It frequently happens, in business transactions, that the principal in an obligation procures the signatures of others as his securities; and, ordinarily, the securities, after signing the obligation, pass it back to the principal obligor. Can it be said that the mere act of passing it to the principal obligor, is constructive delivery to the obligee? Nothing more, we apprehend, is meant or intended, by such an act, than that the principal obligor shall hold, or be the custodian of the obligation, until delivery is made. It is, no doubt, the intention of the parties, under such circumstances, that the obligation shall be delivered; but until the act of delivery is performed, that intention may be changed. An intention to deliver is one thing, and delivery is another. In such case, the act of signing and sealing would, necessarily, of itself, bind all the obligors, except him who kept the writing, since more than one could not have the actual custody of it, and the others must, necessarily, pass it to that one—thus making a case, where, in the nature of things, there could not be a delivery, distinguishable from the act of signing and sealing; and yet it is said that delivery is a "substantive, specific, and independent act." (*Hughes vs. Easten, supra.*) In *Fay vs. Richardson*, 7 *Pickering*, 91, a guardian bond to the judge of probate was executed by the principal and securities, in the presence of witnesses, and taken

away by the principal, who retained it until his death, when his administrator finding it among his papers, took it and filed it in the register of probate. In an action on the bond against the securities it appeared, in addition to the facts above stated, that the estate of the ward had passed into the hands of the principal in the bond, who had assumed to act as guardian for a period of more than three years; and it was held that no action could be maintained on the bond, for the reason that it never had been delivered. In that case it was argued, as it has been in this, that there was a constructive delivery. But Parker, C. J., said: "We have not been able to find any principle or authority to justify us in giving validity to the bond on which this suit is brought. A bond is a deed, and delivery is essential to a deed. There are cases of a constructive delivery, but there is no evidence here to bring this case to a resemblance of them. All that appears is, that the paper was signed and sealed by the principal and sureties and was left in the hands of the principal until his death." And in another part of the opinion, speaking of the sureties, he says: "The instrument never became their bond by their definitive act of delivery, and it cannot be made so by any power of this court."

According to the view we have taken, the ruling of the court upon the instructions was correct, and the judgment must be affirmed.

Brown vs. Cribbs.

Under *sec.* 113, *ch.* 133, *Gould's Dig.*, the court has a discretion in permitting amendments, before final judgment, and without costs; and that discretion was properly exercised where the damages laid in the declaration, from long delay, were not enough.

Error to Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

STILLWELL & WASSELL, for plaintiff in error.

The amendment should have been allowed only on payment of costs, and a continuance of the case, that the defendant might have opportunity to plead to the amended declaration. 2 *Hay. N. C. R.*, 282; 3 *Wendell*, 361; *Gilp. R.*, 139.

GALLAGHER & NEWTON, for defendant.

It was clearly within the discretion of the court to allow the amendment, under *sec.* 113, *ch.* 133, *p.* 862, *of the Digest*, as construed in *Stillwell, Ex. vs. Badgett*, 22 *Ark.*, 166.

It was purely within the discretion of the court to permit the amendment without costs; and that discretion will not be controlled by this court unless clearly abused. *Burr vs. Daugherty*, 21 *Ark.*, 561.

Mr Justice CLENDENIN delivered the opinion of the court.

On the 18th of March, 1861, Cullen G. Cribbs commenced his action of debt in the Pulaski circuit court, against John T. Trigg, John G. Fletcher and William Brown, jr., returnable to the May term of that court. The defendants were all served with process. No orders or proceedings appear to have been taken in the case until the March term, 1866, at which term the plaintiff suggested and proved the death of defendant Trigg, and the suit abated as to him; the defendant Fletcher made default, and Brown filed his prayer of oyer, which was granted, and Brown made no further defence. The record then shows that "the plaintiff asked leave to amend his declaration herein, so as to lay his damages at four hundred dollars, instead of two hundred dollars," to which defendant Brown objected, but the court permitted the amendment to be made, to which Brown excepted, and saying nothing further, judgment was rendered against Fletcher and Brown, and Brown brings the case by writ of error to this court.

The first point raised by the assignment of errors is, that the circuit court erred in permitting the plaintiff to amend his declaration without terms; and second, that the court erred in not taxing the plaintiff with the costs prior to the amendment.

Both of these points assigned for error come within the provisions of section 113, chap. 133, of the Digest of laws of this state. That section says: "The court in which any action may be pending shall have power to amend any process, pleading or proceeding in such action either in form or substance, for the furtherance of justice, on such terms as may be just, at any time before final judgment rendered therein."

The circuit court then had the power, under this section of our statute, to exercise a discretion in permitting this amendment to be made, and also in rendering the judgment for costs: and we think the circuit court exercised a sound legal discretion in permitting the amendment. We can hardly imagine a stronger case that could be presented to the court for the exercise of its power in permitting amendments, than the one we gather from the record in this case. The plaintiff had properly brought his suit five years before the judgment was rendered, had laid his damages at such sum as he might reasonably expect would be sufficient when the case was tried, yet from delays and the natural efflux of time, they were found not to be enough, and therefore, his proposition to amend, before the final judgment, was just and proper; and we think that the circuit court did not err in permitting the amendment to be made and rendering the judgment for the costs.

The judgment of the circuit court is affirmed.

DICKERSON VS. JOHNSON.

24 251
67 375
24 251
82 510

Where there is no total lack of evidence, the verdict, though apparently against the weight of evidence, will not for that reason be set aside.

The vendor of personal property, though incompetent as a witness for the vendee, where the title is involved, as held in *Lindsay vs. Lamb*, is a competent witness for a party contesting the title of his vendee.

Witnesses are not, as a general rule, to draw conclusions from a given state of facts, and to give such conclusions in evidence—they must state only facts.

Where a sale of the plaintiff's property has been made by another, without his consent and against his remonstrance, his silence during a subsequent conversation in his presence, in relation to such sale, raised no presumption of an affirmance of the sale by the plaintiff.

Instructions should never be given unless there is evidence to support them—nor upon trifling and indefinite statements irrelevant to the question at issue.

Appeal from Washington Circuit Court.

Hon. ELIAS HARRELL, Circuit Judge.

WALKER, for the appellant.

A witness, whether interested or not, testifying against his interest is competent. *Brown vs. Burke*, 22 *Georgia*, 574; *Loflin vs. Nally*, 24 *Texas*, 565; *McCanon vs. Cassidy* 18 *Ark.*, 48. When the witness is equally liable, he is competent, *Caldwell vs. Meek*, 17 *Ill.*, 220; 6 *McLean*, 463; 1 *Greenleaf*, *p.* 536, *sec.* 391.

The testimony as to the conversation occurring after the sale was clearly incompetent. There was nothing tending to show a ratification of the sale by the plaintiff. Her silence cannot operate as an estoppel; nor was there any thing to base the instruction upon as to the ratification of the sale.

GREGG for the appellee.

We submit that the witness was liable on her implied warranty; and if the property belonged to the plaintiff the witness was directly liable to her, and hence directly interested in the

result of the suit. *Lindsey vs. Lamb*, decided at the present term of this court.

The subsequent conversation in respect to the sale, in the presence of the plaintiff, and the fact that she seemed satisfied with the sale, were circumstances proper to go to the jury, from which they might infer her ratification and assent to the sale.

Mr. Justice WALKER delivered the opinion of the court.

The appellant, Annette Dickerson, brought her action of replevin against Benjamin F. Johnson for a horse. The general issue was pleaded, upon which a trial was had, and a verdict and judgment rendered for the defendant; from which the appellant has appealed to this court.

During the progress of the trial, several exceptions were taken to the decision of the court by the appellant, which were set forth in her motion as grounds for a new trial, and upon exception to the decision of the court, in refusing to grant a new trial, were, with all of the evidence, made part of the records in the case.

The grounds set forth in the motion for a new trial were:

1st. Because the jury found contrary to evidence.

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

3d. Because the court erred in refusing to permit Rachel Dickerson, the vendor of the defendant, to testify in the cause in behalf of the plaintiff.

4th. Because the court erred in permitting witness Hulbert to testify before the jury as to what Rachel Dickerson said respecting the sale of the horse to defendant.

5th. Because the court erred in instructing the jury that if they believed from the proof that after the purchase of the horse from Rachel Dickerson, the plaintiff ratified the sale, they should find for the defendant.

After a careful examination of the evidence we do not think that the first ground for a new trial was well taken. There was much conflicting evidence given to the jury, whose province

it was to weigh it, and to determine what verdict should be rendered. Both the court and the jury who heard the evidence, and who had an opportunity to test the credit to be given to the witnesses who deposed before them, from the manner when deposing, as well as what they said, are more competent to decide correctly than we would likely be. There was no total lack of evidence: and the verdict, though apparently against the weight of evidence, will not for that cause, be set aside. It is not necessary that we should notice the second ground for a new trial, because it will be, in effect, decided in the decision of the third, fourth and fifth grounds for a new trial. The third and fourth relate to the decision of the court below, in excluding certain evidence, and admitting other evidence, over the objections of the plaintiff, the most important of which is, the refusal of the court to permit the witness Rachel Dickerson to testify.

The counsel for the plaintiff in the court below have made an unusually long statement of the facts, which they offer to prove by the witness. For all legal purposes, it may suffice to say, that they offered to prove by this witness that the horse in litigation was, at the time of the alleged taking and conversion, the property of the plaintiff; that the horse was taken and converted by the defendant against the will of the plaintiff; that she, the witness, sold the horse to the defendant against the will or consent of the plaintiff, and also against her own free will, under the influence of the threats of the defendant, who was a federal soldier stationed at Fayetteville, some eight or nine miles from her residence, believing, as she did, that if she did not sell him, he would be taken from her daughter by force. This evidence was of itself, in the absence of all other evidence, sufficient to entitle the plaintiff to recover. But whether so or not, it was material and competent evidence.

It is insisted by the counsel for the appellee, that this witness was incompetent on account of her interest as the vendor of the horse to the defendant: and the case of *Lindsey vs. Lamb*, de-

cided at the present term, is cited in support of this position. In this, counsel are mistaken in the relative position of the parties. In that case, the vendor was called as a witness to sustain the title of his vendee; his sale carried with it an implied warranty of title, which the witness was interested in sustaining, because he would have been responsible over to his vendee for the consideration received by him for the property, in case a recovery of it should be had against his vendee. But in the case before us, it is just the reverse. Rachel Dickerson was not called to testify in favor of Johnson, her vendee, whose title she was interested in sustaining, but by the plaintiff, whom witness was interested in preventing from recovering the property; because, if Johnson should lose the property (unless under the circumstances of the case and the facts communicated to Johnson at the time of the sale, she should relieve herself from the implied warranty of title) she would be responsible to him for the money paid for the horse. Her interest, therefore, was adverse to that of the plaintiff, who called her to testify, and when such is the case the witness is competent to testify.

In the case of *Buck vs. Brown*, 22 *Geo. Rep.*, 574, Francis D. Kea, who had sold the land to Brown, the title to which was in controversy, was called by Buck as a witness, and gave evidence on his behalf. The defendant moved for a new trial, because the court erred in admitting the testimony of Kea, a witness interested in the suit. Under this state of case the court said: "The first ground is, that the court erred in admitting the testimony of Francis Kea as a witness interested in the event of the suit. He gave evidence against his interest and was therefore competent."

The supreme court of Texas, in the case of *Loflin vs. Nally*, 24 *Texas Rep.* 565, said: "The objection to the witness Bailey was properly overruled. If interested, his interest was adverse to the party calling him, and therefore not a disqualifying interest." And such too has been the decision of our own court, in the case of *McCarron vs. Cassidy* 18 *Ark. Rep.* 48.

Rachel Dickerson was, therefore, a competent witness, and the court erred in excluding her evidence from the jury.

The fourth objection is, that the court permitted the witness Helbert to depose and give evidence of what Rachel Dickerson said after the sale of the horse by her respecting the sale.

The counsel for appellee assume that the statement made by Rachel Dickerson to Helbert is evidence, not of what the sale was, but as conducing to prove a subsequent affirmance of the sale by the plaintiff, who, it appears, was present when the conversation between Rachel Dickerson and Helbert took place. We will not say that if the statements made by Rachel Dickerson had been, in terms, affirmed and adopted by the plaintiff as her own, that such statements might not have been repeated by the witness, not as the declarations of a third person, but as, in effect, the language of the plaintiff. There was no evidence whatever that the plaintiff either assented to, or approved what Rachel Dickerson said. There was but a single sentence of the evidence of Helbert, that made any reference to such assent, and that was: That "they (meaning Rachel and the plaintiff) seemed to be very well satisfied with the trade." This was not evidence, but a mere opinion of the witness. Witnesses are not, as a general rule, to draw conclusions from a given state of facts, and to give such conclusions in evidence. In this, they would usurp the province of the jury. He must state facts, and leave the jury to determine upon the facts, not upon his opinion of them. That the plaintiff remained silent during the conversation raised no presumption of an affirmance of the previous contract made by Rachel Dickerson. The sale had then been made, and as appears from the evidence, without her consent, and by more than one witness, against her earnest remonstrance. Under such circumstances she compromised no right whatever, by remaining silent. It was, therefore, error to have received Helbert's evidence. But, then, if Helbert was permitted to give evidence as to what Rachel Dickerson said to him after the sale, most clearly it was competent to call Rachel Dickerson for the pur-

pose of contradicting his evidence, even though she might have been incompetent as a witness upon examination in chief.

To the first instruction given there can be no well founded objection. The second instruction was predicated upon Helbert's evidence, which we have seen was inadmissible. But even if held otherwise, it was a circumstance too trifling in itself and too indefinite, upon which to base such an instruction. Instructions should never be given, unless there is evidence to support them.

For these errors the judgment of the circuit court must be reversed and the cause remanded that a new trial may be had.

HARDAGE VS. COFFMAN.

It is not necessary for a soldier, justifying, in an action of tresspass, under the commands of his superior officer, to produce the commission of the officer, or account for its absence; it is sufficient to prove that the officer was in command, assumed to act, and was recognized as such.

Where testimony is offered, apparently irrelevant to the issue, it may be excluded, unless some proper explanation, or an offer to accompany it with other evidence which would make it applicable to the issue, be made; but no explanation of testimony is required, where its object is apparent from the pleadings.

Appeal from Hot Spring Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

FLANAGIN, for the appellant.

It is hardly necessary to cite authorities to show that the parol testimony offered to show that Logan was colonel, was improperly excluded. 1 *Greenleaf's Evidence*, 83; and authorities there cited are full and conclusive. See, also, 1 *Green. Ev.*, 513.

GARLAND, WHITE & NASH, for the appellee.

To establish the fact that Col. Logan was a legally constituted officer, his commission was the best evidence and ought to have been produced. 1 *Green. on Ev.*, 82. If that could not be produced, after due diligence, then secondary evidence was admissible. 1 *Watts.*, 353; 9 *Wheat.*, 558; 5 *Wheat. Con. Rep.*, 260, *note*. No effort was made to produce the officer or his commission, and therefore there was no foundation for secondary evidence. 18 *Ark.*, 469; 7 *Peters*, 99.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of trover, brought by Coffman against Hardage. The defendant plead the general issue, and also filed two special pleas. The first of which was, in substance, that he was a soldier in the service of the Confederate States army, in the late war between the United States and the Confederate States, and that, whilst in such service, he took the mare by the direction and command of the officers of said army, under whom he was serving. The second special plea set up the same facts with the additional averment that he took the property under duress and compulsion of his officers. Issues were taken upon these pleas, and the case submitted to a jury, who found a verdict for the plaintiff. The defendant moved for a new trial for several causes, none of which, however, it will become necessary to notice, except that which relates to the exclusion of the defendant's evidence. The motion for a new trial was overruled, exceptions taken, and the case brought before us by appeal.

In order to sustain his defence under the special pleas, it became necessary for the defendant to prove that he was a soldier acting under the orders of his superior officer. This, he proposed to do, and called a witness by whom he offered to prove that "Col. Logan was a cavalry officer in the Confederate States army in the year 1863, and so continued from that time until the surrender." To the introduction of which evidence the plaintiff objected, and the court sustained the objection upon the ground, "that the

officer's position could only be proven by the commission." The defendant then offered to prove by said witnesses, that, just previous to the alleged taking, Col. Logan, whilst in command, gave orders that defendant and others should seize a sufficient number of horses on which to mount themselves in the Confederate States service. To the introduction of which evidence the plaintiff objected as incompetent, and the court sustained the objection.

The correctness of the decision of the court in excluding this evidence is the only material question to be considered.

The appellant's counsel admits that, as a general rule, the best evidence of which the case, in its nature, is susceptible, should be produced, but contends that there are exceptions to the rule, under which it was not necessary for the defendant to produce the commission of Col. Logan, under whose command he acted; nor to account for its absence, to entitle him to introduce secondary evidence. On the other hand, the counsel for the appellee contends that some explanation showing the applicability of this evidence should have accompanied the offer to introduce it, or that some foundation should have been laid for its introduction by other evidence to which the answer to the question asked would relate. In the absence of which, as a distinct proposition unexplained, the court might reject it, even if, in other respects, unexceptionable. It is true that some explanation of the purpose for which the evidence was intended might have been given. And if such object was not, at that stage of the investigation, apparent, the court should have placed its objection to the admissibility of the evidence upon that ground, unless proper explanation had been made, or an offer to accompany it with other evidence, which, when taken together would have been applicable to the issue. But instead of this, the distinct ground upon which the court excluded the evidence was, that the commission of Col. Logan was the only competent evidence that he was a cavalry officer in the Confederate States army. But in the absence of all this, the necessity and applicability of the evidence was quite

apparent from the state of the pleading. The defendant had justified the taking of the property as a soldier in the Confederate States service under the order and direction of his officer; indeed, in one of the pleas, under duress and compulsion of his commanding officer. With this issue before the court, it could not have mistaken the object of the defendant's counsel in putting the question to the witness, and as we have seen, the evidence was excluded upon other distinct grounds, which evidently were that the commission of the officer was the best and the only competent evidence to prove him such.

We have examined the authorities cited by the appellee's counsel, and find that, whilst they sustain the general rule, which requires the best evidence to be introduced, they do not question the correctness of the exception to the rule, under which, in our opinion, it was not necessary for the defendant either to produce the commission of Col. Logan, or to excuse himself for not having done so.

The exception to the rule, stated by MR. GREENLEAF is, that proof that an individual has acted notoriously as a public officer, is *prima facie* evidence of his official character, without producing his commission or appointment. *Vol.* 1, *p.*153. And at page 168, the same writer says, "It is not, in general, necessary to prove the written appointment of public officers. All who are proven to have acted as such, are presumed to have been duly appointed to the office until the contrary appears, and it is not material how the question arises, whether in a civil or a criminal case, nor whether the officer is or is not a party to the suit."

In *Phillips on Evidence*, it is said: "It is not necessary, in general, to prove the written appointment of public officers. *

* * A strong presumption arises from the exercise of a public office, that the appointment to it is valid. *Vol.* 1, *p.* 592. So, it has been held that proof that a revenue officer claimed to be such, and exercised and performed the duties of such office, is good evidence of the fact in any legal proceeding." *Id.* 592.

This exception to the general rule is founded in necessity and

convenience, and applies as well to military as to civil officers. Indeed it would, in the nature of things, appear to apply with more force to military than to civil officers. Soldiers, in many cases, are placed under the command of officers of whom they know nothing; they are continually being changed from one command to another, and should they be required to produce the commission of their commanding officers, or even to prove that they had ever been commissioned, they could rarely indeed sustain a plea of justification for any act done in obedience to orders. The defendant most clearly had a right to prove that Col. Logan was in command of a military force, that he assumed to command as colonel and was recognized as such. And because the court refused to permit him to do so, only by the production of the commission, the judgment must be reversed and the cause remanded.

JONES VS. JOHNSON.

An informal and defective declaration combining several forms of action, should be met by demurrer, not by plea to the writ.

Error to Carroll Circuit Court.

GARLAND, WHITE & NASH, for plaintiff in error.

Mr. Justice COMPTON delivered the opinion of the court.

The plaintiff below filed his declaration against Johnson, and a writ of replevin was issued thereon, and served upon the defendant. At the return term, the defendant appeared and pleaded in abatement, that the writ was issued without any declaration in replevin having been filed. On issue joined, the finding was for

the defendant, and the writ quashed. This was error. There was a declaration, and the finding on the issue should, therefore, have been for the plaintiff. If the declaration was defective, it should have been met by demurrer, and not by plea to the writ, as for want of a declaration. *Sillivant & Thorn vs. Reardon*, 5 *Ark.*, 140; *State vs. Mississippi, Ouachita & Red River R. R. Co.*, 20 *Ark.*, 495. The form of action is misstated in the commencement of the declaration, but we think it sufficiently appears, from the body of the declaration, that replevin in the detinet was the form of action intended, notwithstanding the declaration alleges a finding of the property, as in *trover*, instead of a bailment as in *replevin*. The declaration is certainly informal, and is perhaps, defective in substance: but its legal sufficiency is not a question now before us.

Let the judgment be reversed and the cause remanded, with leave to the plaintiff to amend his declaration should he choose to do so.

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THOMPSON ET AL. VS. SHREVE ET AL.

The remedy by petition in debt will not lie against the maker and indorser of a note—the contract of the indorser, not being for the direct and absolute payment of money but a conditional one, his liability must be shown by averment, and the statute admits of no averments other than those, in substance, which it prescribes.

Appeal from Arkansas Circuit Court.

Hon. W. M. HARRISON, Circuit Judge.

CLARK, WILLIAMS & MARTIN, for appellants.

Mr. Justice COMPTON delivered the opinion of the court.

This was a proceeding by petition in debt. The petition alleges as follows:

"Your petitioners, William T. Shreve, James A. Anderson, and Charles Thomas, merchants and partners in trade, doing business under the firm name and style of Shreve, Anderson & Thomas, the plaintiffs in this cause, state that by assignment, they are the legal owners of a note against the defendants, Henry J. Thompson and Thomas J. Thompson, to the following effect:

'SWAN LAKE, Nov. 1st, 1859.

'$377 57.

'On or before the 1st day of February, 1861, I promise to pay to T. J. Thompson or order three hundred and seventy-seven 57-100 dollars, for value received, bearing interest at the rate of ten per cent. per annum from date until paid.

HENRY J. THOMPSON.'

"On which is the following assignment:

'Pay to Shreve, Anderson & Thomas for value recieved.

T. J. THOMPSON.'

by virtue of which the plaintiffs have become the owners thereof; yet the debt remains unpaid; therefore, they demand judgment for their debt, and damages for the detention thereof, together with their costs."

A demurrer to the petition was overruled, and the defendants declining to make further defence final judgment was rendered against them and they appealed.

The suit is brought against the indorser or assignor, as well as against the maker of the note, and the question raised by the demurrer is whether this can be legally done. It was held by this court in *Blevins vs. Blevins*, 4 *Ark.*, 441, that the remedy by petition in debt will only lie on instruments for the direct payment of money—or, in other words, where the payment is direct and absolute, and not dependent upon a contingency. To the same effect was the principle decided in the previous case of *Mitchell vs. Walker*, 4 *Ark.*, 145. The indorsement of a note,

in contemplation of law, amounts to a contract, by which the indorser binds himself, that if, when the note is duly presented, it is not paid by the maker, he, the indorser, will upon due and reasonable notice given him of the dishonor, pay the same to the indorsee, or other holder. (*Story on Prom. Notes, sec.* 135.) This then is not a contract for the direct and absolute payment of money, but is a conditional one. If the conditions are performed the indorser is liable, and if they are not, he is discharged. It does not, therefore, belong to that class of contracts upon which petition in debt will lie.

There was no averment of demand and notice, but if there had been, it could have made no difference. The statute admits of no material averments other than those, in substance, which it prescribes. The remedy is adapted to a particular class of cases, where the writing on its face is evidence, so directly and unequivocally, of a debt due in money, as that no averment is necessary to show that the plaintiff is entitled to recover. In other words, wherever it becomes necessary in order to disclose the action, to make an averment other than such as are prescribed by the statute, petition in debt does not lie; and the party must resort to his appropriate remedy, according to the forms of the common law. And we are supported in this view by repeated decisions of the court of appeals of Kentucky, upon a statute substantially similar to our own. (*Morehead & Brown's Stat. Laws, Ky. p.* 1319.) Thus in *Pool et al. vs. McCaughan*, 6 *Monroe*, 335, the suit was on a bond for money, with a collateral condition; and the court held that a petition in debt could not be maintained, and referring to the previous decision in *Kincaid vs. Higgins*, 1 *Bibb*, 352, said: "In that case the doctrine is laid down that where the obligation to pay the debt demanded by the petition, is to accrue upon the happening of a contingency, or depends upon the performance or non-performance of a condition, the plaintiff cannot sue in this form prescribed by statute; because the statute admits of no averment. The statute, and the form of the petition prescribed, is adapted to plain and direct

evidences of debt, where no averment is necessary to show the breach except the mere allegation that the said debt so directly and absolutely imported by the face of the writing, remains unpaid. If to support the action of debt, the plaintiff would be bound, over and above the mere exhibition of the note or writing to aver something else, which is traversable by the defendant, then the petition and summons will not do; because the statute admits of no averment."

The provision, in the third section of our statute, to the effect that, if the plaintiff is the owner of the instrument sued on, as assignee, the fact of the assignment must be stated in the petition does not authorize a suit against the assignor, in the form prescribed by the statute, but is merely for the purpose of showing that the plaintiff is the legal owner of the instrument. This is manifest, not only from the context of the statute, but from the language employed in the particular section.

We are clearly of opinion that the court erred in overruling the demurrer, for which error the judgment must be reversed, and the cause remanded for further proceedings.

DUNNAHOE VS. WILLIAMS.

The vendor is not a competent witness for his vendee. (*Lindsey vs. Lamb, ante.*)

Though one of several instructions be too limited, yet if taken in connection with the others they express the law, the party is not injured.

If the use of the plaintiff's property, while in possession of the defendant, is worth any thing, the jury may estimate its value by way of damages to the plaintiff in replevin.

The wife has no legel authority to dispose of the husband's property by sale or otherwise, and to bind him by a contract without a power from him, or his subsequent approval or ratification.

No demand is necessary before suit, where the defendant has converted the plaintiff's property to his own use. (3 *Eng.*, 510; 6 *Eng.*, 249; 17 *Ark.*, 155.)

A new trial will not be granted on the ground of surprise, unless the party brings himself within the rule established for granting a new trial in such case, and unless the evidence to be produced will avail him on a new trial.

Appeal from Hot Spring Circuit Court.

HON. LIBERTY BARTLETT, Circuit Judge.

GARLAND, WHITE & NASH, for the appellant.

Request and demand of the property before suit is necessary. *Storm vs. Livingston*, 6 *John.*, 44; *Barrett vs. Warren*, 3 *Hill*, 348. When the possession was rightful at its inception, the plaintiff in replevin must make a demand before bringing his suit. *Gilchrist vs. More*, 7 *Clark*, 9; *Newman vs. Jonne*, 47 *Maine*, 520. See also, *Pirani vs. Barden*, 5 *Ark.*, 81; *Beebe vs. DeBaun*, 3 *Eng.*; *Hill vs. Robinson*, 16 *Ark.*, 90. We submit that the opinion in *McNeill vs. Arnold*, 17 *Ark.*, 154, is not law. Dunnahoe, so far as appears in the record, was an innocent purchaser, and if demand is ever necessary it must be in a case like this.

ENGLISH and STEWART for the appellee.

Holloway was liable to Dunnahoe, his vendee, upon an implied warranty of title (2 *Kent's Com.*, *marg.*, *p.* 478;) and hence an incompetent witness. *Arnold et al. vs. McNeill*, 17 *Ark.*, 185; *Meek vs. Walthall*, 20 *Ark.*, 648; *Leach vs. Fowler's Dev.*, 22 *Ark.*, 147.

It is too familiar an elementary rule of law to require a citation from the books that the wife has no legal authority to dispose of the husband's property by sale or pledge, and bind him by the contract without a power from him or his subsequent approval or acquiescence.

There is no pretence that the defendant was a bailee, but he claimed the property in his own right as purchaser, and hence no

demand upon him was necessary before suit. 3 *Eng. R.*, 510; 6 *Eng.*, 249; 17 *Ark.*, 155.

Mr. Justice CLENDENIN delivered the opinion of the court.

The appellee, Nicholas T. Williams, brought his action of replevin in the Hot Spring circuit court, the issue was made and the cause tried by a jury, and verdict and judgment rendered for the plaintiff, and the case is brought to this court by appeal.

On the trial of the cause, after the plaintiff had introduced and closed his testimony, the defendant offered James Holloway as a witness, to whom the plaintiff objected upon the ground that said Holloway was an interested witness, which objection was overruled by the court, who stated (as recited by the bill of exceptions) that if the witness was incompetent, his testimony could be excluded afterwards. The witness Holloway then stated, in substance, that he got the colt, the property in controversy, from the wife of the plaintiff, (who was in Texas,) in exchange for a yoke of oxen, and that he afterwards traded the colt to Dunnahoe, the defendant; on cross-examination he stated, that the plaintiff, after his return from Texas, offered to pay him twenty dollars, the amount at which the colt was valued at the time of the trade with Mrs. Williams, and demanded the colt which he refused to give up. The plaintiff then introduced further testimony contradicting, in some respects, the testimony of Holloway, and explaining the character of the trade between Holloway and the wife of the plaintiff, which closed the testimony. The plaintiff then moved the court to exclude the testimony of Holloway on the ground that he was an incompetent witness, which motion was sustained and the testimony of Holloway excluded.

We have thus briefly stated as much of the testimony in the case, as is necessary to enable us to review and decide upon the first point made in the assignment of errors.

It appears clear to us from the testimony of Hollway, that he sold the property in controversy to the defendant, and under the law as decided by this court at the present term in the case of

Lindsey vs. Lamb, Holloway, the vendor, was not a competent witness for his vendee, the defendant in this cause, and therefore the circuit court did not err in excluding his testimony from the jury.

We are now to consider the instructions in the case, to the giving and refusing of which the defendant excepted.

The instructions asked by the plaintiff are as follows:

1st. If the jury believe from the testimony that the horse in question is the property of the plaintiff, they will find for the plaintiff.

2d. If the jury believe from the evidence the use of the horse worth any thing, they will estimate its value in the way of damages for the plaintiff.

3d. If the jury believe from the testimony that the trade for the horse was made by the witness Holloway, with the plaintiff's wife, without the knowledge and consent of the plaintiff, her husband, such sale, unless subsequently approved and ratified by her husband, could not confer any title, and the jury must find for the plaintiff.

The instruction asked by the defendant was: "That if the jury find from the evidence that the plaintiff has failed to prove a demand from defendant Dunnahoe, previous to the suit they must find for defendant."

The court gave the instructions asked by the plaintiff, and refused to give that asked by defendant, but gave it with the addition that if "the jury believe from the evidence that the property had been converted by the defendant, a demand was not necessary."

We can see no serious objections to the instructions given at the instance of the plaintiff. The first instruction standing by itself is too limited, but taken in connection with the other instructions given, and the evidence, we cannot see that the defendant was prejudiced by it.

The second instruction was properly given.

The third instruction was also properly given. There was evi-

dence before the jury (independent of that Holloway excluded) going to prove that Holloway came into possession of the property in controversy, by purchase, barter or pledge from plaintiff's wife, and that plaintiff did not ratify the transaction. It is a principle of law well established that the wife may act as the agent or attorney of her husband: and it is also well settled, that the wife has no legal authority to dispose of the husband's property by sale or exchange, and to bind him by the contract without a power from him, or his subsequent approval or ratification. *Reeve's Dom. Relations*, 79; *Chitty on Contracts, pages* 165, 6 *&* 7, *and authorities cited.* Such being our view of the law, there was no error in giving the third instruction of the plaintiff.

The refusal of the court to give the instruction asked by defendant, but giving it as modified by the court, was correct. The evidence in the case proved that Dunnahoe was in possession of the property, that he converted it to his own use, and used it as his own property. Hence no demand was necessary. See *Beebe vs. DeBaun*, 3 *English*, 510; *Prater ad. vs. Frazier & wife*, 6 *English*, 249; *McNeil vs. Arnold*, 17*th Ark.*, 155.

One of the grounds of the defendant's motion for a new trial in the court below, based on his affidavit, was "that he was taken by surprise, on account of the exclusion by the court of the testimony of Holloway, and permitting that of Mrs. Fountain to go to the jury, and that he believes he can procure other witnesses to prove the trade between the wife of plaintiff and Holloway." The defendant does not bring himself in his motion for a new trial within the established legal rules for granting new trials on the ground of surprise, or of newly discovered testimony, and under the ruling we have made in regard to the sale or transfer of the property by the wife of plaintiff to Holloway, such testimony could not avail him any thing on another trial.

We are therefore of the opinion that there was no error in the rulings and judgment of the circuit court, and the judgment of that court must be affirmed.

HASTINGS VS. WHITE ET AL.

A plea setting up a parol contract different, in terms and legal effect, from the written contract declared upon, is no defence to the suit. (*Roane vs, Green & Wilson*;) and though issue be taken to such plea; there is no issue in fact to try, and the declaration stands confessed.

Appeal from Randolph Circuit Court.

Hon. L. L. MACK, Circuit Judge.

RATCLIFFE and ENGLISH, for the appellant.

The special plea was no defence to the action. It was bad in substance. The decision of this court, at the present term, in *Roane vs. Green & Wilson*, settles the point that the plea is bad.

The plea being bad in substance, though the defendant took issue to it after his demurrer was overruled, he was entitled to judgment. *Dickerson vs. Morrison*, 1 *Eng. Rep.*, 264, *and cases cited. Hughes vs. Sloan*, 3 *Eng. Rep.*, 146.

Mr. Chief Justice WALKER delivered the opinion of the court.

The appellant brought his action of debt against the appellees in the Randolph circuit court, upon a promissory note for the sum of one hundred and fifty dollars, to which the defendant plead specially that the note was given upon a contract which was to have been paid in Confederate States paper money, worth at the time the note was executed, twelve cents, in legal tender United States notes, on the dollar. To this plea, the plaintiff demurred: the demurrer was overruled and withdrawn by the plaintiff, who, thereupon, took issue on the plea; which issue was submitted to the court sitting as a jury. The note sued upon was given in evidence by the plaintiff, and the defendant offered proof in support of his plea, which, for all legal purposes in the investigation

of the case here, may be considered sufficient to sustain the plea. The court found for the plaintiff the sum of eighteen dollars and seventy-five cents debt, and two dollars and forty cents damages with costs.

The plaintiff moved for a new trial: 1st. Because the court found contrary to law and evidence. 2d. Because the court erred in declaring the law. The motion for a new trial was overruled, the plaintiff excepted, and by a bill of exceptions brought the evidence before us.

That the plea was fatally defective, there can be no doubt. It presents the same grounds for defence as that set up in the case of Roane vs. Green & Wilson, decided at the present term of this court: in which it was held, that no matter how formally plead, the matter pleaded could present no valid defence to the action. It merely set up a parol contract different, in terms and legal effect, from that declared upon, which, if proven to be true, would be no defence against that in suit.

Such being the case there was in fact no issue formed, denying or putting in issue the plaintiff's action, and no evidence properly before the court, but the note sued upon. Indeed, there was strictly no issue, nothing to try, and no evidence required to sustain the action. The plaintiff's declaration being unanswered by the plea, and this being the only plea interposed, the plaintiff's declaration stood confessed. The plea interposed was not merely defective in form. If such had been the case, under our statute of amendments, such defects might be considered as cured, and the finding and judgment upheld; but the grounds of defence being unavailable, even when formally plead, it was not subject to amendment; and under our repeated decisions it was error to have rendered judgment upon it. See *Dickinson vs. Morrison*, 1 *Eng.*, 264; *Hughes vs. Sloane*, 3 *Eng.*, 147.

Let the judgment be reversed and the cause remanded.

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ALLEN AND NEELY VS. GRIDER.

On appeal from the judgment of a justice, the surety is not responsible beyond the penalty of the recognizance, If the finding in the circuit court exceed the penalty, the appellee may elect to release the excess and take judgment against both principal and surety, or take judgment against the principal alone for the amount found, and pursue his remedy on the recognizance against the surety.

Appeal from Cross Circuit Court.

Hon. JAMES M. HANKS, Circuit Judge.

WATKINS & ROSE, for the appellants.

Mr. Justice COMPTON delivered the opinion of the court.

Mrs. Grider, the plaintiff below, sued the defendant before a justice of the peace, and recovered judgment for seventy-five dollars besides costs. On entering into recognizance in the sum of one hundred and fifty dollars conditioned according to law, with William A. Neely as his security, the defendant appealed to the circuit court, where, on a trial *de novo*, the cause was submitted, by consent, to the court sitting without a jury, who found for Mrs. Grider, the sum of two hundred dollars. A motion for a new trial was overruled, and judgment rendered for the amount of the finding, together with costs, against the defendant and his security in the recognizance, to reverse which they have appealed to this court.

The several grounds assigned for a new trial may be considered together, as they are based upon the assumption that the evidence is not sufficient to support the finding. We have carefully considered the testimony, as set out in the bill of exceptions, and have not been able to reach the conclusion that there is such a lack of evidence as would warrant us in disturbing the finding of the court below. There was, therefore, no error in overruling the motion for a new trial.

The court erred, however, in rendering judgment against the security for a sum exceeding the penalty of the recognizance. (*Ives vs. The Merchants Bank of Boston*, 12 *How. U. S. Rep.*, 159; *Hendrick vs. Cannon*, 5 *Texas*, 248; *Unterrein adm. vs. McLane*, 10 *Missouri*, 343;) and the judgment being erroneous as to one, is bad as to both. *Murphree vs. The Bank of the State*, 4 *Ark.*, 448; *Cole vs. Wagner*, 2 *Ark.*, 155.

The judgment must be reversed and the cause remanded with instructions to the court below, to enter judgment for the amount of the finding against the appellant, alone, leaving the appellee to pursue her cumulative remedy against the security, by appropriate action on the recognizance, or enter judgment against the appellant and the security, jointly, for a sum not exceeding the penalty of the recognizance, as the appellee may elect.

BEERS & CO. VS. WUERPUL & CO.

A second suit in replevin, brought by the defendant in the first jointly with his partner, against the bailees of the plaintiff in the first, held to be cross-replevin.

The defendant in a cross-replevin may plead in abatement or in bar, the pendency of the first suit; and on determination of the plea in his favor, is entitled to judgment awarding a return of the property.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

RICE for the appellants.

After the property taken in replevin has been turned over to plaintiff, a party other than the defendant may replevy the same

from him, or any one holding under him. 7 *Monroe*, 427; 3 *J. J. Marsh.* 124; 4 *B. Mon.*, 93. In this case Morris was not a party to the original suit; and the rule is stringent that a plea in abatement must show that the other suit pending is between the same parties for the same cause of action. *Bac. Abr.*, *vol.* 1, *p.* 28; 1 *Saund. Pl. & Ev.* 20; 2 *Summer*, 589.

When in replevin a defendant pleads in abatement of the writ, and the plea is sustained and the writ quashed, he is not entitled to a judgment *de retorno habendo.* 6 *Ark.*, 506; 7 *Ark.*, 25.

WHYTOCK for appellees.

The plea set up that the parties were identical either in person or interest, which is sufficient in pleading pendency of another action. *Bennett vs. Chase.* 1 *Foster*, (*N. H.*) 570; *Atkinson vs. State Bank*, 5 *Black.*, 84. The statute prohibits cross-replevin. *Gould's Dig.*, *ch.* 145, *sec.* 2; and a plain provision of the statute cannot be evaded by substituting a partner as co-plaintiff, and the bailees of the plaintiff in the original action.

The plea in this case goes to the right of the plaintiffs to maintain their action, not for informality or variance as in the cases in 1 *Eng.*, 506 and 2 *Eng.*, 23; and the judgment on the writ was properly for a return of the property. *Wilk. Rep.*, 46; *Gilb. Rep.*, 162; 17 *Conn.*, 233.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of replevin brought by Charles H. Beers and Lucein T. Morris, partners, under the style of C. H. Beers & Co., against Morris Wuerpul and Thomas M. Laws, partners in the livery stable business, under the style of M. Wuerpul & Co., for the recovery of two horses, a buggy and set of double harness.

At the return term the defendants appeared and pleaded in abatement, that before the commencement of the suit, one Frank J. Webb brought his action of replevin against the said Charles H. Beers, one of the plaintiffs, whereby the property mentioned

in the declaration was replevied—which action was then still pending and undetermined—and that they, the said defendants, had possession of said property, for and on account of the said Frank J. Webb, at the time the same was seized and taken from them, at the suit of the plaintiffs as aforesaid—all which the plaintiffs well knew.

Two questions are presented: first, whether this is cross-replevin; and second, whether, on the abatement of the suit, the defendants were entitled to a return of the property.

As a general principle, the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law, or unless it has been taken by replevin from him by the party in possession; and our statute, which provides that cross-replevin or replevin for property in possession of an officer, under legal authority, shall not be brought, is but declaratory of this general principle, which existed prior to the enactment. All must admit that if this action had been brought by Beers alone, against Webb—they being the only parties to the first action—it would have been cross-replevin. Is it any the less so, because Morris is joined as co-plaintiff with Beers, and the suit, instead of being instituted against Webb, is brought against M. Wuerpul & Co., his bailees, who happened to have the actual possession of the property. We think not. So far as Morris is concerned, this suit was not necessary for the protection of his rights. If the title to the property was in Beers and Morris, as partners, as is alleged, that fact could have been successfully pleaded by Beers as a defence to the first action, the property would have been returned to him, and he would have held it, as the property of himself and Morris, subject to their respective rights as partners. And as to the defendants, they were, as has been seen, the bailees of Webb, their possession was his possession, and the action may be regarded as, in effect, against him, notwithstanding the plaintiffs chose to bring it against the bailees. In short, the whole transaction indicates an attempt to evade the principle, which forbids cross-replevin.

It is insisted, however, that the court erred in awarding a return of the property. We do not think so. The matters set up in the plea of the defendants, may be pleaded, either in abatement or in bar, (*Deshler vs. Dodge*, 16 *How. U. S.*, 622,) and they not only show that the plaintiffs cannot maintain the action, in *any form*, but also show that the defendants are entitled to the possession of the property as against the plaintiffs. This case is clearly distinguishable from that of *Hartgroves vs. Duval*, 1 *Eng.*, 506.

Let the judgment be affirmed with costs.

BIRD AND BAILEY, EX PARTE.

On an application for bail in a criminal case, the court will give the prisoner the benefit of any reasonable doubts that may arise in considering the testimony.

Application for Bail.

R. S. GANTT and GARLAND & NASH, for petitioner.

CLARK, WILLIAMS & MARTIN, contra.

Mr. Justice CLENDENIN delivered the opinion of the court.

The petitioners in this case allege by their petition, that they were indicted at the August term, 1866, of the Prairie circuit court for the crime of murder. That after their arraignment on said indictment at said August term, they applied to the Hon. LIBERTY BARTLETT, the judge of said circuit court, to be admitted to bail, and in support of their application presented certain testimony contained in a written transcript, which transcript contained all the testimony presented and considered by the court.

That on the hearing of said application, their application to be admitted to bail was refused, and they were ordered into the custody of the sheriff. The petitioners deny that they are guilty of the crime of murder, and pray this court to review the decision of the circuit court in refusing them bail and to grant them a *habeas corpus*, to be brought before this court and admitted to bail, or that a mandamus may be issued to the circuit judge commanding him to admit said petitioners to bail, and in support of their application again submit a certified transcript of the testimony received and acted upon by the circuit court.

We have given full and mature consideration to the arguments for and against the application and have diligently examined and reflected on the testimony submitted by the transcript, and while it is our desire to refrain from giving an opinion that would be, in any wise, calculated to prejudice the rights of the state or of the prisoners, on the final trial of the cause, and adopting the language of this court in the case of *Good et. al.*, *ex parte*, 19 *Ark.*, 410, "that this court has the power of revision, but that it should be cautiously exercised, we cannot lose sight of the humane principle of the law that requires every reasonable doubt to go to the benefit of the prisoner." And, therefore, giving to these petitioners the benefit of such reasonable doubts as arise in our minds when considering the testimony in this case, we think it right to admit them to bail.

It having been suggested by the counsel that the petitioners are now imprisoned in the jail of Pulaski county, we think it would be more convenient to bring them before this court, by *habeas corpus*, to be admitted to bail, than to issue a mandamus to the circuit judge of Prairie county.

The writ of *habeas corpus* will therefore be awarded.

ROZELLE VS. PENNINGTON & JAY.

In a suit against the assigner of a writing obligatory, although the plaintiff must prove that demand was made of the obligor within a reasonable time, and notice of non-payment given, he is not confined to the precise dates alleged in the declaration; and so, the court erred in sustaining a demurrer to the declaration because, the allegations of demand and notice did not show due diligence.

Error to Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

GARLAND & NASH, FARR & VAUGHAN, for plaintiff.

The main point is, whether, under the general averment of demand and notice of non-payment, evidence of circumstances dispensing with such demand and notice is admissible. Admitting that, to charge the indorser, demand must be made of the principal and notice of non-payment given to the indorser, or a legal excuse proven, we contend that no averment of the excuse need be made—such excuse may be proved at the trial, though demand and notice be alleged in the declaration. 1 *Parsons on Bills and Notes*, 465; *Ruddell & McGuire vs. Walker*, 2 *Eng.*, 457; *Edwards on Bills and Pro. Notes*, 633-4, 676; *Hine vs. Allely*, 4 *Barn. & Ad.*, 624; 2 *Green. Ev.*, *sec.* 197; 5 *Pick.*, 435, 444. There is no difference between a general allegation as to the time of demand and notice, and a special one. *Jones vs. Robinson*, 3 *Eng.*, 484. The real time may be proved as well as facts and circumstances which would excuse or would be equivalent to a demand.

GALLAGHER & NEWTON, and RICE, for the defendant.

The demand and notice alleged in the declaration is not sufficient to fix the liability of the indorsers. *Ellis vs. Dunham*, 14 *Ark.*,127; *Levy vs. Drew*, 14 *Ark.*, 334. An averment of notice

is indispensable to entitle the plaintiff to recover, and its omission in the declaration is a fatal defect. *Anderson vs. Yell*, 15 *Ark.*, 13.

Where the necessary notice has not been given and there is a sufficient legal excuse for such omission, the excuse must be averred. 1 *Saund. Pl. and Ev.*, 476. And so where the averment is that the demand was made at a time that, upon the face of the declaration, is clearly unreasonable, there an averment of the reason of the delay must be stated.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of debt, brought by Rozelle against Pennington & Jay, as indorsers of a writing obligatory.

The declaration alleges that on the 1st day of January, 1861, the writing obligatory was executed by James B. Johnson to Pennington & Jay, payable on demand, and that "on, to wit, the day aforesaid," Pennington & Jay indorsed it to William R. Vaughan, who, "on, to wit, the 10th day of October, 1865," indorsed it to the plaintiff. The declaration then avers presentment for payment and refusal to pay, "on, to wit, the 11th day of October, 1865, of which the defendants then and there had notice."

The court below sustained a demurrer to the declaration and the plaintiff declining to plead further, final judgment was rendered, discharging the defendants.

The ground of the demurrer is, that the declaration shows on its face, that the writing obligatory was not presented for payment and notice of non-payment given within a reasonable time—or in other words, that the declaration shows such want of diligence, in respect to demand and notice, as discharges the defendants from liability as indorsers; and this would be so, if the plaintiff, upon the introduction of evidence, could be confined to the precise dates alleged in the declaration, but the law has been settled otherwise. In *Holleville vs. Patrick*, 14 *Ark.*, 208, it was held to be unnecessary to aver in the declaration the precise time

when the assignments were made, or when payment was required, or notice of non-payment given—such being matters of evidence, which, for the sake of brevity and perspicuity in pleading, ought not to be stated; and if stated under a *videlicet*, might be rejected as surplusage. In that case, the court said, it could not "admit of serious doubt, that it was competent for either party on the trial, to have proved that the assignments had been made, or that payment had been demanded, or notice of non-payment given at different periods from those averred in the declaration. Neither party was bound by those precise dates, and might, as we have seen, have treated them as surplusage, and for aught we can know, such proof might have been actually made as above indicated."

It follows that the court erred in sustaining the demurrer to the declaration, for which error, the judgment must be reversed and the cause remanded for further proceedings.

CAMPBELL VS. GARRATT & SCUDDER.

To consider mere *memoranda* endorsed on, or written at the foot of the declaration as a part of it, would be to sanction a practice at variance with the established rules of pleading.

The refusal of the circuit court to permit a bond for costs to be filed by a non-resident plaintiff, after plea, is within the sound discretion of the circuit court, which this court will not control; so, also, the refusal to permit an additional replication after issue to the plea.

Appeal from Jefferson Circuit Court.

Hon. WM. M. HARRISON, Circuit Judge.

RICE, for the appellant.

This suit was brought by Campbell a non-resident for the use and benefit of Wm. A. Coit a resident of the state, and hence no-

bond for costs was necessary. *Dig., chap.* 40, *sec.* 1; *Palmer use etc. vs. Hicks*, 17 *Ark.*, 505; *State use etc. vs. Lawson*, 5 *Ark.*, 665; 3 *Ark.*, 142.

Mr. Justice COMPTON delivered the opinion of the court.

This suit—an action of debt—was brought by Campbell against Garratt & Scudder on a promissory note. The declaration is in the usual form, and is signed by the attorney for the plaintiff. At the foot of the declaration, and below the signature of the attorney, is a memorandum in the following words: "This suit is brought for the benefit of William A. Coit," which memorandum is also signed by the attorney for the plaintiff.

At the return term, the defendants pleaded in abatement, that Campbell, the plaintiff, was a non-resident of the state, and had not filed a bond for costs, as required by law. To this plea the plaintiff replied generally, issue was joined and the cause continued. At the next term, the plaintiff offered to file a bond for costs, which the court refused to permit him to do. The plaintiff then moved the court to declare the issue upon the plea immaterial, and to order a repleader, for the reason that it appeared from the memorandum, at the foot of the declaration, that the suit was brought for the use of Coit, who was the party liable for the costs—which was refused. The plaintiff then moved for leave to file an additional replication to the plea, setting up, that the suit was for the use of Coit, who was a resident of the state—which was likewise refused. The issue to the plea in abatement was then submitted, by consent of the parties, to the court for determination, who, on the evidence adduced, found for the defendants: whereupon, the plaintiff moved the court for judgment notwithstanding the finding, which motion was overruled, and judgment rendered dismissing the suit and for costs.

The motion for a *repleader*, as also for judgment *non obstante veredicto*, was based upon the assumption that the memorandum at the foot of the declaration, above quoted, was, in legal contemplation, a part of the declaration. We have been referred to

no authority, and none has fallen under our observation, that would warrant us in so treating the memorandum. The attorney, himself, seems not to have regarded it as part of the declaration, until after leave to file a bond for costs was denied; because, if he had, it must be supposed that he would have demurred to the plea, instead of taking issue upon it. If the object was to sue for the use of Coit, it should have been accomplished by appropriate averments in the declaration. To consider mere *memoranda*, indorsed on, or written at the foot of the declaration—which is sometimes done for the convenience of the attorney—as a part of the declaration, would be to sanction a practice at variance with the established rules of pleading, and wholly unsupported by authority, so far as our examination has extended.

Whether the plaintiff should have been permitted to file a bond for costs, when he offered to do so, was matter within the sound discretion of the circuit court; and this court, adhering to the decision in *Perkins vs. Reagan*, 14 *Ark.*, 47, will not control that discretion. In that case, which was a bill in chancery by a non-resident, the defendants pleaded in abatement, that no bond for costs had been filed: and, afterwards, and before any action had been taken on the plea, the complainants offered to file a bond, but the court refused to permit the same to be filed, and dismissed the bill. On appeal the judgment was affirmed, this court remarking, that the provision of the statute being express, it had, therefore, gone no farther than to recognise the exercise of a sound discretion by the circuit court, in analagous cases, citing *Town vs. Evans*, 6 *Eng.*, 10, and *Modglin and wife vs. Slay*, 6 *Eng.*, 696.

In refusing to permit the plaintiff to file the additional replication, the court exercised a like discretion, which, under the circumstances in this case, we will not disturb. Besides we are not prepared to admit that the bringing of the suit for the use of Coit, was a fact which could have been made to appear, for the purpose for which the plaintiff sought to establish it, otherwise than by the declaration itself. This, however, is a question which we need not determine, and as to which we express no opinion.

Let the judgment be, in all things, affirmed with costs.

CROW AD. VS. HARDAGE.

This court has no jurisdiction by appeal, unless the prescribed affidavit is filed, or waived of record.

Appeal from Clark Circuit Court.

Hon. A. W. HARGROVES, Circuit Judge.

FLANAGIN, for appellant.

ENGLISH, contra.

Mr. Justice CLENDENIN delivered the opinion of the court.

We learn from the record in this case that it was a case tried before a justice of the peace, appealed to the circuit court, and tried and determined in that court, and an appeal prayed therefrom to this court.

The first question that presents itself for our consideration is as to the jurisdiction of this court.

Our attention is called by the counsel of the appellees, in his brief, to the fact that the record in this court does not show that the affidavit required by law to perfect an appeal to this court was filed by the appellant in the circuit court. Upon inspection of the record, we find that it does not show that any affidavit was filed in the circuit court, nor was it waived. We are, therefore, under the decisions of this court heretofore made on this point, without jurisdiction, and the appeal must be dismissed. See *The Bank of the State vs. Hinchcliff*, 4 *Ark.*, 444; *McJenkin vs. State Bank*, 2 *English*, 232; *Town vs. Wilson*, 2 *English*, 386; *Wilson vs. Dean*, 5 *English*, 308.

BURR VS. ENGLES.

Where the transcript of a judgment of a justice of the peace is filed in the circuit court and entered in the judgment docket, the statute of limitations commences to run from the time of such filing and entry, and not from the date of the justice's finding.

Appeal from Independence Circuit Court.

Hon. RICHARD H. POWELL, Circuit Judge.

WATKINS & ROSE, for appellant.

Mr. Justice CLENDENIN delivered the opinion of the court.

On the 1st day of March, 1855, Burr recovered against Engles, before a justice of the peace of Independence county, two judgments, each for sums exceeding ten dollars; executions were issued by the justice of the peace to the constable of his township, who returned them unsatisfied, there being no goods or chattels whereof to levy them. On the 24th day of February, 1860, Burr filed transcripts of the judgments, executions and returns of the constable in the office of the clerk of the circuit court of Independence county, who entered them on his judgment docket; and on the 3d day of April, 1866, issued executions on the judgments so entered, which were returned unsatisfied; he then, on the 24th day of May, 1866, issued *alias* executions, returnable to the November term, 1866, of the Independence circuit court, which executions were levied on the real estate of Engles.

On the first day of the circuit court to which the executions were returnable, Engles appeared and filed his petition praying the court to quash the executions for certain reasons in the petition specified; the petition was sustained and the executions quashed; to which judgment Burr excepted and appealed to this court.

In reviewing the record in this case, we think it is only necessary to notice two of the reasons assigned in the petition, why these executions should be quashed, because the other reasons are in no wise sustained by the record and bill of exceptions.

The first reason assigned (which we notice) is that the petitioner is a free white citizen, a householder, the head of a family, and that the land levied on has his residence erected on it, and is all the land he has in his own or any other right. And second, that the said judgments were rendered more than ten years before the date of the executions.

Waiving the question whether the petitioner could, in this manner, attack an execution, otherwise legal on its face, we will pass over the first of the reasons, by saying that he in no way, by his proof, sustained his petition in respect to it, for the bill of exceptions, which purports to contain all the evidence heard on the application, nowhere shows that there was any testimony tending to prove that the petitioner was a householder, the head of a family and that the land lived on was all the land owned by petitioner; and to avail himself of the 28th section of chapter 68, of the Digest of this state, in regard to homestead exemptions, (if he could do so in an application of this kind) it was certainly necessary to have proven what he alleged: not having done so, we will presume that the circuit court based its action in quashing the executions, upon the second ground, to-wit: that the judgments were rendered more than ten years before the date of the executions; and which we confess, is not without difficulty.

In deciding on this point it will be necessary to give a construction to *sections* 139 and 140, of *chapter* 99, of the digest of our statutes, which we have not been able to find have been given by any former decisions of this court.

The sections of the law are:

"*Sec.* 139. Every justice, on demand of any person in whose favor he shall have rendered judgment for more than ten dollars, exclusive of costs, shall give to such person a certified copy of such judgment, and the clerk of the circuit court of the same

county in which the judgment was rendered, shall, upon the production of any such transcript file the same in his office, and forthwith enter such judgment in the docket of the circuit court for judgments and decrees, and shall note thereon the time of filing such transcript.

"*Sec.* 140. Every such judgment, from the time of filing the transcript thereof, shall be a lien on the real estate of the defendant in the county, to the same extent as a judgment of the circuit court of the same county, and shall be carried into execution in the same manner and with like effect, as the judgments of such circuit court; but no execution shall be sued out of the circuit court thereon, until an execution shall have been issued by a justice and returned, that the defendant has no goods or chattels whereof to levy the same."

Now, by the language of these provisions of our statute law, does the judgment take effect from the date of its rendition by the justice of the peace, or from the date of its finding and entry on the judgment docket of the circuit court?"

By the law an execution issued by a justice of the peace can only be levied by the constable upon "goods or chattels;" if no goods or chattels are found, it must be returned; if the defendant has real estate, the judgment of the justice does not bind it. A man might, therefore, owe a large number of debts within the jurisdiction of a justice, be the owner of valuable real estate, but having no goods or chattels, could avoid the payment of his debts. To remedy this the law says to the judgment creditor, if you want a lien upon the real estate of your debtor, file a transcript of your judgment with the clerk of the circuit court, and then, if you show that officer legally, that the defendant has no goods or chattels, you may enforce your lien by execution against his real estate.

The filing of the transcript, we have no doubt, was intended by the legislature to be in the nature of a judgment of a circuit court, and took effect from the day of its filing; and was governed by the same limitation that judgments of the circuit court would

be governed by, and that consequently, being filed on the 24th day of February, 1860, and the executions being issued on the 24th day of May, 1866, ten years had not elapsed since it became a judgment lien on the real estate of the petitioner. *Sec.* 19, *ch.* 64, *Digest of Ark.*, and *Hanley vs. Carneal*, 14 *Ark.*, 524.

Giving this construction to the two sections of the law referred to, we are of the opinion that the circuit court erred in quashing the executions, and the judgment must be reversed.

HAWKINS VS. FILKINS.

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The thirteen colonies, although dependencies of the British government, were entirely independent of each other; and separately and severally constituted the government of the United States; and it may be safely assumed that the people of the several states, in whom the sovereign power rests, had conferred upon their state governments sovereign and independent powers as such, limited only by the extent to which power was afterwards conferred by the constitution upon the federal government, or limited by it to the states,

But whether the constitution was made and adopted by the states, or by the people of the states, as a political question, is of no importance for any purpose of judicial investigation.

There can be no question but that the federal government derived its entire power and authority from the constitution; and is limited in the exercise of its powers to the specific grants of power therein contained, and to such implied powers as are necessary to give effect to the expressly delegated powers.

The powers granted to the federal government were for national purposes only: and the constitution and the laws made in pursuance thereof are the supreme law: and as the expressly delegated powers did not embrace any of the local municipal powers of the state government, they necessarily belong exclusively to the states and to the people; in respect to which the states are independent and sovereign; and to that extent the allegiance of the people is due to their state government.

The convention of this state, which framed the constitution of 1861, was called according to the provisions of the then existing constitution; and no acts of that

convention can be void except such as were contrary to the allegiance of the people to the federal government; viz: that which attempted to dissolve the connection of the state with the federal government, and those that were auxiliary to that purpose.

Admitting that the state had no power to withdraw from the compact she had entered into with the United States, and that the act by which she attempted to do this was void; that void act could not affect the validity of the constitution and government of the state in other respects: nor was it intended by that convention to destroy the state government, whose existence as such did not depend upon its connection with the United States.

The position of Arkansas in the national government was equal to that of any other state, her rights and responsibilities the same; and her people owed allegiance to the United States to the extent of the powers delegated for national purposes; but the moment the laws which protected the citizen, were suspended by force of the civil war, that allegiance ceased.

If the state of Arkansas was conquered territory, the laws and government in force at the time of the conquest, remained in force until altered by the conqueror.

If the government of Arkansas was entirely revolutionized, and all of its departments usurped by force, without law or protection, and consequently owing no allegiance to any power, the people of the state as of necessity had a right to establish *de facto* a government for themselves.

The late war between the United States government and that attempted to be established as the Confederate States was a civil war, and the rights of belligerents apply and govern the conduct and rights of both parties; but the rules of conquest over foreign territory do not apply to their full extent; nor were the civil governments of the states overturned by the result.

The only principle settled by the late civil war, is, that no state has the power to dissolve its connection with the federal government—the powers of the two governments, state and federal, remaining the same—the rights of the people the same.

The state courts derive no power or authority to adjudicate from the United States, but from the constitution and laws of the state government, whose power as to its municipal affairs is independent of any other government.

The state of Arkansas did not, either by the passage of the ordinance of secession, by which she unsuccessfully attempted to dissolve her connection with the United States government, or by any subsequent act of hers, suspend or destroy the existence of her state government.

The government of the state continued to exist *de jure*, from the time she attempted to secede, until suspended by the action of the convention of 1864; and the acts of the state government during that period, were valid and binding as though no attempt had been made to secede:

No state convention has the power to declare the existing constitution and government void *ab initio*; and thereby render invalid the executive, legislative and judicial acts.

The rule of construction, applicable as well to constitutions as acts of the legislature, is, that such construction, if possible, shall be given, that no clause, sentence or word shall be void, superfluous or insignificant; but if, from a view of the whole act, the intention is different from the literal import of its terms, then the intention shall prevail: construing the ordinance of the convention of 1864, by this rule, it is apparent that the intention was to make void the acts of the convention of 1861, only so far as the same were in conflict with the constitution and laws of the United States.

Error to Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

ROSE, GALLAGHER & NEWTON, and GARLAND & NASH, for plaintiff.

We respectfully submit that the proposition, that the judgment upon which the execution was issued was rendered by a court whose acts were made void by the preamble to the present constitution of the State of Arkansas, is contrary to law.

The preamble to the constitution does not, *ex vi termini*, admit of such a construction; nor can the same be given to it by any fair intendment. See preamble to present constitution of Arkansas, *page* 5 *of pamph. Acts*, 1864.

The constitution is not to receive a strict construction. "The constitution should receive a fair and liberal construction." *State vs. Ashley*, 1 *Ark.*, 513; *State vs. Scott*, 4 *Eng.*, 270.

But there is a part of this clause which must be strictly construed. So far as it would take away vested rights, it is retroactive; and retroactive construction is not favored, and retrospective clauses must be strictly construed. *Baldwin vs. Cross*, 5 *Ark.*, 510; *Crittenden vs. Johnson*, 14 *id.*, 464; *Couch vs. McKee*, 1 *Eng.*, 484.

So far as it deprived individuals of their rights as a "legitimate consequence of the rebellion," this clause must be considered as penal. "Penal acts are to be strictly construed."

Hughes vs. State, 1 *Eng.* 131. Penal laws cannot be so construed as to embrace doubtful cases, and unless it were the clear intention to take away vested rights, then the clause must be held to be inoperative in that respect.

But, above all, let us apply the following rule: "A statute is to be construed, if possible, so that no clause, sentence or word shall be void, superfluous, or insignificant." *Wilson vs. Biscoe*, 6 *Eng.* 44; *Kelly vs. McGuire*, 15 *Ark.* 555. If the construction contended for by the appellee is to hold good, then the general saving of individual rights may as well be stricken out, since only the rights afterwards specially named are reserved.

For the "RIGHTS OF INDIVIDUALS" therein mentioned, should receive the most liberal construction, for the rule of law is, in the construction of statutes, in all things "*favorable*" the utmost latitude is to be given to the words, whilst in all things "*odious*" the words are to be restricted to their narrowest sense. *Smith's Commentaries*, *page* 649, *secs.* 496, 497, 498.

As to what is meant by "rights of individuals," we will simply refer to 1*st Black. Com.*, *p.* 93; 1*st Stephen's Black. Com.*, *pages* 128 *and* 153.

But if the convention did intend to effect the purpose, that it is contended the words used in the preamble import, the same is nugatory and without force for want of authority in the convention to effect the same.

We should bear in mind that this is a question between citizens of the state of Arkansas, simply, and in which no other power, state or individuals have any interest or concern; and that the proposition necessarily results, and which is the law of nations, that as to private rights and quoad its own citizens, when, by revolution or otherwise, a new government is for the time established, it does not need the recognition of other nations to validate it, but quoad its own citizens and internal affairs, it is not only a government *de facto* but *de jure*, for it exists, no matter what finally becomes of the government so temporarily established. *Wheaton's Int. Law* 56, (3*d Ed.*) and 310;

Ib. Lawrence's Wheat., 36, 37 *and note* 15; *McIlvaine vs. Cox's Lessees*, 4 *Cranch*, 212; 1 *Burrill's Dic.*, *Word "de facto."*

Thus the legislature of the state of Arkansas, at the session of 1860 and '61, (*see Acts of* 1860, *p.* 214,) pursuant to the provisions of the constitution of the United States and the constitution of the state of Arkansas, called the convention of the people, which afterwards, on the 6th day of May, 1861, attempted to separate the state of Arkansas from the United States; this convention was duly elected by the people of the state of Arkansas, every county being represented, and organized the government, which, without any sensible or material opposition, governed the state of Arkansas until September, 1863, the capital of the state was occupied by the United States forces; and the present state government was adopted and organized, pursuant to the suggestions of the late president LINCOLN, and put in force on the 18th day of April, A. D. 1864.

Thus it will be seen, that Arkansas, as far as she is concerned, *never was conquered by the people of Arkansas*, but by the United States, and therefore, the questions of what rights of person and property her citizens retained, as citizens of a conquered country, is not properly in issue; but even admitting, for the sake of argument, that Arkansas is a conquered country, then what is the *status* of her citizens, and what are their rights of person and property as citizens of a conquered country, under the "law of nations."

"When one country conquers or succeeds to another, all private contracts, &c., are left as they are found, as well as their laws, customs and usages, not inconsistent with the paramount right of the conquering power; this is to protect society itself." *Vide* 2 *Burlamaqui*, *p.* 2, 14—*clauses* 14 *and* 15; *Crabb's History of English Law*, 452; *Tucker's Black. Com.*, *chapter* 1, *page* 107; 1 *Sharshwood Black.*, 204; *Ware vs. Hilton*, 3 *Dallas*, 199; [1 *Con. Rep.*, 127] 1 *Bishop's Cr. Law*, *sec.* 7, *et seq. and notes.*

Particularly, *United States vs. Powers*, 11 *How.*, 570; *Mc-*

Mullen vs. Hodge, 5 *Texas*, 44; *Cass vs. Dillon*, 2 *Ohio*, 607; *Commonwealth vs. Chapman*, 13 *Metcalf*, 68-71; *State vs. Raywood*, 2 *Stewart*, 360; *and Bishop on Marriage and Divorce, secs.* 19, *et seq., and authorities cited; Cross vs. Harrison*, 16 *How.*, 181; *Spence's Equitable Jurisprudence of the Court of Chancery, vol.* 1, *p.* 2, 3, 10, 105.

And in this construction of the law, the past history of civilized nations fully bears us out. In addition to what may be found in the foregoing references, we respectfully call attention to the following additional authorities: *Campbell's Lives of Chief Justices of England, vol.* 1, *p.* 80; [*vitae Roger Le Brabacon,*] *Ib. vitae Oliver St. John.*, 464-6-7-70, *etc.; Jefferson's Works, vol.* 7, *p.* 611-612; *Hamilton's Works, vol.* 7, *pages* 844-5; 8 *Wheaton*, 489; 2 *Gallison*, 501.

In another view, Arkansas is at least entitled to belligerent rights, always accorded by the laws of war of civilized nations, under the law of nations, to a conquered country, if she is so considered. *Hughes vs. Litsey et al., Amer. Law Reg., Jan. No.* 1866, *p.* 148; 2 *Blacks. U. S. Sup. Ct. Rep*, 635; *Lawrence Wheat.* 249, 250, *note; ib.* 605: *Hildreth vs. McIntyre*, 1 *J. J. Marsh.*, 205.

That the state of Arkansas *has never ceased to exist*, and that, as to *her own citizens* and *her internal affairs, she has always been sovereign and independent;* or, in other words, that the state of Arkansas *never did surrender her sovereignty as to these matters*, and that by her abortive attempt to secede from the United States, she did not forfeit any of these rights, or any other rights which she had not previously surrendered to the United States—*Martin vs. Hunter's Lessee*, 1 *Wheaton*, 304; [3*d Cond. Rep.*, 473;] *McCulloch vs. State of Maryland*, 4 *Wheaton*, 316; [4 *Cond.* 466.]

But finally, there is an insuperable objection to the construction sought to be put upon the preamble of the present constitution, by the attorney for the defendant in error, namely—that such a construction would be the violation of the constitution

of the United States; it would impair the obligations of contracts, and be in the nature of an *ex post facto* law; and the constitution of the United States is paramount, and her laws of superior force to the action of the state convention, as well as of legislatures.

We refer the court to the following authorities, as to laws impairing the obligation of contracts: 2 *Story on Const.*, *p.* 236, *sec.* 1385; *Blair vs. Williams*, 4 *Littell, Ky.*, 38—47; *Lapsley vs. Brashear*, *ib.* 56; *ib.* 75, 76; *Davis vs. Ballard*, 1 *J. J. Marshall*, (*Ky.*) 570; *Tounsend vs. Tounsend*, 1 *Peck. Tenn.*, 1; *Record Book K., of Opinions Sup. Ct. Ark.*, *Burt vs. Williams —Opinion per Fairchild*, (*J.*) *p.* 506; *Smith's Com. on Constitutional Law*, *p.* 384, *sec.* 252.

As to ex post facto laws, *vide*, *Fletcher vs. Peck*, 6 *Cranch*, 87, (1 *Cond. Rep.* 308;) *Calder vs. Bull*, 3 *Dallas* 386; (1 *Cond. Rep.* 172.

And on both the latter points, see *Society vs. Wheeler*, 2 *Gallison* 105.

RICE, for the defendant.

There was no judgment rendered in any court of the United States as a foundation for the execution.

The court will take judicial notice of the fact that there was a revolution on the part of the people of the state against the government of the United States, that the courts held in Arkansas when this judgment was rendered, were rendered under confederate, and not federal authority; that every department of the state, executive, legislative and judicial claimed allegiance to the confederate government; that the revolution was unsuccessful; and that no civil government was established, that was recognized by any foreign power, or by the United States. The recognizing the "rebels" as belligerents by the United States was not recognizing them as a civil government. See *Secretary Seward's letter to Mr. Adams.*

It the confederate government was a civil government, it was

foreign to the United States; and the judgment being foreign, this court cannot examine and adjudicate upon the jurisdiction of the foreign tribunal that rendered it. See *Rose vs. Hinely*, 4 *Cranch*, 24.

Was this a court *de facto* or otherwise that rendered this judgment? To be a court of any jurisdiction it must have been a constitutional court. See 24 *Wendell*, 520,—*Chancellor Walworth's opinion, and authorities cited; Obarman vs. Booth*, 21 *Howard*, 515. The authority the court had was derived from the confederacy; and to give it legal power, the confederacy must have been a civil government *de facto*, or *de jure;* and the decision of this question belongs to the state department. *Hoyt vs. Ghelston*, 13 *John.*, 139; *Rose vs. Hinely*, 4 *Cranch*, 24; *Kennett vs. Chambers*, 14 *How.*, 38; *Luther vs. Borden*, 7 *How.*, 1.

There can be no *de facto* court. There may be a *de facto* judge of a constitutional court. 1 *J. J. Marsh.*, 205.

The court derived its authority from the confederacy, and that was not a *de facto* civil government with power to make a constitutional circuit, as has been decided by the political department of the government, and this court must follow that decision.

Belligerent rights do not constitute a civil government. *Lawrence Wheaton on Int. Law*, 40 *and a note.*

The constitutional convention which made the constitution under which this court is now acting expressly repudiate and declare null and void all legislative and judicial acts of the state of Arkansas, while acting under the ordinances of the convention of the 4th of March, 1861. The proviso cannot do away with the body of the act or section to which it is a proviso. The rule is thus stated. It is the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso covers special exceptions only out of

the enacting clause, and those who set up any such exception must establish it as being within the *words* as well as within the *reason* thereof. *U. S. vs. Dickson*, 15 *Pet.*, 141.

But the clause or exception saving the rights of individuals is not repugnant to the body of the act or section. The convention in the body of the preamble, declare that no individual could acquire any rights under the confederacy, and then saves all their rights derived from any other source.

The question is asked, cannot a state by virtue of its reserved power legally pass laws, create courts, etc., although it has violated its compact with the United States by seceding therefrom? Could Arkansas, after the 6th of May, 1861, exercise that kind of sovereignty and have a civil government which was legal and whose acts would be binding?

The question as to whether she could do so may be a judicial one; but the question as to whether she did exercise soverignty and establish a civil government, is a political one, as decided in the *Dorr and Borden cases*, and the decision of the political department is binding on the courts.

Mr. Chief Justice WALKER delivered the opinion of the court.

Jacob Hawkins, the plaintiff in error as well as in the court below, brought his action of debt, in the Pulaski circuit court, against Lemuel M. Filkins, upon a promissory note for the sum of four hundred and fifty dollars. The declaration was filed, and the writ made returnable to the May term of said court, 1861. The writ was duly executed, and at the return term, the defendant appeared and craved oyer of the writing declared upon, which was granted by filing the original note. Without further proceedings at that term, the case was continued until the September term, 1861, of said court. At which term the parties appeared, and no further defence being offered, judgment was rendered in favor of the plaintiff for his debt, and costs of suit.

On the 24th day of July, 1865, execution was issued upon this judgment, by the clerk of the Pulaski circuit court, and there-

after, duly levied upon the property of the defendant, Filkins; who, thereupon, gave notice to the plaintiff of his intended motion to stay and quash the execution so issued; the grounds of which were set forth in his petition substantially, as follows: "That there is, and was not, at the time said execution issued, any valid subsisting judgment on record in said clerk's office against the petitioner, (the defendant,) but was isued upon a record purporting to be a judgment rendered in the Pulaski circuit court, at its September term, A. D., 1861, at which time no legal court was held in said county of Pulaski, and that said judgment for that reason was void." This motion was resisted by the plaintiff, but after consideration, the judge of the circuit court granted an order staying all further proceedings on said execution, until the petition should be heard in the circuit court.

Afterwards, on the 7th day of November, 1865, the circuit court of Pulaski county, after having heard the evidence, and upon mature consideration, rendered judgment that the execution be quashed, set aside, and held for naught, and that the petitioner, Filkins, recover his costs, etc.

The judgment of the Pulaski circuit court, upon which the execution issued, and all the proceedings upon which it was founded, as well as the execution, and the endorsements thereon, were preserved by bill of exceptions, and made part of the record in the case.

With regard to the state of case thus presented, it may be well to remark, that the proceeding are all regular. No question is raised as to the validity of the judgment, or the right of the plaintiff to have satisfaction by execution, if, at the time when the judgment was rendered, there could be held a circuit court in Pulaski county; nor is there any question but that the court was held at the regularly appointed time and place, and by all the officers required by law to hold such court, who were all duly qualified to perform the duties imposed upon them by law, if, in law and in fact, there did, at that time exist a government and laws within the state of Arkansas. And as regards that question,

it is conceded that, unless by the action of her state convention, held on the 4th of March, 1861, the government of the state of Arkansas was destroyed, and ceased to exist, until it was subsequently revived under the present state constitution, the court that rendered the judgment in this case, was a legal court, and the judgment rendered by it valid. Nor is there any act of the convention, to which exception in this respect can be taken, unless it be that, by which a severance of the bonds of the national union was attempted. So that the question is, in fact, narrowed to this: Was the state government destroyed by force of such act? If such was not the effect of the ordinance of secession, it is not contended that the individual acts of her citizens, in organized hostile force against the national government, however it might fix upon them personal responsibility for attempting, by force, to prevent the government of the United States from exercising its constitutional powers and authority within the state, could affect the state government, or the right to make and enforce all needful laws for the municipal government of the citizens thereof.

Before however proceeding to consider the question, reduced, as we have seen it may be, to a single proposition, there are several preliminary questions, which it will become necessary to consider. Among which, are: the powers claimed and exercised by the states prior to the formation of the federal government—the object and purpose for which the federal government was established—the powers conferred upon it—the bonds of union between the states and the federal government, and their reciprocal obligations and duties to each other—and finally, the power of the state to dissolve its connection with the federal government, whether by ordinance or otherwise.

The mere statement of these very important and difficult questions, about which there has been such a diversity of opinion, at all times since the formation of the national government, and which resulted in a most disastrous civil war, shows the magnitude of the questions to be decided, and the difficulties which are to be

encountered in their determination. And not alone as questions of law are they important, for, involving as they do, the maintenance, or the overthrow of the legislative, the executive and the judicial acts under state authority, for nearly three years, upon the faith of the validity of which the contracts and dealings of the whole people of the state have been made, they become second only in importance to the correct decision of the law itself; and for these reasons, merit and must receive the most careful and deliberate consideration.

Guided, as we are assured we shall be, by well established historical facts, by the decisions of our own courts of the highest authority, and assisted, as we have already been, by the eminent counsel who have argued the case, with an earnestness and ability alike creditable to themselves and to the profession, and profitable to the court, we will proceed briefly to review some of the most prominent circumstances connected with the formation of the two governments, state and federal.

As political questions they will not be considered by us. But, as facts tending to show the nature and extent of the compact, which binds the state and the federal government together, and, particularly, to show how, to what extent, and under what circumstances, the state may sustain, and exercise its legitimate authority in the municipal administration of the state government, it becomes highly important to do so.

That the thirteen British colonies established in North America, (now states of the federal government,) although dependencies of the British government, were entirely independent of each other, is a historical fact, about which there can be no question. Nor, is it less certain that, subsequently, when the states confederated together, mainly for the purpose of defence against a common enemy, they did so as independent provinces or states. When passing upon the articles of confederation in convention, each state had one vote. Such, too, was the case in the congressional legislation, both before and after the articles of confederation were adopted. In *article*, 2 it was provided: "That each state

retains its sovereignty, freedom, independence, and rights, which are not in this confederation expressly delegated to the United States in congress assembled." *Elliott's Debates, vol.* 1, *p.* 107. The 3d *article* declared, that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare.

At the close of the revolutionary war, in the treaty of peace with England, they are severally named as parties to that treaty, and severally recognized as independent states. Subsequently, when the inefficiency of the articles of confederation became apparent, the several states re-assembled in convention to amend them, so as to give greater strength and efficiency to the federal government, and to form a more perfect and enduring bond of union. The delegates in convention thus assembled, still voted by states, each state having one vote. By its own terms the constitution was not to take effect, unless adopted by nine of the states. And when adopted by the convention, it was by resolution submitted to a convention of delegates, to be chosen in each state by the people, under the recommendation of the several legislatures thereof, for their assent aud ratification. 1*st Elliott's Debates on Con.*, *page* 52; *Story on the Constitution*, *vol.* 1, *page* 188.

The constitution was laid before the congress of the United States, and by that body, by resolution, referred to the legislatures of the several states, to be by the legislatures submitted to a convention of delegates, chosen by the people of each of the states. *Story on Con.*, *vol.* 1, *p.* 189. And it was, subsequently, ratified by a convention of each of the states, separately, and by several of them not until late in the year 1789, after its submission.

The several states became parties to this compact by force of their voluntary assent and adoption, for it was never seriously doubted, but that if any one of them had declined to adopt the federal constitution, such state would not have been bound by it, even should all of the other states, with the assent of their whole

people, have done so; but would, in itself, have been a sovereign, independent goverment.

In view of these and other contemporaneous facts, we may safely assume, that the people of the several states, in whom the sovereign power rests, (according to the theory of our government) had conferred upon their state governments, sovereign and independent powers as such, which were plenary, for all the purposes of an independent government; and, which (as we shall presently see,) were only limited by the extent to which power was conferred, by the constitution, upon the federal government, or prohibited by it to the states.

The question as to whether the constitution was made and adopted by the states, or the people of the states, as a political question, was once esteemed by many as of vital importance; but, we apprehend, of less practical value now than was formerly supposed. But, however this may be as a political question, for all the purposes of judicial consideration, it is a matter of no importance, whether the constitution was made and adopted by the states, or by the people of the states, or by the people through the agency of states; because, whether it emanated from the one or the other, it is alike obligatory as the supreme law of the nation.

Our reference to the earlier history of the American government has been, not to ascertain political rights, but the more clearly to ascertain what the reserved rights of the states were. For it is expressly declared in the constitution that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Our next inquiry, then, must be as to the extent of the powers delegated by the states, or the people thereof, to the "United States." For when we shall have done this, we can readily see what powers the state of Arkansas possessed on the 6th of May, 1861, when, it is assumed, that by an act of her state convention, she ceased to exist as a state; and to what extent, if at all, she

could sustain and administer her local state government. notwithstanding the act of seeession.

There can be no question but that the federal government derived its entire power and authority from the constitution, and is limited, in the exercise of its powers, to the specified grants of power therein contained, and to such implied powers as are necessary to give effect to the expressly delegated powers. This is evident, as well from the express provision in the constitution, as from repeated decisions of the supreme court of the United States. *McCulloch vs. the State of Maryland*, 4 *Wheaton Rep.* 316; *Cadder and wife vs. Bull and wife*, 3 *Dallas Rep.*, 386; *Martin vs. Hunter's Lessee*, 1 *Wheaton Rep.*, 325. In the last mentioned case, Mr. Justice STORY said: "The government of the United States can claim no powers which are not granted to it by the constitution, and the powers must be such as are expressly given, or given by necessary implication."

It is equally clear, that these limited powers all relate, solely, to national purposes. This is plainly shown by the powers enumerated: "to lay and collect taxes;" "to borrow money;" "to regulate commerce;" "to coin money;" "to establish post offices and post roads;" "to establish courts, inferior to the supreme court; "to declare war;" "to provide for, and maintain a navy;" are some of the most important powers delegated to the United States government; which, with all others, will be found to be strictly national. At the time the constitution was framed and adopted, there was a pressing necessity for conferring powers for national objects; but none, whatever, for conferring upon the national government, local municipal powers, because the state governments were already in existence, and were admitted to be fully competent to manage their internal affairs.

But limited and defined as these powers were, they were, by an express provision in the constitution, together with all the laws of the United States made in pursuance thereof, declared to be the supreme law of the land, and that the judges in every state shall be bound thereby, any thing in the laws or constitution of

any state to the contrary notwithstanding; and in the case of *McCulloch vs. The State of Maryland*, Chief Justice MARSHALL said: "That it was a proposition of universal consent, that the government of the United States, though limited in its powers, is supreme within its sphere of action, and being supreme, allegiance to it is due, both from the states, and the whole people, to the extent of its delegated powers."

We have seen that the powers not thus delegated, were expressly reserved to the states, and to the people thereof: and as the expressly delegated powers did not embrace any of the local municipal powers of the state government, they necessarily belong, exclusively, to the states, and to the people. In respect to all of which, the states have independent, sovereign power. The powers thus conferred by the states, as well as those retained, are said by Mr. Justice BALDWIN, who delivered the opinion of the court in the case of *The State of Rhode Island vs. The State of Massachusetts*, 12 *Peter's C. C. Rep.*, 719, to be of the highest sovereign capacity. In the exercise of this sovereign capacity, it is exclusive and supreme, within the limits of the state, over its municipal government. And allegiance is due from the people of the state, to their state government, to the full extent of its power and jurisdiction, and in this respect, there is no conflict between the allegiance due to the state, and to the federal government. Thus, there exist within the United States, two sovereign, independent powers, state and federal, but not over the same objects of government, because the one is strictly national, the other local. Each supreme and independent of the other, when acting within its legitimate sphere of action; each deriving its power from one supreme source, dependent in many respects upon the other for support, and both taken together constitute one government. Thus considered as parts of one government, bound together, as we must admit them to be, by an indissoluble compact—to each having been assigned sovereign independent powers, to be performed for the common good of all—we are brought to consider the distinct proposition under consideration.

Did the passage of the ordinance of secession, and the revolutionary action of the state, destroy the state government, or make invalid the acts of her civil government?

No question can arise with regard to the position of Arkansas in the national government; her position was equal to that of any other state; her rights and responsibilities the same. Nor can any question arise with regard to the regularity, in all respects, of her call of the convention which passed the ordinance of secession. It was called under an act of the legislature, and approved by a direct vote of the people at the polls—a majority of those voting upon the question, being in favor of calling the convention. The objection to the validity of the proceeding, is not in this, but in the action of the convention, whereby an ordinance was passed, declaring the bonds of union dissolved, and renouncing all further allegiance to the United States government.

It is contended, that the state of Arkansas, by her convention, had no power to withdraw from the compact she had entered into with the United States, and that the act of secession, by which she attempted to do this, was void for want of such power. Suppose we concede this to be true, can it be said that a void act could affect the validity of the constitution and government of the state; or on the other hand, should it be said that the state had such power, the mere exercise of a lawful power would impair no other right. Therefore, in neither alternative could such effect be produced. There was no change made in the state government; the ordinance of secession neither added to, or detracted from the constitution. It was not intended by the convention to destroy the state government, whose existence as a state did not depend upon such connection. The constitution remained, substantially, the same (although re-affirmed,) as that under which the state government was originally organized. The same statute laws were continued in force, the same officers were continued in office, to administer the laws under the state government; no other state government, indeed no government whatever, contested with the state her right to administer the laws under such

government. An uninterrupted exercise of the powers of the state government, in all its departments, over the whole state, existed at the time the judgment, the validity of which is questioned, was rendered, and, although suspended after that, in portions of the state, on account of its military occupation by the United States troops, in other portions of the state, the administration of the state government was uninterrupted. Even in time of civil war, government and law remain absolute necessities. The people of the state had given their allegiance to the state government, and were entitled to its protection. Their only protection must necessarily come from the state government; because, for municipal government, the power existed no where else. The federal government could set up no such government, because no power to do so was delegated to it. Therefore, unless the state could govern, there could be no government, and as a necessary consequence, the whole people of the state would be left withont law, without government; life, liberty and property left to the mercy of brutal violence, and the whole society, in this age of advanced civilization, be left to the mercy of those who can only be restrained from violence by law. Such is not, and from the very nature of things, cannot be the law—not even over conquered territory, unless our most eminent judges have been greatly mistaken. In the case of the *United States vs. Percheman, 7 Peters Rep. page* 86, Chief Justice MARSHALL said: "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conquerors to do more than to displace the sovereign, and assume dominion over the territory. The modern usages of nations, which have become law, would be violated; that sense of justice and of right, which is acknowledged, and felt by the whole civilized world, would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance, their relation to their ancient sovereign is dissolved. But their relations to each other, and their rights of property remain undisturbed."

When delivering the opinion in the *Amy Warwick case*, Mr.

Justice GRIER said: "It is a proposition never doubted, that the belligerent party, who claims to be sovereign, may exercise both belligerent and sovereign rights, * * * * Under the very peculiar constitution of this government, although the citizens owe supreme allegiance to the federal government, they owe, also, a qualified allegiance to the states in which they are domiciled." 2 *Black Rep., page* 673. This power, during a civil war, to exercise both belligerent and sovereign rights, so distinctly asserted by Vattel, and by the supreme court of the United States, through its eminent judges, MARSHALL and GRIER, is fully illustrated and most distinctly announced by Judge STORY, in the case of the *United States vs. Hayward*, 2 *Gallison Rep.*, 485. The facts in that case were, that "*Castine*," a port of entry in the district of *Penobscot*, within, and belonging to the United States government, was, on the 1st of September, 1814, taken possession of by the British troops, and was held by that power until after the treaty of peace, After having thus taken possession, the governor of *Nova Scotia* issued a proclamation claiming the whole country. Under this state of the case, the question arose, as to whether "*Castine*," during the time it was thus held, was to be considered a foreign port. In regard to which Judge STORY said: "by the conquest and occupation, the laws of the United States were necessarily suspended in *Castine*, and by their surrender, the inhabitants became subject to such laws, and to such only, as the conquerors chose to impose. No other laws could, in the nature of things, be obligatory upon them; for, where there is no protection, or sovereignty, there can be no claim to obedience." *Id. page* 502. "By the conquest and occupation of Castine, that territory passed under the allegiance and sovereignty of the enemy. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced, or be obligatory upon the inhabitants, who remained and submitted to the conquerors. Castine, therefore, could not, strictly speaking, be deemed a part of the United States; for its sovereignty no longer extended over the place." *Id.* 501.

Thus it is shown, even admitting that Arkansas should be held as foreign territory—conquered if you please, by the Confederate States, (which was not in point of fact true,)—that, for the time being, no allegiance was due from the citizens of the state to the United States; because the sovereign power of the United States was suspended over the territory in the possession of the enemy, and was not obligatory upon the inhabitants who remained, because, says Judge STORY, "where there is no protection or sovereignty, there can be no claim to obedience."

Such was the condition of the people of Arkansas. They owed to the United States allegiance, to the extent of her delegated powers for national purposes, but the moment the laws, which protected the citizen, were suspended by force of a civil war, that allegiance ceased.

During the suspension, there must, of necessity, be some law to govern the people. All associations of people, when numerous, must of necessity have government; self-protection, indeed their very existence depends upon it. A civilized christian people are not because of war, to be remitted back to a state of barbarism. Arkansas, with other states, attempted to organize a new government. At the time she attempted to do this she was a sovereign state, with all of her powers and rights as perfect and full as were the powers of the original thirteen states. Amongst the reserved rights of the states, and of the people, is that of making, altering or remodeling their state constitutions. That it is republican in form, and does not infringe any of the powers delegated to the United States, is all that can be required of them. Beyond this, there is no restriction upon them. Nor has it ever been questioned, that the states have an exclusive right to make all necessary laws for the government of the people of the states, and to execute them. They had a government and laws in force at the time that, by force of civil war, the laws of the United States were suspended; and, like the people of "Castine," they owed obedience to the laws and government under which they lived, although that government should be held by force of arms.

It would be strange, indeed, if more than ten millions of people, over whom the national sovereignty had been suspended, and, consequently, no claim of obedience to any sovereign, superior power existed, could not, in any event, establish and maintain a valid *de facto* government. The mere statement of the proposition furnishes to it an answer; because if there is no ruling authority over them—no obligations of duty—then, surely, they are free, under the laws of nature and of God, to make laws for their own government, and to enforce obedience to them, over all persons within their territorial limits.

Thus, in the case of *Hilldreth's heirs vs. McEntire's Devisee*, 1 *J. J. Marshall, page* 208, it was held that "when government is entirely revolutionized, and all its departments usurped by force, or the voice of a majority, then prudence recommends, and necessity enforces obedience to the authority of those who may act as public functionaries, and in such a case, the acts of a *de facto* executive, a *de facto* judiciary, and of a *de facto* legislature, must be recognized as valid. There is no government in action, excepting the government *de facto*, because all the attributes of sovereignty, have, by usurpation, been transferred from those who had been legally invested with them to others, who sustained by a power above the forms of law, claim to act, and do act in their stead."

In the case of *Hughes vs. Lilsey et al.*, recently decided in Kentucky, as reported in *American Law Register, Jan. no.* 1866, it is said: "The defendant, before the war, was a citizen of the state of Texas, and owed to that state a true and faithful allegiance. * * * Allegiance and protection are correlative duties, 4 *Wheaton Reps.* 254; 2 *Gallison Rep.* 500; *Lawrence's Wheat.* 600. And where the federal government, as is averred in this case, did not, and could not protect the defendant, * * it surely would be unjust to exact from him the full and complete discharge of his duties to the federal government, and deny to him, especially in a state court, a defence based upon those rights,

which the laws of nations and of war confer upon the people of a *de facto* state, in revolt against the established government."

There arose a question of much importance in Texas, after the people of that state had overthrown the Mexican authority, and established for themselves a new government, as to whether the Mexican laws remained in force, and communicated title to property under the new government. Mr. Justice LIPSCOMB, who delivered the opinion of the court, after a review of authorities, concludes that no treaty stipulations are necessary to protect the rights of property, upon a change of government, and proceeds: "It would be difficult to conceive, on any known principles of reason, or just regard to the rights of man, why a change made by the people themselves, should subject their rights to harsher rules of construction. It is indeed a principle, that seems to pervade the whole social relations of man, that laws, customs, and usages, when once established, shall continue until abrogated by the introduction of new ones; our sympathies to such influences, and reason, approve them just and right; and in truth, it is hardly possible to conceive of a civilized people existing, where all laws and customs, and all the social relations have been dissolved," *McMullen vs. Hodge*, 5 *Texas Rep.* 72.

In the case of the *United States vs. Mitchell*, 19 *Peters R.* 734, it is held that: "The inhabitants, citizens, or subjects of a conquered, or ceded country, retain all the rights of property, which have not been taken from them by the orders of the conqueror, or the laws of the sovereign, who acquired it by cession, and remain under their former laws until they shall be changed."

In the case of *United States vs. Perkins*, Mr. Justice CATRON, who delivered the opinion of the court, said: "By the law of nations, in all cases of conquest among civilized countries having established laws of property, the rule is, that laws, usages and municipal regulations in force at the time of the conquest, remain in force until changed by the new sovereign," 2 *Howard U. S. Rep.* 577.

These authorities, as well as others to which we have had reference, very clearly establish two propositions:

1. That if Arkansas was conquered territory, the laws and government in force at the time of the conquest, remained in force until altered by the conqueror.

2. That if the government of Arkansas was entirely revolutionized, and all of its departments usurped by force, without law or protection, and, consequently, owing no allegiance to any power, the people of the state, as of necessity, had a right to establish, *de facto*, a government for themselves.

And thus, we are brought to consider the character and object of the war.

The positions assumed by the defendant's counsel, are based upon the assumption, that the State of Arkansas, at the time the judgment was rendered, was acting with, and part of a foreign government—of this, we will presently consider.

That the late war between the United States government, and that attempted to be established as the Confederate States government, was a *civil war*, we entertain no doubt. It was, in view of the distinct and well defined limits of the territory, over which there was, at the time, assumed to be a distinct and separate government; of the large and well appointed armies, and well contested conflicts in arms, beyond all question such. It was recognized as a *civil war*, by foreign nations; so treated by the substantive acts of the United States; so held by writers on international law, and so expressly decided by the supreme court of the United States. *Vattel's Law of Nations, page* 424; 2 *Blackstone's Com., page* 669; *Lawrence's Wheaton's International Law, page* 612; *Santissima Trinidad*, 7 *Wheaton's Rep.*, 337; *Proclamation of Queen Victoria*, 13*th May*, 1861; *Proclamation of President Lincoln*, 16*th August*, 1861; *The Army Warwick prize case*, 2 *Black, United States Sup. Court Reports, page* 635.

"When a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him—or when, in a republic, the nation is divided into two opposite

factions, and both sides take up arms—this is called a civil war." *Vattel*, 424. "And though one of the parties may have been to blame in breaking the unity of the state, and resisting lawful authority, they are not the less divided in fact." *Id.* 425.

"Where the party in rebellion occupy and hold, in a hostile manner, a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have engaged in hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war." 2 *Black Sup. Court Rep.*, 666. "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, *civil war exists*, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land," *id.* 667. "It is not the less a civil war with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels, or traitors. It is not necessary that the independence of the revolted province, or state be acknowledged, in order to constitute it a party belligerent in a war, according to the law of nations," *id.* 669. "Under the very peculiar constitution of this government, although the citizens owe supreme allegiance to the federal government, they owe also, a qualified allegiance to the state in which they are domiciled. * * * Hence, in organizing this rebellion, they have *acted as states*, claiming to be sovereign over all persons within their respective limits, and asserting a right to absolve their citizens from their allegiance to the federal government." *Id. page* 673.

The late war with the United States, then, being a civil war, all of the rights of the citizens within the territory where it existed, may well be claimed. But the fact that it is a civil war does not, necessarily, give to the victors all of the rights of conquest as between foreign nations. In a domestic war between different portions of the same government, so far as regards the suppression of armed resistance, it may be complete, but the rules of conquest over foreign territory do not apply to their full

extent; no government can, properly speaking, conquer its own territory. And, more particularly, may it not be done in a complicated government like ours. The idea of either conquest or coercion, is not to be tolerated from any thing in the history or structure of our government, unless it be that coercion which is necessary to suppress insurrection and rebellion. The public mind has been for a time unsettled upon this question, and, even at this time, it would seem that there exists, in some minds, an impression that, by the exercise of military force, the whole civil governments of the states have been overturned by revolution; in consequence of which, new powers have sprung into existence. However much this may be indulged in, by wild theorists in politics, it can never be sanctioned by the judiciary.

We will best understand the extent of this error by keeping constantly in mind the fact, that in the civil war just closed, there was but one great political question at issue, which was as to the power of a state to dissolve its connection with the national government—in which, by a conflict in arms, it has been settled that such power does not exist. That is the question, and the only question settled. In all other respects the compact remains just as it was previous to the war, and this change is but a change in the construction of the compact. The powers of the two governments, state and federal, remain the same—the rights of the people the same. The question thus settled, not only denies that the states have power to secede, but upon principle, must also deny to the states the right to destroy or suspend their state governments, by any means whatever; for it cannot be denied that upon the existence of the state governments depends that of the federal government under its present constitution. A consolidated national government may be established upon the ruins of the state governments, but there will cease to be any longer, a government under the present constitution. Nor can we conceive how it would be possible for the federal government to destroy a state government. Because, as has at all times been held, that government is of limited delegated powers, and the constitution

must, as held by Mr. Justice DAVIS, in the case of *Milligan, ex parte*, whether in peace or war, limit and control the action of the government—in his own language: "The constitution of the United States is a law for rulers and people, equally in war and in peace." The national government, then, must exist, and that too, under the provisions of the constitution, in war as well as in peace; and if it must exist, it cannot destroy the state governments, which are indispensably essential to its existence. Nor can a state government be altered, or changed by the federal government; nor can it rightfully compel the people of a state to make any change in their local government, because, by such compulsion, the act, in effect, would be the act of the federal government, not of the state.

At this point we are brought to consider another question, which is involved in the range of the argument by the counsel for the defendant, in which he assimilates the condition of the state, to that of a conquered territory of a foreign government. We have seen that the national government was formed by the states, and the people, and is of defined limited powers, under which it must act in time of war, as well as in peace. The power of conquest is no where delegated, and therefore cannot be rightfully exercised. But if such power had been given, it certainly never could be, that the United States could conquer her own territory; because all the while that territory was hers. She could gain no new title by conquest. To suppress insurrections, to repel invasions, and to execute the laws were the only domestic purposes for which she could call into service military force. Such were certainly the views entertained by both presidents, BUCHANAN and LINCOLN. To Mr. Buchanan the question was presented: "Has the constitution delegated to congress the power to coerce a state into submission. * * If answered in the affirmative, it must be on the principle that the power has been conferred upon congress to declare and make war against a state. After much serious reflection I have arrived at the conclusion that no such power was delegated to congress, or to any

other department of the federal government." *Congressional Globe*, 1860—1; *Appendix, p.* 3.

President Lincoln, in his inaugural address, 4th March, 1861, says "perpetuity is implied in the fundamental law of all national governments. * * It follows from these views, that no state upon its own mere motion, can lawfully get out of the union; that *resolves* and *ordinances* to that effect are legally void. * * I therefore consider that, in view of the constitution and the laws, the union is unbroken. * * Where hostility to the United States in any interior locality, shall be so great and so universal as to prevent competent resident citizens from holding the federal offices, there will be no attempt to force obnoxious strangers among the people for that object." *Congressional Globe*, 1860–1, *page* 1434.

These opinions of the two chief magistrates of the nation at the commencement of the war, show, most clearly, what was, then, understood to be the limit of constitutional power, and the purpose alone for which force might be used. We know that, as the civil war enlarged in proportions, an increased force was used by the national government, and under the plea of national necessity upon a great emergency, powers not provided for under the constitution, were exercised, in which the views of counsel may have taken root, but we must believe that however cultivated and to whatever dimensions they have recently grown, they are a growth, the seeds of which were never scattered by the great arm of the patriot founder of the national government.

The conclusions at which we have already arrived, will, to a great extent, furnish an answer to the able and ingenious argument of the counsel for the defendant, who bases his argument upon two propositions:

1. That the state, whether she rightfully, or not, connected herself with the Confederate States, constituted part of the Confederate States government, which he assumed was a foreign government, contesting in arms her right to take a place among the independent nations.

2. That all of the authority, which the court that rendered the judgment had, was derived from the Confederate government.

And assuming these propositions as true, he argues that, inasmuch as the Confederate States failed to sustain her position by force of arms, and was never recognized as an independent government, this court cannot decide upon the question, but must be governed by the action of the national government. And to sustain this latter position, he has referred to several authorities of deserved weight, which very fully sustain his position as between this government and foreign governments; but after due consideration, we are satisfied that the question, as to whether the late Confederate States government was, or was not a foreign government, is not properly before us. We are aware that cases may, and probably will soon arise, where this will properly come before us for consideration; until which time, we will enter into no consideration of it.

The question before us is, not with regard to the relations existing between the Confederate States and the United States, but whether the state of Arkansas, after the ordinance of secession, maintained her state government, either *de jure or de facto.* The learned counsel, in our opinion, was mistaken in supposing the courts of Arkansas derived any power, or authority to adjudicate, from the Confederate States government, or from the United States government. The power of the court was derived, directly, from the constitution and laws of the state government of Arkansas, whose power as to its municipal government, as we have seen, is independent of any other government, whether confederate or federal. The fact that she chose, in her sovereign capacity, to act with the Confederate States, (even conceding that she had the power to disconnect herself from the United States government, which we have seen she had not), in no wise affected her rights, or power as a state. And so far as the recognition of the state government is concerned, we are sustained by very high authority in saying, that no recognition was necessary; and we may further safely assume that, if it was, there is

abundant evidence that the existence of the state government of Arkansas, was fully and explicitly acknowledged by the executive department of the nation, in the president's proclamation of the 22d September, 1862, in which he expressly declares: "that the war has been and will still continue to be prosecuted to restore the relations between the United States and each of the states and the people thereof, in which the relation is, or may be suspended or disturbed;" as well as by the legislative department, in the act of congress of the United States, approved 4th March, 1862, apportioning to Arkansas her full representation.

We have reserved a reference to the following authority, as more appropriately connected with this precise question, and upon a careful consideration of it, we think it will be found highly applicable to, and in a great measure decisive of, the question under consideration. We prefer, therefore, to refer to it by giving the language of the learned writer on international law, Mr. WHEATON, who, at page 56, says: "Sovereignty is acquired by a state, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent. This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty. The internal sovereignty of a state, does not in any degree depend upon its recognition by other states. * * The existence of the state *de facto*, is sufficient in this respect, to establish its sovereignty *de jure*. It is a state because it exists." *At page* 57, the same writer says: "The identity of a state consists in its having the same origin or commencement of existence; and its difference from all other states consists in its having a different origin or commencement of existence. * * This existence continues until it is interrupted by some change affecting the being of the state. If this change be an internal revolution, merely altering the municipal constitution, and form of govern-

ment, the state remains the same; it neither loses any of its rights, nor is discharged from any of its obligations."

It is apparent from this authority, that the internal sovereignty of Arkansas did not depend upon the recognition of the United States government; and if it did, it is equally clear that Mr. Lincoln, in his inaugural address, as well as in his subsequent proclamations, did recognize the existence of the state governments after they had passed ordinances of secession. After the ordinances of secession of several of the states had been passed, and after the formation of the Confederate States government, that government sent commissioners to Washington, whom Mr. Seward refused to receive, because, by the principles announced in the president's inaugural address, he was precluded from admitting, "that the states have, *in law, or in fact*, withdrawn from the federal union." *Department files, March 15th*, 1861. *See acts of congress* 1862, *apportioning representation to Arkansas.*

We have looked carefully into the case of *Luther vs. Borden*, particularly relied upon by counsel in argument, and although the question in that case was with regard to the acknowledgment of a state government, and in that respect differs from the other cases cited, yet, we do not think it applicable to the state of facts in this case. In that case, two state governments were set up in *Rhode Island*, each claiming to be the true government. The court when called upon to decide between them, held that it was a political question, which should properly be settled by the executive department, or by the congress of the United States, and that the court was bound by such recognition; that the *charter government of Rhode Island* having been recognized by the national government, the court, without further inquiry, would hold that to be the true government. But in the case before us, no such question is presented; there existed but one government in Arkansas at the time the judgment was rendered; that government, like the "*charter government*," was the original government—a government which continuously existed; and

which, as we have seen, was recognized by the federal government as existing, and which continued to exist, until the government under the new constitution assumed its administration, or took effect.

After the most mature consideration of the whole case, involving many new and difficult questions, which have arisen under circumstances growing out of the late action of the state, we feel fully sustained, by the weight of authority, and upon principle, as well as by the express decisions of the court of appeals of the state of Kentucky, in the case of *Norris vs. Doniphan*, reported *in* 4 *Metcalf*, *page* 385, and of the supreme court of the state of Mississippi, in *Hill et al. vs. Boylan et al.*, decided at the October term, 1866, in announcing the following, as the conclusions at which we have arrived.

1. That the state of Arkansas did not, either by the passage of the ordinance of secession, by which she unsuccessfully attempted to dissolve her connection with the United States government, or by any subsequent act of hers, suspend or destroy the existence of her state government.

2. That the government of the state continued to exist *de jure*, from the time she attempted to secede, until suspended by the state government under the new constitution, and that the acts of the state government, during that period, were valid and binding as though no attempt to secede had been made. And, consequently, the judgment rendered in the case before us was valid, unless by the subsequent action of the convention that framed the constitution of 1864, it was invalidated and rendered void.

Upon examination of that part of the acts of the convention, which, it is assumed, invalidate and declare void the acts of the government of the state of Arkansas, under the constitution adopted by the convention assembled on the 4th of March, 1861, it is difficult to determine, whether it was intended as a preamble to the constitution, or as an independent ordinance. Perhaps, in view of its position, its recital of facts, and its emphatic declara-

tions, so confusedly intermingled, it may, to some extent, be said to partake of both.

In position, it precedes the constitution, and is as follows:

"We, the people of the state of Arkansas, having the right to establish for ourselves a constitution in conformity with the constitution of the United States of America, recognizing the legitimate consequences of the existing rebellion, do hereby declare the entire action of the convention of the state of Arkansas, which assembled in the city of Little Rock, on 4th of March, 1861, was, and is, null and void; and is not now, and never has been binding and obligatory upon the people.

"That all the action of the state of Arkansas, under the authority of said convention, of its ordinances, or of its constitution, whether legislative, executive, judicial or military, (except as hereinafter provided) was, and is hereby declared null and void; *Provided*, that this ordinance shall not be so construed, as to affect the rights of individuals, or to change county boundaries, or county seats, or to make invalid the acts of justices of the peace, or other officers in their authority to administer oaths, or to take and certify acknowledgments of writings, or in the solemnization of marriages; *And, provided further*, that no debt or liability of the state of Arkansas incurred by the action of said convention, or the legislature, or any department of the government, under the authority of either, shall ever be recognized as obligatory."

It is contended by the counsel for the defendant, that if the constitution framed by the convention of 1861, and the government and laws thereunder, should be held to have been originally valid, still, the convention, which subsequently, in 1864, convened, had the power to declare the constitution of 1861, and the acts of the government under its authority, null and void; and in fact had done so. On the other hand, the counsel for the plaintiff contends, that upon a fair and just construction of the ordinance of 1864, such was not the intention of the convention;

but, that if such was its intention, it had no power to do so.

Thus the questions are presented:

1. Had the convention of 1864, power to declare the constitution and government formed by the convention of 1861, void, *ab initio?*

2. If it had such power, was it exercised or attempted to be exercised, in the ordinance under consideration?

If the ordinance is consistent in its provisions, and unambiguous in its language, the intention of the convention is to be ascertained, and carried into effect, according to the ordinary meaning of the language used. But if the ordinance, upon examination of its several parts, should be found inconsistent or ambiguous, we must bring to our aid several well established rules for construing contracts and laws of this character, and to which we may presently refer.

The ordinance, at the outset, affirms the right of the people to establish a constitution, "in *conformity with the constitution of the United States*," and "recognizing the legitimate consequences of the existing rebellion," declares the *entire action of the convention* of the 4th March, 1861, null and void, and never, at any time, binding upon the people. Now, it is evident, that if the word *entire*, in this connection, be taken in its enlarged sense, it comprehends everything done by the convention of 1861; that is, that the convention of 1861, had no power to do any thing. And if this be true, it must be because the convention had no legal existence—which we have already determined not to be the case. The convention of 1861 was a legally constituted convention of the people, with power to do all that a convention might lawfully do. Acts done in excess of power, do not vitiate, or make void those done within the scope of the powers conferred.

At this point, then, arises a question as important as it is new. That is, has one convention the power to declare *void ab initio*, the constitution of the state framed by a preceding convention? If this be true, and such be its effect, it necessarily follows, as a consequence, that, from the 6th of May, 1861, until the govern-

ment under the present constitution took effect, there was no government whatever in the state of Arkansas; for no one will contend, that there can exist a government, without the adoption of some fundamental rules, by which the sovereignty is transferred from the individual members of society to a corporation of their own creation. Until this is done, there is no government —no sovereign power to govern conferred by the people, and, of course, it is retained by them individually.

If the convention of 1864 had power to do this, then, a state convention may destroy its state government. This we have already said the state cannot do, whether attempted by ordinance or otherwise. If the bond of union of the states is, as we have held, perpetual, in defiance of the powers of a state, or its efforts to sever them, it is bound to keep in existence a state government, republican in form, and by an indissoluble bond of union, in connection with the federal government. In no other condition can a state fulfill its covenant of duty with the federal government.

The most extreme doctrine of the right of secession, never went beyond this, or could effect more.

Upon principle, if the convention of 1864 had power to declare the constitution of 1861 *void "ab initio,"* most clearly that of 1861 had a like power to declare the constitution and government of 1836 void. The people, from whom all power is derived, never delegated to any convention the power to destroy all government; nor, as we have seen, can any such power be exercised by the people of any state, without violating its compact with the federal government. Nor is this assumed power permissible for another reason. It is, also, in violation of that clause in the federal constitution, which denies to a state the right to pass laws *ex post facto*, or laws impairing the obligation of contracts. *Fletcher vs. Pick*, 6 *Cranch Rep.* 87; *New Jersey vs. Wilson*, 7 *Cranch Rep.* 164. "It is immaterial whether the contract be between a state and an individual, or between individuals only; the contracting parties, whoever they may be,

stand, in this respect, upon the same ground. The obligations imposed, and the rights acquired by virtue of the contract, cannot be impaired by legislative act." *Smith's Com. p.* 384. Nor are these restrictions upon the state to be evaded, or overridden by any claim of omnipotence by a convention; in this respect, like a state legislature, it is subordinate to the constitution of the United States.

This precise question recently came before the supreme court of the United States, in the case of *Cummings vs. The State of Missouri.* The state of Missouri had, by a constitutional provision, attempted to abridge the rights of a certain class of her citizens, among which were clergymen, whose right to preach the gospel of Christ was attempted to be fettered by an oath prescribed by the convention, penal and retrospective in its provisions. It was contended that the convention of the state of Missouri was of enlarged powers, in the exercise of which it might prescribe such terms upon the exercise of the rights and privileges of its own citizens, as it might deem best for the public good. Mr. Justice FIELD, who delivered the opinion of the court, in which it was held that the constitutional provision, which placed restrictions upon the rights of ministers and others, was in violation of the constitution of the United States, and, for that reason, inoperative and void, placed his opinion upon principles, which are, to some extent, applicable to this case. He says: "The theory upon which our political institutions rest, is, that all men have certain inalienable rights; that among these, are life, liberty, and the pursuit of happiness; all avocations of honor, all positions, are alike open to every one, and in the protection of these rights, all are equal before the law." And in addition to these, are, upon principle, those, also, of acquiring, possessing, and protecting property, which, by the express language of the declaration of rights in the constitution of Arkansas, are excepted out of the powers of the government, and are declared to be forever inviolate. Perhaps, in the whole history of man, no more sweeping attempt was ever made, to

destroy the rights of property, than the one under consideration, if the construction of the ordinance contended for by the counsel for the defendant should be adopted.

This late and important decision of the supreme court, then, is not only conclusive as to the limitation of the power of the state convention, by the constitution of the United States, but it also settles the question as to the extent of that limitation, in the preservation of the free exercise of pursuits most conducive to man's happiness, or support; and to protection in the use and enjoyment of the property acquired by him.

In view of all which, we are satisfied that the convention of 1864, (if, upon further inquiry, it should appear that it so intended,) had not the power to declare the constitution of 1861, and the acts of the state government under it, void.

1st. Because it would thereby, in effect, destroy all state government, which, we have seen, it could not do.

2d. Because it would destroy the right of property, which is, also, in violation of the constitution of the United States.

Thus, it will be seen, that unless the word, "*entire*" can, without destroying the sense of the ordinance, be limited in its meaning, it must, necessarily, lead to the conclusions at which we have just arrived. The rule of construction, as laid down by this court, in *Wilson vs. Biscoe*, 6 *Eng.*, *p.* 48, and which is alike applicable to constitutions, as well as acts of the legislature, is, that such construction (if possible) should be given to the act, that no clause, sentence, or word shall be void, superfluous or insignificant; but if, from a view of the whole act, the intention is different from the literal import of its terms, then, the intent should prevail. And in *Kelly's heirs vs. McGuire and wife*, 15 *Ark. Rep.*, 594, it is said: "It is the duty of the court, if possible, to ascertain the legislative will, and to execute it, because the intention constitutes the law; no construction is to be indulged, that could produce absurd consequences;" and in order to ascertain what the true intention of the framers of the act is, it is a rule, that if many different interpretations present

themselves, from the language in which the law is expressed, and any one of them will enable us to avoid such an effect, that should be preferred which appears to be the most agreeable to the intention of the framers of the statute, for that would be most consistent with the true office of interpretation. *Smith's Com.* 637. Puffendorff says: "That which helps us most in the discovery of the true meaning of the law, is, the reason of it, or the cause which moved the legislature to enact it."

Let us, then, look to the reasons, which induced the people of Arkansas to declare this ordinance. In doing so, we must look to the political condition of the state, prior to, and at the time the ordinance was passed. As a matter of public history, we know, that, however unanimously the people of the state joined in repelling the invading armies, which were penetrating the country, when they did enter, and take possession of it, many remained at home, whilst others deserted the service in which they had entered, and came for protection within the federal lines. That being apprised of this, the president was induced, perhaps from motives of policy, as well as from considerations of humanity and justice, to encourage the people of the state to return to their allegiance, under a civil government in connection with that of the United States. It was within the limits of the country held by the federal army, and by the encouragement thus held out to the people, that the convention of 1864 assembled, in the language of the ordinance, "to establish a state government, loyal to the government of the United States." This was the great object to be accomplished, and for this purpose it became necessary to repeal, or declare void, the ordinances or acts of the convention of 1861, to the extent that they conflicted with the paramount law of the nation. To this extent the act would accord with the leading motive, but no further. That is, evidently, what was meant by the terms, "a constitution in *conformity* with the constitution of the United States," because there could possibly be no conformity in any other respect. It would be no "*conformity*" to the United States constitution, to

declare acts void which did not conflict with it. Additional evidence is furnished of this, from the expressions, "*recognizing the legitimate consequences of the existing rebellion.*" To what consequences do they refer? Perhaps, that the country had been overrun, and was being laid waste, that the laws had ceased to be administered in that part of the state occupied by them, and that the effort to maintain a separate government had become hopeless and ruinous to them. This is what we may presume they meant, as the legitimate consequences of the rebellion. How was this to be remedied? Most evidently, in their opinion, it was by re-uniting the state government with that of the United States, in connection with which they had once lived in peace, and to whom, even then, they looked for protection. To effect this, they must re-unite the state government, by repealing the acts which would prevent a re-union; this accomplished, and all motive for further action ceased.

In further confirmation of this, and to show that the convention did not intend to be understood, when using the word "*entire*," as declaring that there was no valid government framed by the convention of 1861, and that none thereafter existed, they expressly say, "they do agree to continue themselves as a free and independent state."

Thus the language used in the ordinance, as well as the condition of the country, and the inducements held out by the president to the people, to resume their allegiance to the United States, show that the leading purpose of the framers of the constitution was, that which a limited construction of the words, "*entire action*," would effect. And by thus construing the words "*entire action*" to mean the *entire action of the convention of* 1861, *which is in conflict* with the constitution and laws of the United States, all of the other acts of the convention will stand, and the leading purpose of the framers of the constitution and ordinance of 1864, be still preserved unimpaired. Otherwise, all government must fall: for no government can exist without a constitution in which there is the necessary power delegated.

The words, "*all the action of the state*," in the second clause of the ordinance, should receive a like limited meaning, because if all the action of the state, legislative, executive, judicial, and military, without limitation, should be held void *ab initio* the *proviso*, which declares that the "rights of individuals" are excepted, can have no effect; because it is utterly inconsistent, to declare all void, and still that a part shall be preserved. Nor will it do to say that the rights of individuals, *not to be affected*, are such as did not arise out of or depend upon state action; because as no rights were declared void, except those arising out of state action, no proviso was necessary to preserve them—any other rights would not, in any event have been affected.

But by construing the words, "all the action of the state," to mean all of the action of the state, under the constitution of 1861, which is in conflict with the constitution of the United States, shall be void, the rights of individuals as contradistinguished from the rights of the government, would be preserved. The words, "individual rights," clearly point to a class of rights distinct from those which belong to government, and favor the construction which limits the meaning of the words, "*entire*," and "*all*," in their several connections.

By thus giving to these words a limited meaning, in harmony with the leading purpose for which the convention of 1864 was called together, we are aware that there are words and sentences in the ordinance, which would be surperfluous; but by leaving these as superfluous and unnecessary, we may preserve and give effect to the ordinance, according to what appears to us to have been the obvious intention of the framers of the constitution, and can thus best avoid the most absurd and disastrous consequences. Owing to the peculiar wording of the ordinance, an attempt in any other way, to reconcile and bring in harmony its several parts would but lead to like results.

Thus, if we give to the word "entire," an unqualified meaning, the constitution of 1861 must be treated as a nullity—void from its inception. That which is absolutely void, is in law nothing.

If nothing—of no effect—a legislature, courts and officers could not exist under it; something can never depend for existence upon nothing. It would be sheer nonsense to declare the acts of courts void, when there were no courts—could in the nature of things be none; or to hold valid certain acts of officers, when there could be no officers.

And so too, if we give the words, "*all the action of the state*," an unlimited meaning, and hold all such action void, there can be no possible use for the *proviso*. Unless the words, "rights of individuals," were intended to qualify the general terms, and except something that would otherwise have been embraced therein, and held void, there could be no use for any proviso; because, as we have already seen, the *proviso* would be mere surplusage.

Any attempt, therefore, to reconcile the several parts of the ordinance must result in leaving some of the language used unnecessary and meaningless. If we should adopt the latter construction as the true one, in doing so we must depart from the obvious purpose for which the convention was called, and substitute in its stead, purposes and acts, which could only have resulted from very great ignorance, or an utter disregard to the laws of war, the precedents in the history of modern revolutions, the decisions of our highest courts, made by our most distinguished judges, and to every prompting of humanity. No civilized nation, even after conquest by a foreign power, ever failed to respect the private rights of property of the great mass of the people. But that a convention, called by the people of a state, to remodel their constitution so as to make it conform to the constitution of the United States, would intentionally, in a spirit of wantonness and cruelty unprecedented, with one sweep of the pen throw into chaos and confusion, all of the action of the state government for years—a government too which perhaps many of them had contributed to make, whose laws they had helped to execute, and for whose defence their arm or voice, had, at one time or other, been raised, we cannot believe. Nor can we, in view of all this,

indulge in conclusions so damaging to human nature. But, under the sanction of our own decisions, repeatedly approved by this court, we will adopt and uphold that construction most consistent with the general intention of the framers of the constitution of 1864, which will lead to no such absurd consequences.

It, therefore, only remains for us to say, that after the most careful and deliberate consideration of this question, we are satisfied that the ordinance of the convention of 1864 made void the action of the convention of 1861, only so far as the same was in conflict with the constitution and laws of the United States; and consequently, that the judgment of the Pulaski circuit court was a valid judgment, and that the court below erred in sustaining the motion of the defendant, and in rendering judgment thereon, quashing the execution issued upon the judgment rendered in said court, at the September term thereof, 1861.

Let the judgment be reversed and set aside, and the cause be remanded.

DORRIS VS. GRACE.

The rights of the owners of slaves, not within the lines of the military occupation of the United States during the late war, were in no wise affected or impaired by the proclamation of the president, of the 1st of September, 1862, commanding that all slaves in the state should be free from and after the first day of January, 1863.

The act of congress of the 3d of March, 1865, does not repeal the act of the 30th of June, 1864, so as to take away the right of the plaintiff, at any time before offering in evidence an unstamped writing obligatory sued on, to affix a revenue stamp to it in the presence of the court, where such stamp has not been omitted with intent to evade the provisions of the act.

A writing obligatory when stamped, as prescribed by the act of congress, in the presence of the court, is valid from its date.

Where a case is submitted to a jury, without objection upon no issue, or an informal issue—as where the defendant pleads a good plea in bar, and the plaintiff "puts himself upon the country" instead of answering the plea—and the parties have had a fair trial with the benefit of his evidence applicable to his plea, and the finding is consistent with right and justice, this court will not disturb the judgment, but under the statute consider the pleadings as amended.

Appeal from Jefferson Circuit Court.

Hon. WM. M. HARRISON, Circuit Judge.

CLARK, WILLIAMS & MARTIN, for the appellant.

The question raised upon the demurrer to the first plea, is, did the proclamations of the president of September 1st, 1862, and January 1st, 1863, operate to make the negro free so that would cease to be a valid consideration for a contract. It is suggested that the president, as commander in chief of the army, and a military necessity existing, might in the absence of law make his wish the law of the land. See *Acts of July 29th* 1861; 2 *Brightley's Dig.*, 192; *Pro. of Sept. 1st.*, 1863; 12 *Stat. at Large*, 1267; *Act of July* 17, 1862; *Stat. at Large*, 591; *Brightley's Dig.* 199, 200.

The contract was void by law, having never been stamped; and the court had no power to permit it to be stamped at the trial, so as to make it valid, and surely none to make it relate back and become valid *ab initio*. *See the Stamp Act of 3d March*, 1865; 2 *Brightley's Dig.*, 265, *secs.* 252, 25, *page* 266. *Gibson vs. Hibbard*, 13 *Mich.*, is against this position.

The want of a replication to defendant's second plea is not cured by verdict, by Stat Henry 8th, ch. 30. See *Tidd's Prac.*, 835; *McMechan vs. Hoyt*, 16 *Ark.*, 303; *Bac. Abr. title Pleas & Pleading, G.*, 2; *Taylor et al. vs. Coolidge*, 17 *Ark.* 456.

RICE for the appellee.

In time of peace, the president with or without the sanction or authority of congress had no power to issue a proclamation free-

ing the slaves; but as commander in chief of the army he had the power, during the war, to issue any military order authorized by the usages of modern warfare, which the circumstances required; but no military order or proclamation issued by him could have effect over persons or property not within the lines of military occupation but within the lines of the enemy and over which they had exclusive control. *Lawrence's ed. of Wheaton's Int. Law, page*, 604 *and notes.*

Personal property within the enemy's country may be taken by military order for use of the army, and the owner's title thereby divested. *Mr. Alexander's Colton*, 2 *Wallace*, 404; but the right of the owners cannot be divested or impaired until actual seizure and appropriation.

There was what was styled a replication to the second plea: and though it was defective, the parties went to trial without objection, as upon issue to the plea. This comes under and is covered by *sec. 36, ch.* 134, *Gould's Dig.*

Mr. Chief Justice WALKER delivered the opinion of the court.

Grace brought his action of debt against Dorris upon the following instrument:

"One day after date I promise to pay W. P. Grace or order, the sum of three thousand dollars, with ten per cent. interest thereon for value received of him. Witness my hand and seal this August 29th, 1863.

GARLAND H. DORRIS, [Seal.]"

In defence of the action brought upon this note, the defendant, Dorris, filed four pleas. The first of which was as follows:

"Comes the said defendant and defends the wrong and injury when, etc., and says *actio non*, because he says that the said writing obligatory was given for the consideration of a certain negro man by the said plaintiff sold to defendant, and for no other consideration whatever, and the said defendant in fact saith, that heretofore, to-wit: on the first day of September, 1862, Abraham Lincoln, then president of the United States, issued his proclama-

tion commanding that, from and after the first day of January, all slaves in certain states, including the state of Arkansas and county of Jefferson, where said slave was sold, should be and were free from and after the first day of January, 1863, by order of which the said negro was not a slave for life, but on the contrary, was a free man, and said defendant procured from said plaintiff no property in the labor of said slave, or right to control his person, and the said contract was made in violation of the said proclamation, and in violation of the law of the land, and the consideration of said writing obligatory is illegal and void, and the said defendant is ready to verify, etc."

To this plea the court sustained a demurrer, and its legal sufficiency is thus presented for our consideration.

The defendant insists, that the negro slave sold by Grace to him was, by force of the proclamation of President Lincoln, made on the first of January, 1863, free, and not property subject to sale, and that, therefore, the writing obligatory was given without consideration.

The effect which the proclamation of the president had upon the rights of the owners of slaves held as such within the limits of the territory actually occupied by the federal army, and consequently within its lines, is not now before us for consideration, because it is not averred in the plea, the legal sufficiency of which we are now considering. And, therefore, the precise question before us, and which we will proceed to determine, is as to the effect of the president's proclamation upon the rights of the owners of slaves, who resided with them beyond the lines of occupation of the federal army.

We are clearly of opinion, under such circumstances, that the rights of the owners of slaves were in no wise affected, or impaired by the proclamation of the president. For whether we consider the proclamation as issued by him in virtue of his authority as the head of the military of the nation, in the exercise of all his military powers in time of war, or as enlarged by act of congress for the purpose of enabling him the more effectively to

conduct the war to a favorable issue, it could in no wise affect the rights of property in slaves—a right fully recognized by the constitution of the United States, and settled by the highest judicial tribunals of the nation.

It is a matter of public history that eleven of the American states had assumed the right to dissolve their connection with the federal government of the United States and to establish for themselves a separate and independent government. This attempt was held by the government of the United States to be revolutionary and rebellious, and the military forces of the nation had been called out to suppress it. It was under these circumstances, and after repeated conflicts in arms, that the proclamation was addressed by the chief executive of the nation to the people of the states in rebellion, commanding of them obedience and denouncing, as a penalty for disobedience, the emancipation of their slaves. The proclamation was, evidently, intended as a war measure, issued under his military power as commander-in-chief in time of civil war. We cannot suppose that the president assumed to act in any other capacity, because such act would be clearly unconstitutional. Slaves were property, so recognized by an express provision of the constitution, and so decided by the supreme court of the United States. As a war measure it may have been, and was, probably, intended to act upon the fears of the slave-holders (who had long had a well grounded apprehension that their slave property, if not wrested from them, would be rendered insecure and comparatively worthless,) and by threats to induce them to return to their allegiance to the government of the United States. But beyond this, it could only be available as an indication of executive will, or as directory to the military forces who were invading the states assumed to be in rebellion. It could only be made available to the limits of the federal lines—was enforced by the military, whose lines were its limits; and whose strong arm was essential to its efficacy: because, at the time when the proclamation was issued, the power and authority of the United States government had been suspended

beyond such limits, and the territory was then claimed and held as part of an independent government, foreign to that of the United States. And the laws having been suspended, it could in no event extend beyond its lines of occupation. But even if such had been the case, we are at a loss to conceive upon what principle of right, the property in slaves could be divested by force of a mere proclamation, emanating, even, from the chief of the executive department of the nation. Captured property in time of war, stands upon quite a different footing. But we deem it unnecessary to argue this question at any length, as we have recently decided all the questions of law that may have a bearing upon this precise point in the case of *Hawkins vs. Filkins.*

In this case, the enemy had not extended his lines to Pine Bluff. The negro had neither been within the federal lines, nor captured. The title of Grace was, therefore, as perfect as if no such proclamation had issued, and the plea which was based upon a supposed defective title, presented no bar to the plaintiff's recovery. The demurrer to it was therefore properly sustained.

The third plea presents, substantially, the same question as that decided at the present term of the court, in the case of *Julia Roane vs. Green and Wilson*, and upon the authority of which we will hold the plea insufficient.

A demurrer was also filed to the fourth plea, which was by the court sustained. The defence set up in the plea was, that the writing obligatory, upon which suit was brought, had not been stamped as required by the act of congress. The writing obligatory was executed on the 29th day of August, 1863, and remained unstamped until the 11th day of December, 1865, at which time it was duly stamped in the presence of the court.

It is contended by the counsel for the defendant:

First. That the act of congress of the 3d of March, 1865, in effect, so far repealed the act of the 30th of June, 1864, as to take from the court, or officer (as therein provided,) the power to permit instruments executed prior to the first of August, 1864, to be stamped. And *Second.* That if such power is given, when so

stamped the instrument could only take effect, as a valid instrument, from the time when the stamp was affixed to it, but did not relate back, so as to make it valid from its date.

By reference to the several acts of congress in regard to stamp duties, it will be found that under the first act, which took effect on the first of October, 1862, instruments executed prior to that date, were not chargeable with stamp duties; but, as the writing sued upon in the case before us was executed since that date and prior to the first of August, 1864, unless, as contended for by counsel, the act of 30th of June, 1864, was repealed by the act of the 3d of March, 1865, there can be no doubt but that the party had a right, at any time before offering the writing obligatory as evidence in the case, to affix a revenue stamp to it in the presence of the court. The act of 30th of June, 1864, provides: "That no deed, instrument, document, writing or paper, required by law to be stamped, which has heretofore been signed, or issued, without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded, or admitted, or used as evidence in any court, until a legal stamp or stamps, denoting the amount of duty, shall be affixed thereto, and the date when the same is so used or affixed, with his initials, shall have been placed thereon, by the person using or affixing the same; and the person desiring to use, or record any such deed, instrument, document, writing, or paper, as evidence, his agent or attorney, is authorized in the presence of the court, register or recorder, respectively, to affix the stamp or stamps thereon required. *Provided*, that no instrument, document, or paper, made, signed or issued, prior to the passage of this act, without being duly stamped, or having thereon an adhesive stamp, or stamps, to denote the duty imposed thereon, shall for that cause, if the stamp or stamps required shall be subsequently affixed, be deemed invalid and of no effect."

The great leading motive in this enactment was, not to embarrass, or impose terms upon the parties contracting: so far from this, it is the purpose of all legislation upon the subject, to encourage, uphold and maintain them when fairly made. The life of

trade demands this: but it is a revenue measure, and the penalties imposed upon a non-observance of its provision, were, evidently, intended to compel the use of stamps by parties contracting, and thereby increase the revenue. Bearing in mind this manifest intention, and in the light of it, looking into the subsequent act of the 3d of March, 1865, in which there is no repealing clause, we cannot believe that the act of 1864 was, by force of the act of 1855, by necessary implication, repealed. The first part of section 158 of the act of March 3d, 1865, after enumerating all the several contracts set forth in the act of 1864, and requiring that they shall be stamped, provides: "That if the stamp be omitted, *with intent to evade the provisions of the act*, the party so failing, shall forfeit the sum of fifty dollars, and such instrument, document or paper, bill, draft, order or note, not being stamped according to law, shall be deemed invalid and of no effect." This is the act [of the proviso to it, we will make reference hereafter.] Upon a careful examination of the act, it will be found that it is, in effect, a penal act, intended to throw safeguards around the laws then in force, not to repeal them: indeed it is difficult to conceive how it can be otherwise considered. It says, that if a party omit to stamp an instrument, or, if stamped, to cancel the stamp, *with intent to evade the provisions of the act*, he shall pay a fine of $50, and that the instrument so unstamped, shall be deemed invalid and of no effect. These are the penalties imposed. For what? Not simply for omitting the stamp, but for omitting it *with "intent to defraud."* If there was no "intent to defraud," there would be no penalty. The instrument would still be admissible in evidence under the provisions of the act of 1864, or upon compliance with the further provisions made in the *proviso* of the act of 1865. No side issue could be made, upon an application to stamp, as to whether there was, or was not, an *intent to defraud* the United States out of the stamps required to be placed upon the instrument. This act is in limitation of the rights of the citizen, as well as penal in its character, and by well established rules, will be construed strictly.

We are sustained in our view of the proper construction of this act, by a recent decision of the supreme court of Iowa, as will appear from a late Digest of the decisions of that court: and it would seem, from the same authority, that it had been, also, held that a note executed prior to the act of 30th June, 1864, and stamped under the provisions of said act, is valid as if stamped at the time when it was executed.

And now with regard to the *proviso* of the act of 1865. We think, upon a fair construction of it, that so far from repealing the then existing laws, it was intended to extend to the party who had, from inadvertence, omitted to stamp a deed, or other instrument, additional facilities for complying with the law, by providing an additional tribunal before whom the instrument might be made valid, by affixing to it the proper stamp. Prior to the passage of the act of 1865, the party whose instrument was unstamped, could put the necessary stamp upon it, in the presence of the court, the register, or the recorder; by the *proviso* of the act of 1865, the party may also appear before the collector of the revenue of the proper district, and have a stamp affixed either with or without penal terms as may seem right to the collector.

The writing obligatory, then, having been stamped in the presence of the court, was valid, not from the day it was stamped, as contended for by counsel, but from its date. *Edwards on the Stamp Act, page* 237; *Brown vs. Savage*, 5 *Jurist, N. S.*, 1020. The court did not, therefore, err in sustaining a demurrer to the plea.

The remaining question presented for consideration, arises out of the action taken upon the second special plea of the defendant, to which issue was attempted to be taken by the plaintiff, and upon the trial of which by the jury, a verdict and judgment were rendered for the plaintiff.

The defendant's counsel insists that the replication of the plaintiff was, in effect, a nullity—presented no issue to be tried, and that in fact the plea stood wholly unanswered.

The plea presents matter which, if true, (and if unanswered

we must so consider it,) is a good bar to the action. It sets forth a total failure of consideration, in this, that the negro sold by Grace to the defendant, and in consideration of which he executed the writing obligatory in suit, was, at the time of the sale, and still is, a free man, and concludes with a verification. The plaintiff, instead of negativing this affirmative matter, or of confessing it and setting up new matter in avoidance, says: "he puts himself upon the country." For what purpose? There could be no necessity for calling a jury to try that, which, not having been denied, stood admitted to be true.

The counsel for the plaintiff concedes that there was no formal issue presented by the verification, but contends, that after verdict, this defect is cured by our statute of amendments.

The provisions of the statute are very broad. The 119th *sec. Dig., page* 863, provides: "That when a verdict shall have been rendered in any cause, the judgment shall not be reversed, or in any way affected, by reason of any mis-pleading, mis-continuance, discontinuance, insufficient pleading or mis-joinder of issue:" and it is provided in *sec.* 120, "That any such imperfections, not being against the right and justice of the matter of the suit, and not altering the issue between the parties on the trial, shall be supplied and amended by the court, when the judgment shall be given, or by the court in which such judgment may be removed by writ of error, or appeal."

Our former decisions have all given to this statute a liberal construction, and unless in this case the finding has been (in the language of the statute) against the right and justice of the matter of the suit, or alters the issue which was tried by the jury, it will become our duty to sustain the verdict and the judgment rendered upon it.

Upon reference to the state of the pleading, we find a good plea, which was, in effect, not replied to, or, at most, an informal and insufficient reply, to which no objection was made by the defendant, but which was treated, both by the parties and the court, as presenting an issue upon the facts stated in the plea, to

be tried by a jury, and and to try which a jury came, and after having heard the evidence, found a verdict for the plaintiff. Upon the trial, the defendant had the full benefit of his plea, his range of evidence was as full as if his plea had been properly negatived; and by reference to the evidence we find that it wholly failed to sustain his plea, and that the finding of the jury was correct. For what purpose, then, should this verdict be set aside? Surely no injustice has been done the defendant; he did not object, as he might have done, to the sufficiency of the replication; he has had the benefit of a fair trial upon all the evidence he produced, and from the state of case made out by him, has no right to complain of the result.

It is clear that, upon the whole record, there has been no error in the rulings of the court, and that the judgment is correct. And when such is the case, we have repeatedly held, that the judgment of the court below will not be disturbed. *Sweiptzer vs. Gaines et al.*, 19 *Ark. Rep.*, 96; *Tatum vs. Tatum*, *id.*, 199.

Upon the whole case, the law is clearly for the plaintiff, and although we think it not improbable that the defendant, at a time when slave property was of very doubtful value, did not intend to pay $3000 in cash for the negro, yet as he has, in reducing his contract to writing, used such terms as import a purchase for cash—as we have heretofore held—a court of law cannot depart from the established law of evidence to relieve him from the consequences of neglect, or inadvertency, should there have been such.

Let the judgment of the circuit court be affirmed.

TAYLOR VS. JENKINS.

Where a citizen, during the late civil war, resided within the lines of the confederate army, he might, *prima facie,* be considered an enemy to the United States, and his property enemy's property, and liable to seizure: and so if the lines be only temporarily extended over him; but if living within the permanently established lines, never thereafter interrupted, he was entitled to the protection of the law, and his property not subject to seizure except in case of military necessity.

Soldiers may justify the taking of property under the orders of their commanding officers; but they, having a discretion, are liable for taking the citizens, property without sufficient warrant.

The mere seizure of the citizens' property by unauthorized military power, and placing it among other property of the United States, without other act of condemnation, or appropriation to military purposes, does not divest the owner of his title.

Appeal from Jefferson Circuit Court.

Hon. W. M. HARRISON, Circuit Judge.

ENGLISH for the appellant.

If this case is to be tested by the laws of war, the re-capture of the mule by the confederate scout, and restoration of it to Taylor, restored his title.

If it is to be tested by the opinion of Chief Justice CHASE in *Mrs. Alexander's cotton case*, 2 *Wallace*, 420, there was no showing that the mule was subject to capture under the act of congress—no showing that Taylor's title was ever divested by any legal seizure or confiscation.

Mr. Chief Justice WALKER delivered the opinion of the court.

Jenkins, the appellee, brought his action of replevin in the Jefferson circuit court against the appellant, Taylor, for a mule.

The defendant filed pleas of *non-cepit* and property in himself; to which issues were taken, and the cause submitted to the court sitting as a jury. The court, after having heard the evidence, declared the law governing its decision, and found the issues for

the plaintiff, and rendered judgment thereon accordingly. The defendant moved the court for a new trial, and assigned for cause that the ruling of the court was contrary to law, and that the finding was not warranted by the evidence, which motion the court overruled, and thereupon the defendant excepted, and in his bill of exceptions has made the ruling of the court upon the law, and all of the evidence, part of the record now presented for our consideration.

Although the amount in controversy in this case is small, yet upon looking into the state of facts presented, there are but few questions of more general importance than this is.

It appears from the evidence that Taylor, the defendant in the action of replevin, was the owner of the mule in controversy in the year 1863; that he bought the mule from a drover, and had worked it on his plantation for some eight years; that in 1863, and after the federal army had taken possession of Pine Bluff, near where Taylor lived, a federal scout came to his house, arrested him and one other person there, and holding them in custody, drove off some twelve or sixteen head of Taylor's mules and horses, took them to Pine Bluff, and turned them into a pen in charge of the United States quartermaster. There is no positive evidence that the mule in controversy was one of those taken from Taylor and turned into the lot, but from all the facts and circumstances of the case, there is a strong presumption that such was the case. It is in proof that it was customary with the government officers to brand stock so taken and turned over to the government with the letters "U. S.", but that Taylor's mules were not branded. The mule in controversy had no such brand. As a matter of history, we know that the federal army occupied Pine Bluff early in the fall of 1863, but how long after that it was before the mule was taken from Taylor does not appear in evidence. It appears, however, that shortly before Christmas of that year, a son of the plaintiff traded for the mule from a stranger—who that stranger was, or how he came into possession of the mule, or how long he had been in possession of it, does not

appear; nor is it shown whether he was a soldier of the southern or federal army, or was a citizen in sympathy with either party of the belligerents. The plaintiff proved that he got the mule from his son; that she remained in his possession until the fall of the year 1864, when she was captured and taken from him by Vaughn's company of rebel scouts; that thereafter, the defendant, Taylor, found the mule in the possession of these scouts, claimed and identified the mule as his, whereupon it was delivered to him.

Thus it will be seen, that if Taylor, who beyond all question (according to the evidence) was once the lawful owner of the mule, was divested of his title to it, it was by force of the capture, by which she ceased to be his property and became that of the United States. If such was not the effect of the capture, then the title to the property remained in Taylor. The determination of this question will, in effect, settle also the law with regard to the second capture, and supersede the necessity of a separate investigation of it.

That the late war was a civil war, and that all of the rights of belligerents apply and govern the conduct and the rights of both parties, we may, without reference to authorities, hold to be fully settled in the case of *Hawkins vs. Filkins*, decided at the present term of this court. And we are left to consider whether the capture in this case was such as to divest Taylor of his title to the property, and as a consequence necessarily following, to vest it in the United States.

The first question to be considered is, was the property captured "enemy's property"? To make it such, Creed Taylor, the then owner of the property, must have been an enemy to the United States. If he had resided within what was recognized as enemy's country, that is, within the lines of the Confederate States army, uncertain and difficult as in many instances, it might be to determine certainly where the line was, then, *prima facie*, Taylor might have been considered an enemy, and his property enemy's property; but we are not to be understood as holding

that this presumption might not be removed by evidence tending to show what the real facts were. There were, doubtless, individuals found, both within the federal lines and the confederate lines, who were enemies to one of the respective belligerent parties, and who, when ascertained to be such, might be treated accordingly. It is not necessary, however, in this case, to attempt to lay down any rule for general application, if indeed it would be practicable to do so, because each case must, at least to some extent, depend upon the facts and circumstances connected with it.

In the case under consideration, Taylor resided within the federal lines at the time the property was taken from him. The possession and dominion of the federal government over that part of the state in which Taylor resided, was not temporary, as in the case of the occupation of that part of the state of Louisiana in which Fort De Russy was situated at the time Mrs. Alexander's cotton was captured. In Mrs. Alexander's case, it was argued with much plausibility: "That the moment the people were released from rebel military rule, the political and military power of the usurpers was broken, and the jurisdiction and authority of the United States were supreme. It gave to the loyal citizen that dominion over his property, accompanied with *rights of property* such as he enjoyed before this rebel rule intervened." As a general proposition, this was held to be true, but the court said: "The occupation of that part of Louisiana in which Mrs. Alexander resided, was too limited, and too precarious to change the enemy relation created for the country and its inhabitants, by three years continuous rebellion, interrupted at last, for a few weeks, but immediately resumed, and ever since maintained." 2 *Wallace*, 418.

If, however, the occupation of that part of Louisiana near Fort DeRussy had been permanent, as it was at Pine Bluff and its vicinity, there can be no doubt but that the court would have held the capture of Mrs. Alexander's cotton unlawful, and that she was entitled to compensation for it.

In view of this authority, and guided by the rules which we have stated, it cannot be said that the defendant Taylor was an enemy. He resided at the time the property was taken from him within the established permanent lines of occupation of the federal army, never thereafter interrupted, and had as far as appears in evidence been loyal. The laws of the United States, which had been suspended by forcible adverse occupancy, followed the national flag, and the citizens resident within the territory thus reclaimed, were entitled to the protection of the law. Taylor being thus a resident within such territorial limits was not an enemy, nor was his property subject to seizure for other or different purposes than such as the law of necessity in time of war justifies.

Chancellor KENT, after reviewing the earlier practice under the laws of war, says: "The general usage now is, not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war. * * * If the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, * * * he violates the modern usages of war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world." *Kents Com., vol.* 1, *pages* 91–93.

In *Mrs. Alexander's cotton case*, Chief Justice CHASE says: "It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions, it may now be regarded as substantially restricted to special cases, dictated by the necessary operation of the war, and as excluding, in general, the seizure of private property of peaceful persons for the sake of gain. The commanding general may determine in what special cases its more stringent application is required by military emergencies."

"By the usages of modern war, the private property of an

enemy is protected from seizure or confiscation as such." *Lawrence Wheaton*, 631.

In the light of these authorities, except in some special cases from the necessity of which the officer in command must act, and in which, in his judgment, it is necessary to take the property to promote the public service, private property is not subject to be taken by the military. The property of Taylor, under the circumstances of the case as presented to us, was not subject to either capture or seizure, by military authority. It is not shown that the capture was made by any order or command of a superior officer, or other directions than that of the witness Jenkins, who states that he was in command of a federal scout, who took the mules from Taylor. The rank or grade of the officer, if such indeed he was, is not stated. The purpose for which the scout was sent out is not shown; nor is there any inference to be drawn from existing circumstances, that mules were needed for military purposes.

It was held by the supreme court of the United States, in the case of *Mitchell vs. Harmony*, 13 *How.*, 134, that even when invading the enemy's country, when each day's march marked the line of enemy's country, the private property of a loyal citizen was not subject to seizure and appropriation, even for public use, nor to prevent its falling into enemy's hands, unless there existed an absolute necessity for doing so, and that, when an order was given to take the property, the discretionary power given the officer must be sustained by the facts then existing. And whilst officers may exercise a discretionary power in effecting that which they are required to perform, soldiers under their command have no such discretion. They act under orders, are in fact the instruments through which orders are carried into effect. VATTEL says: "The troops, officers, soldiers, and in general, all of those by whose agency the sovereign makes war, are only instruments in his hands. They execute his will, and not their own." The soldiers, who took the defendant's mules under the orders of an officer (if indeed he was such) might

justify under such order, but, until the officer who commanded the act to be done, be shown to have acted in obedience to some order of his immediate superior, he would stand in the relation of a tresspasser, and as such would be liable for his acts, or the acts of those under his command, and if a tresspasser, then the legal right to the property was not affected by such act.

Whether the mule in controversy was one of those taken and placed in the quartermaster's pen is not very clear; but admitting such to have been the case, there is no proof that the mule was either branded, used or sold by the military authorities, and soon thereafter it was found in the hands of a stranger, but whether a soldier or a citizen does not appear, from whom the son of the plaintiff purchased the mule, and sold it to the plaintiff, who held and claimed it until the fall of 1864, when it was captured from him by a confederate scout, near one Carson's; but whether Carson lived within the federal or the confederate lines does not appear; nor is it shown whether the plaintiff was in sympathy with, or acted with the one or the other party belligerent. In the absence of these facts, we cannot say whether the plaintiff's title was or was not affected by such capture. For aught that appears from the evidence, we might, upon principle, say that it was not; but ot this we need make no further investigation, because we are, in view of the whole case, of opinion that such capture as is shown by the evidence did not divest Taylor of his title to the mule; and that the circuit erred in declaring the law to be otherwise, and upon the state of facts presented, in rendering judgment for the plaintiff; and that for such erroneous ruling of the law and finding, a new trial should have been granted.

Let the judgment be set aside and reversed, and the cause remanded for further proceedings.

MILLER AD. VS. HENDERSON.

A demurrer to a declaration by an administrator, because the letters were unstamped, held bad: it is sufficient to stamp either the letters or the administration bond, if a stamp be required; and the objection, if good, should be made by plea.

Appeal from Saline Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

WATKINS & ROSE, and J. M. SMITH, for appellant.

CLARK, WILLIAMS & MARTIN, for appellee.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of debt, brought by the appellant, as administratrix of the estate of Mark S. Miller, deceased, upon a writing obligatory, executed by the defendant to the plaintiff's intestate. The declaration is in the usual form, and makes profert of the letters of administration granted by the clerk of the court of probate, for the county of Ouachita, on the 24th day of February, 1864.

The defendant craved oyer of the letters of administration, which was granted, and demurred to the declaration, and set forth as special cause, of demurrer:

1st. That upon the face of said letters, and upon the record it is shown that Phillip Agee was not clerk of said county of Ouachita, and that there was no clerk or probate court in existence in said county at the date of said letters.

2d. Said letters of administration are not stamped as required by act of congress.

The circuit court sustained the demurrer and rendered judgment for the defendant, from which the plaintiff appealed.

The first ground of demurrer presents the same question which was decided by this court in the case of *Hawkins vs. Filkins*, and under that decision we will hold the ground of demurrer insufficient.

As regards the second ground of demurrer, which is for the want of a stamp placed upon the letters of administration, it will be observed that, even if it was necessary to place a stamp upon the letters, about which it is not at this time necessary to express an opinion, the objection could not be reached by demurrer; because, under the act of congress and the instructions in regard to affixing revenue stamps, the stamp may either be affixed to the administration bond, or the letters of administration, and therefore, although there is no stamp affixed to the letters, it does not necessarily follow that the letters were invalid. By demurrer the facts are taken as true, and as the letters would be as valid if the bond was stamped, as if the stamp had been affixed to the letters, there is no necessary defect in pleading.

If the defendant wished to question the validity of the letters of administration he should have done so by plea *ne unques administrator*. *Edwards on the Stamp Act, p.* 218; *Thynne vs. Pothero*, 2 *M. & S.*, 553. The plaintiff might sustain the issue on this plea, by producing his letters stamped, or by producing an administration bond stamped in connection with his unstamped letters; or if neither had been stamped, the letters bore date in February, 1864, and under the act of congress passed June 30th, 1864, could have been produced in court and then stamped, and offered in evidence, as held in the case of *Dorris vs. Grace*, at the present term of this court.

We are therefore of opinion that the circuit court erred in sustaining the demurrer to the declaration. And for this error the judgment must be reversed and set aside.

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MILAN VS. THE STATE.

An assault with intent to kill, as created by our statute, (*Gould's Dig. ch.* 51, *part* 3, *art.*, 5, *sec.* 1; *part* 10, *sec.* 5,) is a felony; and an indictment for such offence must charge that the assault was made feloniously, etc., and also that the intent was felonious, etc.

The record should always show the empanneling of the grand jury that found the indictment; and that the indictment had been returned into court by the grand jury. (13 *Ark.*, 720; 19 *Ark.*, 178.)

By the common law, challenges to the polls for cause, are for principal cause, or to the favor. If for principal cause—as where the matter imports absolute bias or favor—it is tried by the court on the testimony of the juror to the exclusion of other evidence, and if found true, the law *per se* pronounces the juror incompetent. If to the favor,—as where it is supposed the juror is under undue influence or prejudice—it is tried, under the direction of the court, by triers, on other testimony to the exclusion of the oath of the juror; and the finding is conclusive unless the triers are improperly directed.

The practice, as modified by our statute is, that challenges to the polls, whether for principal cause or to the favor may be tried by the court, or by triers at the election of the party challenging: if tried by the court, then on the oath of the person challenged; if by triers, then on other testimony; and if the challenge be for favor, then the finding of the court is as conclusive as if it had been determined by triers. (13 *Ark.*, 720.)

In view of the constitutional provision which guarantees to the accused a trial by an impartial jury, and of that purity and sense of justice which should characterize the administration of the law, a person who states that he would convict a colored man on less evidence than he would a white man for the same offence, should be rejected as a juror on an indictment against a colored man.

A witness who had given evidence before the examining court in a criminal case, may be interrogated on the trial in relation to such evidence, for the purpose of laying a foundation to contradict him.

Although an attorney is bound to withhold, and will never be compelled to disclose any information which he knows only through professional relations to his client, he may be compelled to testify against his client as to other matters.

The testimony of a witness given before the examining court, which was reduced to writing, is competent evidence on the trial for contradicting him—a foundation having been laid for the introduction of such evidence.

Appeal from White Circuit Court.

Hon. K. H. POWELL, Circuit Judge.

TURNER and WATKINS & ROSE, for appellants.

The circuit court erred in empanneling upon the jury men who were disqualified by prejudice, to act as impartial jurors. The legal rights of the negro in the courts when charged with crime are the same as the white man's; and a jury as impartial and unprejudiced must be awarded to him as is accorded to the white man. The bill of rights (*sec.* 11) secures to every one charged with crime, the right to be tried by an impartial jury; and makes no distinction between the white and the black man, and the courts can make none. As to the disqualification of a juror by having formed or expressed an opinion in the case, see *Dig. ch.* 52, *sec.* 163; *Stewart vs. State*, 13 *Ark.*, 727, *and Meyer vs. State*, 19 *Ark.* 156.

A party is always allowed to impeach the credit of a witness by proving that he has made statements out of court contrary to his testimony on the trial—the witness being first interrogated as to those statements, as was done in relation to the statements of Mary Branch. 1 *Green. Ev.*, 462.

The refusal of the court to compel McRae to testify was a glaring error. The fact that he was counsel for the prosecutor afforded no excuse whatever, nor can any be given.

The written testimony given before the examining court was competent evidence to discredit the witnesses, who had denied, on the trial, the statements they had made on the examination. *Atkins vs. State*, 1 *Ark.*, 568; *Ros. Cr. Ev.*, 236.

The indictment is clearly defective, if not a nullity, in failing to charge that the assault was willful, felonious and of malice aforethought, and that it was made with a felonious intent. *Dig.* 336, *sec.* 31; *State vs. Eldridge*, 7 *Eng.*, 608; *Whar. Cr. Law*, 552.

Mr. Attorney General C. T. JORDAN, for the state.

The court below did not err in overruling appellant's challenge of jurors. See 13 *Ark.*, 147; *Gould's Dig., page* 644; *Wharton's American Law*, 854.

As to witnesses testifying on the final trial, of statements made before the committing court. *Atkins vs. The State*, 16 *Ark.*, 588; *Roscoe's Evidence*, 236; *Greenleaf on Evidence*, *sec.* 513.

As to granting a new trial on the grounds of the verdict of the jury being contrary to the evidence. *Walker vs. The State*, 4 *Ark.*, 88; *Wharton's American Law*, 873; *Chittwood vs. The State*, 18 *Ark.*, 453.

Motion in arrest of judgment. 1 *Chitty Cr. Law*, 663; *Gould's Digest*, *ch.* 52, *page* 407.

Mr. Justice COMPTON delivered the opinion of the court.

Milan—a man of color—was convicted in the circuit court of White county, of an assault with intent to kill, and was sentenced to the penitentiary. He moved in arrest of judgment, and for a new trial, which motions were overruled, and the case now comes before this court for consideration.

In determining the several questions presented, we will first consider those which relate to the sufficiency of the indictment. The indictment charges, with requisite certainty of time and place "that a colored man, named Milan, on etc., at etc., with force and arms, in and upon one Haywood Branch, then and there being in the peace of God and the state, did make an assault, with intent to kill, and him the said Haywood Branch then and there feloniously, wilfully and of his malice aforethought, did, with a certain pistol, then and there had by said Milan, beat, bruise and attempt to shoot, kill and murder, and other wrongs to the said Haywood Branch, contrary, etc." By our statute (*Gould's Dig.*, *chap.* 51, *part* 3, *art.* 5, *sec.* 1) it is provided, that "whoever shall feloniously, willfully and with malice aforethought, assault any person, with intent to murder, kill, rob or commit a rape, or shall administer, or attempt to give any poison or potion, with intent to kill or murder, and their counsellors, aiders and abettors, shall, on conviction thereof, be imprisoned in the jail and penitentiary house, not less than three, nor more than twenty-one years;" and by section 5, part 10, of the same chapter, it is

further provided that "the term 'felony,' as used in the laws of the state of Arkansas, is defined to be any crime, or offence, which by the laws are punishable, either capitally, or by imprisonment in the penitentiary, or when any portion of the punishment inflicted shall be imprisonment in the penitentiary." Construing these provisions together, as they must be, they create the offence for which the accused was indicted, and make it a felony. No such offence existed at common law. An assault with intent to kill was by the common law an assault only, and might be charged with or without the aggravating circumstances, that is, the intent to kill. Not so of an assault with intent to kill, as created by the statute. Under the statute, the intent to kill *must* be charged—by the common law it may or may not be laid. The statute creates a new offence, and declares it a felony. The indictment must, therefore, be framed upon the statute, according to the rules of the common law, for framing an indictment for a felony declared by the statute. And these rules require, in all cases, that the act constituting the offence must be charged to have been done feloniously. From what has been said, the unavoidable conclusion is, that the indictment, in the case before us, to have been good upon the statute, should have charged that the accused, feloniously, wilfully and of his malice aforethought made the assault, as well as that the intent was, feloniously, wilfully and of his malice aforethought, to kill. To charge that the accused made an assault with intent, feloniously, wilfully and of his malice aforethought, to kill, is to charge a misdemeanor only, with the aggravating circumstance of the intent to commit a felony. Failing to charge the assault as required by law the indictment is fatally defective. See *Williams vs. The State*, 8 *Hump.* 585, *and authorities there cited*; 2 *Hale*, 184–5. The indictment is also defective, for the reason that it nowhere charges an intent, feloniously, wilfully and of malice aforethought, to kill. The phraseology "with intent to kill," without more, is not sufficient. The killing intended must be a felonious, wilful and malicious killing, and should be so alleged, in order that the character and extent of the crime intended to

be perpetrated may distinctly appear. *Curtis vs. The People*, 1 *Scam.* 285.

Our attention has been called to the fact that the transcript of the record in this case does not show that the indictment upon which the accused was tried, was found by a legally organized jury—in other words, that the record entry or caption, showing the empanneling of the grand jury, at the time at which the indictment purports to have been found, is omitted. The uniform practice in this court has been to supply this omission by certiorari, *ex officio*, even after error joined, for the purpose of affirming, where no other error appears in the record, as indicated in *Stewart vs. The State*. 13 *Ark.*, 720, and *Green vs. The State*, 19 *Ark.*, 178. The record also fails to state that the indictment was returned into court by the grand jury; nor does it show that any note was made by the clerk upon the back of the indictment of its having been returned into court and filed. This was held to be good ground for reversal in *Green vs. The State*, *supra*. There the prisoner had pleaded to the indictment and procured a change of venue; and the court, after an extended review of the authorities, said: "We would not reverse the judgment of the court below on the ground in question, if there was any competent legal evidence in the transcript, either of an entry of record or an endorsement upon the indictment, that the grand jury had returned the indictment into court, but there is no such evidence; and the course of decisions of this court does not warrant the indulgence of presumptions against the prisoner, in cases involving life or liberty in reference to matters vital to the regularity of the prosecution."

Having disposed of the questions deemed material, arising upon the motion in arrest, we will next consider those upon the motion for a new trial.

It appears from the bill of exceptions that in empanneling the jury who tried the case, the following jurors, namely, Henry Blevins, Henry Martin, Frank Gill, Samuel Neely, Luke T. Hutchinson, Green Wright, Laban C. Elliott, Harrison Blevins,

Charles Gillam, and Benjamin Bolton were called, and who, after having been sworn on their *voir dire* and examined by the attorney for the state, were severally put to the defendant, who propounded to each of them the following interrogatory: "Do you feel that you can act as a juror in this case and decide it, according to the law and the evidence, with the same impartiality and want of prejudice toward the defendant that you would if a white man were on trial?" To which they each answered: "I don't think I can." The attorney for the state then put the following question: "Don't you believe that you can go into the jury box and do the defendant impartial justice, according to the law and the evidence?" To which each answered: "I do." Whereupon the defendant's interrogatory was repeated and answered as before. The defendant then propounded to the said Laban C. Elliott, Charles Gillam and Harrison Blevins the following interrogatory: "Would you acquit a negro charged with an assault with intent to kill a white man, upon the same evidence that you would acquit a white man on a like charge?" To which each answered: "I don't think I could." The juror, Benjamin Bolton, on further examination, was asked whether he had formed and expressed an opinion as to the guilt or innocence of the accused; and answered that he had from rumor, but that the opinion so formed was not such as to prejudice his mind, though it would require evidence to remove it.

The party challenging the before mentioned jurors not demanding triers, the court proceeded to try the issue, and found the jurors competent, and they were sworn upon the jury—to which finding the defendant excepted.

At common law, a challenge to the polls, for cause, may be either for principal cause, or to the favor. A challenge for principal cause is always tried by the court, and is for some matter which imports absolute bias or favor. When the fact alleged is put in issue the court has only to find whether it is true or not. If true, the law adjudges the juror incompetent and he is ex-

cluded. As, for instance, if the juror has formed and expressed an opinion as to the issue to be tried, or is of kin to either party, or if he was one of the grand jury who found the particular bill—in all such cases when the truth of the fact is ascertained, the law *per se* fixes the incompetency. A challenge to the favor is not tried by the court, but is submitted to triers, under the direction of the court, and takes place when, though the circumstances are not such as to fix the juror's partiality as a conclusion of law, as in case of challenge for principal cause, there is nevertheless reasonable ground to suspect that he will act under some undue influence or prejudice. The causes of such challenge are numerous, and dependent on a variety of circumstances; as that the juror challenged and the opposite party are in habits of great intimacy, or are partners in business, and the like. The question to be tried, in such case, is whether the juror stands altogether indifferent between the parties. In the nature of things, no rule can be laid down that will enable the triers, in every case, to determine with certainty, that the juror is or is not biased. It is not a question of law, but is matter of *fact* to be submitted to the common sense of the triers, who must find that the juror stands impartial, or they should reject him. The court may direct what evidence is admissible upon the question of indifference; but its weight and influence in proving the allegation of favor or bias, are for the triers alone to determine. *Freeman vs. The People*, 4 *Denio* 9; *Wharton Crim. Law*, 836, 843, 858. These rules of the common law have been modified, in some respects, by our statute (*Gould's Dig.*, *chap.* 52, *sec.* 52, *et seq.*;) and this court, in *Stewart vs. The State*, *supra*, took occasion to indicate the extent of the modification, as also what was conceived to be the correct practice, under the statute, in reference to challenges to the polls. It is there said: "Construing this statute with reference to the common law, we think the correct mode of proceeding under it, as to challenges to the polls for cause, is that when a juror is presented, it is the duty of the court to inquire first of the attorney for the state, and then of the

defendant, 'do you accept this juror, or do you challenge him?' If challenged for cause, the party should declare for what cause or causes he so challenges him. Then the court should inquire, 'how will you have this challenge tried, by the court or by triers?' If by the court, the cause, if disputed, is to be tried by the court upon the oath of the person challenged, and upon no other evidence. If the party challenging shall elect to have the cause of challenge in dispute determined by triers, it is to be tried on other evidence to the exclusion of the oath of the person challenged." And in another part of the opinion, it is said that "unless it be made to appear upon the record that the party challenging demanded triers, the presumption will be that he elected to have the cause of challenge tried by the court; and in challenges for favor, the finding of the court as to the fact whether the juror stands indifferently between the parties is equally conclusive, as if found by triers." Thus abolishing in form, though not in substance, two distinctions which existed at common law between challenges to the polls for principal cause and to the favor.

The bill of exceptions states that the several jurors were challenged "for cause," but fails to show whether for principal cause, or to the favor—because all challenges, except such as are made peremptorily, are *for cause.* We infer, however, from the examination of the jurors, that the challenge was to the favor; and treating it as such, we do not hesitate to say that, in view of the constitutional provision which guarantees to the accused a trial by an impartial jury, and of that purity and sense of justice which should ever characterize the administration of the law, among an enlightened people, the jurors challenged, especially those who stated that it would require less evidence to convict the accused than it would a white man on trial for the same offence, ought to have been rejected. But, though we differ in opinion with the circuit judge, sitting in lieu of triers, in regard to the weight of evidence upon the issue as to whether the jurors were, in point of fact, biased or not, we cannot for that reason,

consistently with the established rules of law, disturb the finding. In *Freeman vs. The People, supra*, it is laid down that the finding of triers, if they have been properly directed, is *not* subject to revision. The court said—speaking of the issue on a challenge to the favor—"*that* must be determined by triers, who are to pass upon the question of actual bias or favor. They are final judges upon the matters submitted to them; and from their decision, when properly instructed, the law has provided no appeal." In *Mima Queen and child vs. Hepburn*, 7 *Cranch* 290, which was a suit for freedom, one of the jurors was challenged for favor; and on being questioned, said that he had formed and expressed no opinion as to the particular case, but that such was his detestation of slavery that in a doubtful case he would find a verdict for the plaintiff, and that he had so expressed himself in regard to the case then on trial. He also stated that if the testimony were equal he should certainly find a verdict for the plaintiff. Upon this statement the circuit judge rejected the juror; and on appeal to the supreme court of the United States, the judgment was affirmed. MARSHALL C. J., remarking upon the point as to the competency of the juror, said: "Jurors ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case, might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way; and therefore the court exercised a sound discretion in not permitting him to be sworn." In *Costby vs. The State*, 19 *Geo.* 614, LUMPKIN J., in delivering the opinion of the court, said: "We would not undertake to disturb the finding of triers—why should we that of the court, sitting quoad this point in the place of triers?" And in *Stewart vs. The State, supra*, this court, as above shown, has said that in challenges to the favor, the finding of the court is as conclusive as if found by triers.

At the trial the counsel for the accused asked the witness, Mary Branch, on cross-examination, whether she did not state

in her evidence before the examining court, at West Point, that she saw the accused strike at Haywood Branch after they came out of the cabin in which the struggle had commenced. The state objected to the question, and the court sustained the objection. In this there was error. The question was material to the issue, was put for the purpose of laying foundation on which to contradict the witness, and the court should have required an answer.

It also appears that the accused offered to introduce as a witness Dandridge McRae, Esq., who announced to the court that he was of counsel for the prosecution, and for that reason declined to testify: whereupon the counsel for the accused stated that he did not propose to interrogate McRae as to any matter of professional confidence, and moved the court to compel him to testify—which the court refused to do. This was error. Although an attorney is bound to withhold, and will never be compelled to disclose any information which he knows only through professional relation to his client, it does not follow that he is incompetent as a witness, or may not testify against the client as to other matters.

The testimony of Haywood Branch, taken before the examining court and reduced to writing, was competent evidence on the trial, for the purpose of contradicting him—a foundation for the introduction of such evidence having been first laid as to that witness—and the court erred in excluding it. *Atkins vs. The State*, 16 *Ark.*, 868,

Let the judgment be reversed and the cause remanded for further proceedings.

REID VS. NUNNELLY.

Where the payee in a note agrees with the surety and principal debtor to accept a third person as surety in his place and discharge him, and the agreement is executed, it operates as a discharge of the original surety and may be shown by parol.

Appeal from Columbia Circuit Court.

Hon. LEN B. GREEN, Circuit Judge.

GALLAGHER & NEWTON, for appellant.

Release by parol even of a sealed instrument is sufficient, *a fortiori*, a parol release is good in this case which is a mere simple contract. *Dearborn vs. Cross*, 7 *Cowan*, 48: The contract was discharged so far as appellant is concerned for a full and valuable consideration; and the party absolutely discharged by substituting a new security who was accepted.

GARLAND & NASH, for appellee.

The defendant attempted to set up a release of the claim sued on in parol. The demand sued on is a promissory note, which, under the statute, is of equal grade with a sealed instrument, and a parol release cannot be pleaded to either. This is beyond all question. *Levy vs. Very*, 7 *Eng.*, 148. For this reason the court below did not err in sustaining the demurrer.

Mr. Justice CLENDENIN delivered the opinion of the court.

This was an action of assumpsit, brought by the plaintiff in the court below, upon a promissory note, payable to Josiah. E. Nunnelly, for $675.00, dated 14th February, 1857, and payable on the first day of January, 1858, signed by Robt. V. Reid, John E. Buchanan, Wm. H. C. Reid, and Wm. M. Joiner, and which was assigned by the payee to the plaintiff. Robt. V. Reid, John

E. Buchanan and Wm. M. Joiner were not sued in the action. No copy of the note appears in the transcript. On the return of the writ, Wm. H. C. Reid filed five pleas: First, *non assumpsit;* second, payment; third, set off, and fourth and fifth, special pleas, sworn to. The plaintiff demurred to the plea of set-off, and to the two special pleas. The court sustained the demurrers; the defendant withdrew his first and second pleas and judgment was rendered in favor of the plaintiff, and the defendant brings the case by appeal to this court.

Our review of the case must necessarily turn upon the action of the circuit court in sustaining the demurrers to the defendant's pleas. The plea of set-off attempted to be set up, is clearly defective under the decision rendered by this court in the case of *Mace vs. Robinson*, 16 *Ark.*, *page* 500, and is so conceded by the counsel of the appellant in their brief.

The fourth plea of the defendant is, "and for a further plea in this behalf, said defendant says *actio non*, because he says, some time in the month of December, and before said promissory note was due and payable, said defendant, together with said John C. Buchanan, the principal in said note, wishing to remove from the state of Georgia (the state in which said note was given) to the state of Louisiana or Arkansas, called upon Josiah E. Nunnelly, the then holder of said note, and stated to said Nunnelly, that he wished said defendant to move as aforesaid, and that he was indebted to said plaintiff as security on the promissory note in said declaration mentioned, he wished to be discharged from any liability on, or in regard to said promissory note in any way and form whatever; that said defendant and said John E., acting under said agreement, and in full faith that the same would be complied with on the part of the said Josiah E., then the holder of said note, and the only person who had any authority or control over said note, produced one William M. Joiner, at the time of said assignment then a man in perfect solvent circumstances, so far as this defendant and the said Josiah E. knew, to sign said promissory note in his stead, with the full knowledge and consent, and in ful-

filment of the agreement made and entered into between said Josiah E. and the said defendant: that the said James E. expressed himself perfectly satisfied with said William M. Joiner "as a security in the place of said defendant and accepted fully of him the said William M. in the place and stead of said defendant, whereby the said William M., became liable on said promissory note, and would not have signed said note under any other circumstances, and said Josiah E. stated at the time to said defendant that he was fully discharged from said note and his name canceled therefrom: that said defendant acted in full faith, and never knew but that his said name was cancelled, until a short time before the commencement of this suit, which said defendant is ready to verify, wherefore he prays judgment," etc.

The fifth plea is substantially the same as the one copied.

The demurrer to the pleas being sustained, their legal sufficiency is submitted for our consideration.

The question raised by these pleas, is, was the appellant (the defendant in the court below) discharged from his liability on the note by the parol agreement of the payee, to receive another name on the note and to release and discharge the defendant?

The pleas aver this agreement and that on the part of the defendant it was perfected, by offering Joiner in his place, and that Joiner was accepted, and that Joiner signed the note. If we consider the pleas as an attempt to set up a release, they would be defective, because they do not aver such release was in writing and under seal, but we do not so treat them. We look upon these special pleas as an offer on the part of the defendant to show by parol that he was discharged from all liability on the note by the agreement (perfected) with the payee to substitute the name of Joiner, for the name of defendant on the note. We have examined at some length the authorities referred to by counsel, and also others tending to throw some light on a question comparatively new in this court, and our conclusions are, and we think sustained by the weight of authority, that the defendant can show by parol the agreement made and perfected between himself and the payee of the note.

In the case of *Logan vs. Williamson*, 3 *Ark.*, 216, it is held, that a debt may be paid or extinguished by a third person becoming responsible to the creditor with the concurrence of the debtor. A bond or other specialty may be released or discharged by a parol agreement between the parties, especially where such agreement is executed. 7 *Cowen*, 48. If the debtor gives and a creditor receives, in full satisfaction for the debt, the note of a third person for a smaller sum than the amount of the debt, it is a valid discharge. 1 *Rhode Island*, 496. A mere parol agreement is not sufficient of itself, to release an instrument under seal: but an executed parol agreement may have that effect, as it is not the agreement alone that is relied on, but the agreement coupled with the acts done under it. 6 *Indiana*, 128.

Testing the pleas in this case by these conclusions and authorities, we are of the opinion that the 4th and 5th pleas were sufficient, and that the circuit court erred in sustaining the demurrer.

The judgment of the circuit court must be reversed, with instructions to that court to overrule the demurrer to the 4th and 5th pleas.

RUST VS. REIVES.

In an action against the maker of a note payable at a particular place, it is not necessary to aver or prove a demand at that place.

Where the circuit court has ordered an execution, in an attachment case, this court will presume that the law providing that a bond be filed by the plaintiff has been complied with.

Error to Drew Circuit Court.

Hon. WILLIAM M. HARRISON, Circuit Judge.

GARLAND & NASH, for plaintiff in error.

The pleas set up that the instrument sued on being payable at a particular place, should have been presented at that place before suit brought, and that the declaration should so aver: and there is no doubt of the correctness of this. *Byles on Bills*, (*3d Amer. Ed.*) 166-7-8; *Cohen vs. Hunt*, 1 *Sm. & Mar.*, 227.

The judgment rendered by the court cannot be sustained; because execution was awarded on the judgment and the record does not show that a bond with good security was filed before this was done; and our statute is peremptory as to this. *Gould's Dig.*, *p.* 176, *sec.* 41.

CLARK, WILLIAMS & MARTIN, contra.

In so far as the plaintiff attempts to set up that the note was payable at a particular place and had not been presented, it is defective and incomplete in failing to aver that money was ready at the place when the obligation fell due; and even then would, like a plea of tender, only bar cost and interest. *Summer vs. Ford*, 3 *Ark. Rep.*, 389.

Mr. Justice CLENDENIN delivered the opinion of the court.

James H. Reives commenced his suit in attachment, by petition and summons, against Albert Rust, in the circuit court of Drew county to the April term, 1866, upon the following instrument:

"$12,500. Albemarle Co., Va., Sept. 20th, 1860.

"On demand I promise to pay to George Reives or order at the counting house of Stokes & Reives, in the city of Richmond, Va., twelve thousand five hundred dollars, with interest from date in payment for seventeen negroes which he has this day sold to me, the title to which he warrants, but makes no warrant as to health or constitution. Witness my hand and seal.

A. RUST, [Seal.]"

On which instrument is the following assignment: "Oct. 20th,

1865. I assign the within bond to J. H. Reives, but without recourse. Signed GEO. REIVES."

The attachment was levied and personal service had on the defendant. At the return term the defendant appeared and filed his prayer of oyer, which was granted by filing the original. The defendant then filed two pleas, the first of which, as appears by the amended transcript, was, on motion of the plaintiff, stricken out. The second plea is as follows:

"Comes the said defendant by attorney and for a plea in this behalf says actio. non, because he says, that the said instrument sued on in the above mentioned cause, if executed at all, was executed to one George Reives of the state of Virginia in the year A. D., 1860, for the purchase of seventeen negroes, sold by the said George Reives to the defendant, which said negroes the said George Reives warranted to be slaves for life, upon which warranty said bond was executed, payable when the payment should be thereunto afterwards demanded, at the banking house of defendant's banker in the city of Richmond, Virginia, and said defendant avers that said bond was never presented and shown for payment by the said George Reives or any other person for him, at the counting house of defendant's bankers, nor at any other place was payment demanded of this defendant, and this defendant further avers that after the execution of said bond, and before payment thereof was demanded, said negroes were declared free by the president of the United States, to wit, on the day of January, 1863, and by the laws of the United States, and by the laws of the several states on the 1st day of March, 1864, said negroes were emancipated, and taken from the possession of defendant, and to him rendered utterly valueless, by reason whereof said defendant says the consideration for which said bond was executed, if executed at all, has failed, and this he is ready to verify."

This plea was sworn to. The plaintiff demurred to this plea, and the court sustained the demurrer; and the defendant saying nothing further, judgment was rendered for the debt and damages,

with interest, and that execution should issue against the lands attached, and from this judgment the defendant in the court below prosecutes his writ of error.

The only cause assigned for error is, that the circuit court erred in sustaining the demurrer. But our attention is drawn by the brief of the counsel of the plaintiff in error to the final judgment in the case ordering execution to be issued, which they insist is erroneous.

The plea attempts to set up two defences; the first, that no demand was made at the place where the bond was payable; the second, that the consideration of the note had failed in this, that the negroes for which the bond was given were declared free by the proclamation of the president of the United States, and were free by the laws of the United States before demand of payment was made.

We consider it to be well settled law that no demand against the maker of a note need be averred or proved. In *9th Howard, U. S. R.*, 263, it is decided, that in an action against the maker of a note payable at a particular place, it is not necessary to aver or prove a demand at that place. And in *11th Illinois*, 467, it is also so decided, and that the commencement of a suit is a sufficient demand of payment.

The second matter of defence made by the plea has been decided by this court at the present term in the case of *Grace vs. Dorris*, where a defence similar in its character to the one presented in this case, was held not to be a good defence.

In regard to the point made by the counsel in their brief, it is unquestionably the law in this state that no execution shall be awarded against any defendant or garnishee, nor shall any of the defendant's goods or property be sold, unless the plaintiff enter into bond, to be approved by the court, with conditions as prescribed by law. See *sec.* 41. *ch.* 17, *Dig. of Ark.* But we think that is a matter that addresses itself to the circuit court; and if the circuit court has ordered an execution, as the record shows us has been done in this case, we will presume that the law has been complied with.

Finding no error in the proceedings and judgment of the circuit court in this case, the judgment is affirmed.

BELLER VS. PAGE.

The only question in this case was decided in *Hawkins vs. Filkins, supra.*

Appeal from Hempstead Circuit Court.

Hon. THOMAS ELLIOTT, Circuit Judge.

YONLEY, FARRELLY & KNIGHT, for the appellant.

GALLAGHER & NEWTON, for the appellee.

Mr Justice CLENDENIN delivered the opinion of the court.

On the 18th day of November, 1862, James R. Page, as administrator of Thomas Christian, dec'd, recovered in the circuit court of Hempstead county, a judgment by *nil dicit* against Eli V. Collins, Noel G. Neal and Allen T. Beller: on the 18th day of September, 1865, an execution was issued on this judgment, returnable to the October term of said court. The execution was levied on the property of Beller. At the return term of the execution, Beller filed his petition in the circuit court, praying the court to quash the execution upon the ground that the court that rendered the judgment upon which the execution was based, "had no legal jurisdiction or existence." The court overruled the petition and refused to quash the execution, and Beller filed his bill of exceptions and appealed to this court.

The question raised by the record and bill of exceptions in this

case, is the same as that presented by the case of *Hawkins vs. Filkins*, decided at the present term of this court, and will be governed by it.

The judgment of the circuit court is affirmed.

MILLWEE EX PARTE.

The point in this case settled in *Dorris vs. Grace, supra.*

Application for Mandamus.

GARLAND & NASH, for the application.

GALLAGHER & NEWTON, *contra.*

Mr. Justice CLENDENIN delivered the opinion of the court.

This is an application for mandamus against the Hon. Augustus N. Hargroves, judge of the 9th judicial circuit of this state, to compel him to grant an injunction, which, it appears by the endorsement on the bill, now filed with the petition in this case, he refused to grant.

From the bill of complaint and the exhibits, we learn that on the 18th of February, A. D. 1863, the petitioner purchased from William P. McIntosh, the defendant in the bill, a negro slave, for the sum of fourteen hundred dollars, upon a credit of twelve months; that he executed three writings obligatory to said McIntosh, two for five hundred dollars each, and one for four hundred dollars, due at twelve months, with ten per cent from due; that McIntosh executed a bill of sale to petitioner; that petitioner afterwards paid one of said five hundred dollar notes, and two hundred dollars on account of the other; that McIntosh instituted his action of debt, upon the balance due on said notes, in

the circuit court of Sevier county; that service of process was had; that at the September term of said circuit court, petitioner, Millwee, appeared and craved oyer of the instruments sued on; which being granted, he filed his three pleas: 1st. of *nil debet*, not sworn to; 2d. payment, and 3d a special plea, sworn to: that the consideration of the instruments sued on, was a negro slave, which was warranted a slave for life, and that by the proclamation of Abraham Lincoln, president of the United States, and the organic law, slavery had been abolished, etc., that the plaintiff moved to strike out the plea of *nil debet*, took issue to the plea of payment and demurred to the third plea; that petitioner Millwee then withdrew his pleas, and judgment was rendered against him.

The petitioner then presented his bill praying for an injunction and setting up, in substance, the same matter presented by the special plea.

Independent of the question, that the defendant, having elected to defend at law, he is bound by his election, we are clearly of the opinion that the first reason assigned for refusing to grant the injunction—for want of equity on the face of the bill—was a good and sufficient one, and is based on the law as decided at the present term of this court in the case of *Dorris vs. Grace*.

The mandamus is therefore refused.

STEELE VS. RICHARDSON.

After the adoption of the constitution of 1864, by which slavery was abolished in Arkansas, S. sold and conveyed to R. a tract of land for the expressed consideration of ten thousand dollars, but, in reality, for a number of negroes, valued at that sum, which R. warranted to be slaves for life: *Held*, on a bill in

equity to cancel the deed for the land: 1st That the facts in this case bring it within the exception to the rule, *ignorantia juris non excusat*: 2d. That the sale was entirely without consideration: 3d. That nothing of any value whatever having been paid for the land, the negroes being free, there was no necessity to offer to return them: 4th. That R. may have a remedy on the warranty, but as a court of law could not place him in possession of his land, equity would relieve him, and cancel the deed.

Appeal from Ouachita Circuit Court in Chancery.

Hon. JAMES T. ELLIOTT, Circuit Judge.

GALLAGHER & NEWTON, for appellant.

We think none of the grounds taken in the demurrer, separately or collectively, to be well taken.

The bill shows that the pretended consideration of ten thousand dollars in the deed of conveyance was not paid in money, as appears *prima facie*, but in negroes at that time free. *Vaugine vs. Taylor et al.*, 18 *Ark.*, 78. That the complainant accepted the pretended sale of the negroes on account of representations of defendant that they were his property and slaves for life. This misrepresentation was fatal even though innocently made, and sufficient to avoid the contract. 1 *Story's Eq.*, *p.* 225, *sec.* 193, *and authorities cited; Harrell vs. Hill*, 19 *Ark.*, 115.

Admitting that the party contracted in ignorance of the law, still it is sufficient to avoid the contract. *State vs. Paup.*, 13 *Ark.*, 138. But this contract was based upon the *fact* that the party was ignorant that at the time it was entered into, slavery did not exist in Arkansas. *Exr's of Hopkins vs. Maseyk, et al.*, 1 *Hill's Ch. Rep.*

There was a total failure of consideration and assuredly the complainant had a right to have the conveyance annulled, though he is willing to let the agreement stand if the defendant will pay him the value of the property, (21 *Ark.*, 84; 1 *Eng.*, 317.)

It was unnecessary to offer to return the negroes—they were not within the control of the complainant—did not belong to the defendant when he pretended to sell them—he was in *statu quo* without a return.

GARLAND & NASH for appellee.

The contract being executed the matter is closed even if there had been no consideration whatever; if a mere voluntary gift it was then beyond reach of the parties unless fraud be alleged. *Adams Eq.*, 174–5 *et seq.*; 2 *Spence Eq. Jur.*, 885; 2 *Green. Cruise*, 532.

The mere ignorance of Steele, that negroes had been freed, will not protect him. *Adams Eq.*, 189. *State vs. Paup.*, 13 *Ark.*, 129; 7 *Geo.*, 70; 2 *McCord, Ch. R.* 455; 1 *Hill, Ch. R.* (*S. C.*) 250. And were it simply a fact about which Steele was ignorant, he could not be relieved without averring he could not obtain the necessary information with due diligence. *Adams Eq.*, 179,* 187,* *Mason vs. Waring*, 15 *Beav.* 151.

The bill should offer to place the parties *in statu quo*, and is demurrable for this defect. *Davis vs. Tarwater*, 15 *Ark.*, 286, *ib.* 292.

The contract being performed and executed, the parties must stand altogether on their covenants. It is not a case for equity to relieve. 1 *Parsons on Con.*, 456, 475; 6 *Eng.*, 58. Both parties knew the fact that negroes were free, or both equally ignorant of it; and it is probable that both knew it was so ordained and proclaimed, but being within the confederate lines did not heed the fact. Even if Steele had paid the money for them he could not recover it back on the contract executed, and certainly equity will not undo the contract now. 6 *Mass.*, 358; 6 *Cowen*, 431; *Adams vs. Barratt*, 5 *Georgia*, 404.

Mr. Chief Justice WALKER delivered the opinion of the court.

The complainant, Steele, charges that on the 14th day of April, 1865, he was the lawful owner of a valuable tract of land situate

in the county of Ouachita and state of Arkansas, containing four hundred and thirty-five acres, a part of which was improved and then in cultivation, and that the complainant also owned and was possessed of fifty head of cattle, fifty head of hogs, thirty-five bushels of corn, five bushels of seed peas, eight bee-gums, a large lot of household and kitchen furniture, together with a growing crop of thirty acres of corn, and a growing crop of twenty acres of wheat, which land and property were of the value of $10,000; which sum the defendant agreed to pay in property of that value, to-wit: negro slaves, which the defendant claimed and owned as his property, and thereupon executed to the complainant a bill of sale for six negroes, which he then warranted to be his property and slaves; which negroes, so warranted to be the property of the defendant and slaves, complainant accepted at the value aforesaid in payment and satisfaction for said tract of land and other property; and thereupon, together with his wife executed to the defendant a deed in fee simple for said tract of land: that at the time of such sale, and the execution of such deed, he the complainant was ignorant of the fact that, long before that time, slavery had been, and then was abolished and prohibited by the constitution of the state of Arkansas. That he made the contract, and conveyed the lands and other property in good faith, believing that the said six negroes so conveyed were slaves, and worth the sum agreed upon. That he was induced to make the trade and execute the deed for the land, upon the faith and confidence in the representations of the defendant, and that the negroes were slaves; but in truth and in fact that said negroes were not slaves, but were then free, and that defendant had no title or property in them whatever. And that he knew at the time said conveyance was made and consummated, that they were not slaves, and that he had no right to dispose of them as such. That defendant, although requested so to do, had refused to pay the complainant the sum of $10,000, the price agreed upon, or to re-convey and re-deliver the land and property so conveyed by the complainant

to him—with a prayer for the payment of the $10,000, or that the sale of the land may be set aside and an account taken, etc.

To this bill the defendant demurred; the demurrer was sustained, and a decree rendered dismissing the bill, and for costs; from which the complainant appealed.

The several allegations in complainant's bill, which are set forth at greater length than we have considered necessary to repeat here, must be taken upon demurrer as being true; and the question is, when thus taken, is the complainant entitled to relief in a court of equity?

That the complainant contracted under a mistake, there can be no doubt. No one can believe that any man in his senses would have conveyed $10,000 worth of property, to which he had an undisputed title, for no other consideration than negroes, if he had known that the negroes were not property, and that he could not in law, for a single day, command their services. The bill expressly avers that complainant was ignorant of the fact, that by the constitution of 1864, negroes were freed, and that the defendant, at the time he made the trade and represented the negroes as being slaves and his property, knew that they were not property, but were free. It is beyond all question, from the statements in the bill, that the defendant has possessed himself of valuable property worth $10,000, for which in fact he has paid not one cent, and if the bill be true, he knew, at the time he made the contract, that he was paying nothing for the property received by him. And the defendant comes into a court of equity and says that I admit this to be true, and yet a court of equity can give to the complainant no relief, because this mistake was not of fact but of law; and that the rule, *ignorantia juris no excusat*, must prevail, and denies to the complainant all relief. The existence of this rule is fully recognized, but there are exceptions to it, which are equally well understood. This question of ignorance, or mistake of law was fully considered by this court in the case of *The State vs. Paup.*, 13 *Ark. Rep.*, 109, in which the general rule, as well as the exceptions to it, was considered, and in which

it was held that even though the party contracting did know of the existence of the law; yet as he mistook its legal effect, equity would relieve him. In that case as in this, the complainant got nothing by his contract, and the defendant, the state, lost nothing, parted with nothing.

It is insisted that the complainant should have returned, or offered to return the negroes. We think not. Defendant had no negroes—sold none to complainant—negroes were not the subject of sale; they were not property at the time this contract was made. The complainant acquired no title to them, and could not lawfully, for an instant, control them. Consequently he got nothing from defendant and had nothing to return.

The claim of the complainant to equitable relief does not rest alone upon his ignorance of the constitutional provision emancipating slaves, but also upon the ground that the deed made by him to the defendant, and the transfer of the chattels set forth in the bill was made without any consideration whatever. No contract without consideration is valid. A consideration is an essential requisite to all contracts. The deed, however, purported to be made in consideration of $10,000. This, in point of fact, as shown by the bill, is not true. Under this deed, which is *prima facie*, valid, the defendant had taken possession of the property and claimed to hold it. The deed, even if invalid, created a cloud on the title of the complainant, which he had a right to have removed. This was held to be permissible in the case of *Cook vs. Cole*, 2 *Halst. Ch.*, 522, 627.

In the case before us, the complainant parted with property of the value of $10,000, for which he received nothing whatever. The defendant under this contract took possession of this property, as expressly charged in the bill, knowing, at the time, that he had no title to the negroes, which he professed to sell to the complainant. No one can believe that the complainant would have parted with his property and received these negroes in payment for it, if he had known that they were free. He must, in the

very nature of things, have relied upon the false statements of the defendant, with regard to his title to the negroes.

It is true that complainant may have his recourse at law upon his bill of sale for damages upon a breach of warranty of title; but he could not be restored to the possession of his property by any process of a court of law. He is also entitled to have the deed canceled and set aside. This the court of law could not do.

In view of this whole case, which is certainly a very strong one, we are of opinion that the complainant has, upon the face of his bill, shown a case which entitles him to relief in a court of equity; and that the court below erred in sustaining a demurrer to it.

Let the decree be reversed.

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TRAPNALL ET AL. VS. BURTON ET AL.

Where two persons bring a bill in chancery, the one claiming to be executrix and the other to be sole heir of a deceased person, asserting a right to certain lands purchased at execution sale by the testator, and the will of the deceased and the letters testamentary thereon are neither pleaded nor exhibited, and the judgment and execution under which the testator purchased are not exhibited, the bill is fatally defective.

Infant defendants must have the benefit of any defence in this court which could have been interposed for them before the chancellor.

They are deemed as having set up and relied upon the want of equity in the bill, limitation, non-claim, fraud as to subsequent purchasers, and any special defence interposed by a co-defendant not peculiar to himself, but of which each defendant was equally at liberty to avail himself.

One of the defendants having disclosed no title or interest in himself, but having confined himself to impeaching the plaintiff's title, and issue having been taken on his answer, the plaintiff waived objection to his failure to show title or interest.

Where there are infant defendants in chancery duly served with process, an affidavit for an appeal cannot be waived.

A cross-bill is required to be as perfect and complete as any other bill; and it or the answer to it might as well and legitimately refer to papers in any other suit in the court as in the original suit, and so endeavor, with statement of their contents or exhibition of copies, to make them part of the pleadings on record.

The two suits are distinct from and independent of each other.

They merely proceed side by side, the hearing of one being delayed until the hearing of the other.

It is a fundamental maxim, as well in courts of chancery as in courts of law, that no proof can be admitted of any matter which is not noticed in the pleadings. *Brodie vs. Skelton*, 11 *Ark.*, 134.

Defendants having referred to proceedings in another suit by way of showing an equitable estoppel against the plaintiff, the plaintiff cannot use them to avoid the effect of the statute of limitation, not having pleaded them in the bill.

St. John's college having been undertaken by the Grand Lodge of Free Masons and the masonic fraternity of Arkansas, a person who was a mason when he testified, and one of the trustees of the college, but without any personal or pecuniary interest in the controversy, is not incompetent as a witness for the college.

More than a year having elapsed after the disimissal of one suit, before the beginning of another by the same parties, the former suit cannot be urged to remove the bar of the statute of limitations.

When a new statute of limitations is enacted, it will be taken to be prospective in its operation, and to apply not to causes of action which had occurred at its passage, but to those occurring thereafter, in the absence of language in the statute compelling a contrary construction; and all causes of action existing at the time of the new act are governed as to the length of time necessary to constitute the bar, by the old law and not by the new. *Couch vs. McKee*, 6 *Ark.*, 484, *and other cases cited.*

When the complainant's remedy is barred by limitation on the face of the bill, and he fails to allege anything in avoidance of the defence, and the answer contains a demurrer, the objection is fatal at the hearing. *Sullivan vs. Hadley*, 15 *Ark.*, 129.

The old statute of limitations (*Eng. Dig.*, 695, *sec.* 14,) provides that no action for the recovery or possession of lands should be maintained, unless it appeared that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of them within ten years before the commencement of such suit.

To bar the plaintiff's claim *actual* possession must be shown by the defendant; lapse of time and actual possession must unite.

The possession must be so open and exclusive as to amount to a disseisin, or an ouster or termination of the plaintiff's possession.

The acts of the defendant must be plain and unmistakable and such as prove his intention to use the land as owner.

Where A buys B's land under execution, he is barred if he does not gain actual possession within ten years.

To recover the possession of land, under our statute of ten years, the plaintiff must have had actual or constructive possession within that time. If the execution purchaser does not obtain actual possession, and the defendant in the execution continues in it without agreement to hold under him, the purchaser has no constructive possession.

Constructive possession by the plaintiff is sufficient; and if he proves that, then the defendant must prove by sufficient acts that more than ten years before suit he took actual possession and continued it, adversely, so as to put an end to the constructive possession; and that the latter has not been renewed.

Where the defendant in execution conveyed the lands in controversy with covenants which guaranteed, not only the absolute title in fee, but the immediate, continued and exclusive possession against all claims of all persons whatever, this was the clearest possible declaration that he claimed the land, or all the interest he ever had in it, as his own.

If this conveyance and these covenants did not fix the character of his possession as adverse from the beginning, they made it, at least, adverse from that time forward.

Where process is not sued out against several parties, who have an existing legal interest in the lands whereof partition is asked, the bill must be dismissed at the hearing.

The case stood precisely as if the bill had not sought to make them parties.

One of the plaintiff's having sued as executrix and the other as sole heir of the testator, for the defendants to admit this relationship between the plaintiffs and the testator, was not to admit that the latter, being sole *heir*, had any rights in the lands in question under the will.

If a person who has the claim to, or is the owner of property real or personal, stands by and permits it to be sold, without giving notice of or asserting his right, he is estopped from setting up his claim or title against the purchaser. *Shall vs. Biscoe*, 18 *Ark.*, 142.

Where any of the parties have died after the cause has been submitted in this court, the court will order its decree to relate to the day of submission.

Appeal from Pulaski Chancery Court.

Hon. H. F. FAIRCHILD, Chancellor.

GARLAND & RANDOLPH, for appellants.

WATKINS and WILLIAMS, for Kimber's heirs and the trustees.

S. H. HEMPSTEAD, for Vance.

Opinion prepared by A. PIKE, ESQ.—*See note, page* VIII.

This case comes here on appeal from the chancery court of Pulaski county.

On the 8th of February, 1858, Martha F., and Mary R. Trapnall, the former described as "executrix of the last will and testament of Frederic W. Trapnall, deceased," and the latter as "infant and sole heir of the said Frederic W. Trapnall, by her guardian *ad litem*, Charles A. Carroll, by the court appointed," filed their "bill of complaint and cross-bill against Edwin Kinder and several others; and on the 22d of June, 1858, their amended bill, taking the place of the original, Henry Edwin Burton, *alias* Edward Kinder, William Burton, Elijah A. More, Roderick L. Dodge, Robert A. Watkins, Thomas H. Kimber, the trustees of St. John's College, William Vance, Richard C. Hawkins, Noah H. Badgett, William Bronaugh and Sarah A. Bronaugh were made defendants.

The bill stated, that the first named defendant, Burton *alias* Kinder, had filed his bill of complaint, to October term, 1857 of the same court, against the complainants and others, to which the complainants had filed answer and cross-bill, and had permission to amend.

That on the 18th of September, 1841, Samuel Evans recovered judgment in the Pulaski circuit court against Richard C. Hawkins and two others for $232 96-100 debt, with interest at 10 per cent. from December 22d, 1840 till paid and costs: that an *alias fi. fa.* issued on this judgment, on the 29th of August, 1844, which became returnable by law to April term 1845, and was levied on the 3d of September, 1844, on the north-east quarter, the north-west fractional quarter, and the south-west quarter, of section eleven, in township one north, of range twelve west, as the property of Richard C. Hawkins; which, after due advertisement,

were sold under the execution, on the first day of the April term 1845, in separate tracts, and purchased by Frederic W. Trapnall, for the sum, in the aggregate, of $274, and that, on the 8th of May, 1845, the sheriff duly executed and acknowledged in open court his deed for said lands, which was afterwards duly recorded.

A copy of the deed is exhibited.

That on the 21st of May, 1834, these lands were patented to Noah H. Badgett, Jesse B. Badgett, William Badgett and Richard C. Hawkins, jointly.

That on the 9th of May, 1837, the patentees sold thirty acres of the north-west fractional quarter to the United States. A copy of the conveyance, it is stated, is filed with the answer of one of the complainants to Kinder's bill.

That on the 3d of April, 1838, Jesse B. Badgett and William Badgett mortgaged their undivided moiety of the lands, to secure a debt afterwards assigned to James Vance, who, on the 27th of June, 1846, obtained a decree foreclosing the mortgage, and William Vance purchased the whole interest of Jesse B. and William Badgett at commissioner's sale under the decree.

That on the 26th of May, 1846, Noah H. Badgett and Hawkins and their wives, conveyed the north-east quarter to William Burton, who received the conveyance with full knowledge of the sheriff's sale and conveyance to Trapnall.

That on the 19th of May, 1847, Burton, by his attorney, William A. Bronaugh, conveyed to Thomas H. Kimber the west half of the said north-east quarter, who received the same with full knowledge of the sheriff's sale and conveyance to Trapnall.

That Kimber took possession of the west half "and continued to keep possession until he sold and conveyed the same to the trustees of St. Johns' College, who are now asserting possession and erecting a college building thereon."

That when Vance made his purchase, it was agreed between him and Noah H. Badgett, that he should take the north-west and south-west fractional quarters for his entire interest in the lands.

That long before Evans' judgment was obtained, Hawkins had made a clearing and improvement on the west half of the north-east quarter, and built a house on it and occupied the same several years, with the express understanding between him and Noah H. and Jesse B. Badgett, [William Badgett having died without children, and his brothers and sister being his only heirs,] that he was to have the said west half quarter as his separate share of said lands; but no deeds of partition were made, and the lands remained in possession of the partnership, all holding under the patent as tenants in common, and subject to partition, when agreed on or decreed.

The complainants had hoped that Burton, Kimber and the trustees of the college would have acknowledged Trapnall's paramount title, and admitted him to possession; but as they refuse, alleging that the complainants have no title, the bill prays that the defendants may answer, and that the conveyances to Burton, Kimber, and the trustees may be set aside as to the west half, and that the lands may be divided and deeds of partition made, and the west half of the north-east quarter assigned to complainants, "and as much more as shall be meet and proper," and title thereto be quieted, and possession of the same be returned to them, with such other and further relief as to equity and the premises belongs.

This is the whole bill. Its defects are obvious and fatal. The will of Trapnall is not pleaded or exhibited, nor are the letters testamentary granted to Mrs. Trapnall. When he died, what relationship she bore to him, or what relationship Mary R. Trapnall bore to him is not pleaded. The latter sues as sole heir, and not as devisee; and in the absence of any statement as to the will, she is not shown to have any interest in the lands in controversy. The judgment and execution under which Trapnall purchased are not exhibited.

Trapnall purchased early in April, 1845. The bill was filed on the 8th of February, 1858, nearly thirteen years after his right of action accrued, and more than seven years after the passage of

the limitation act of 4th January, 1851. Yet no excuse is given for this long delay, in order to avoid the statute bar.

It is not shown what interest Kinder claims in the lands; there is nothing in the bill that connects More, Dodge, Watkins or Sarah A. Bronaugh with the matters in controversy; and William Bronaugh figures merely as the attorney in fact by whom Burton conveys to Kimber.

Though no process was issued, Kinder appeared and answered the bill on the 6th of July, 1858. Kimber's widow and one heir, and Dodge, Watkins, and the trustees entered their appearance on the 14th of October, 1853, and answered afterwards; and a guardian *ad litem* filed an answer for the minor heirs of Kimber on the 11th of February, 1859. William Burton, Elijah A. More, Vance, Hawkins, Noah H. Badgett, and William and Sarah A. Bronaugh never appeared. For although the decree states that "this day appeared the several parties to the original and cross-bill in this cause," that must be confined to such of them as had already entered their appearance, since no others were under any legal obligation to appear; nor, indeed, there being no process or order of publication, was there any suit pending against any of the others.

It appeared by the answers of Dodge and Watkins, and is proven, that on the 3d of June, 1847, William Burton conveyed to Elijah A. More, the east half of the north-east quarter, and that More conveyed one half of that to Dodge, on the 27th of October, 1851, and the other half to Watkins, on the 29th of November, 1852.

The minor heirs of Kimber must, of course, have the benefit here of every defence, which could have been interposed for them before the chancellor. They are to be deemed as having set up and relied upon the want of equity in the bill, limitation, non-claim, fraud as to subsequent purchasers, and any special defence interposed by a co-defendant, not peculiar to himself, but of which each defendant was equally at liberty to avail himself.

Kinder demurred to the bill, by proper clause in his answer.

Dodge and Watkins, and the widow and adult heir of Kimber demurred in the same way, and relied on the statute of limitation; and the trustees of St. John's College relied upon those statutes.

As any defence maintained at the hearing and valid as to one defendant, being general and not personal to himself, was sufficient to defeat the complainant's case as to all, we need not refer in detail to the allegations or denials of the several answers.

Kinder disclosed no title or interest in himself, but confined himself to impeaching Trapnall's title. As issue was taken on his answer, the complainants waived objection to his failure to show title or interest. Dodge, Watkins, and Kimber's heirs and widow allege in defence, that Trapnall, after his purchase, held Hawkins' interest in the land as and by way of security for the Evans debt, and other debts of Hawkins, held by him as an attorney at law for collection, which debts were afterwards fully paid. It is alleged by one of the answers that after his purchase, Hawkins sold to Henry M. Rector, a dwelling house and grounds in Little Rock, in part consideration for which Rector undertook and agreed to pay, and did pay those debts.

The answers also present by way of defence the allegations that Trapnall never had any possession under his purchase; that Hawkins continued in adverse peaceable and undisturbed possession, and transferred that possession to Burton, who transferred it to his vendees; that Watkins, Dodge and the trustees received possession, upon their purchases of the premises conveyed to them, and ever after retained that possession; and that the purchase of each was made in good faith without actual notice of Trapnall's purchase by any of them except the trustees.

The Trustees of St. John's College are by law a corporation, sued and answering by their corporate name; and they made the following statement in their answer, and fully proved it at the hearing: that when the agents of the corporation were in treaty for the purchase of the land, and before the purchase was concluded, one of the agents called on Trapnall, and informed him of the pending negotiation and inquired of him as to his claim

under his purchase at sheriff's sale, under the Evans execution, telling him that the trustees would not purchose if he set up any claim to the land under that sale. The reason for this was, that he then had a suit pending in the Pulaski circuit court, in chancery, against Kimber, asserting his title under the sheriff's sale. Trapnall explained that he did not want or expect to recover the land, but that the object of his suit was to coerce payment of a residue, of between $400 and $600, of a judgment he had against Hawkins, and which Mr. Rector had assumed to pay, as part of the consideration of his purchase from Hawkins of a certain dwelling house and lot in Little Rock; but which he had refused or failed to pay. Mr. Rector, on inquiring of him, stated that he did not deny his assumption some years before for Hawkins to Trapnall, but claimed that the latter as surety for costs, owed him a large sum [Rector having been the marshal of the United States] for such costs, which Rector wished settled. Afterwards, Trapnall's suit was dismissed: and the trustees supposed that his claim was abandoned. They had full notice of the claim, and made the purchase and the deferred payments with the confident expectation that he did not claim the land itself, or any interest in it, save as a means of enforcing a moneyed demand, which, as between him and Rector, had became barred by limitation, and seemed to have created ill feeling between them. Trapnall was a warm fried of the undertaking to build the college, and declared that he did not wish to throw any obstacle in the way of the proposed purchase from Kimber. With that understanding, and on the faith of those assurances, the purchase was made.

This cause and that on Kinder's bill were heard together, and the two decrees are contained in one record entry. Each bill was "dismissed for want of equity"; and the complainants in cross-bill appealed, "the affidavit required by the statute being waived."

If the infant heirs of Kimber had been legally made parties, by service of process, so that a decree below or here would bind

them, the afficevit could not have been waived. The trustees paid Kimber $5,500 for the land purchased by them, and if Trapnall recovered it, they would be entitled to recover of Kimber's estate that sum and interest on the covenants in Kimber's deed, running with the land. If they were parties, and to be bound by decree, the appeal would be dismissed. But as they are not, we are at liberty to consider the merits of the case.

The suit on the cross-bill was heard, it is stated by the record, on the original and amended bill and exhibits; and a transcript of the record of the suit brought by Trapnall against Kimber and others; on the answers to the cross-bill, and replications to these answers; and on the testimony introduced by each defendant, by documents and depositions in the original cause. The answers also referred to the answers of the respective respondents to Kinder's bill, for statement of the title of each, and made these answers part of themselves. If it had been indispensable for Dodge, Watkins and the trustees to set out their titles with particularity, this mode of pleading would have been vicious. It was not indispensable, the bill being fatally defective on its face; but such pleading is not to be encouraged. A cross-bill is required to be as perfect and complete within itself as any other bill; and it or the answers to it might as well and legitimately refer to papers in any other suit in the court as in the original suit, and to endeavor without statement of their contents or exhibition of copies, to make them part of the pleading on record. The two suits are distinct from and independent of each other. They merely proceed side by side, the hearing of one being delayed until the hearing of the other. It is a great error to imagine that accurate and systematic pleading is not quite as necessary in equity as at law. True, much of the prolixity and repetition of the old forms may profitably be omitted; but to dispense with all form and regularity of pleading should not be permitted by a chancellor. Far better adhere to the old forms with punctilious accuracy, than indulge in pleadings like the bill in the present case.

The fruit of the erroneous pleading and vicious proceeding allowed, is, that although Kinder has not brought his case here by appeal, and we have nothing before us but the cross-suit, the whole record of both sides has come up to us in one transcript, to the great increase of costs and of the labor of the court. As to so much of the pleadings and record of Kinder's suit, as is not specially referred to and made part of the pleadings or record of the suit now before us, the pages are to us as if they were blank, and they can give us no judicial knowledge of any thing they contain.

It is a fundamental maxim as well in this court as in the courts of law, that no proof can be admitted of any matter which is not noticed in the pleadings. 2 *Daniell*, 992; *Story*, *Eq. Pl.*, § 257, 258; *Whaley vs. Norton*, 1 *Vern.*, 483; *Gordon vs. Gordon*, 3 *Swanst.*, 472; *Clark vs. Turton*, 11 *Ves.*, 240; *Williams vs. Llewellyn*, 2 *Younge & Jer.*, 68; *Hall vs. Maltby*, 6 *Price*, 240, 259; *Montesquieu vs. Sandays*, 18 *Ves.*, 302; *Powys vs. Mansfield*, 6 *Sim.*, 565; *Langdon vs. Goddard*, 2 *Story*, 267; *James vs. McKenin*, 6 *John R.*, 543; *Lyon vs. Talmadge*, 14 *id.*, 501; *Barque Chuson*, 2 *Story* 456; *Harding vs. Handy*, 11 *Wheat.*, 103; *Brodie vs. Skelton*, 11 *Ark.*, 134.

Sir ANTHONY HART said, in *Farrell vs.* ———, 1 *Malloy*, 353. "LORD TALBOT said, long ago, that if you are to oust a defendant for fraud alleged against him, and the fraud is proved by the acknowledgment of the defendant that he had no right to the matter of litigation, the plaintiff must charge that, on the record, to give him the opportunity to deny or explain and avoid." To allege and not prove, benefits a party quite as much as to prove and not allege.

The suit instituted by Trapnall referred to in the answer of the trustees, is not mentioned or alluded to in the bill. It can only be referred to in connection with the testimony in support of the equitable estoppel relied upon in the answer. The complainants cannot use it to avoid the effect of the statute of limitations. They have not pleaded it.

Of the testimony in the case it is only material to say:

That the allegations of the answer of the trustees in regard to what occurred between the agent of the college and Trapnall, before the trustees purchased, are at all points sustained by the testimony of George C. Watkins. Some question was raised as to his competency. St. John's College was undertaken by the Grand Lodge of Free Masons, and the masonic fraternity of Arkansas. Mr. Watkins was a mason, when he testified, and one of the trustees, but without any personal or pecuniary interest in the controversy. It is very clear that he was not incompetent to testify.

It was proven that Hawkins took possession of the west half of the north-east quarter, about 1840, and cleared a field of twenty or thirty acres on it, and built a house on another tract near it: that he occupied this place until he had sold to Burton and Burton to Kimber. Then Kimber took possession, and lived on and cultivated the land until he sold to the trustees, who thenceforward had possession, and proceeded to erect a college building upon it.

The prior suit, referred to above, was brought by Trapnall on the 11th of March, 1850, and the allegations of the bill are precisely the same as those of the amended bill in this case. William Vance, William Burton, Kimber and Noah H. Badgett were alone made defendants. The relief prayed was precisely as in the present suit. Kimber, Badgett and Vance were served with process, and order of publication was taken as to Burton. Kimber demurred to the bill, and Trapnall, in July, 1850, took leave to amend it. Nothing more was done until the 16th of February, 1854, when Trapnall's death was suggested, and the suit ordered to stand revived and progress in the names of the present appellants. On the 22d of December, 1854, they dismissed the suit.

Though the chancellor dismissed the bill for want of equity, he decided it upon the pleadings and testimony, on the ground of adverse possession of the whole north-east quarter in Hawkins

and others, from the date of Trapnall's purchase; and also, as to the west half, on the ground of equitable estoppel.

The bill does not pretend that Trapnall ever had actual possession of any part of the land. It states that Hawkins had cleared part of the west half, built on it and occupied it, with the understanding that he was to have that for his share; but no partition was effected, and the land remained in possession of the joint owners as tenants in common. It alleges that Burton, Kimber and the trustees, refused to recognize Trapnall's title, or *admit him to possession;* and it prays that possession of not only the west half, but of so much more as may be decreed, may be returned to the complainants.

The proof of continuous adverse possession of the west half of the north-east quarter, is full and ample; and we do not think it necessary to inquire whether the proof of such possession of the other half, and the quarter purchased by Vance, is conclusive or not.

When the bill was filed, the persons holding paper title to portions of the lands were, as the bill and answers show, Noah H. Badgett, William Vance, the Trustees of the College and Dodge and Watkins. These were the only necessary parties so far as the bill was brought for partition of the lands. The trustees, Dodge and Watkins undeniably have title, under the conveyance from Badgett and Hawkins to Burton, to Badgett's interest of one-fourth in the respective tracts purchased by them.

Trapnall's title dates from 21st April, 1845. He instituted his first suit on the 11th of January, 1850, and these complainants dismissed it on the 22d of December, 1854. This suit was commenced on the 8th of February, 1858. More than a year having elapsed after the dismissal of the former suit, it is as if that suit had never been brought; besides that, as we have already said, this former suit is not mentioned in the bill, and therefore could not be resorted to for any purpose by the complainants, in any event.

Vance obtained his title on the 27th of June, 1846, under a

mortgage dated the 3d of April, 1835; the trustees, on the 17th of July, 1852; Dodge, on the 27th of October, 1851, and Watkins, on the 29th of November, 1852.

From the time of his purchase, Trapnall permitted Hawkins to remain in possession of the half quarter, which he claims was to be his share, without attempting to obtain possession, by any proceeding whatever, or to put an end to the tenancy in common, created by his purchase, between him and Vance, and Noah H. Badgett. He lies still a year, until Badgett and Hawkins sell the north-east quarter in May, 1846, to Burton; and then again another year, until, in May, 1847, Burton sold to Kimber; and then again nearly three years, when he instituted a suit on a bill as grossly defective as the one in this case, took leave to amend it in July, 1850, and let the suit sleep until his death, in 1853. Then these complainants revive it in February, 1854; and although, in the meantime in 1851 and 1852, Dodge, Watkins and the trustees have purchased parts of the north-east quarter, and placed their conveyances of record, these are not made parties, until, late in December, 1854, the suit is dismissed voluntarily by these complainants, and the matter sleeps again more than three years, and this suit is at last only instituted under the spur of the bill filed by Kinder. Hawkins, Burton, Kimber, the trustees, Dodge, and Watkins are all allowed peaceably to take and receive possession; the trustees building on the land and adding value to it, erecting an institution of learning by voluntary contribution from the masonic fraternity and citizens. No explanation is offered for this neglect of Trapnall, to enforce his pretended rights, none to explain Hawkins' continuance in possession, or reconcile it with Trapnall's proprietorship. While the former suit sleeps, the stringent limitation act of 1851, is enacted; yet it still sleeps, regardless of the menaces of that statute.

The question in this case, as in many others, is not so much whether Trapnall has a title, as whether equity will lend him its aid to make that title available. One must use even what

is his own, so as not to injure others. Equity does not minister to iniquity.

Until the 4th of January, 1851, ten years was the time requisite to create a bar to the recovery of real estate.

It is too well settled in this court for the doctrine to be now disturbed, that when a new statute of limitations is enacted, it will be taken to be prospective in its operation, and to apply, not to causes of action which had accrued at its passage, but to those accruing thereafter, in the absence of language in the statute compelling a contrary construction; and that all causes of action existing at the time of the passage of the new act, are governed, as to the length of time necessary to constitute the bar, by the old law and not by the new.

This explanation of the law, in *Couch vs. McKee*, 6 *Ark.*, 484, and *Hawkins vs. Campbell*, *id.*, 513, was not predicated, it was declared in *Calvert vs. Lowell*, 10 *Ark.*, 147, upon any supposed connection between the contract and the act of limitations in force at the time of its inception, whereby the law of prescription then in force entered into or became one of the terms of the contract; but it was the simple ascertainment, by means of construction, of the intention of the legislature, the court being guided by the presumption that all laws are prospective and not retrospective; and resting his opinion mainly on the prospective language of the statute and the dubious meaning of its repealing section in reference to laws in force at the time of its passage. That the result of this doctrine is, that two different laws are held to be at one and the same time in force, was not considered so great an anomaly as to forbid the establishment of the doctrine, and was shown to be the case elsewhere.

In *Davis vs. Sullivan*, 7 *Ark.*, 449, it was expressly adjudicated that, in regard to bonds, the act of 1839, was the rule for a case, where the bar was not complete on the passage of the act of December, 1844. And the same doctrine was recognized in *Wilson vs. Keller*, 8 *Ark.*, 508; *Carneal vs. Thompson et al.*, 9 *Ark.*, 55; and *Ringgold et al. vs. Dunn*, 8 *Ark.*, 497. The same doc-

trine was adhered to in *Biscoe et al., vs. Stone et al.*, 11 *Ark*, 39: and in *Durritt vs. Trammell, id.*, 183, it was held, that where the cause of action accrued under the old law, part payment made after the passage of the new law did not take the case out of the former act, and place it within the latter, which extended the term for limitation. In *Sullivan vs. Hadley*, 16 *Ark.*, 129, the doctrine was again applied, as it had been in *Mason vs. Howell*, 14 *Ark.*, 199, and *Bank of the State vs. Gray*, 13 *id.*, 39.

In *Couch vs. McKee* and *Hawkins vs. Campbell*, the bar under the old statute had become complete before the passage of the new law. So it had in *Davis vs. Sullivan*. But in *Calvert vs. Lowell*, *Wilson vs. Keller*, *Durritt vs. Trammell*, *Biscoe vs. Stone* and *Sullivan vs. Hadley*, that was not the case.

The statute of 4th January, 1851, it is true, declares that all laws inconsistent with its provisions are repealed; and therefore it is urged that the former law is wholly annulled, and can no longer be relied on in any case or for any purpose. But in *Hawkins vs. Campbell* this court said that the act of December, 1844, did not, by express words, repeal any other portion of the 9th chapter of the Revised Statutes than certain specified sections, "and other parts of that chapter which come in conflict with that act." "The sixth section," the court said, "is not repealed by express words: and the question then recurs, does it conflict with the provisions of the act of 1844? *So far as it relates to demands accruing after its passage*, the first is by the operation of the last restricted to demands previously existing." And this construction of the repealing clause was adopted in *Calvert vs. Lowell.*

If these questions were not already settled we should give our statutes the same construction. The object of the act of 4th January, 1851, was to reduce the time necessary to bar a suit for the recovery of lands, from ten years to seven; and not to lengthen the time in any case. If, as the counsel for the appellants thinks, the new statute governs *all* cases, then if A had a right of action for lands, which accrued on the 5th of January, 1841, and would have been barred the day after the new law passed, the effect of

that law was to give him seven years more, less one day, in which to sue. The statute did not intend this absurd consequence, any more than it intended to cut off the right of action at once, where it had accrued *more* than seven years before the passage of the new act. It provides "that no person or persons or their heirs shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, but within seven years next after his, her or their right to commence, have or maintain such suit *shall have come, fallen* or *accrued:* and that all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments, shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed:" with a proviso that if any person "be or shall be, at the time said right or title first accrued, come or fallen" within the age of twenty-one years etc.

The language of the act leaves no doubt that it provides only for future cases. It does not say, "Provided such person *was*, when the cause of action accrued;" so as to cover any disability existing *before* its passage.

But it is said that the effect of a statute of limitation upon causes of action *existing* at the time of its passage, is the same as upon those accruing on the day it took effect. *Baldwin vs. Cross* 5 *Ark.*, 510; *The People vs. Supervisors of Columbia College*, 10, *Wend.*, 365. Undoubtedly: so far as this, that existing causes of action are barred, in any event, in seven years from its date, if not barred sooner under the law in force when they accrued. The statute creates a new rule; and the essence of a new rule is, that it forms a law for future cases. It applies to old cases, but not till the expiration of the fixed time from and after it takes effect. It could not be pleaded until after the 4th of January, 1858, in any case. If then there was a cause of action existing, not barred by the old statute, but to which the new one applied, it could be pleaded. See *Sayre vs. Wisnor*, 8 *Wend.*, 661; *Fairbanks vs. Wood*, 17 *Wend.*, 330; *Eakin vs. Ramb*, 12 *Serg. & Rawle.*, 330. If a right of action accrued on the 30th January,

1851, and another on the 5th of same month, the term of limitation of the former was not ten years, less a day, after the passage of the act, and that of the latter seven years and a day from the same. No such absurd consequence was intended. The former would be barred in seven years from the date of the law, though ten years had not elapsed from its accrual. The former law governs, until the time fixed by the new law expires, after its passage, and then the new law applies to all cases not then barred by the old law.

In *Conway vs. Kinsworthy*, 21 *Ark.*, 9, it was held that where a party having an equitable interest in land did not file his bill to establish and quiet his title to it, for thirteen years from the time when his right to bring his suit accrued; and he made no proof that during that time he asserted any claim to the land, paid taxes on it, or exercised any dominion over it, and the defendant and those under whom he claimed had, for more than the period of limitation held the legal title, exercised dominion over the land, paid the taxes on it, and openly claimed it as their own, under a title conflicting with that of the complainant, his bill was properly dismissed for want of equity. The defendants had had no actual residence or improvements on the land, and the lands being wild and unimproved, it was not necessary for them to actually go upon them, and enclose or improve them, they having the legal title, in order to constitute such adverse possession as would cause the statute to commence running in their favor. Open and notorious acts of ownership were sufficient. Adverse possession is possession in opposition to the title of another, or rather, in non-recognition of his title. A forcible disseizin will commence it. Where there is no actual *possessio pedis*, there must be a claim of title adverse to the other party, or in one's own right.

In *Guthrie vs. Field*, 21 *Ark.*, 379, a bill to foreclose a mortgage executed in 1833, was brought in 1850, the mortgagor of the land having been in possession, as appeared in evidence, at least from the year 1843; which appeared by his having made

other mortgages of the land, reserving the right to retain possession. It was contended that he had not been in possession, as far as appeared, long enough to bar an ejectment, or indeed for any length of time, and that in the absence of such a showing, the law presumed the possession to have been with the mortgagee, in whom the mortgage vested the legal title. Both the bill and answer were totally silent as to possession. The court neither admitted nor denied the legal presumption that possession was with the mortgagee: but said there was evidence to prove that he did not go into possession of the premises upon the execution of the mortgage, or at least did not retain it long enough to mature a title against the mortgagor, and that the legal presumption was overturned. The truth is that there is no such legal presumption, in case of a mortgage of land; which is now regarded, both at law and in equity, as a mere security for a debt. Where a person takes an absolute conveyance of land, the legal presumption is that the grantor gives him possession, because he is entitled to it, it is consistent with his title and the intention of the conveyance, it is almost always the case that he takes possession, he purchases the land in order to get possession, and takes covenants to secure him in it. Therefore, in the absence of proof either way, it is reasonable to suppose he takes possession; indeed, it is unreasonable and contrary to universal experience to suppose he does not: and therefore the law is said to *presume* that he does so. There are no such reasons to create such a presumption in favor of a mortgagee. On the contrary, the reasonable presumption is just the other way; and so it is in the case of an execution purchaser, because though he has the legal title and generally desires possession, the former owner is not presumed to desire to yield it to him, nor is it common for him to do so until compelled.

In the case cited, the defendant in effect pleaded the statute; and the complainant took issue. This, the court said, threw the burden of proof on the complainant: and as he failed to adduce such testimony as would take the case out of the operation of lapse of time, as set up in analogy to the statute, the plea stood confessed, and the bill was properly dismissed.

Where the complainant's remedy is barred by limitation, on the face of the bill, and he fails to allege anything in avoidance of the defence, and the answer contains a demurrer, the objection is fatal at the hearing. *Sullivan vs. Hadley*, 16 *Ark.*, 129. And it needs, at this day, no citation of authorities to show that such a bill as the present, setting up a claim that had so long slumbered, and giving no reason or excuse for the delay, but admitting that the party had never even had possession, could properly be dismissed for want of equity and as a stale claim, without a hearing; unless there be something in the doctrine as to the necessity of proof of continuous adverse possession, which can aid the complainant's case. In *Guthrie vs. Field*, nothing of that kind was proven, except that, ten years after the execution of the mortgage which it was sought to foreclose, the mortgagor executed two other mortgages to other parties, stipulating in each for retention of possession of the land. These were not necessarily acts adverse to the title of the first mortgagee, or done under claim of title in conflict with his: because a mortgagor may mortgage the same land again and again, without thereby impeaching the validity of the first mortgage. The execution of the subsequent mortgages, therefore, only proved continuance of possession by the mortgagor, not adverse possession, and the bill did not allege that possession ever was had or obtained by the mortgagee com plainant.

The whole doctrine of adverse possession is in a condition of doubt and confusion, which is a shame to the law; and it would be almost, if not quite impossible, by weighing the cases against each other and giving equal weight to each, to extract from them an intelligible, consistent and rational body of doctrine. "Distressing conflicts of opinion," on many questions, are inevitable, when, besides the English courts and the supreme court of the United States, from twenty to thirty state courts have been engaged for half a century in expounding a doctrine affecting the rights of parties in a multitude of suits. As the multiplicity of tribunals and the contrarieties of their decisions make it now im-

possible for a court to bow to any particular case, decided by another court as a binding "authority," in the English sense of that word, and as we are thus constrained, in many cases, to compare the decisions and weigh one against the other, judging of each by the rules of reason and logic and not without regard to the rank and character of the courts pronouncing them, we must often adopt, not that doctrine which is sustained by the greatest number of cases, but that which is most in accordance with sound sense, judicial reason and legal logic.

It will at some time become necessary to re-examine the whole doctrine of adverse possession, and to endeavor to place it on the stable foundation of a few undeniable legal principles. We do not undertake that now. Our present statute of limitations in regard to suits for recovery of lands, like the former statute, says nothing whatever in regard to the possession of the defendant; but broadly provides that no person shall sue or maintain a suit at law or in equity, for lands, after the expiration of seven years from the time when his right to commence, have or maintain such a suit shall have come, fallen or accrued. By our statute, in force when Trapnall purchased, and ever since then, if Hawkins refused to give him possession, he could, on motion, have had an order of the court, under which the sheriff would without delay have put him in possession, *Gould* 514, *sec.* 80; and this proceeding was a suit or action; because an appeal lay from, or a writ of error to, such order for possession; and because the averments in the petition were traversable and issuable. *Etter vs. Smith*, 5 *Ark.*, 90; *Fitzgerald vs. Beebe*, 7 *Ark.*, 310; *Ferguson vs. Blakeney*, 6 *Ark.*, 296.

The old statute [*English*, 695, *sec.* 1] provided that no action for the recovery of lands, or of the possession of lands, shall be maintained, unless it appeared that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of them within ten years before the commencement of such suit. Upon the mere language of this and statutes in similar words, the natural construction would seem to be, that the plaintiff must show seizin or

possession by himself within ten years before suit; and that if constructive possession, as following title, were sufficient, yet, to defeat him, the defendant would only need to show actual possession in himself, which, as there could not be two possessions at one and the same time, would prove the non-existence of such constructive possession, or of *presumed* possession as the natural accompaniment of title. But the courts have carried the presumption farther; and have held that where A has absolute title, and B is in possession, as A is entitled to the possession, B's possession will be *presumed* to be under A, or not in denial of his title, unless B shows the contrary, by proving what is called *adverse* possession, that is, possession with non-recognition of A's title. If B took possession by force, that shows such non-recognition. An infinite variety of acts may show the same, and repel the presumption that B holds under A, or does not respect and acknowledge, but denies, contemns or disregards his title: in other words, holds for himself, meaning to keep possession, whether A is willing or not.

Of course *actual* possession by the defendant must be shown. Lapse of time, it is said, and actual possession must unite. This possession, it is said, must be so open and exclusive as to amount to a disseizin, or an ouster or termination of the plaintiff's possession. Of course an occasional interruption of it would amount to nothing. He would still remain seized and possessed. The defendant must have occupied and appropriated, or taken to his use the lands by some defined boundaries. His acts must be plain and unmistakable, and such as prove an intention to use the land as owner. No other acts change the true proprietor's possession. To build upon, enclose, clear, cultivate or improve lands is to assert a right to use them as one's own. *Continued* residence is not necessary to constitute possession, where land has been so enclosed and used as to give publicity to the possession. See *Bradstreet vs. Huntington*, 5 *Peters*, 402; *Sparhawk vs. Bullard*, 1 *Metc.*, 95; *Blood vs. Wood*, *id.*, 535: *Potts vs. Gilbert*, 3 *Wash. C. C. R.*, 475; *Doe vs. Campbell*, 10 *John.*, 477; *Johnson*

vs. Sevine, 3 *Serg. & Rawle*, 291; *Jackson vs. Howe*, 14 *John.*, 405; *Barr vs. Gratz*, 4 *Wheat.*, 213; *Cummings vs. Wyman*, 10 *Man.* 464; *Ewing vs. Burnett*, 11 *Peters*, 53.

It is said that the occupation must be visible and notorious, because the statute proceeds upon the ground that there has been an acquiescence on the part of the owner; which supposition could never be indulged, if an occupation was so secret and clandestine as not to afford notice. *Angell on Lim.*, 416. The reason itself needs explanation. The owner does not lose his land because he has acquiesced in the defendant's possession, but because he has himself never had possession, or has abandoned it. That he knows of the defendant's possession, and does not resist it, is proof that the defendant's possession displaces his, and that his is abandoned. The whole is a question of fact as to the continuance or cessation of his possession. If he is disseized by force, and actual possession held against his will, and he does not retake possession, or attempt to recover it by suit, he abandons it. When he obtains absolute title, he is presumed to take possession. When he has once taken possession, and his title continues, his possession is deemed to continue. He need not daily or monthly reiterate acts of possession or proprietorship. A possession under him, or under his title, as by a tenant or lessee, is his possession. Such is the legal effect of the contract, and of the obligation to restore possession. A mere temporary trespass does not change or oust his possession. The whole question is, whether the possession taken and kept by another, does that.

Suppose now, that A is absolute owner of a tract of land, in possession, and actually residing on and otherwise actually holding the land. Under execution against him, B purchases the land. A thereby at once ceases to have any title whatever. But he remains in possession ten years, B never taking possession, nor instituting any action to be placed in possession. Immediately on B's purchase, the *right* to take possession vested in him but he did not exercise it, nor did A agree to hold as his tenant. Suppose that A *has* done no act in express denial of B's right to

possession or of his title, but has simply held possession and gone on improving and cultivating as before. As B undeniably *knows* of this possession, and does not interrupt it, he acquiesces in it. Does the estate run in favor of A? Is his possession adverse to B; or does the rule requiring adverse possession not apply?

In this case, B has no actual possession; and as A has, B has no constructive possession, or, which that phrase means, is not *presumed* to have actual possession; because he is *proven not* to have any. This is clear, unless the law regards A's possession as the possession of B, on the ground that he holds under him as tenant or otherwise. But A is not tenant at will of B; for a tenancy at will is where lands are let by one to another, to hold at the will of the lessor, and the tenant's possession is taken under this lease; *Litt. sec.* 68; and a tenancy at sufferance is where one gains possession of lands under another, by lawful title, as a lessee or mortgagee or the like, and keeps the lands afterwards without any title at all. In each case there is a prior recognition of the other's title, and possession is obtained under it. Therefore it was held in *Chalfin vs. Malone*, 9 *B. Mon.*, 496, that the defendant in execution does not occupy the relation of tenant or *quasi* tenant, to the purchaser, and is therefore not entitled to notice to quit, or demand of possession before the purchaser may bring his action. *Snowden vs. McKinney*, 7 *B. Mon.*, 259.

But the court said in *Chalfin vs. Malone*, that the possession of the defendant in execution is regarded, in the absence of all testimony manifesting the actual character of his holding, as consistent with the title of the purchaser. As there cannot be two concurrent possessions of the whole, this must mean that the defendant's possession is the purchaser's; that is, that the former holds for and under the latter. Is an agreement to that effect supposed or presumed, or does the *law* make him so hold? Neither. But, the court also said, as there is nothing in the relation of the parties, or in the attitude of the defendant, which imposes on him any obligation to hold the possession of the land for the benefit of the purchaser, or which authorizes the purchaser to rest in

security upon the belief that it is so held, there is no estoppel upon the defendant which precludes him from converting the amicable possession into one that is adverse and hostile. The law, it said, does not, merely, from the faith that he continues in possession, raise the presumption that the possession is adverse; but devolves upon him the burthen of evincing, if he rely upon it, that such have been its true nature and character.

We do not agree to this. Where one sells and conveys land to another, and remains in possession, he is deemed to hold under the vendee and as his tenant, not because the law gives him constructive possession, or presumes actual possession by him, as a consequence of his proprietorship, but because the vendor transfers to him the right of possession and binds himself to maintain him in possession, and must be deemed to have agreed to hold the possession, if he should remain in it, for and under the vendee, who had paid him for it. But no such legal conclusion follows, where B buys A's land under execution. There is no such agreement to be presumed. B buys the right of possesaion, but not from A: and as, under under our statute, B's right of action accrued as soon as he purchased, without notice to quit or demand for possession, and as he has no constructive possession, he is barred if he does not obtain actual possession within ten years. Even if adverse possession in the defendant were required, the length of his possession alone would prove it adverse. Its character depends upon his own views and intentions, not on the plaintiff's. At first, and for a reasonable time, it might be deemed indeterminate; because, it is natural, for a time, that he merely continued temporarily in possession, by the plaintiff's permission, and tacit consent, or delay to oust him, without meaning to continue permanently on the land, when no longer proprietor, and in defiance of the plaintiff's title. But that presumption would soon cease. It is easy to see why. An owner of land wants the possession and use of it, or rents for it. That is really all the interest one has in land. "*What is the land,*" says Lord COKE, "*but the profits thereof?*" As little is it to be presnmed that any one contin-

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ues for years to reside upon land, to expend his labor and means upon it, and connect it with himself by all the ties of association, until it has a value in his eyes far beyond that of money; when he does not regard it as his own, or when there is no agreement between him and the owner, which legalizes his possession and protects him in it.

The lapse of time might also prove the possession adverse in another way. The long continued possession of the defendant, with the tacit acquiescence of the purchaser would raise the presumption that some arrangement existed between them, by which the land was really the property of the defendant notwithstanding the sale, the title being held by way of security for the debt, or otherwise, and that the debt had been paid. For limitation, proceeding on the supposition that it has been paid, would bar a suit for the *debt;* and it would be presumed that if it still remained due, or the purchaser retained any claim on the land, he would not so long sleep upon and risk the loss of his rights. And if the defendant holds the land under any agreement, inconsistent with the supposition of total want of interest in himself, and absolute title in the purchaser, his claim to the land and his possession under that claim are adverse to that title.

To recover the possession under our statute of ten years, the plaintiff must have had actual or constructive possession within that time. If the execution purchaser does not obtain actual possession, and the defendant continues in it, without agreement to hold under him, he has no constructive possession. Such is the plain meaning, and such are the peremptory terms of the statute. The courts cannot incorporate new terms into its provisions. They can only say that constructive possession is sufficient; and that, if the plaintiff proves that, then the defendant must prove, by sufficient acts, that more than ten years before suit, he took actual possession and continued it, adversely, so as to put an end to the constructive possession, and that the latter has not been renewed.

If, however, some act were necessary, or some declaration,

showing that the possession of Hawkins and those claiming under him was adverse, such acts were done. When Hawkins joined Badgett, on the 26th of May, 1846, in selling the land to Burton and conveying it to him, with covenants which guaranteed not only the absolute title in fee, but the immediate and continued exclusive possession of the lands, against all claims of all persons whatsoever, this was the clearest possible declaration that he claimed the land, or all the interest he ever had in it, as his own, and that he held the possession in his own right. Such a conveyance and covenants were utterly inconsistent with the theory that he held possession, or ever had held possession under Trapnall. If they did not fix the character of his possession as adverse from the beginning, they made it, at least, adverse from that time forward. The suit was not brought until February, 1858; and under the old statute, Trapnall's claim and that of his representatives, heirs and devisees was thus barred, at any rate, on the 26th of May, 1856. It is proven that Hawkins retained possession [which he of course did as tenant of Burton] of the north-east quarter, until Burton sold to Kimber, on the 19th of May, 1847; and that since then, Kimber and the trustees have always had undisturbed possession of the west half of the quarter. And as Hawkins had adverse possession of the east half, for Burton, until the 19th of May, 1847, at least; and Burton, sold to More on the 3d of June, 1847; and More to Dodge and Watkins in 1851 and 1852, each conveyance conveying in fee, with covenants of warranty, the same adverse possession must be presumed, in the absence of any allegation in the bill to the contrary, to have continued, and to have actually accompanied each conveyance of title.

If the suit had not been barred by the old statute, it would have been doubly barred by the new. The act of 4th January, 1851, not only bars all suits for land at the end of seven years after title or cause of action accrued, which barred Trapnall on the 4th of January, 1858; but moreover, on the 4th of January, 1851, by the first section of the act of that day, it was provided

that when any person should have had three years' possession of any lands that had been granted or patented, holding or claiming them under a deed, devise, grant or assurance, and no suit should be brought for the land within three years from the passage of the act, the possession should be an effectual bar to any action brought to recover the land, in law or equity, and should vest an absolute and indefeasible title in fee simple to the land. Whatever may be the construction of this act as to *future* cases, it is certain that, as Burton and under him More and Kimber had, on the 4th of January, 1851, had peaceable and uninterrupted possession of the whole north-east quarter for more than three years, under a deed of conveyance duly recorded, and as no suit was brought, in law or equity, by Trapnall, for the land or any part of it within three years from the passage of the act; but the one then pending was dismissed on the 22d of December, 1854, and not renewed until more than three years afterwards; the suit in this last case was not only barred, but an indefeasible title in fee simple had vested in Dodge, Watkins, and the trustees by prescription.

Apart from every other ground of defence, the bill must needs have been dismissed, on account of the incapacity of the court to decree the relief asked, if otherwise Trapnall's representative and heir had been entitled to it, for the failure to bring the necessary parties before the court. Burton, More, Vance, Hawkins and Noah H. Badgett were all necessary parties to the bill. *Brodie vs. Skelton* 11 *Ark.*, 136; *Wood vs. Dummer*, 3 *Mason*, 317; *Cockburn vs. Thompson*, 16 *Ves.*, 329; *Porter vs. Clements*, 3 *Ark.*, 382. For all of these, except Burton and More had an existing legal interest in the lands whereof partition was asked; and Burton was grantor of Kimber, and More of Dodge and Watkins, each bound by the full covenants of his conveyance.

No process being sued out against these parties, there could be no decree, either for partition, or for the whole title to the west half of the north-east quarter. To decree the latter, it was necessary to establish against Vance, Hawkins and Badgett the

parol agreement of partition relied on in the bill, under which alone Hawkins could have been held sole proprietor of that separate tract. There was no suit against the parties named; or if there was, it should have been dismissed as to them before the hearing. The case stood precisely as if the bill had not sought to make them parties, and therefore the court was powerless to grant the relief prayed for.

Nor was the will of Trapnall produced at the hearing to prove the representative character of Martha F. Trapnall, or the right of Mary R. Trapnall under it. Even as to the defendants who answered, and who did not deny that there was a will, or that Martha F. Trapnall was executrix, or that Mary R. was sole heir of Trapnall, the case was not helped, because to admit that the latter was his *heir*, was not to admit that she had any rights in the land in question under the will; the tenor or substance of the will not being stated, nor any allegation made that the land was devised to her. In short, the bill was so radically defective that no decree for relief could be based upon it.

In favor of the trustees of the college, the court was constrained to dismiss the bill on another ground. If a person who has the claim to, or is the owner of, property real or personal, stands by and permits it to be sold, without giving notice of or asserting his right, he is estopped from setting up his claim or title, against the purchaser. *Shall vs. Biscoe.* 18 *Ark.* 142; *Corbett vs. Norcross*, 35 *N. Hamp.*, 99; *Storrs vs. Barker*, 6 *J. C. R.*, 344.

"There is no principle," said Chancellor KENT, in *Wendell vs. Van Rensselaer*, 1 *J. C. R.*, 354, "better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice; and his conscience is

bound by this equitable estoppel. *Qui tacet, consentire videtur. Qui potest et debet vetare, jubet.*"

A stronger case for the application of this salutary doctrine than this, could not well be imagined. Even Trapnall's mere silence would have been strangely significant, when he had so long left Hawkins and those claiming under him in possession, and no agreement between him and Hawkins is shown, with which this is consistent. It was inconsistent with the hypothesis of absolute proprietorship in Trapnall; and the presumption, continually strengthening, and on which third persons might well act, was that Hawkins continued to own the land, under some secret agreement between him and Trapnall, or that the judgment had been paid.

A man is estopped when he has done some act, which the policy of the law, or good faith, will not permit him to gainsay or deny, and when the principle of estoppel is understood, and unwise legislation or decision does not push the doctrine beyond reasonable limits, it is one of the wisest and most just and righteous doctrines of the law. The whole principle of equitable estoppel is, that when a man has deliberately done an act or said a thing, and another person, who had a right to do so, has relied on that act or word, and shaped his conduct accordingly, and will be injured if the former can repudiate the act or recall the word, it shall not be done; but, of whatever things the act was evidence, in the nature of things, and on ordinary principles, it shall be taken to be *conclusive* evidence; and what was said, the party shall not deny to have been true.

When the trustees were about purchasing the west half of the north-east quarter, not for themselves, but as a site on which to erect a public and charitable institution of learning, they knew of Trapnall's claim, and of his then pending suit. They informed him of the intended purchase, he himself being warmly interested in the enterprise of establishing the college. They told him that they should not purchase, if he intended enforcing his claim. He told them that he neither wanted or expected to recover the land

itself, but to compel the payment of a sum of money due by Hawkins, and which Rector had assumed to pay, but claiming to have the right to set off certain costs against it. He declared that he would place no obstacle in the way of the purchase. The trustees believed him, and relying on these assurances made the purchase.

These positive assurances, coupled with his long delay in asserting his right to possession, and availing himself of his legal title, with his indifference to the continuous possession of Hawkins and to his conveyance to Burton, and Burton's to Kimber, made it neither a wrongful or imprudent act in the Trustees to purchase the property, and proceed to erect the college upon it. It is not probable that Trapnall himself would ever have impeached their title, and voluntarily have placed himself in the unenviable position which he would have occupied by doing so: for he virtually abandoned his pending suit, by not amending his bill, after he had obtained leave to do so. The estoppel would be perfectly conclusive in favor of an individual, and where pecuniary interests alone were involved. It is more so when relied on, as it is here, where the interests of all the people of the state are concerned, and where the purposes of the charitable and philanthropic would be thwarted, and an infant institution of learning destroyed, by permitting the representative or heir of a party to set up a pretext of title which he had disclaimed, so making him to have perpetrated a deliberate fraud, of which it is evident he never dreamed of being guilty.

On these grounds the decree of the chancellor dismissing the suit, was correct. The decree dismisses the bill, for want of equity: but the chancellor heard the whole case and decided it, in reality, on the pleadings and evidence, though there was, on account of its many defects, no equity on the face of the bill, and no relief could have been granted upon it. The dismissal should be equivalent to a judgment in bar: and the decree will be affirmed, with the further decree that it operate as a perpetual bar against all claim of any person or persons, under the said

purchase of the said Frederic W. Trapnall, and as his representatives, heirs or devisees, to any part of the lands originally patented to Noah H., Jesse B. and William Badgett and Richard C. Hawkins, as the same lands are described in the pleadings in this case.

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RICE VS. HARRELL.

The plaintiff must recover on the strength of his own title, and not on the weakness of that of the defendant.

The proper construction of *sec.* 10, *art.* 6, *ch.* 101, *Gould's Dig.*, is that as to lands which were subject to entry, at the date of the act, and which the state desired to put upon the market at an early period, persons were allowed to make improvements upon them, and file their declarations and supporting affidavits in the office of the land agent, at any time within sixty days after the passage of the act; and as to the lands unconfirmed at the date of the act, persons were allowed to make improvements upon them, and file their declarations and affidavits at any time within sixty days after such lands were advertised for sale by the land agent.

A state land agent being a public officer acting under his official oath, in the discharge of his official duties, is presumed to have acted in conformity with the law, in the absence of any showing to the contrary.

When a fact is charged in the bill inferentially, and not directly, although on demurrer filed in proper time, the court might have sustained the demurrer, and ordered the bill to be amended, yet it would be unjust to dismiss the bill at the hearing for the want of such direct allegation.

The defendant having filed in the office of the land agent his declaration supported by affidavits, claiming a pre-emption to certain lands not now in controversy, his attorney afterwards, by permission of the land agent, erased the description of the lands in the declaration and affidavits, and inserted in lieu thereof the land in controversy: *Held*, that the affidavits in their altered state could have no legal effect, not having been sworn to; and that the sale made upon them by the land agent was unauthorized by law.

The making and filing the proper declaration and affidavits in the office of the land agent within the time limited are legal prerequisites to a valid sale of the land by pre-emption.

Appeal from Pulaski Chancery Court.

Hon. H. F. FAIRCHILD, Chancellor.

Opinion prepared by E. H. ENGLISH, Esq.—*See note page* VIII.

John Q. Rice sought, by bill in the Pulaski chancery court, to establish an equitable title to a tract of swamp land, described in the public surveys as the *north-east quarter of the south-west quarter of section thirty-two in township two south, range ten west*, containing *forty acres:* and to cancel a certificate of entry obtained by John M. Harrell from the land agent of the Little Rock district, for the same tract of land, or to obtain, by decree, the benefit of Harrell's entry.

The cause was heard upon the pleadings and evidence, and the chancellor dismissed the bill for want of equity, and Rice appealed.

It must first be determined whether Rice has established his right to the land, for, as well remarked by the chancellor, if he has no title, he stands in no attitude to impeach the legality of Harrell's entry, or to obtain the benefit of it.

On and after the 28th of March, 1859, Rice, intending to secure a pre-emption, made an improvement upon, and put in cultivation a part of the land in controversy. On the 6th of April following, he made a declaration in writing, sworn to before a justice of the peace, setting forth the facts upon which he claimed a pre-emption; and, on the same day, he procured two witnesses to make affidavits before the same justice in proof of his claim.

On the 25th of April, 1859, he filed in the office of the land agent this declaration, and these affidavits, and offered to enter the land, but Harrell had been permitted to enter it, on a claim of pre-emption, two days before.

The chancellor supposing Rice's claim of pre-emption to rest upon *section* 10, *article VI*, *chapter* 101, *Gould's Digest*, *page* 721, held it to be invalid because his improvement upon the land was made after, and not before, the land agent had advertised the swamp lands of his district for public sale, etc.

The answer of Harrell did not attack the title of Rice on that ground. The date of the advertisement is not alleged in the bill or answer, and is not proven with accuracy by any of the depositions; but it is to be inferred, and may be assumed to be true, from the allegations of the bill, that Rice made his improvement upon the land after the publication of the advertisement.

The opinion of the chancellor was based upon a literal and narrow construction of the language of the single section of the pre-emption statutes above referred to. It provides that: "Any head of a family, or other free white citizen of the state of Arkansas, over the age of twenty-one years, who has an improvement on any of the swamp and overflowed lands, who shall, within sixty days after such lands are advertised by the land agent of the proper district, under the provisions of sections two and three, after such lands shall have been reported by the local agents, or if the same is now subject to entry, within sixty days from and after the passage of this act, file his or her declaration in writing, setting forth the fact that he or she claims said tract of land to be described in such declaration, as a pre-emption right, under the provisions of this act, with the land agent of the district in which such lands are, shall be entitled to a pre-emption for the term of twelve months from and after the time of filing said declaration," etc.

"Any head of a family etc., who *has* an improvement" etc. If the word "*has*," as used in this sentence, is to be understood in a literal and restricted sense, being in the present tense, it applies to the time of the passage of the act, and not to the date of the future advertisement to be made by the land agent, or to the time of any other subsequent event. And this construction would cut off all persons from the benefit of the statute, except such as had made improvements upon the lands prior to its passage.

But such construction would not be in harmony with the general policy of our pre-emption statutes, or, we think, with the spirit of the act in question.

After the swamp and overflowed lands were granted to the state, the legislature pursuing the policy which had been adopted by congress, repeatedly offered inducements to the settlement and improvement of the public lands, by acts granting and protecting pre-emption rights.

Thus, by the 13th section of the act of 6th January, 1851, the first act passed by the legislature for the disposal of the swamp lands after they were granted to the state, pre-emption rights existing under acts of congress were preserved: and to persons "who shall reside on or who shall have improved" such lands, the "exclusive right of purchase," was given for the period of twelve months from and after the date of the patents to be issued to the state by the United States.

And by the act of 12th January, 1853, every head of a family who was then a settler upon, or who might thereafter settle upon, any of the undisposed swamp lands, was given a pre-emption right thereto up to the day of public sale.

So, the 14th section of the act of 15th January, 1857, declares that, "Any person who resides on, or who may hereafter reside on, reclaim, or *cultivate* any of the swamp or overflowed lands which may be confirmed to the state, should have a pre-emption right to 160 acres, to be proved up according to existing laws," etc.

Thus the policy of granting and protecting pre-emption rights, as rewards for, or inducements to settlement, improvement and cultivation of the wild public lands, appears to have been a permanent and continuing policy—each act limiting the time in which such rights were to be asserted; some of them fixing the day of public sale as the period of limitation, and others (like that which we are now considering) sixty days after publication of the notice of sale.

We can see no good reason why the legislature should have intended to depart from the general policy of the pre-emption system, in framing the act in question, by granting the right of pre-emption to persons who had made improvements prior to its passage, and denying to persons subsequently improving, within the periods limited by the act, the benefit of pre-emption.

We think the more reasonable construction of the act is, that as to lands which were subject to entry at the date of the act, and which the state desired to put upon the public market at an early period, persons were allowed to make improvements upon them, and file their declarations and supporting affidavits in the office of the land agent at any time within sixty days after the passage of the act; and as to lands unconfirmed at the date of the act, persons were allowed to make improvements upon them, and file their declarations and affidavits at any time within sixty days after such lands were advertised for sale by the land agent. If persons could continue to make pre-emption improvements upon these lands after the passage of the act up to the date of the advertisement, as seems to have been conceded by the chancellor, we can perceive no good reason why they should not have been permitted to continue to make such improvements and file their declarations and proof up to the conclusion of the period of sixty days during which the public notice of the time fixed for the sale of the lands, by the land agent, was to continue.

But if this construction of the act should be regarded as doubtful, Rice made out his right of pre-emption to the land in question, under the act of *13th January*, 1857, *sec.* 14, (*Gould's Dig.*, *art.* 6, *sec.* 15, *chap.* 101, *p.* 772,) which declares, as above shown, that "Any person who resides on, or may *hereafter* reside on, reclaim, or *cultivate* any of the swamp or overflowed lands which may be confirmed to the state, shall have a pre-emption right to one hundred and sixty acres, to be proved up according to existing laws," etc. Rice alleges in his bill, and the proof shows, that he had a part of the land in question in cultivation at the time he made his declaration and filed his supporting affidavits in the office of the land agent. It is true that the cultivation, as well as the improvement, was limited, but one of the witnesses deposed, and no doubt truthfully, that they were such as were usually made by pre-emptors: and doubtless in this, as in most instances, which have come before us, the letter rather than the spirit of the pre-emption acts has been observed. (As to the right of Rice

to a pre-emption under the act last above referred to, see *Woodruff vs. Core*, 23 *Ark.*, 341.)

The chancellor was also of the opinion that Rice failed to make out his case, by omitting to allege in his bill that his pre-emption claim was filed in the land office within sixty days from the date of the advertisement.

It is true that this is not directly alleged as such a material fact should have been. But the bill alleges that on and after the 28th March, 1859, Rice made his improvement and cultivation upon the land. That on the 6th of April following, intending to avail himself of the benefit of the pre-emption laws, the declaration was prepared, and the supporting affidavits made before a justice of the peace, and then the bill proceeds to allege: "that your orator having plenty of time within which to file the said declaration and affidavits in the office of the land agent for the Little Rock district, was not in a very great hurry to do so, *it being considerably more than a month before the day appointed by said land agent for the public sale of said land*, and therefore he did not file the same until the 25th day of April, A. D. 1859, as will appear by reference to exhibit A." (Exhibit A was the declaration, affidavits and file endorsement of the land agent.)

The law required the public sale to be made on the first Monday after the expiration of the sixty days from the date of the advertisement, and it must be presumed that the land agent, acting under his official oath in the discharge of official duties, fixed the day of sale in conformity with the law, in the absence of any showing to the contrary.

The first Monday after the expiration of sixty days from the date of the advertisement being fixed as the day of sale, and it being *considerably more than a month* from the 6th of April, the day on which the declaration and affidavits were made, to the day of sale, and the declaration and affidavits having been filed in the office of the land agent on the 25th of April, it necessarily follows that they were filed within sixty days from the date of the advertisement.

Had Harrell demurred to the bill on the grounds that the material fact in question was alleged inferentially and not directly, and insisted upon the demurrer at the proper time, the court might properly have sustained the objection, and ordered an amendment of the bill. But Harrell answered the whole bill, without controverting the filing of Rice's pre-emption claim in time, and in the conclusion of the answer interposed a demurrer in general terms for want of equity, craving leave, in the usual form, of insisting upon the demurrer at the final hearing.

We think it would be unjust and an unusual practice to dismiss a bill for want of equity at the final hearing, upon such a demurrer, for a defective allegation like the one in question, and put the complainant to the delay and expense of a new suit.

It is manifest, we think, from the pleadings and proof that Rice filed his application to enter the land in question by pre-emption within the time required by law: and it remains to consider the validity of the opposing title of Harrell.

On the 23d of March, 1859, Harrell filed in the office of the land agent his declaration supported by his affidavit, and the affidavits of two witnesses, stating that he had made an improvement upon, and claimed to enter by pre-emption, the *south half of the north-east quarter, and the north half of the south-east quarter of section thirty-two, in township two south, range ten west*, containing one hundred and sixty acres.

It will be observed that the land in controversy was not included in these affidavits.

On the 23d of April, 1859, Matheny, the attorney of Harrell, went to the land office, and by permission of the land agent, erased from the declaration and affidavits the lands above described and inserted in lieu thereof, "The *south half of the north-east quarter, and the north-east quarter of the south-west quarter, and the north-west quarter of the south-east quarter of section* 32, *township* 2 *south, range* 10 *west*, 160 acres."

It will be observed that the declaration and affidavits, as amended, omitted one of the forty acre tracts of land embraced

by them when made and filed in the office, and included in lieu thereof the tract of land in controversy.

Neither Harrell nor the witnesses were present when this change was made in the declaration and affidavits. Harrell had in fact, at that time, no improvement on the tract of land in controversy, and one of his witnesses had made an affidavit to prove Rice's improvement.

Upon the declaration and affidavits so altered, and without their being again sworn to, the land agent permitted Harrell to enter the land by pre-emption, and issued to him a certificate of entry.

The affidavits, in their altered form, can have no legal effect. The new state of facts inserted in them was never sworn to by the affiants. They must be regarded, for the purposes of this suit, as remaining as they originally were when made and filed in the land office.

So treating the affidavits, it follows that the land agent permitted Harrell to enter the land in controversy by pre-emption, without the declaration and affidavits required by law, that he had an improvement thereon, etc.

The sale so made was unauthorized by law. The statute provides: "that the land agents shall have full power and authority to sell any of the swamp and overflowed lands, but in making such sales, shall be govered by the rules, provisions and regulations now in force and hereafter provided, or which may exist by law at the time of such sale." *Act of 12th January*, 1853, *sec.* 7; *Act of 30th December*, 1856, *sec.* 2.

The making and filing of the proper declaration and affidavits in the office of the land agent, within the time limited, were legal pre-requisites to a valid sale of the land by pre-emption. Without them the land agent had no legal power to make such sale.

As remarked by this court in *Cheatham vs. Phillips*, 23 *Ark.*, 87, the swamp lands belonged to the state. The title to them is not in the land agent; they derive their power to sell them from

the statutes, and have to follow their requirements in order to make valid sales.

It is true, as remarked by the chancellor, that no fraud is attributable to Harrell in the change of the affidavits. It appears that after they were filed in the land office, Harrell concluded to abandon one of the tracts described in them, and to claim the land in controversy by pre-emption, and instructed Matheny to withdraw the application and affidavits from the land office, and make out a new application, etc.; but Matheny, by permission of the land agent, took the shorter mode, and made the change in the original papers above described.

But it is not a question of fraud, but a question of power in the land agent to make a sale of land by pre-emption without a compliance with the material provisions of the law from which he derives his authority to sell.

The decree of the court below must be reversed, and the cause remanded with instructions to render a decree in favor of Rice as prayed by the bill.

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Marshall vs. Green Exr.

So far as the answer of the defendants is responsive to the bill, replying to it in the negative and positively, and not admitting it and seeking to avoid the effect of the allegations and admissions by counter allegations, it is the *testimony* of the defendants in their own behalf, and must prevail unless overweighed by other testimony.

Two witnesses, or one whose testimony is well corroborated by circumstances, are necessary to overweigh the direct testimony of a respondent so given.

At the same time the answer is no more sacred than the testimony of a disinterested witness.

And its credit may be wholly destroyed by equivocations, evasions, concealments evident on its face, contradictions, improbabilities, or any other of the many defects and vices in evidence which often make the most positive statement of a witness weigh little or nothing.

Green's executor having filed a cross-bill to subject certain lands to execution at law, the defendants being father and son, answered that after the bond for title had been made, whereby the father acquired a right to the land, he made a transfer of the bond and delivery of possession of the land to the son: *Held,* that this was matter in avoidance which the defendants must prove.

The father having denied that he purchased the land for himself, states in his answer that "he may or may not have told his vendor that he was purchasing for himself;" this being in regard to a matter within his own knowledge, and not being a denial, is in law equivalent to an admission that he did so state.

The answer of one of the defendants being evidently untrue as to a certain statement of a fact within his own knowledge; the maxim *falsus in uno falsus in omnibus* applies, and his testimony ceases to be entitled to any credit whatever.

The defendant must take the privilege of being a witness for himself *cum onere,* subject to all the rules and principles of the law of evidence by which the law strives to guard against the dangers of perjury.

He must be careful to testify fairly, frankly, ingenuously, fully, and it is the duty of his solicitor to see that he does it.

A claim against the estate of a deceased person cannot be verified by the affidavit of an agent.

Execution having been levied on certain lands as the property of the defendant in the judgment at law, the son of the defendant filed a bill in chancery to injoin the sale, claiming the lands as his own, asserting that they had been conveyed to him by his father. Many circumstances combining to show that this alleged conveyance was merely colorable and intended to hinder and delay the creditors of the father, the same is held to be void.

The creditor having filed a cross-bill to subject the lands to the payment of his debt, the court below, in decreeing the sale from the father to the son to be fraudulent and void, should have further decreed that unless by a day fixed, the defendants in the cross-bill should pay the plaintiff the amount of the debt, damages, interest and costs adjudged at law, and also costs on the original and cross-bill, the lands, or so much thereof as as should be necessary, should be sold by a commissioner.

The proceeds of such sale should first be applied to payment of the costs on the original and cross bill and the expense of executing the decree, and the residue should be applied to the payment of the judgments at law, and the surplus, if any, should be brought into court.

Should the proceeds of such sale fail to produce satisfaction of the costs and

judgments at law, the creditor should be remitted to his proceedings at law for the collection of the residue by execution or garnishment.

Damages on the dissolution of an injunction can only be awarded by the court where money is injoined, and then "on the amount released by the injunction."

The suit on the original bill in the case not being to enjoin the collection of a debt generally, but only to prevent the sale of particular property for payment of it, damages should not have been awarded by the court below on dissolving the injunction.

And the court below having erred in this respect to the injury of the appellant, the appellee must pay all the costs accruing in this court, although in other respects the decree entered in this court be in his favor.

Appeal from Hempstead Circuit Court.

Hon. LEN B. GREEN, Circuit Judge.

WATKINS and EAKIN, for the appellant.

S. H. HEMPSTEAD, for the appellee.

Opinion prepared by A. PIKE, ESQ.—See *note* page VIII.

This suit comes before us upon a cross-bill for discovery and relief, brought to subject certain lands, as the property of William Marshall, the legal title to which is in James A. Marshall, to the payment of two judgments against the former, executions on which judgments had been levied on the lands, and the lien of the judgments is claimed to have fastened upon them in equity.

The chancellor decided the cause, and granted the relief, on what was virtually an issue of fact, as to the real ownership of the lands; and it is for us to decide whether that finding is so plainly against the evidence furnished by the answers and testimony, as to require us to find otherwise, and to reverse the decree.

To determine this, it is first necessary to ascertain what facts in the case are admitted, or so fully proven as to be beyond dispute.

On the 26th of April, 1858, William Marshall the father, a

man about 57 years of age, agreed with B. F. Renfro to purchase from him a small piece of land in Hempstead county, near the town of Washington, containing about two acres or a little less for $203.25; executed his note for this sum and received a bond by which Renfro agreed to convey him the land, on payment of the purchase money.

William Marshall immediately took possession of the land, and continued in actual possession and occupancy of it, from that time forward, until decree rendered in the court below.

Some two months after the first purchase, William Marshall also contracted orally with Renfro for a piece of land 80 feet square, near the other, at the rate of $175 per acre. This sale was evidenced by no writing, nor was the price secured by any; but the purchaser took possession, and ever after retained possession.

Soon after purchasing, William Marshall moved upon the land, and proceeded to build a dwelling house upon it, which, as soon as it became habitable, he occupied and lived in until decree below.

William Marshall was, by trade, a wagon-maker, and had carried on that business in Washington for several years prior to 1858. Both before and after the beginning of that year, his son James A. Marshall, was in the habit of having and collecting accounts for work done by his father.

William Marshall, Renfro testifies, had settled with him, previous to the 8th of March, 1859, the whole purchase money for both pieces of land, except some $17 or $18. Thirty-one dollars were settled by an account, at first made out in the name of William Marshall, but changed, when taken back for correction of items, into the name of James A. Marshall, for work on wagons and ploughs, done by William Marshall, at his shop in 1858, commencing with the 1st of February and without later date of month or day. Eighty-three dollars were settled by transfer of an account against W. A. Muldrow, in favor of James A. Marshall, for the same kind of work, done by William Marshall, in January, February and April,

two items only being later than February, and these amounting to $8.75 only. This account was verified by the affidavit of William Marshall, on the 11th of February, 1859.

The amount of this account was included in a receipt, dated January 1, 1859, given by Renfro to James A. Marshall, when William Marshall handed him the accounts, for an order on George Muldrow for $109.75, due by the estate of Warren Muldrow, and $79.75 due by George Muldrow. Both were for work done by William Marshall.

Previous to March, 1859, William Marshall several times told Renfro that when he should fully have paid for the land, he meant to have it conveyed to his daughter.

The lumber for building the house was purchased in the name of James A. Marshall, as far as purchases are proven. Part was purchased from Collins, to be delivered at William Marshall's building. William Marshall left the bill, and the account for the lumber was made out against him, but James A. Marshall afterwards told Collins *he* would settle the bill, and directed it should be made out against himself. Part of this bill was paid for by shop-work done by William Marshall. Collins had also furnished other lumber, which was delivered on a lot sold by J. A. Marshall to J. R. Eakin, and for the price of this lumber, in part, Eakin gave J. A. Marshall his note, which was given Collins by J. A. Marshall in part payment for the two bills of lumber. Part of the bill for the lumber for the house was also settled by a grocery bill due by Collins to J. A. Marshall & Brother. Another lot of lumber was bought from Matthew Moss, William Marshall bringing the bill for it, but it being in James A. Marshall's name. James A. told Moss *he* had sent the bill, and would see it paid and he gave his note for it. William Marshall said it was to build a house on land he had bought from Renfro.

On the 7th of March, 1859, William D. Green, as executor of the will of George W. Green, filed in the office of the clerk of the circuit court of Hempstead county a transcript of a judgment obtained by him against William Marshall before a justice

of the peace, on the 13th of December, 1858, for $88.33 debt, and $60.88 damages, with costs, and interest at 10 per cent. on debt and damages.

And on the 11th April, 1859, he filed a transcript of another judgment before a justiee of the peace, also obtained by him against William Marshall, on the 3d of January, 1853, for $66.09 debt, $13.20 damages and 87 cents costs, with interest at 10 per cent. on debt and damages.

On the 8th of March, 1859, the day after the first transcript was filed, William Marshall, by indorsement under seal, on the bond for title, assigned it, and all his rights and equities therein, to James A. Marshall, and directed deed to be made to him; this being stated by the indorsement to be due for value received, and in pursuance of a previous agreement between the father and son, by which, in consideration that the son would pay the notes for which the bond was given, he was to acquire all the father's right, title and interest in and to the land. James A. Marshall then told Renfro, on applying to him the same day for a deed, that the indorsement had been very carefully drawn, because he expected to have to fight Green for the land, and that, if it was not fully paid for, he would pay the balance still due; and he did give his note for the $17 or $18 unpaid, and Renfro made him a deed of conveyance.

Executions issued from the clerk's office on the two judgments, against William Marshall, returnable to May term, 1859, and were levied on the lands, and these advertised to be sold on the 30th of May.

To prevent this sale, James A. Marshall, on the 30th of May, filed his bill against Green as executor, the sheriff and William Marshall, claiming the land as his, and seeking to injoin the sale. The injunction was granted. At November term 1859, Green answered, and exhibited cross-bill to subject the lands to his executions, as the property of William Marshall, making the father and son defendants. Each answered; and the cases being duly at issue were heard together.

So far as the answers of the Marshalls are responsive to the allegations of the bill, replying to them in the negative and positively, and not admitting them and seeking to avoid the effect of the allegations and admissions by counter-allegations, they are the *testimony* of these defendants, in their own behalf, and must prevail, unless over-weighed by other testimony. Two witnesses, or one whose testimony is well corroborated by circumstances, are necessary to overweigh the direct testimony of a respondent so given. At the same time, the testimony of a respondent, in the shape of an answer is no more sacred than that of a disinterested witness; and its credit may be wholly destroyed by equivocations, evasions, concealments evident on its face, contradictions, improbabilities, repugnance to facts impossible to be denied, or any other of the many defects and vices in evidence, which often make the most positive statements of witnesses weigh little or nothing.

The principal allegations by which the son's title is impeached are:

1st. That the father bought the land for his own use and benefit.

This the son virtually admits, by not denying it, and by admitting that he did *not* at first purchase it for the use of and on behalf of him, the son. His account is, that, about the 1st of May, 1858, (four days after the purchase) before the bond had been proven, acknowledged or recorded, or any thing done to carry it into execution, the father, finding himself in embarrassed circumstances and professing to be unable to conclude his bargain with Renfro, agreed with the son to transfer to him his interest in the contract, if he would pay the purchase money; which proposition the son accepted, and the father delivered him the bond and put him in possession.

But the father swears that he *originally* made the purchase on account of his son, the land to be paid for out of the son's means, and to be conveyed to him for his own use. He says that he may or may not have *said*, at the time of the purchase, that he was purchasing for his own use; a matter of more importance and

significance than he seems to imagine it, but he avers that the bond for title was made *hastily* and *carelessly* to himself, instead of to James A. Marshall, *for whom he intended the purchase*, and to whom he afterwards transferred the bond and delivered possession. And he broadly avers that he never meant to buy for himself, and never paid a cent for the land out of his own means, and that he had never set up any claim to it, since the verbal transfer to his son.

This matter of a verbal transfer and assignment of the contract and bond, being set up affirmatively, to avoid the legal consequences flowing from the facts that the father purchased the land, the son in no way intervening, and that he gave his note for the price, and took a bond for title to himself, which note and bond for title were still in existence uncanceled as late as the 8th of of March, 1859, more than ten months afterwards, is still matter in avoidance, pleaded affirmatively, and put in issue by the replication. The only proof that it was ever made is furnished by another son of William Marshall, who states that he had heard his father say, two or three times, the first time about two years prior to November, 1860, that he had transferred the land to James A. Marshall. It is very certain that if the son had filed a bill against the father for specific performance of this verbal contract, this testimony would not have entitled him to relief; nor would any degree or quantity of parol evidence as to the making of the bargain have done it, because there would have been no sufficient proof of part performance to take the case out of the operation of the statute of frauds, as we shall hereafter more clearly see.

The testimony of William J. Marshall amounts to but little, on this point, not only because the father himself paid, with accounts for work done by him, nearly the whole purchase money, repeatedly told Renfro that when he should have finished paying for it, he would wish it conveyed to his daughter; but also because the account of the purchase given by the father himself, in his answer, carries its own contradiction upon its face. He evades

answering that he did tell Renfro he was purchasing for himself, by saying that he may or may not have said so, when it is entirely improbable that, when giving his own note for the price and taking a bond to himself, he did not say something equivalent to a statement that he was buying for himself. The answer, couched in these disingenuous words, is equivalent to an admission that he did *not* give Renfro to understand that he was *not* purchasing for himself, but for his son. And the answer that he may or may not have said so and so, not being a denial, and this of a matter certainly within his own knowledge, is in law, as it is in reason, eqnivalent to an admission that he did so state.

The averment that the bond was "hastily and carelessly" taken to himself, is worse than an evasion. Did he also "hastily and carelessly" execute his own note for the price? It is inconceivable how any man could expect to blind a chancellor or avoid the legal conclusions resulting from the deliberate execution of the most solemn and binding instruments, by such a transparently absurd averment. If the chancellor was satisfied that this deliberate allegation was false, he could not but conclude that the positive and reiterated averment that he purchased, not for himself, but for James A. Marshall, was also willfully and deliberately false. We cannot but think he was justified in so concluding; and then, as the whole weight of William Marshall's answer as testimony depends upon his credit as a witness, the maxim "*falsus in uno, falsus in omnibus*" applies, both in law and reason, and his testimony ceases to be entitled to any credit whatever.

Fraud always takes a tortuous course, and endeavors to cover and conceal its tracks. The defendant to a bill which seeks to unearth and expose it, has a mighty advantage in being allowed to swear in his own behalf. He must take the privilege of being a witness for himself *cum onere*, subject to all the rules and principles of the law of evidence, by which the law strives to guard against the dangers of perjury. He must be careful to testify fairly, ingenuously, fully. It is the duty of his solicitor to see that he does it, though, as every one knows who has been familiar

with the chancery practice in this state and elsewhere, such is not the universal idea of the solicitor's duty; and answers too often display ingenuity in evasion, and reluctance to admit the whole truth rather than fairness and frankness; a fault so general as to seem almost to have ceased to be a fault at all.

Moreover, the two accounts, given by the father and the son in their answers, are irreconcilable and both improbable. If, as the father alleges, he purchased for the son, how could the son *truly* answer, that "he does not know, and has not been informed, save by said cross-bill, and cannot set forth as to his information or belief or otherwise, whether or not the said William purchased the said tract of land for his own use or otherwise." That is not credible, if the father's answer is true. Both pretend that the son has been virtually the guardian of the father for years, the latter being unable to support himself, without the help of the former; and the former hiring him to work for him and collecting his accounts. Is it at all credible that the father would have purchased land for the son without authority from him, without notice to him, without letting him know he was about to do so, or had done so? Can it be true that the son had, when he answered, no *information* or *belief* on that point? It is too evident that this is one of those too common tricks of evasion in answering, or rather in testifying under oath, which *are* common, because they have not been visited with the consequences which they demand. It is far too common for respondents to answer that they have no knowledge, information or belief on a given point; this being done for the purpose of putting the complainant to trouble, when they *do* possess sufficient information, and their belief and conviction are sufficient and sufficiently well founded to make it their sworn duty to admit the fact alleged. A defendant is as much bound to answer as to his information, hearsay and belief, as to his knowledge. What *he* believes, the court will believe, if it is against his interest. Fair and frank answers will be much more common than they are now, when parties cease to swear falsely by such denials, and when the tes-

timony of which these make part, is held to be wholly discredited by them, and chancellors shall pronounce them entitled to no weight or consideration. A defendant should be the more scrupulously frank and fair, because his interest exposes him to suspicion.

Not only when an answer which is to be the defendant's testimony in his own behalf, contains a deliberate, positive and willful mis-statement of fact; but equally when it is manifestly reticent, evasive, or disingenuous, the chancellor not only *may* act on the maxim "*falsus in uno, falsus in omnibus*," and attach little or no credit to the whole; but he *ought* to do so, as a jury should, where a witness before them, testifying orally, deliberately perjures himself as to a single fact, or reluctantly lets the truth ooze out, or attempts to evade or avoid full disclosure, or testifies unfairly and disingenuously, or contradicts himself, or is contradicted by circumstances that cannot lie.

When it was demanded of the chancellor that he should believe the statement of James A. Marshall, that four days after his father purchased the land, he concluded he could not carry out the bargain, and *therefore* assigned the contract and bond for title, by parol, to his son, it devolved upon him to compare this testimony of the claimant under the alleged parol transfer, with all the facts and circumstances in proof, and determine whether he could give it credit or not. In doing so, he could not fail to be startled by the singular reply of the son as to his knowledge, information and belief in respect to his father's purchasing or not purchasing for himself. It was singular that the father should become convinced of his inability to pay for the land only four days after he bought it; and when he could and did pay for it, and for another piece of land purchased two months afterwards, with accounts for work done by him, which were due at the time of the purchase. It was singular, if the father so soon concluded that he could not pay for the land, that he should, two months afterwards, two months after abandoning the contract to his son, go on to purchase from the same person an adjoining piece of land. It was

singular that the son did not at once substitute his note in place of his father's, and himself pay for the land with those accounts which he claimed as his own property. It was singular he should take no assignment of the title bond for ten months, and not until one of the transcripts on which execution issued had been filed in the clerk's office. All these circumstances were materials for the chancellor's judgment, affecting the credibility of the whole answer of the son.

2d. That upon the purchase from Renfro, the father took possession of the land, and proceeded to improve it and to build a dwelling-house upon it: that he contracted for the lumber and materials in his own name, erected the building in his own name, and for his own use, his son having a family of his own and living elsewhere, and following a different business; that the father employed hands to work on the house, and paid them in his own labor, or with his own money: that the son took no control over the building, ordered no materials, and paid nothing towards the expense of building or improvement, until about the 8th of March, 1859; that he hired no hands to work on it, and became responsible for nothing connected with it, until about the same time; and that the father continued all the time in possession, the son never claiming to be proprietor in any public or open manner until about the same time; and that if the son made any payments on account of the house, he made them out of moneys earned by the father at his trade, collected by the son on settlement, and to be applied for the father's benefit as he should direct; the son having, for some years, been in the habit of collecting his father's accounts.

The reply to this is: that the father did take and retain actual possession and occupancy of the land, and lived on it until the suit was brought, his son having a family of his own and living elsewhere; but—that he was in reality, in consequence of the verbal transfer of the contract and bond, only the son's tenant at will or sufferance; that the house *was* intended for the residence of the father: but he did not do any work or procure it to be done,

or contract for any lumber or materials, in his own name, or otherwise than as agent for the son and on the son's responsibility; that the son exercised full control, assumed all the responsibility and bore all the expenses of improvements, after the verbal transfer, the father improving entirely under his control and direction. It is not pretended that the father paid any rent for the land. It is admitted that nothing was paid him, or agreed to be paid as a consideration for his transfer of the title. It is not disclosed, as was afterwards proven, that the purchase-money had been nearly paid by old accounts for work done by the father. It is not alleged that the son planned the building, or superintended the work, or hired any hands to work on it, or in any way interfered.

It is further replied, that the purchase money of the land and the materials of the house were in part paid and settled with accounts for work done by the father; and that before the purchase the son had been in the habit of collecting accounts due his father; but this was because the father was embarrassed, and the son furnished him supplies and money, and took the accounts in part payment for the same; and that since January, 1853, the son owned all the accounts, and the father only collected them, when he did so at all, as his employee; and that the son paid Renfro with money and assets of his own—because he had fully settled with the father for all the proceeds of his work and labor that had come to his hands; and the son sometimes used the father as his agent, in the transaction of business, and employed him as a mechanic to work on the house. And to prove that the son did not pay for the land or buy materials with means derived from the labor of the father—"except such as belonged to the son under contract," it is pleaded that on the 3d of March, 1858, the son agreed with the father that he would pay him $500 for his work and the proceeds of it that year, he, the son, controlling the business, furnishing the materials and receiving the proceeds: an arrangement which has continued every year afterwards; that Renfro was paid in part by work done by the father while in the son's employ: how much, is not stated.

This agreement is found with the testimony of William J. Marshall, another son. It was executed by each party under his seal; and the witness proves the signatures genuine; and that he saw and read it in the early part of the year 1858, when it was placed by James A. Marshall in the safe at the grocery, for safe-keeping, where it remained twelve months or more. There is no proof that this arrangement was made public. The witness had heard his father say, he was working for James A. Marshall, several times since the agreement was made; heard him say so soon after it was made, and since it was made James A. has exercised the right to control and collect all the accounts for work done by the father. The instrument fixes the compensation of the father at *four* hundred dollars. The answers say it was *five* hundred: and William J. Marshall says that both parties told him it was *five* hundred. If the arrangement was a real and *bona fide* one, made by a poor man unable to support his family by his work, this indifference—as to the amount of compensation he was to receive—might well have seemed singular to the chancellor.

So this witness says that, about two years or over before he testified (which he did in November, 1860,) he heard his father say he had transferred to James A. the lands bought of Renfro; and that "since then James A. Marshall has exercised control and ownership over that property" and had the improvements made on it, though the father occupied it and worked on the house. Never heard him claim it as his own: he said it was James A. Marshall's. This was before the 7th of March, 1859. He proves that James A. had furnished some lumber for the shop and paid for some hauling, since the spring of 1858: and that he exercised acts of ownership over the property by furnishing materials, paying money etc. How much he paid, the witness could not say; but swears he furnished all the lumber and paid out a great deal: but how much lumber he furnished he does not know.

If there was really this distinct arrangement, made in earnest and in good faith, it is hard to conceive why the account against Renfro should first have been made out in the name of William

Marshall as creditor, and then changed to that of James A. Marshall. And also it should be noted that the claim against Muldrow's estate, for work done by William Marshall, was verified by *his* affidavit, though that of the creditor himself was required by law, and a claim could not be verified by the affidavit of an agent, as this court had decided six years before.

That it was not made publicly known that the son was building the house, the father being only his agent, is proven by Renfro, who understood from the father's own statements as to the plan that he himself was directing it, and that he was controlled in regard to the plan by the consideration of expense. It is plain the arrangement was a secret one.

The agreement between the father and the son set up in the answers, under which it is claimed the father worked at his trade, is affirmative matter, to avoid the effect of the admission that the accounts of William Marshall for work, were used by him to pay Renfro for the land, and by James A. Marshall to pay for materials for the house. Such an agreement is produced and proven by a witness. It was a secret agreement, not known to the public: and whether it was made in good faith, and as evidence of a real and actual business arrangement, or only as a device to hinder creditors, was a question for the chancellor to decide upon all the circumstances.

3d. That upon a fair accounting, a large balance would be found due from the son to the father, charging the former with all moneys collected for the latter, and crediting him with all advances and payments:—and by special interrogatories the son was required to state how much he had collected, in all, from persons who owed his father: how much his father ever owed him; and how much more he had paid for his father than he had received; and as to that the cross-bill prayed for an account to be taken.

The son declined to account: but stated that his father was largely indebted to him at the time of the verbal transfer of the contract for the land, then owing him *about* $381.91; and that he continued largely indebted, owing him about the same *when*

James A. Marshall paid Renfro for the lands: and at the time of answering about $736.12. This accuracy as to the dollars and cents would seem to indicate that the materials for a full account existed, and that the account had been kept and the balance due at different times ascertained; but no account is furnished or statement of items of advances made or of accounts collected.

The general charges, that the transfer of title was made to prevent creditors of the father from collecting their debts; and that the other arrangements and dealings were made and had with the fraudulent design of securing his earnings to the father and shielding his property from his creditors, are broadly and positively denied by both answers.

The son submitted that it is no fraud upon creditors to assist, by advances of money and supplies, a parent whose advancing age and indigent circumstances render him unable to support himself; and to take in part remuneration such choses in action or other effects as the father may be able to transfer; or to step in and relieve him of a bargain which he is unable to carry out: or to furnish him with a house for his shelter and protection. And this is earnestly and eloquently urged upon us by his counsel as presenting the true features of his case.

If such and such only *were* the purposes and motives of the son, it probably seemed to the chancellor, as it certainly seems to us, that they could have been attained in a more natural and straight-forward way. If the proceeds of the father's labor were insufficient to support him as his family, and the son was willing and intended to loan or present him with such amounts, in money or supplies, as the proceeds of his labor fell short of furnishing, it was easy to do so without interfering with his business, or hiring his time and labor. The means used were more than was necessary to attain the object, and persuasively suggest a further object and purpose, the one assigned not being adequate to account for the resort of the parties to these means. Did the necessity of contributing to the father's support require that the son should demand to be repaid for his advances, as far as the father could

repay him, not in moneys collected by the father from those who became indebted to him, but in the accounts themselves: that the son should take the trouble of collecting those accounts; that he should himself carry on the father's business, pay him an annual stipend, and be entitled to all the proceeds of his labor? That course would naturally engender suspicion that the object was not alone to contribute to the father's support by the addition of gratuities to his earnings, but also to place those earnings beyond the reach of his creditors. If such was not one and perhaps the chief object, what necessity is pleaded or shown for so taking control of the father's labor and business, and collecting the accounts for his work? Such secret arrangements between father and son, being unusual, are naturally suspicious, and could be freed from suspicion only by being publicly avowed and made known.

So, too, if the son desired merely to give his father a home, the way to do so legally and fairly was easy. A purchase of the land by the son himself, and a lease for years, or conveyance for life, in trust, duly placed on record, would have been a plain and straight-forward mode of effecting what was desired. But fraud does not move on straight lines, but seeks circuitous and secret paths to effect its purposes, and by these betrays itself. If the son had taken the simple and natural measures to effect the ends which he professes he had alone in view, we could have believed that he had no other, and that he was actuated by no other motives than those which he professes. The only key to explain the devices to which he resorted, is supplied by the facts that his father had long been in embarrassed circumstances, and that the land and house were in danger of being subjected to payment of the complainant's judgments. And if the purpose of the son really was not to put his father's earnings beyond the reach of his creditors, and to enable him in reality to own and to enjoy the land purchased, laughing at the attempts of his creditors to subject it to the payment of his debts, it is exceedingly unfortunate that the course of action pursued and the plans resorted to, were

such as fraud, seeking to hinder and defeat the claims of creditors, would have availed itself of, as most appropriate and efficient.

In *Hildreth vs. Sands*, 2 *J. C. R.*, 35, the debtor had continued in possession, and in the exercise of acts of ownership. He superintended the erection of a building on the premises, and made improvements on them at his own expense, and received the rents. The party claiming against the creditors, alleged in his answer, that the debtor so in possession acted all the time as his agent; but the chancellor said, "there is no certain authority produced from which that agency flowed, nor any voucher or account exhibited as evidence of the agency, nor even any assumption of that character, prior to the autumn of 1810, when C. Sands first represented himself as acting in that capacity. These continued acts of ownership are inconsistent with the averment of a fair, bona fide sale of the property in February, 1807, and inconsistent with the ordinary course of dealing, when no imposition is intended to be practiced upon mankind." And he referred to *Codwise et al., vs. Sands*, 4 *Johns.*, 536, where it was held in the court of errors, "that the receiving of rents and managing the estate by the vendor, after an alleged sale, and under an assumed agency from the vendee, but without any evidence of a genuine agency, other than the uncorroborated assertion of the party, was a strong indication of fraud." Nothing, he said, would be more destructive to fair dealing and to the rights of others, than to permit such a miserable contrivance to prevail: for all fraudulent sales could be masked in this way with the utmost facility. "Whether such a fraudulent conveyance," he said, "shall stand or fall, is a question deeply interesting to the whole community."

In the court of errors, 14 *John.*, 493, upon an opinion delivered by SPENCER, J., this decree was unanimously affirmed. The question was, whether a deed executed in February, 1807, was to be deemed fraudulent. The party seeking to avoid it was purchaser of the property under a judgment obtained in February, 1808; but it was proved that Sands was under considerable embarassments in 1807, and Judge SPENCER said that the court had a right

to infer that the judgment was obtained in regular course of law, and that the debt must have been due when the deed in question was given. In this case, it is admitted that William Marshall was embarrassed long before 1858: one judgment was obtained in 1853, and though the other was not obtained until December, 1858, the large amount of damages or interest ($60 88) compared with the debt (88 38) shows that the debt had been due many years before.

So the judge there said that it was urged that Sands might have had property abundantly sufficient to satisfy his creditors, independently of the lands in question. But that, he said, was not proved, and it was for the appellant to make out the fact; and he not having done so, the inevitable conclusion was that Sands had no other property out of which his creditors could obtain satisfaction. He then remarked on the conduct of the appellant, as not such as that of a *bona fide* purchaser would have been: and said that his answer as to the time when the deed was made and the first knowledge he had of it, was open to severe remark: and added: "it is pretended that he acted as an agent to the appellant, but no authority for that purpose is produced, and like the rest of the facts, it stands on the naked assertion of the appellant."

It is urged upon us that the utter want of caution of these parties repels any presumption of fraudulent conduct or intent. In this connection we are referred to their mistake as to the price to be paid William Marshall by his son, for his labor in 1858, and to their uncertainty as to the date of the purchase of the land 80 feet square. To us the former seems quite inconsistent with the hypothesis that the agreement was made in earnest and to be really acted under; and the latter with the alleged fact that the son received a transfer of all his father's right to the land on the 2d of May, 1858. That the assignment on the bond *might* have been antedated, and that its not being so is evidence of fair dealing, has been duly weighed by us, but amounts to very little when coupled with the facts that it is evidently the work of

one familiar with the law, and that Marshall "had had it very carefully drawn, because he had Green to fight." If he had ventured on antedating it, the handwriting might perhaps have disclosed by whom it was written, and the testimony of that person might have shown when it really was executed.

SPENCER, J. said in *Sands vs. Hildreth*, "I cannot take the trouble to go through all the evidence of fraud, nor shall I cite a single adjudged case; but content myself with saying that I never met with a more marked case of actual, positive fraud; and if such a deed, so contaminated, is allowed to stand, there would be an end of all upright and honest dealing between man and man, and no creditor would hereafter have the least chance of coercing a dishonest debtor to pay his debts." Whether we should or should not be justified in using language so strong and pointed in this case, we are at least prepared to say with the chancellor; that we are satisfied from the facts which have been stated that the transfer to the defendant was colorable merely, and intended to cover the property from claims then existing, or then impending and anticipated; and that, as against all such claims, the deed is to be adjudged fraudulent and void.

The court belowed decreed that the injunction granted on the original bill should be dissolved and the creditor remitted to all his remedies at law to make the property liable for the debts in question, and awarded damages at six per cent on the dissolution of the injunction, and the deed of Renfro was decreed to be "in all things set aside," so far as concerned the collection of the judgments in question; and that deed was "for the purpose of collecting said judgment debts, in all things canceled, set aside and held for naught"; with decree for all costs against the defendants.

In regard to the damages, were are of opinion that the case was not one for awarding them. By the statute, damages are to be assessed and awarded, only "when money has been injoined," and then "on the amount released by the dissolution of the injunction." This was not a suit to injoin the collection of a debt

generally, but only to prevent the sale of a particular property for payment of it. The existence of the debt and the validity of the judgments were in no wise impeached. The judgment debtor was not complainant, nor was the injunction granted to him. The collection of the debt out of other property, if his, was not injoined: and it might well happen that a third person could well ask for and obtain an injunction like the present, to prevent the sale of land claimed by him, without the judgment debtor having any connection with the question involved. Damages can only be assessed when the judgment debtor obtains an injunction to prevent the collection of a money demand. So much of the decree, therefore, is erroneous.

In *The State vs. Curran*, 15 *Ark.*, 20, the proper form of decree in a case like the present is given. The court below should have held the transfer of the title bond to James A. Marshall, and the deed to him, fraudulent and void as against these debts, and therefore should have decreed that unless by a day fixed, the defendants or one of them should pay the complainant the whole amount of debt, damages, interest and costs, adjudged by the said two judgments and of subsequent costs thereunder, and should also pay all the costs in the original suit and in the suit on cross-bill, in the court below, that then the lands specified in the pleadings, or so much thereof as should be necessary should be sold on that day, at the court house door in the county of Hempstead, by a commissioner appointed by the court for that purpose, and after a specified notice; that the commissioner should execute and deliver a deed or deeds to the purchaser or purchasers, conveying to him or them all the right and estate of both the defendants in said land, or so much thereof as might be sold, on the seventh day of March, 1859, or at any time since; that should the proceeds of such sale fail to produce satisfaction of said judgments and payment of costs, then that complainants should be remitted for the residue unsatisfied by said judgment to his legal remedy by execution or garnishment; and that the commissioner should first pay out of the moneys relized by such

sale the costs in the original and cross-suits, in the court below and the expenses of executing the decree, and then apply the residue to the satisfaction of said judgments, bringing the surplus, if any, into court.

The decree below will, therefore, be reversed, and decree entered here in conformity to this opinion, the court below to appoint the commissioner and fix the day of sale, and as the decree must have been reversed on appeal, as to the damages assessed, if otherwise properly framed, the costs in this court are to be paid by William D. Green, executor of George W. Green, the appellee.

BRANCH VS. MITCHELL.

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When any of the defendants in a chancery suit are minors, the court is the guardian of their rights, and must give them here as well as below, the benefit of every ground of defence of which they might have availed themselves by demurrer or by general and particular denial of the allegations of the bill.

Nor would they, not demurring, nor even if the objection were not made at the hearing, lose the benefit of an objection to the jurisdiction of the court that would have been valid on demurer.

Where a party has the only or better *legal* title to land, he may obtain or regain possession by an action of ejectment if he is out of possession; and it is reasonable that equity should decline to interfere where he may obtain all the relief he needs at law. (*Apperson vs. Ford*, 23 *Ark.*, 746.)

If he be *in* possession, then, as he can bring no action at law, it has been held that he may ask a court of equity to remove a cloud upon his title which makes it less valuable, or may prevent his disposing of it to others.

But where one holding an equitable title only to lands, or a junior legal title with prior or superior equities, comes into a court of equity to impeach or cancel, or compel a conveyance of, the senior or better *legal* title, the jurisdiction of the court in no wise depends on the question of possession.

And in each case the court of chancery will have jurisdiction though no fraud is charged in the bill.

Depositions read before the register and receiver of the United States land office could not be read in this suit in chancery, unless it were shown that the witnesses were dead or beyond the reach of the process of the court.

A person conveying lands by a deed containing the words "grant, bargain, sell and convey," is not a competent witness for his grantee in a suit between such grantee and a third person concerning the title to the lands.

When on an appeal from a decree in chancery the question presented to this court is one simply of fact, it is precisely as it would be if the parties had had it tried before a jury on an issue out of chancery, and the verdict being against the appellants, their motion for a new trial had been overruled.

Even if we thought the weight of the testimony was against the finding, we should not disturb it, unless it was palpably and glaringly wrong.

If there is merely a doubt, or a preponderance of testimony one way or the other, the finding below must remain conclusive.

By the words of the act of congress of September 28, 1850, all the lands in the state which were swamp and overflowed, and thereby unfit for cultivation, immediately passed to and vested in the state.

The provisions of the 5th section of the act of January 11, 1857, must be construed to be a consent on the part of the state to receive from the United States the purchase money paid to the latter for only such of the swamp lands as the state could rightfully relinquish; and not for any which any person might obtain a right to as against the state before the purchase of the same by another from the United States.

Under the act of January 11, 1851, a levee contractor had a preference right of entry to lands in the rear and adjacent to his front lands; and he might make his selections before he had completed his levees.

The law of January 6, 1851, did not say that he should not *select* his land until after he had finished his work; but only that when he had done both he should furnish the numbers of the land to the commissioners, and receive from them a certificate.

When he had finished the work, if he had selected the lands and furnished the numbers to the commissioner, his right to the land was complete, whether he ever obtained a certificate or not.

No matter at what date he selected the lands; if he finished the work, in whole or in part, and the commissioner approved and received it, and the amount due for it was enough to pay for the lands, they became his, and his title, if necessary, as against any intervening purchaser or claimant, would relate to the 11th of January, 1851, on which day the right of preference in building the levees and taking these lands in payment vested.

His right of pre-emption was to *all* the lands in rear of and adjacent to the front land by right lines.

The selection in this case was made by a letter addressed to the commissioner, which was sufficient.

And the entries in the book kept by the commissioner, whether it was a *record* or not, are sufficient to prove the selections and applications noted in it, where the commissioner has sworn that he entered them correctly there.

When he filed it in the office of the board, it became sufficient evidence to the board on which to base its confirmations.

The entry of the appellee having been confirmed by the commissioners, their decision is conclusive unless properly impeached.

The law presumes in favor of the commissioners that they acted on sufficient data and evidence.

The commissioners had power to pay for the work as it advanced towards completion.

The appellee had a pre-emption right and was only bound to pay for the land in one way, by doing the work undertaken by him to a sufficient amount, by a certain time and in accordance with his contract.

Whether he made known his selection of the lands sooner or later, so that he did not permit his right to lapse by abandonment, made no difference. It was only material that he should do it when or before his work was finished and received.

Appeal from Arkansas Circuit Court in Chancery.

Hon JOHN C. MURRAY, Circuit Judge.

GARLAND for the appellant.

WILLIAMS and STILLWELL for the appellee

Opinion prepared by A. PIKE, Esq.—See *note* page VIII.

Samuel Mitchell instituted suit in chancery against John A. Jordan, Joseph Branch, and the minor heirs of George W. Martin, to obtain cancellation of the patent granted to Jordan by the United States for certain lands in Arkansas county, and to have his own title to the same perfected and quieted. Jordan disclaimed title and interest. Branch answered, and general defence was interposed for the minor heirs by a guardian *ad litem* appointed by the court. Replications were filed to each answer, and the cause heard on the pleadings, exhibits, other documentary evidence and depositions.

The case as presented to us for decision is as follows:

Before the passage of the act of congress of 28th September,

1850, granting to the state of Arkansas the whole of the swamp and overflowed lands in the state, "made unfit thereby for cultivation," Mitchell had purchased and owned lands on the Arkansas river, in the alluvial bottom, on and along the river bank; in rear of, and adjacent to which lay the lands in controversy, also in the alluvial bottom, and lower than the front lands. On the lands owned by him were his plantation and homestead. It is very clear from the testimony that the back lands were swamp and overflowed lands, unfit for cultivation in their natural state and without protection from levees, and that therefore they passed to the state under the grant.

On the 6th of January, 1851, the legislature of the state provided for reclaiming these swamp and overflowed lands, by providing for the creation of a board of three commissioners, empowered to fix the price of the lands, to inaugurate a system of levees and drains, to let out the making of the same to contractors, and to make payment to such contractors; and on the 11th of January, 1851, by a supplemental act, it was, among other things, enacted, that any person owning lands on the banks of any river, in any land district, should have the preference of taking the contract to levee such lands; and also the preference "to take in payment for executing his contract, any swamp or overflowed lands lying in the rear, adjacent to his own lands."

By the principal act, payment for making levees and drains was to be made "in the lands reclaimed or in the proceeds of the sales thereof" at the prices to be previously fixed by the commissioners; the commissioners were empowered "to issue land scrip representing quarter section tracts," in which, "at his option, and in lieu of lands," any contractor might demand and receive payment for his work; and it was provided, that when any contractor should have finished his work in accordance with his contract, and should "have selected his land in payment therefor, or located his scrip in lieu thereof," he should furnish the numbers of the land to the commissioners, and on their

certificate the governor should execute a deed to him or his assignee.

On the 3d of June, 1851, the board of commissioners, by ordinance, empowered each commissioner, within his division or district, to locate the necessary levees, let the contracts for building them, and supervise and pass upon the work. On the 2d of September, they required contractors, claiming adjacent lands by preference right, to take them immediately in rear of their work, by right lines; and provided that "no portion of land" should be sold for cash, at the fixed rates, except to contractors, in payment for work, or to pay expenses. On the 14th of October, they fixed the price of lands within six miles of a navigable stream at 75 cents per acre; and established three offices, for sale of lands, one in each division, subject to the supervision of the commissioner assigned to the division. A sub-commissioner was provided for, for each division, and certificates of purchase were to be signed by the commissioner of the division, and countersigned by the sub-commissioner. These were to "entitle the purchaser to the land" so purchased. On the 8th of January, 1852, the board ordained that contractors might receive pay whenever they had completed 5,000 cubic yards of levee, in accordance with their contract, or as soon afterwards as the same could be measured, received and approved of; provided that the work were fully secured, and approved of by the commissioner of the division. And, on the 9th of January, 1852, the board ordained that the secretary of the board, or the commissioner of the division should issue certificates to persons applying for lands and filing scrip for the same, or an authenticated account of work done. On presentation of these certificates to the board, and if the lands were confirmed to the state, the purchaser was to receive a full certificate of purchase for the lands.

Creed Taylor, one of the commissioners in 1851, was assigned to the district or division in which the lands in controversy lay.

On the 16th of July, 1851, Mitchell took, and entered into

a contract for the leveeing of the lands in front of those in controversy, by the terms of which he was to be paid fifteen cents a cubic foot for the contents of the levees "when completed and received."

On the 12th of November, 1851, Mitchell wrote to Taylor, the division commissioner, requesting him to enter and secure for him, among other lands, all those in controversy, that is, lots 9, 10 and 11, in the south-west quarter of section 31, in township 8 south, of range 3 west; and the north half and south-west quarter of section 5, and the whole of fractional section 6, in township 9 south, of range 3 west.

On the 20th of November, Taylor entered these, as applied for by Mitchell, "for work not yet received," in his memorandum book of sales and entries, which was afterwards filed and remained in the office of the board.

The bill alleges that, on the 15th of December, 1851, Taylor gave Mitchell a certificate of entry of these and other lands, which is lost; and an affidavit of its loss was filed by Mitchell before the hearing; but no evidence was made of the existence or contents of such certificate.

The bill also alleges that the entries were confirmed by the board in January, 1851. Taylor testifies that they were to be confirmed on the 6th of January. The records of the swamp land commissioners show that Mitchell applied to enter them on the 8th of February, 1852.

By section 31 of the act of 12th January, 1853, the commissioners were required to file in the auditor's office a list of all swamp and overflowed lands disposed of by them, showing to whom, for what and when each tract of land was sold, to what class each tract belonged, the name of the person who signed the certificate of purchase, the number of the certificate, etc., and the records in the auditor's office show that the lands in question were entered by Mitchell on the 8th of February, 1852. On the 3d of April, 1855, Hobbs and Williams, swamp land commissioners, certified that it appeared from evidence in the office

of the board, that they were sold to Mitchell on the 20th of November, 1851. They were, no doubt, governed by the entry in Taylor's book of memoranda.

We do not think there is any material discrepancy, in these dates. It is quite clear, we think, that on the 12th of November, 1851, Mitchell wrote to Taylor, selecting these and other lands, in which he desired to receive payment for his work: that Taylor received the letter about the 20th, and on that day made the entry: that he is mistaken in testifying that the entries were confirmed on the 6th of January, but they were in fact confirmed on the 8th of February, 1852, at the session of the board which commenced in January.

On the 18th of December, 1851, Taylor reported these and other lands to the governor, as swamp and overflowed, and unfit thereby for cultivation. The governor applied to the surveyor general to report the same as swamp and overflowed lands, and on the 20th of December, that officer approved the list, and recognized the lands as of the character intended by the grant.

In the meantime, on the 25th of November, 1851, John A. Jordan entered the lands in controversy, among others, in the proper land office of the United States, with Choctaw scrip, and afterwards, obtained patents for the same. Before the patents issued, he conveyed one undivided half of the lands to Branch by a deed whereby he "granted, bargained, sold and conveyed" to him; warranting against the lawful claims of all persons claiming through or under himself, but against none other. The other half he seems to have treated as the property of his partner, George W. Martin; but never conveyed it to him.

Soon after Jordan's entry, Mitchell protested against it, and it was suspended. The commissioner of the general land office then directed the register and receiver at Little Rock to give notice to the parties and take proof as to the character of the land, and certify the same, with their joint opinion, to the surveyor general.

On the 4th of December, 1854, the parties appeared before the register and receiver; witnesses were examined, and those officers

certified it to the surveyor general, to be their opinion that the lands were swamp and overflowed within the meaning of the act of congress; and the surveyor general also so certified, to the commissioner of the general land office on the 19th of December.

The first allowance for work was made to Mitchell, on the 7th of April, 1852. Many others were made on different days afterwards, during the same year. He had already been charged with the price of the lands applied for by him; and as each allowance was made, he was credited with its amount, against the previous charges.

The act of 20th January, 1855, recognized the validity of certificates of purchase given by the swamp land commissioners, or any one of them, or by any one acting under their authority, and provided the means of obtaining patent certificates thereon. And the act of 7th January, 1857, authorized the auditor to issue duplicate certificates of entries made by persons under any of the acts for the entry and sale of the swamp and overflowed lands, in lieu of certificates lost, when it shall appear, by the public records in the auditor's office, or in that of the land agent, that such entry in fact existed.

The heirs of Martin being minors, the court is the custodian of their rights, and must give them, here, as well as below, the benefit of every ground of defence of which they might have availed themselves by demurrer or general and particular denial of the allegations of the bill. Nor would they, not demurring, nor even if the objection were not made at the hearing, lose the benefit of an objection to the jurisdiction of the court, that would have been valid on demurrer.

We have, therefore, in consequence of the expression of individual opinion on the part of the learned judge who delivered the opinion of the court in the case of *Apperson vs. Ford*, 23 *Ark.*, 746, looked at the question of jurisdiction, as dependent on the possession or non-possession by the plaintiff, of the land in controversy. For it is undeniable that the bill does not allege that

the complainant has possession of the lands, as to which he invokes the aid of the court in this case.

When a party has the only or the better *legal* title to land, as against that which he wishes to put at rest, he may obtain or regain possession by an action of ejectment, if he is out of possession; and it is reasonable that equity should decline to interfere where he may obtain all the relief he needs, at law. If he is *in* possession, then, as he can bring no action at law, it has been held that he may ask the court of equity to remove a cloud upon his title, which makes it less valuable, or may prevent his disposing of it to others. The court of chancery will not become a tribunal to try the legal title to land; or, in other words, it will not without some special ground for assuming the jurisdiction, undertake on behalf of the *better* legal title, to remove out of its way an inferior title, legal or equitable. But whether one holding a junior or inferior legal title, with prior or superior equities be in or out of possession, it is difficult to conceive on what ground his right to the aid of a court of equity can be denied. If *in* possession, he may be ousted by an ejectment: if *out*, he cannot obtain possession, when confronted by the only or the older and better legal title. If *in* possession, he cannot *bring* ejectment; *out*, he can not maintain it.

The language of the courts is always to be understood by applying it to the facts of the case decided. That which seems to be general and of universal application, has, in reality, often a limited application; and so the words of truth and the utterances of the law, undeniable in the case wherein they are spoken, become the parents of error and false doctrine. That judges have often been too incautious in their language, is true: and so it has been in regard to this particular doctrine.

Where one holding an equitable title only to lands, or a junior legal title with prior or superior equities, comes into a court of equity to impeach and cancel, or compel a conveyance of, the senior or better *legal* title, the jurisdiction of the court in no wise depends on the question of possession. He does not

come to have "a cloud upon his title" removed. In this case, the best legal title, even if Mitchell held a patent from the state, would be in Branch; and Mitchell has a clear right to invoke the aid of the court.

It is also objected that the bill is deficient "in not charging fraud and mistake, especially, in allowing Jordan to make his entry." But, in a case like the present, though fraudulent courses on the part of the holder of the better or only legal title, would add strength to the contestant's case, if the fraud existed, his case may well be complete in the absence of any actual fraud; and if the title impeached had been obtained in entire ignorance, on the part of the holder of it, of any title, or claim or equity whatever on the part of the contestant, the equities of the latter might still be perfect, vested under the law, and his right to relief and redress complete. When, in the case of *Cunningham vs. Ashley & Beebe*, 15 *Howard*, ; 13 *Ark.*, 653, the complainant showed that he had a valid pre-emption, which, but for the legal title procured by the defendant, ought by law to have ripened into a legal title, it was entirely unimportant whether their entry of the lands was procured or accompanied by actual fraud. And as to mistake, if the entry by Jordan was permitted when the United States no longer owned the land, of course Jordan was at least mistaken in purchasing and paying for it, and the land officers in selling it, and the general land office and president, in treating the sale as valid, and granting a patent.

That the issuance of the patent is an act of sovereignty, if it were so, could not make an allegation of fraud or mistake in procuring it, any the more necessary. True, it is not to be "lightly questioned, or set aside on slight provocations." But the United States, in selling their lands, exercised none of the attributes of sovereignty. They were simply the owners in fee simple absolute of the public lands: and as between persons claiming title under different grants or conveyances from them, their deeds (and a patent is but a deed) stand upon the same footing, in a court of equity, as the deeds executed by an individual owning lands in

fee simple. The grant of swamp and overflowed lands to the state was as much an act of sovereignty; and the question in the case is, at bottom, whether these lands were disposed of and possessed by one or the other conveyance from the same grantor. Whether Jordan did or did not intend a fraud is not a question that can affect the rights of Mitchell. If he cannot make out his case without alleging such fraud, he cannot make it out at all.

There is no doubt that, in order to demand an inquiry into the validity of Jordan's entry, Mitchell must show that if no one had interfered as Jordon has done, the state would have had the power to dispose of the land to himself; and that he has so dealt in regard to it, that, the title of the state becoming complete, he would be entitled to demand from her a conveyance, or could procure title under her by proper suit. The court would not at the instance of a party not interested and not entitled to a conveyance from the state, undertake to inquire whether the lands passed to the state or not, under the act of congress granting the swamp and overflowed lands. If the lands in controversy have not, in equity, passed from the state to Mitchell, the state alone is competent to impeach the title of Jordan or Branch; and this especially, since the act of congress of the 2d of March, 1855, authorized patents to issue to persons who had entered or purchased swamp lands, prior to the issue of patents to the state; and since the state itself; by the act of 11th January, 1851, consented to receive from the United States the purchase money paid for any swamp lands, theretofore or thereafter sold by the United States.

The first enquiry, therefore, in this case, is whether these lands passed to and vested in the state, as by a grant *in presenti*, by the provisions of the act of congress of September 28th, 1850; and the second, whether, under the laws of the state, Mitchell, if the state had the power, or now has the power, to convey to him the lands, is entitled to demand a conveyance.

The first question requires it first to be determined whether the lands were, at the date of the act of congress, swamp and over-

flowed, and thereby rendered unfit for cultivation. It is upon this question the testimony taken before the register and receiver bears, and it is denied that it was competent to read that testimony at the hearing. Two of the witnesses, *Shultz* and *Smith*, had died before this suit was brought. The testimony, laying their's aside, is ample and uncontradicted in regard to the character of the land; it being fully proven to overflow frequently from eighteen inches to twelve feet, and that no one would think of cultivating it, unless it were protected by levees from inundation. Creed Taylor, Gibson, Lenox, Foster, Felts and Moore, by depositions read at the hearing, prove that they were deeply overflowed lands. A continuous levee of great length was necessary to protect them. Most of them were covered with water in 1857, and again overflowed in 1858.

No depositions were read in the court below, on behalf of the defendants, to show that the lands were not swamp and overflowed and thereby unfit for cultivation, except Jordan's, and except also those of three witnesses read before the register and receiver. As these witnesses were not shown to be dead, or beyond reach of the process of the court, it was clearly not competent to read their depositions. And the testimony of Jordan was clearly incompetent. It is claimed that he was not interested, because he had conveyed by quit claim only, and with covenants against no person save those claiming under himself. But his deed was not a quit-claim. The words used in it are of gift and grant, "grant, bargain, sell and convey." True, his warranty is only as to persons claiming under himself; but the words, "grant, bargain and sell" also import a covenant of seizin or title, broken when made, if at all, distinct from the warranty, and under which he and his heirs were and are responsible to the grantees, if the title fails in this suit. Moreover, he still stands on the record as proprietor of one undivided half of the land, not having conveyed it to any one.

The register and receiver and surveyor general were satisfied as to the character of the lands: and although it was testified that

the plantations in front also overflowed, and that a plantation liable to overflow is not thereby unfit for cultivation, this cannot prove that there are no swamp and overflowed lands in the Arkansas bottom unfit thereby for cultivation. Low and swamp lands holding rain water and overflowing to a great depth, are clearly of the character contemplated by the law; and the evidence of this is only the more conclusive, if even the front lands, almost invariably higher, and in this case certainly so, are not free from overflow unless protected by levees.

The inquiry before the register and receiver shows that those officers and the surveyor general were satisfied by proof, and so decided, that the lands were such as intended by the grant: and as no further investigation was had, it is quite plain that the patents must have issued to Jordan, not on account of any doubt on that point, but solely in obedience to the peremptory mandate of the act of March 2, 1855.

Whether it was competent to read on the hearing the depositions of Shultz and Smith, we need not consider. The testimony was sufficient without them. And, it may be added, this simple question of fact is before us here, precisely as it would be if the parties had had it tried before a jury, on an issue out of chancery, and the verdict being against them, their motion for a new trial had been overruled. Even if we thought that the weight of the testimony was against the finding, we should not disturb it unless it was palpably and glaringly wrong. If there is merely a doubt, or a preponderance of testimony one way or the other, the finding below must remain conclusive.

As to the second branch of the first inquiry, this court has already repeatedly decided that by the words of the act of 28th September, 1850, all the lands in the state which were in fact swamp and overflowed, and thereby unfit for cultivation, immediately passed to and vested in the state. The question is no longer an open one. That grave inconveniences might result to the state and individuals, and distressing conflicts of title, from the doubtful character of much of the land in the state, was a

consideration to be duly weighed by the court, in determining the meaning of the grant, and it has been duly considered. And also it was and is a consideration of no small moment, that the congress of the United States, by the act of 2d March, 1855, virtually decided that the grant was not *in presenti*, since they ordered that patents should issue to purchasers of such lands, on purchases made after the grant "any decision of the secretary of the interior, or other officer of the government of the United States to the contrary notwithstanding." So explicit a declaration of opinion by the congress invoked for the consideration of the question, careful consideration and great deliberation. Yet the congress, at the same time, admitted the validity of any sale made of such lands by the state, prior to the entry, location or purchase of the same under the laws of the United States; though such sales were ordered to be disregarded if the state should not, within ninety days, furnish a list of the lands so sold.

Whether the lands falling within the terms of the grant, had or had not vested in the state under the act, was a judicial question, which congress had not the right to take upon itself to decide; and it is but respectful to that body to suppose that it was simply the intention of the act to give purchasers their patents, so that the claimants under the state might institute proceedings in equity to establish their titles and avoid the patents. However that may be, we continue satisfied with the decisions heretofore made; and again hold that all the lands in the state which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the state, on the 28th of September, 1850. The case is the same as if the grant had been of all the prairie land, or all the wood land, or all the alluvial land, in the state; the difficulty of ascertainment of its character not affecting the question. The words of grant, the operative words are direct and positive: "Shall be, and the same are hereby granted to the state;" and the provision of the second section, that the secretary of the interior should make out and transmit to the governor a list and plats of the

land described, and at the request of the governor, cause a patent to issue to the state; and that "on that patent, the fee simple to said lands shall vest in the said state," can no more be held to limit the effect of the present grant in the first section, than if, in a deed, after immediate and express conveyance of lands by some general description, it should be provided that, when the numbers should be ascertained, another deed should be made, "on which the fee simple should vest." This would make the title of the state to any of the land, depend on the request of the governor for a patent. The words of the second section must be held to be simply a definition of the *nature* of the title which the state took under the grant, and not a postponement of the period at which the title should vest.

It is quite true, that "where grants are made under descriptions so vague and indefinite, that neither the grantee nor any other can tell their location or boundaries, until the *grantee* does some act which locates and defines them, if another grant strictly defined, intervenes, the first grantee may lose what he would have been entitled to, if his own grant had been descriptive and definite." The cases decided by the supreme court of the United States, "where one had a claim, unlocated, on a large section of country, which might be located by survey at any spot not appropriated by an individual title" in which it has of course been held, that "if any other person afterwards obtained a grant by specific boundaries, within the limits wherein the prior grant was to be located, the title of the latter grantee could not be impaired by any subsequent survey of the former," are far from deciding this case. Such were *The United States vs. Forbes*, 15 *Peters*, 184; *The United States vs. King*, 3 *Howard*, 736; *Glenn vs. The United States*, 13 *Howard*, 250, *and Fremont's case*, 17 *Howard*, 558.

No doubt the land granted must in some way be severed from the public domain. If the grant were of all the lands below high water mark on the Arkansas and Red rivers, they would be sufficiently "severed from the public domain," no matter how

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much trouble and difficulty it might cost to ascertain them. The definition of the lands, in this case, as well as that, is distinct and certain enough; though mistakes may be made in deciding on the question of fact. Whatever can be made certain is certain.

The position of the learned counsel, that even if the land did pass by the grant, it did not relieve the state of the necessity of getting it located and confirmed as swamp land; and that, from the time of the grant until this was done by her, the United States did not obligate themselves not to sell the lands to any one else, needs no serious refutation. The act making the grant did not require the state to do any act at all, except, through her governor, to demand the patent; and it can hardly be seriously contended, that if the secretary of the interior, in making out the lists, omitted half the lands in the state, which were really swamp and overflowed lands unfit for cultivation, the state must lose them, and would not take them under the grant. If the lands in question passed to the state by the grant, the United States no longer owned them, and of course could not sell what was no longer her own. That the state was a donee and Jordan a purchaser has no place here. A title parted with on any valid consideration is gone forever; and the reference to the distinction between executed and executory contracts is a misapplication of principle and doctrine.

The provisions of the 5th section of the act of 11th January, 1852, must be construed to be a consent on the part of the state to receive from the United States the purchase money paid to the latter, for all such of the swamp lands as the state could rightfully relinquish, and not for any which any person might obtain a right to, as against the state, before the purchase of the same by another from the United States.

This brings us to the second enquiry: which is, as to the title of Mitchell, and his right as vendee of the state or under the laws.

It is undeniable that, when he selected these lands and when

Jordan entered them, Mitchell had not completed the work he had undertaken; that none of his work had been received; and that no allowance whatever had been made him, of any amount due him on account of such work.

It is also true that the board did not confirm or act on his entries until the 8th of February, 1852: and that he stands here as if he had never obtained any certificate of entry or purchase.

It is earnestly insisted, therefore, that Mitchell fails in every respect to show that he was entitled to purchase the land, when he made the application; that he completely fails to show that he was ever, at any time, entitled to purchase them; and that an entry by him, subsequent to Jordan's location was, in any event, unavailing.

The argument is, that by the law of 6th January, 1851, he was to have a certificate issued to him, when he should have *finished* his work in accordance with his contract, and should have selected his land in payment therefor; and that Mitchell selected these lands nearly four months before the day fixed for completing his contract, and more than three months before any allowance was made him of moneys due under his contract. And it is also urged that the contract itself provided that he should be paid when the work should be finished and received.

Under the act of 11th January, 1851, Mitchell had the right, in preference to all others, to take the contract in question, for leveeing in front of these lands. Under the same act he had a right of preference or pre-emption as to these and other lands in the rear of and adjacent to his front lands. But, according to the argument, he must go on and complete the levees, before he could select any of the rear lands, and in the mean time Jordan, or any other person, might purchase these lands as swamp lands, from the state, or buy them of the United States, and so defeat his pre-emption right altogether. That would make the right truly "a visionary and unsubstantial thing." Either he could make the selection at any time, as the work progressed, and so prevent any sale of the same lands to others, or he could require

the commissioners not to sell *any* of the rear lands, which he might have a right to take in payment, to other persons. If his work did not amount to enough to pay for *all* the rear and adjacent lands, and he made no selection in time, a grant of a specific tract within the same boundaries, a sale of it by the state, *might* give title to that tract against him. It was therefore wise, prudent and fair to others, to select at an early day, the lands to which he meant to assert his right to a pre-emption. The law of January 6th, 1851, did not say that he should not *select* his land until after he had finished his work, but only that when he had done both he should furnish the numbers of the land to the commissioners, and receive from them a certificate.

As contractors often agreed to build several miles of levee, and could only carry on the work by receiving payment in land or scrip as the work progressed, the commissioners wisely provided for paying them when they completed 5,000 cubic yards, in accordance with their contracts, and fully secured, and approved by the division commissioner.

We think that it was entirely proper for Mitchell to indicate these lands to the division commissioner, five months after he commenced the work, and that his letter to Taylor, the commissioner, was a sufficient selection. He had a pre-emption right to the lands, inchoate and to be complete when he should finish the work; he had a right to receive his payment in lands; and when he had finished the work, if he had selected the lands and furnished the numbers to the commissioners, his right to the land was complete, whether he ever obtained a certificate or not. He had, in such case, done all that the law required him to do; and even if the commissioners refused him his certificate, that would not affect his right nor defeat his title.

No matter at what date he selected the lands, if he finished the work, in whole or in part, and the commissioners approved of and received it, and the amount due for it were enough to pay for the lands, they became his; and his title, if necessary, as against any intervening purchaser or claimant would relate to the

11th of January, 1851, on which day the right of preference in building the levee and taking these lands in payment vested.

And it is quite clear that, having the right of pre-emption of the land, and having taken the contract to build the levee, and commenced the work, he could not be ousted of his right of pre-emption by a purchase made by any other person, even from the state; though he did not select the lands until after such purchase. His right of pre-emption was in *all* the lands in rear of and adjacent to the front land, by right lines. Much less could any one deprive him of his right of pre-emption by purchasing the land from the United States, since they were not the owners of it.

The letter of the 12th of November, was a sufficient selection of the lands. No form is prescribed by law, or by any ordinance of the commissioners. The contractor was merely required to furnish the numbers to the commissioners, when he should have selected his lands. Of course, some sort of notification was necessary, accompanying the list, to show with certainty that he had selected these particular lands, and elected to receive them in payment for his work. The form of that was immaterial.

And the entries on the book kept by the commissioner, whether that book was large or small, and whether it was a *record* or not, are sufficient to prove the selections and applications noted in it, when the commissioner has sworn that he entered them correctly there. When he filed it in the office of the board, it became sufficient evidence to the board on which to base its certificate.

It is quite evident that the entries of Mitchell were confirmed: and as the commissioners were made by law a tribunal to pass upon all work done under contract, to approve of and accept it, or reject it, to settle the amounts due contractors and order payment, and to confirm or reject their entries and purchases of land in payment for work, from their decisions on all which matters there was no appeal, those decisions are conclusive, unless properly impeached, and the evidences, accounts, papers and the like, on which they proceeded, need not be produced to fortify their decisions, when these are relied on. That the board allowed

Mitchell a sufficient amount, in the aggregate, between the 7th of April, 1852 and March, 1853, for work done by him, to pay for 4,000 acres of land, and that they recognized and treated as valid his entries; and placed them on their records, and included them in the lists sent up to the auditor, proves that they had approved of and received his work and confirmed his entries, and were bound to grant him certificates of purchase. If they had not done either of these things: or if it was intended to insist that Mitchell never really built the levees, or completed his work, or that he defrauded the state, or if it was meant to rely on any other facts that might avoid the action of the board in settling the amount due to him or ratifying his entries, these matters should have been specially set up and relied on by way of defence, and would have demanded proof.

We cannot perceive that it was wrong for Taylor to decline to permit Jordan to interfere with the lands in the rear of Mitchell's front lands and levee, until Mitchell should first have indicated to what lands he intended to hold and enforce his right of pre-emption. That was simply to respect his rights.

It is testified by Kimball, the custodian of the swamp land records, that he could find in his office no estimates of the work done by Mitchell. The answer does not impeach the validity of the allowances, by any averment that no estimates or fraudulent estimates were furnished; and it was not necessary for Mitchell to do more than prove that the allowances were made. The law presumes in favor of the commissioners, that they acted on sufficient data and evidence. The orders of allowance profess on their face to be based on estimates, and that these are no longer to be found cannot affect the validity of the allowances, when that fact appears only incidentally.

That the commissioners had the power to pay for work as it advanced towards completion we do not see any reason to doubt. The miles of levee to be made were numbered. Mitchell took several; and though many miles might be included in one contract, there is no reason for holding that the contract was in-

divisible, if the board chose to consider it otherwise. It might well be deemed a separate contract for each mile or some less length of levee. The object of the legislatnre was, as the act declared, "to encourage, by all just means, the progress and completion of the reclamation, by offering inducements to purchasers and contractors to take up said lands;" and if a contractor taking ten miles of levee to build, completely finished nine, and the other remained unfinished, by his death or otherwise, the commissioners were not required, by the merely directory provisions of the law to refuse to make any payment whatever for the nine miles of completed levee. The provision of the law is not mandatory nor prohibitory. It is simply, that when the contractor has finished his work, and selected his lands in payment, he shall furnish the numbers to the commisioners, and on their certificate have a deed from the governor.

And, if the selection had not been good, when made before the whole work under a contract was finished, it became good, if not withdrawn when the work *was* finished. If the contractor could not select the lands sooner, then, necessarily, no other person could intervene and take them from him by purchase. The true question in this case is, whether the state could be heard to object, on this technical ground, if Mitchell were demanding from her a deed; and she admitted that he had the pre-emption right, had done the work, and selected the land, and that the amount due him for work being sufficient, he had been charged with the price of the land and so had paid for it in 1852. Evidently the state would be estopped, after receiving payment, to object to making title in consequence of any trivial precedent informality; especially when her commissioners, invested with very ample powers, had agreed to pay all contractors as often as they should complete 5,000 cubic yards of levee. In fact she has provided for such a case, by the act of 7th January, 1857. Since it appears, both by the records in the auditor's office, and by those of the swamp land commissioners, "that the entry in fact existed," and since, in such case, the purchaser could procure from the auditor a

duplicate certificate, on his affidavit of loss, and such other evidence of it "as he can command, in the discretion of the auditor." This is the agreement of the state that she will furnish Mitchell a duplicate certificate on his demand. If he did not finish his work according to his contract, it was for the commissioners to apply the remedy or enforce the penalty, by withholding his pay, or canceling his entries. By allowance of the payments, they admitted performance on his part. They are presumed to have acted fairly, regularly and on sufficient premises, and if it is to be relied on that they were guilty of fraud or collusion, or were deceived, this must be particularly alleged and proven, or the presumption stands.

In *Walworth vs. Miles*, 23 *Ark.*, 653, Miles claimed no preemption right. He had contracted to build certain levees, and on estimates of a commissioner had been allowed for an old levee and work done, some $4,800; and in part payment he applied to purchase the lands in controversy, which application was certified by the secretary of the board to have been made. But the day after the allowances were made to Miles by the board, on protest of Walworth to the effect that the allowance for the old levee was improper, the board suspended the allowances, the application to purchase and the certificate issued for the residue of the allowance, until the question as to the sufficiency of the old levee should be determined. At the next meeting the claim for the old levee was rejected, and the entries rescinded and canceled. Meanwhile Walworth had entered the lands.

Upon this case it was held that the commissioners had not sold the lands to Miles; that they could not give certificates of application to purchase them, by Miles, when the work, in payment for which the lands were asked, had been rejected: and that when the commissioners discovered that Miles had not done the work allowed for, and was not entitled to the allowance, it was the right and duty of the commissioners to refuse to consummate the sale. The court considered the action of the commissioners to have been had in the lawful exercise of their authority, and

said: that until Miles had paid for the lands by a sufficient amount of work, he was not entitled to a certificate of purchase; and that, until he received such a certificate, he had no evidence of an entry. And it is quite true, that if he had applied to enter the lands, in payment of levee-work when nothing was due him, or not enough to pay for the land, his application would have amounted to nothing; and a subsequent entry by another, before he had paid for it, would have held the lands. For, his purchase had no prior right to rest upon or connect with. If he had had a pre-emption right to the lands, it would have been quite different. As it was, payment was the only possible inception of his title, and the court said that he could not buy or acquire a valid claim without paying for the lands; that his work once received as pay was found to be insufficient work, was therefore no payment; and therefore, his application was rightly disregarded, his scrip properly canceled. But Mitchell had a pre-emption right, and was only bound to pay for the land in one way—by doing the work undertaken by him, to a sufficient amount by a certain time, and in accordance with his contract. Whether he made known his selection of the lands sooner or later, so that he did not permit his right to lapse by abandonment, made no difference. It was only material that he should do it when or before his work was finished and received. That he paid for the land is indisputable, for the commissioners charged the price of them against the allowances made him, and the allowances were sufficient to pay for very much more land.

In *Brodie vs. Moseby*, 23 *Ark.*, 313, Moseby, like Mitchell, took a levee contract, intending to secure the rear lands by the consequent pre-emption right. He took the contract in June, 1851; applied to enter the lands in June, 1852, and had the lands marked on the plats in the office as applied for by him. In January, 1853, all levee work was required to be paid for in scrip, and in May, 1855, he renewed his claim to enter the lands, by virtue of his pre-emption right, and did do so, paying for them with scrip received for his levee work. This court held his title good,

and that his equity would have made his the better title, against any other legal title otherwise equal to his. In that case, as in this, the pre-emptor applied for the land before his work was finished. Of course an application *without* payment creates no title, but an application by a pre-emptor, *followed* by timely payment, does do so. Moseby's scrip and Mitchell's allowances were evidences of payment; because each was the evidence that so much work had been done in payment. Moseby did not *pay* for his land in the the scrip, any more than Mitchell paid for his by the allowances. The scrip was *evidence* that he *had* paid for it long before. So were the allowances. Each began to pay for his lands, as soon as he began his work. Perhaps each had fully paid for them, in fact, before he applied to enter tbem.

We need only refer again, in addition, to the case of *Cunningham vs. Ashley and Beebe*, 15 *Howard, and* 13 *Ark.*, 653. In that case Cunningham was entitled to a pre-emption to the quarter section in controversy, because he cultivated a portion of it in the year 1829, and was in possession on the 29th of May, 1830. He made proof of his pre-emption on the 29th of May, 1831. He then applied to enter the land, and offered to pay for it, but was not allowed to do so, in consequence of its being covered by a New Madrid claim. This was afterwards decided not to hold the land, but in the meantime Beebe entered the land with floats, and subsequently procured a patent. Every technical and formal objection possible was taken to Cunningham's claim, and it was defeated in the court of original jurisdiction and here; but it was sustained by the supreme court of the United States, which held that Cunningham's rights were paramount to those acquired under the new location, and were founded on his settlement and improvement, and the acts subsequently done in the prosecution of his claim. "Having done," the court said, "every thing which was in his power to do, the law required nothing more." The principle stated in *Lytle vs. the State of Arkansas*, "that a pre-emption right, covered by law, becomes a *legal* title, subject to be defeated only by a failure to perform the conditions annex-

ed to it," was strongly enforced in the case of *Cunningham vs. Ashley and Beebe*, and many plausible objections to the pre-emption title of the same class as those taken in this case, were with little notice overruled. It was especially urged that there was no sufficient evidence of the allowance of Cunningham's claim by the register and receiver; in other words, of their decision that his proof was sufficient to entitle him to purchase in preference to others. This proof consisted not of any *certificate* by the register and receiver, who decided upon the evidence produced, but of a *list* of the pre-emptions allowed at the land office at Batesville by those officers, found in the office and not signed by either of them, but made out by a clerk under the register's decision, and certified by a subsequent register, and a certificate of still a subsequent register, that the claim was allowed, as appeared from the papers in his office. It is evident that the court considered the claim to be quite as complete, in the absence of any certificate of allowance, as it would have been if one had been given. The list of allowed claims proved the allowance, as in this case the entries on the books of the board, and the list sent to the auditor prove Mitchell's entry and the sale to him by the commissioners.

Upon the whole case, we are clearly of opinion that when Jordan purchased of the United States, the latter had no title to the lands, they having before then vested in the state; and that Mitchell having a pre-emption right to the same under the laws of the state, having in no wise lost or abandoned his right, having selected these lands as those which he wished to take in payment for his work, and that selection having been assented to by the commissioners; and his purchase of and payment for the lands entered by them on their records and reported to the auditor, his equitable title would be good even against a purchaser from the state. It is clearly sufficient to enable him to avoid the intrusive title of Jordan or Branch. The patents vesting in Jordan no title to these lands, none can pass from Branch to Mitchell by

decree. So much of the decree below as directs that, is surplusage and inoperative. Otherwise the decree is proper, and it is therefore affirmed.

BUSBY VS. TREADWELL.

Where a purchaser has been let into possession, and continues without interruption, under paramount title, he is not, in the absence of fraud, entitled to equitable relief from payment of the purchase money upon the ground of defect of title. *Hoppes vs. Cheek*, 21 *Ark.*, 588; *Worthington vs. Curd*, 22 *ib.*, 284; *Bolton vs. Branch*, *ib.*, 435.

A knowledge of incumbrances or defects of title, is no objection to recovery upon the covenants of the deed in a court of law; but it is a ground for equity to refuse relief out of the unpaid consideration; because it supposes that, with such knowledge, the vendee chose to rely upon the covenants; and to their legal effect he will be remitted. *Worthington vs. Curd, ubi sup.*

A vendee having given his note for certain lands, to be paid on a day certain, provided that if the lands were involved in suit concerning the title to the same, payment was not to be made until the suit should be decided; there being no suit pending, at the time of the coming to maturity of the note, involving the title to the lands so sold, the vendor's right of action was complete.

Appeal from Jefferson Circuit Court in Chancery.

Hon. JOHN C. MURRAY, Circuit Judge.

BELL, for appellant.

HUTCHINSON, for appellee.

Opinion prepared by E. H. ENGLISH, ESQ.—*See note, page* VIII.

Treadwell sold and conveyed to Busby, by deed with general covenants of warranty, a tract of land, and took the note copied

below for the purchase money: and Busby went into possession of the land. After the maturity of the note, Treadwell brought suit upon it, in the law side of the Jefferson circuit court, obtained judgment without defence, and Busby filed a bill for injunction, etc. Upon the hearing, the bill was dismissed for want of equity, and he appealed.

It appears from the allegation of the bill, and admissions of the answer, that William Waters claiming the land devised it as part of his real estate to his sons Robert and William T., and his daughter Delia, in common: that Robert Waters afterwards sold and conveyed the whole tract to Albright, who conveyed it to Treadwell, from whom Busby purchased.

It is shown by the answer that after the bill was filed, Treadwell purchased and obtained a conveyance of the interest of Delia Waters from her and her husband, leaving outstanding the title of William T. Waters.

There was an attempt to show that Wm. Waters, deceased, had no title to the land, and that the title was in the heirs of Wm. D. Taylor, but there was no competent proof of this.

In this aspect of the case, Busby stands in the attitude of a vendee in possession, under a deed with general covenants of warranty, attempting to enjoin the collection of the purchase money on account of a defect in the vendor's title.

The rule upon this subject was declared in *Hoppes vs. Cheek et al.*, 21 *Ark.*, 588, to be as follows:

"Where a purchaser has been let into possession and continues without interruption, under a paramount title, he is not, in the absence of fraud, entitled to equitable relief from payment of the purchase money, upon the ground of defect of title. In such a case, he must seek his remedy at law, on the covenants of his deed, etc. There are cases, however, in which it seems to have been held that the assertion and prosecution of an adverse title, coupled with the insolvency or non-residence of the party bound by the covenants, are sufficient to bring the case within the *quia*

timet jurisdiction, which in extraordinary cases courts of equity have exercised."

The rule so declared was affirmed, and followed in *Worthington vs. Curd & Co.*, 22 *Ark.*, 284, and in *Bolton vs. Branch*, *ib.*, 435.

In the case now before us, there is no showing that the vendor was insolvent or a non-resident, or that any adverse title was being asserted or prosecuted.

It was also held in *Worthington vs. Curd & Co.*, "that a knowledge of incumbrances, or defects of title, is no objection to recovery upon the covenants of the deed in a court of law; but it is a ground for equity to refuse relief out of the unpaid consideration, because it appears, that, with such knowledge the vendee chooses to rely upon the covenants, and to their legal effect he will be remitted."

Here, it was proven upon the hearing, that Busby was advised of the defects in Treadwell's title at the time the note for the purchase money was executed.

But Busby also attempted to protect himself by conditions expressed in the note, which remain to be considered.

The instrument is as follows:

"$680. PINE BLUFF, Ark., Feb., 1st. 1858.

On or before the first day of January, A. D. 1859, I promise to pay to John R. Treadwell or order the sum of six hundred and eighty dollars, for value received, with ten per cent. interest per annum thereon from the first day of January, A. D. 1858, until paid: *provided*, that if the south-west quarter of the south-west quarter of section thirty-two, (32) in township six south, of range eight west, forty acres of land sold by the said Treadwell to me, and for which the above note is given, is involved in suit concerning the title to the same, this note is not to be paid until the said suit is decided, and if it is decided that the title to the said land is not good, the above note is to be null and void.

(Signed) J. J. BUSBY."

The legal effect of this instrument is that the money was to be

paid on the first of January following the date of its execution, with a *proviso* that if the land should at that time be involved in suit, the money was not to be paid until the suit was decided, and if decided adversely to the title, the note was to be void.

If it was not the intention of the parties that the contingency of apprehended litigation about the title to the land, was to be considered at the maturity of the note, then no time was fixed at all, and the maker of the instrument might claim an indefinite delay of payment. Such a construction of the instrument would be unreasonable. If the maker desired longer time than the maturity of the note to test the contingency of litigation, he should have insisted on an expression of it in the instrument.

There is no allegation in the bill that the title to the land was involved in suit at the maturity of the note, or at any time thereafter.

The decree of the court below must be affirmed.

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TWOMBLY VS. KIMBROUGH.

A sheriff having sold certain lands for taxes, and having afterwards taken an assignment of one half of the lands so sold from the purchaser to himself, the sheriff was properly made a party to a bill filed by the original owner of the land to set aside the tax sale.

The answer of the purchaser at the tax sale having set up that the transfer from himself to the sheriff was rescinded soon after it was made; this was matter in avoidance which the defendant must prove.

But it could not be proved by the sheriff, he being a necessary and proper party, and interested.

The bill having charged that the sheriff and the purchaser were parties in the purchase, and jointly interested therein, and the answer stating that there was no partnership at the time of the sale, but that the assignment to the sheriff, was made afterwards, and not in pursuance of any previous understanding the answer herein was directly responsive to the bill, and being uncontradicted by testimony, stands as if proved.

A tax deed is by law evidence of the truth of its own recitals.

General averments of fraud amount to nothing unless the facts constituting the charge are distinctly and specifically averred; and unless also those facts do in law and fact constitute fraud.

Though any sheriff who is concerned in the purchase of any lands at a tax sale, is liable to a penalty of five thousand dollars, to be recovered by indictment, yet when the bill merely charges that the sheriff was interested in the purchase of certain lands, without any allegation that by the combination between the sheriff and the purchaser, it was intended to prevent competition in bidding, or that such was the effect, or that any other person did bid, or desire to bid for themselves, this does not amount to a charge of fraud.

The collector for a particular year is the only officer authorized to collect the taxes for that year; and although his term of office expires before the day fixed for the sale of lands for such taxes, he alone can make such sales. He may do this himself or by his deputy,

It is only when the collector has *died* or been *removed* from office, or is otherwise *disqualified* to act, that the actual collector can sell in such case.

Any judicial sale made by any person or officer other than the one authorized by law to make it, is void.

Lands having been assessed for taxes for 1856, and the tax book for that year given to one collector; and the lands sold by another collector in 1857, the former collector being alive and not disqualified from selling at the time of such sale, the sale was void.

In this case the collector who made the sale had been the deputy of the former collector to whom the tax book had been delivered, but as the sale was not made by him as such deputy, but as collector of 1857, the sale was void.

Plaintiff filing a bill to set aside a tax sale, offered therein to pay whatever amount of taxes the defendants might have paid on the lands, with proper interest and other dues; the court below, in granting the relief sought by the bill, should have ordered that these sums and the value of any improvements made on the lands by the defendants should be brought into court by the plaintiff.

Appeal from Arkansas Circuit Court in Chancery.

Hon. JOHN C. MURRAY, Circuit Judge.

GARLAND & RANDOLPH, and HUTCHINSON, for appellant.

Opinion prepared by A. PIKE ESQ.—See *note*, page VIII.

This cause comes to us by appeal from the circuit court of Arkansas county in chancery.

In 1856, William A. and Buckley Kimbrough were joint and equal owners of fractional sec. 7, in township 7 south, of range 5 west, and the fractional north-east quarter of section 12, in township 7 south, of range 6 west; the two tracts containing together, 691.25 acres. Buckley Kimbrough had for several years lived on and cultivated the land. William A., his co-tenant and partner, was a non-resident of the county.

The individual interest of William A. was assessed for taxation in 1856, for the taxes of that year, as the property of a non-resident. The taxes being unpaid, this interest, with other lands of non-residents was advertised to be sold at the regular time in March, 1857, for the taxes, penalty and costs: but the advertisement not being published in time, the county court, on the 19th of January, 1857, on motion of George W. S. Cross, sheriff of the county, made an order that "the sheriff of the county" should be and thereby was empowered and authorized to advertize, in some newspaper printed in the state, "the non-resident lands in the county," to be sold on the fourth Monday of April, 1857; and gave "said sheriff" time until the first Monday of May to file his delinquent list.

The lands were advertised accordingiy, in a newspaper published at Helena. William A. Kimbrough's interest in the lands mentioned was returned as sold to Benjamin Twombly; and G. W. S. Cross, sheriff of the county, gave him a certificate, dated 27th of April, 1857, certifying that at such sale, that day made, Twombly purchased the undivided half of each tract, (345.50 acres in all,) assessed and taxed in the name of W. A. Kimbrough, a non-resident of the county, for the sum of $41.54, aggregate amount of taxes, penalty and costs. On the 20th of October, 1858, the successor of Cross executed and acknowledged a deed to Twombly for the same premises, under that tax sale.

William A. and Buckley Kimbrough, in April, 1859, exhibited their bill in the Arkansas circuit court, praying that the purchase of Twombly might be set aside and the certificate and deed canceled. In October, 1859, Twombly and Cross, who were made

defendants, answered the bill. It is unnecessary to state in detail the allegations by which the bill impeaches the sale. It alleges that the lands "were never listed, assessed and advertised in the way and manner prescribed by law for tax sales in the state of Arkansas." It makes several averments, which are denied by the answer and not sustained by proof, and it relies on two special grounds of objection, which may be better stated as they appear on the whole record.

The first is that George W. S. Cross had no power or authority to make the sale. He was elected sheriff on the first Monday of August, 1856, to succeed his brother, P. P. Cross, whose deputy he had been by regular appointment, duly approved and recorded, from the 7th of April, 1854. P. P. Cross was collector of the revenue of 1856, having made the necessary affidavit and given the necessary bond; and G. W. S. Cross was collector for 1857, having made the affidavit and given bond. He sold as sheriff the lands in question, for the taxes of 1856. The former sheriff was still living; and the question is, whether the power to sell was vested in him, or in the former sheriff.

The second ground of objection is that the sale was fraudulent. On the certificate of purchase by Twombly is this indorsement, dated the 2d day of May, 1857, five days after the purchase: "For and in consideration of the sum of twenty dollars and seventy-seven cents, to me in hand paid, I hereby transfer unto G. W. S. Cross, one half or an equal interest in and to the within described lands, in the event the same is not redeemed, and in the event the same be redeemed, the one half of the proceeds arising therefrom to be paid to the said Cross." This bears Twombly's signature, and the bill alleges that Twombly was not present at the sale and did not bid for the land; that Cross had them struck off as sold, and so marked in the minutes of the sale, the words "to Benjamin Twombly," being afterwards added: that Cross and Twombly were partners in the purchase, and the latter never paid more than one half of the sum said to have been bid; and that therefore the sale was fraudulent and void.

The answer denies that Cross was interested with Twombly at the time of the sale, and alleges that Twombly himself bid for the lands; that the subsequent transfer was not made to carry out a previous understanding; and that soon afterwards the purchase by Cross of one half of Twombly's interest was rescinded by the parties and the sum paid by Cross to Twombly repaid.

Cross was properly made a party defendant since this transfer showed a joint interest in him, which would enable him to compel, in equity, a conveyance to him by Twombly of one half the interest purchased and held by him under the sheriff's deed. The averment in the answer, as to the rescission of this purchase and transfer, was strictly matter in avoidance, put in issue by replication, and amounting to nothing unless proven by the defendants. It was attempted to prove it by the testimony of Cross himself. But he being a party, and a necessary and proper one, and interested, was incompetent to testify; and his deposition was both taken and read with full reservation of all objections on the score of competency. As it is impossible to doubt that he was properly made a party, and equally impossible to doubt that, as a party in interest he was incompetent to testify, we cannot understand why his deposition was not disregarded, nor with what propriety it was permitted to be read at all, that it might uselessly encumber the record and occupy time and space in the discussion here.

Upon the proof in the cause, which consists of the testimony of the clerk of the court, who attended the sale and kept the minutes of it, and of the crier who sold the lands, as auctioneer, the facts are: that Twombly *was* present at the sale, but did not himself bid. The lands in question and many others were struck off and noted as sold; Cross, when they were cried, saying "sold," or that there was a bid, the clerk noted them as sold, and Cross himself afterwards added the words "to Benjamin Twombly." Five days afterwards, Twombly assigned to Cross, by transfer endorsed on the certificates, one half of the lands or of the interest in them purchased by him, precisely for one half of the sum

bid and paid for them; but the deeds were made by Cross' successor to Twombly alone. There is no proof of any recision of the sales made by Twombly to Cross. The averments in the answer, that there was no partnership at the time of the sale; that the purchase of Cross was made subsequently, and not in pursuance of any previous understanding, being directly responsive to the bill and uncontradicted by testimony, stand as if proven.

The bill alleges, generally, that on account of this joint interest the sale was fraudulent and void; but it is not shown, by the averment of any other irregularity or informality, *how* this connection between the sheriff and the purchaser, if it existed, made the sale fraudulent. It is not alleged that by means of it, Kimbrough was in any way injured, or what fraud the purchasers perpetrated. True, it is alleged that the land was not legally listed, assessed and advertised. But this the answer traverses, and the deed of the sheriff is by law evidence of the truth of its own recitals, (*if the sale was made by the proper officer*,) and recites the listing, assessment and advertisement of sale of the land, in accordance with law. The advertisement, though not proven by copy, is proven orally by the witnesses; and no attempt was made by the complainant to rebut the proof made by the deed itself. It is not alleged that by the combination between the sheriff and purchaser, it was intended to prevent competition or bidding, or that such was the effect, or that any other person did bid or desired to bid for the land; and therefore if all the averments of fact in the bill had been proven they would have failed in establishing the fraud alleged; though, under section 128, chap. 148, of the Revised Statutes, the sheriff would have been liable to a penalty of five hundred dollars, to be recovered by indictment. General averments of fraud or fraudulent intent, in the use of which bills are sometimes so liberal, amount to nothing, unless the facts constituting the charge are distinctly and specifically averred; and unless, also, those facts do in law and fact constitute fraud. It is admitted that the taxes had not been paid on the interest of William A. Kimbrough in the lands.

They had been regularly listed, assessed and placed on the tax-book. The proper amounts of tax, penalty and costs were charged, and the owner was a non-resident of the county. Necessarily the land had to be sold, and it *was* sold at the proper time and place, and after due advertisement. That A bought instead of B, if the land was in any event to be sold to some one or struck off to the state, was not a fraud on the owner, though against public policy, and punishable as a misdemeanor. Still less is the allegation of fraud sustained, when it is not proven that the sheriff was "directly or indirectly concerned in the purchase."

If there had been any other irregularity, with which the sheriff's interest in the purchase could be connected, the interest of the sheriff, if proven, would become of the utmost importance, because it would supply evidence of a sufficient and powerful motive on his part to deprive the owner illegally of his lands; and it would, in any case, lead a court of equity to scrutenize the sale more closely, and to regard any irregularity as more significant and important. The testimony in the case goes a good way to show that there was only the form of a fair sale at auction, and that not only was there in reality no competition in bidding, but it was so managed as to prevent competition, Cross saying, when the lands in question and others were put up, that there was a bid for them, or they were sold, and they being at once so noted, and this, although some fifty or sixty persons were present; but notwithstanding that the testimony produces this impression, it is not sufficient to establish actual fraud in the sale. We do not decide whether the fact, if it was fully proven, that the officer was directly interested in the purchases, would or would not invalidate the sale, because that fact is not proven, though the circumstances, notwithstanding the broad denials of the answer, which are always to be looked for in such cases, are exceedingly suspicious.

The court below decreed the relief prayed by the bill. Whether that decree was proper must depend on the question first stated: whether the sale was made by the proper officer, by law author-

ized to sell; that is, whether the old or new sheriff was the proper officer to make the sale.

By the law in force at the time, each sheriff was ex-officio collector of taxes within his county, for two years, commencing on the first day of January next after his election: and was required to give bond each year, by the 10th day of January, conditioned according to law. P. P. Cross filed such bond in 1856, and performed the duties of assessor. His assessment list was required to be filed by the 15th of April, and to be adjusted by the county court in April; thirty days after which the tax-book was required to be delivered to the collector. It is not disputed that the tax-book was so delivered to P. P. Cross.

Upon it was necessarily endorsed a warrant, commanding him to collect the taxes on all the property assessed in it, in the manner and by the proceedings prescribed by law, and to pay over the same in the manner and within the time prescribed by law.

The collector's delinquent list was to be acted upon by the county court on the 3d Monday of March, in each year, it being made out by the same collector who had been unable to collect portions of the taxes; and collectors were to settle their accounts with the auditor by the first day of May.

Sales of lands for taxes were required to be made on the second Monday of March in each year. On or before the first Monday of December in each year 'the collector of revenue' in each county was required to make out and file in the clerk's office a list of lands belonging to non-residents of the county; and at least four weeks before the second Monday of March to publish this list in some newspaper with a notice of sale: he was to have this list recorded; and by himself or deputy attend and make the sale, and make out and deliver certificates to the purchasers. If from any cause he failed to make such sale at the proper time, the county court could order him to sell them on another day, after twenty days' notice by publication in some newspaper in the state.

In *Gossett vs. Kent*, 19 *Ark.*, 602, this court decided that the

assessment list, when adjusted by the county court, is in the nature of a judgment; and the warrant attached to the tax-book in the nature of an execution. By the statute, *sec.* 106, *chap.* 148, all taxes on lands, with penalties and interest, are levied on the lands charged, until payment or forfeiture. This levy dates at least from the date of the warrant.

The collector, therefore, holding the tax-book and warrant, commanded to collect the taxes on all the property assessed, and bound by his bond to do so and to pay over the same, stands in the same attitude as if he held an execution against an individual, and had levied it upon lands. By the general law as to *executions*, *sec.* 7, *chap.* 68, where an officer had levied on land by virtue of any execution, and his term of service expired, and was determined before sale, he was empowered to make the sale, in all respects as if his term of service had not expired. In the absence of other and overruling provisions to the contrary, this must be held to govern in regard to the sales of lands for taxes. This, reason, analogy and consistency all require, more especially as the provision is but in affirmance of the common law in regard to the powers of sheriffs.

There are no provisions to the contrary; but all that bear upon the question favor this construction.

If the new sheriff must sell, because the term of the former collector expired on the 1st day of January, then it results that each sheriff, serving one full term and no more, must sell the lands charged with the unpaid taxes of the year of his election, though his predecessor assessed them that year, gave bond for their collection, and holds the tax-book; and *he* cannot sell those charged with the unpaid taxes of the second year of his term, though he assessed the lands, gave bond to collect the taxes and holds the tax-book. He holds the execution, nevertheless, and no law authorizes him to deliver it to his successor; and if he pays into the state and county treasuries the full amount of state and county tax with which he may stand charged, on or before the time prescribed by law, he can proceed to collect the taxes so

paid by him, for three years after such payment, in the same manner as other taxes are collectable; that is, by sale or otherwise, though his term of office may have expired. And, by law, he is not required to pay over the county revenue until the 25th of May, nor the state revenue until after the auditor has settled his account, which he is required to file by the first day of May.

Again, by the chapter on executions, the ex-sheriff could not only sell lands levied on by him while he was in office, but he could also execute deeds for the same. *Sec.* 132, *of chap.* 148, changes this, as to the execution of the deed for lands sold for taxes, by authorizing the collector actually in office to make the deed, where the collector who sold has ceased to be collector by expiration of his term of service after sale of the lands; but no change is made as to the power of the collector holding the tax-book to make the sales. As to that, then, the general law must be held to govern.

And in the several provisions directing the different steps to be taken, from first to last, beginning with the assessment and ending with the sale, the language construed according to its natural and obvious meaning, indicates that the "collector," who is to do the several acts, is one and the same person. He is not to file his list of non-resident lands until the fourth Monday of December, though his term of office expires on the first Monday in January, thereafter. *He* is to set up a copy of the list at the court house door, and publish it in a newspaper. The sale is to be made on the second Monday of March by *him* or his deputy; and to give him time to do this, and because the collector for 1856, for example, could not complete his collection of the taxes until that sale, he was not required to pay over either the state or county revenue until the latter part of May.

We are clear, therefore, that the collector for a particular year is the only officer authorized and empowered to collect the taxes for that year; and that although his term of office expires before the day fixed for the sale of lands for those taxes, he alone can make such sales. He may do this himself, or by deputy.

In *Hogins vs. Bradshears*, 13 *Ark.*, 242, it was held that a sale for taxes "made by an ex-collector, after the expiration of his term of office," was invalid; for that, and also because it was made on a day other than that, and after that, fixed by law, without any order of the county court directing it to be made on such other day. In that case the taxes due were for the year 1842. Abraham Sinclair, the assessor and collector for that year, assessed the lands and received the tax-book, and died in July, 1842. On the first day of August, 1842, William Adams was commissioned sheriff and received the tax-list. His term of office expired, and after that he made out and filed the list of non-resident lands in May, 1843, and sold them on the 1st of July, 1843.

By the general statute, *sec.* 72, *chap.* 68, when an officer *dies*, after taking land in execution, and before sale, the sheriff in office is to proceed with the execution and make the sale. Sinclair having died, Adams could sell, *while he remained in office*; but as he had not taken the land in execution, or done any act whatever, until he ceased to be sheriff, his successor alone, the actual sheriff, could by law make the sale. The decision in that case was, therefore, correct, and so was the general expression used in the opinion, when confined to the given case. But that case was entirely different from the present, and the decision does not in the least conflict with the conclusion to which we have arrived. P. P. Cross had not died, when this sale was made, and the provisions of the statute are different in the different cases. It is only when the sheriff making the levy has *died*, or been *removed* from office, or is otherwise *disqualified* that the actual sheriff can complete the execution of the process.

Any judicial sale, made by any person or officer other than the one authorized and empowered by law to make it, is void. It is not, in such case, the act of the law, from which alone it can derive validity. In this case the sale was not made by P. P. Cross, who was collector in 1856, but by G. W. S. Cross, sheriff elected in August, 1856, and who became collector for 1857,

on the first day of January in that year. It was therefore null and void.

But it is urged that G. W. S. Cross was the deputy of P. P. Cross; that the objection that he acted in his own name and right as sheriff, and not as deputy, is a technical one, hardly tenable any where, and certainly not in a court of equity; that the only question should be, whether G. W. S. Cross was authorized to sell, at the time and in the manner in which he did, and not whether he was authorized to sell in the particular capacity he assumed, or by which he described himself; that if he was in fact authorized to sell, it worked no injustice that he sold as sheriff; and that if he was in fact authorized to sell, it does not matter, substantially, whether he sold as deputy or principal. For, it is said, the bidders at the sale had nothing to do with his official description of himself, and are not to be held responsible for it.

The argument is ingenious and plausible, but unsound. Undoubtedly the courts ought not to exercise their ingenuity to invent obstacles to defeat sales for non-payment of taxes, or to regard these sales as iniquitous, and support them only when it is impossible to do otherwise. For though it is true, as has been judicially said, that purchasers at tax sales obtain acres for cents, yet that ought never to have made the courts acute to seek out and anxious to sustain objections to such titles. There can be no free government without revenue; the imposition and collection of taxes is the exercise of the highest powers of sovereignty; and one of the first duties of the citizen is to bear cheerfully the light burthens and pay promptly the equitable and equal taxes imposed on his property by the government of his choice; and if the taxes are small, and the lands on which they are charged valuable, so much the more reason why he should pay them promptly, and so much the less cause he has for complaint, if, in consequence of failure to pay, he loses his lands.

But, nevertheless, in this as in all other proceedings that alone is valid which is done legally, and especially that which is done

by the proper officer by law empowered to do it. It is true that if G. W. S. Cross was empowered to sell, his mistake in describing the capacity in which he sold might not be material. But *he* was *not* authorized to sell. The sheriff of the former year was the only officer authorized; and the whole case affirmatively shows that *he* did not sell, but that the sheriff actually in office did. That the latter was also deputy of the former, and made the sale does not prove that the former did it. If the certificate purported to be given by P. P. Cross, by his deputy, it would be presumed, in this collateral proceeding, that the latter was authorized by his general powers as deputy, or by special deputation, to make the sale, and the court would look no further. It is not alleged in the answer, or proven by the testimony, that he sold as deputy, or, more accurately, that P. P. Cross made the sale, by him as deputy. A certificate of sale given by him as deputy, in his own name, like a return on a writ so made, would be worthless. Made by him as sheriff, it is at least equally so; for it even excludes the conclusion that he did the act as deputy. No attempt is made to reform the certificate; and it is clear from the pleadings and proof that G. W. S. Cross, in his own right as sheriff, advertised the lands and made the sale.

A deed made by an attorney in fact in his own name is worthless. It must be made in the name of the principal. It is worthless though made by the attorney in fact for the owner of the land on its face. And even if it could be enforced against the principal, in equity, as virtually his agreement, certainly that could not be done, if the attorney in fact conveyed in his own name, as owner of the land, under a title conflicting with that of the principal, however plausibly it might be urged that he really was attorney in fact of the principal, and *could* have sold and conveyed for *him*. The deed could not be, at one and the same time, *his* deed and his principal's. The argument here is not that G. W. S. Cross *did* make the sale as deputy of P. P. Cross, but that he *could* have done so, if he pleased. Now even that does not appear. If he could have done so, the legal pre-

sumption is that he would have done it; and if P. P. Cross supposed that the legal power to make the sale was not in himself, of course he did not authorize G. W. S. Cross, though previously his deputy, to do it for him. Nor did the latter, supposing as he did that he had himself power to sell, as sheriff, act as deputy of his brother, or deem that his deputization extended to this sale.

The question is not what *person*, but what *officer*, made the sale. If A, authorized to make a sale as sheriff, and being sheriff, had made it in some other official capacity, there would be reason to urge that the court should regard the description as a mistake, and that he should be presumed to have made it in the only legal capacity in which he could do so. But this is not that case. He had no authority to make it at all; and having made it as sheriff, his general deputization does not prove that he *could* have made it, or had the right to make it, as deputy for P. P. Cross. If he had done it as deputy, his general deputization would be presumed to have continued. As he did not, it must be presumed to have expired when he and P. P. Cross supposed the powers of the latter as collector to have terminated. When he declared that he was acting, not as deputy, but in his own right as sheriff, we should be going a great way in order to support this title, to hold that, without other evidence, we must infer that he acted as deputy for another.

It is the official character of the sheriff, and not of his deputy, the oath of office of the sheriff, that gave *his acts* validity, conclusiveness and sanctity. It is *his* return that cannot be impeached. It is because the sheriff's certificate of purchase, the certificate of purchase given by the officer who made the assessment and advertisement, is deemed by law conclusive, like a return, as to the facts that constitute the regularity of the proceedings prior to the sale, and at the sale, that his deed is made evidence, and that even the deed of a subsequent collector, who knows the facts from the certificate alone, is evidence of the truth of all its recitals. The law attributes no such dignity or sanctity to the certificate or deed of a deputy. The sale in this

case had not for its regularity the guarantee of the proper collector's oath of office. It was not the act of the law by her sworn minister, authorized to make it. It was not an official act at all; but that of an unauthorized individual, not commissioned *quoad hoc* by the state. It is not as where one does an act which he may legally do in one capacity and cannot do in another; in which case the law and courts presume, in the absence of proof to the contrary, that he did it as he legally could, and not as in law he could not. For here that presumption is excluded by the broad fact that Cross did not pretend to act as deputy, but in his own character as sheriff, the former sheriff being in no wise bound by or responsible for his acts, nor accountable for the moneys received by him, nor entitled to the commissions, nor lending his official sanction to the sale, nor vouching, under the obligations of his oath of office, for its regularity.

The deed of the subsequent sheriff states that George W. S. Cross advertised the lands; that *he* sold them; that Twombly paid *him* the money bid, and that *he* gave Twombly the certificate. To infer, in the face of this deed, that George W. S. Cross, sheriff of Arkansas county, did not make the sale, but that Pleasant P. Cross, ex-sheriff, by G. W. S. Cross his deputy did, would be to falsify and destroy the deed. The certificate, changed and amended by parol testimony, would not support the deed.

And it may be added, that as the deed shows that the advertisement and sale were made by an officer not authorized to sell, it is not evidence of the truth of the recitals, or of the regularity of the different steps taken. It recites an illegal sale, and cannot be aided by parol evidence which contradicts it. By the deed and certificate as they are, the purchaser must stand or fall.

The order of the county court could not confer the power to sell on an officer not authorized by law to sell. If it meant to confer it on G. W. S. Cross, it was so far null; and, in ordering the sheriff to sell, it must be presumed to have intended merely to direct that the sale should be made by the officer authorized

by law to make it. It was not a judgment, not to be collaterally drawn in question. If it had undertaken to decide that an officer not authorized by law should sell, it would have acted without jurisdiction, and its order have been so far *coram non judice.*

We need not undertake to decide whether a sale of lands for taxes, made by a collector *de facto*, would be valid, like other acts done by judicial and other officers *de facto.* This court, in *Scott vs. Watkins*, 22 *Ark.*, 556, indicated its disinclination to agree to the doctrine of the supreme court of the United States, in *Parker vs. Overman*, 18 *Howard*, 137; that the acts of an assessor, who had not made the required affidavit, were void. The increase in the number of the judges of that court beyond reasonable limits, and the continual recurrence of dissenting opinions had, many years since, greatly lessened its authority; and we should not bow with unhesitating submission to its decision on a question arising under our own statutes. We see no reason why the general principle as to the acts of officers *de facto* should not apply to those of assessors and collectors. But G. W. S. Cross was not, *quoad hoc*, the collector *de facto.* An officer *de facto* is one who comes into the particular office by color of title. And the acts of such an officer are valid, as it concerns the public, or third persons who have an interest in his acts. *The People vs. Collins*, 7 *Johns.*, 549; *The People vs. White*, 24 *Wend.*, 525; *The People vs. Stevens*, 5 *Hill*, 616. You cannot assail his title to the office collaterally. The official acts of an officer regularly appointed, though not regularly qualified, are valid in respect to third persons. *Bucknam vs. Ruggles*, 15 *Mass.*, 180; *Mason vs. Dillingham*, *id.*, 170; and while a person holds an office, that of sheriff, for instance, his doings are deemed valid. *Fowler vs. Beebe*, 9 *Mass.*, 231; *Commonwealth vs. Fowler*, 10 *Mass.*, 290; *Doty vs. Gorham*, 5 *Pick.*, 487.

But G. W. S. Cross was sheriff and collector *de jure*, as to the taxes of 1857. As to those of 1856, the office of collector was still filled by P. P. Cross, and G. W. S. Cross did not hold it by color of title; nor claim to be sheriff under any election, appoint-

ment or commission prior to August, 1856. He could not be collector *quoad hoc*, when that office was held by another, whose title he could not dispute, and whose deputy he had been. He simply undertook in another capacity, an act which another person, still for that purpose holding the office, could alone perform. If the argument were valid, it would not only warrant a new collector in selling lands, in every case, for taxes of the year for which he was not collector; but a new sheriff in selling lands levied on by his predecessor, who was still living and alone invested by law with the power to sell. The principle relied on is based on considerations of public policy; and only protects rights gained under the action of persons in possession of offices, and apparently in legal possession. The public peace, and justice to individuals alike require the maintainance of the principle. But G. W. S. Cross only assumed to act in a character of which he was legally in possession, and under a commission and authority which did not give him the power to do the act. He never assumed to be what he was not. If he had assumed to be sheriff and acted as sheriff, not being legally so, and being liable to be ousted on *quo warranto*, and if, being what he assumed to be, he could, as such, legally have made the sale, then he would have been, as to that, collector *de facto*, and the sale would have been valid. But he did not assume to possess any appointment or commission under which he could legally do the act.

We cannot hold that the original owner of land cannot impeach a tax sale until he has paid the taxes. To whom and how could he pay them, after the sale? He could but tender them to the purchaser: for the state and county already have them in their treasuries. He must tender them before filing his bill, and again by his bill. The affidavit required by *section 7, chap.* 106 *of the Revised Statutes*, was made and filed before the 29th of April, 1859; and no motion to dismiss the suit for want of it was made.

The relief prayed by the bill was properly grantable by the court below. But the bill offered to pay whatever amount of taxes Cross and Twombly might have paid on the lands, with

the proper interest and other legal dues; and even if the owner seeks to redeem lands sold for taxes within the year allowed by law, he must pay or tender twice the sum bid and paid by the purchaser, for taxes, penalty and costs, and the true value of any improvement made on the lands by the purchaser; and of course, the relief sought could only be had when what the complainant had tendered, or should have tendered, should have been paid into court, with interest, and with any other taxes paid by the purchaser or defendants on the same premises, after the purchase, and interest on such sums, and the value of any improvements made.

The decree must therefore be reversed and the case remanded, with directions to the court below to enter a decree interlocutory, for the taking an account before the master, wherein shall be stated: first, the sum of eighty-three dollars and eight cents, with interest at six per cent. per annum from the 27th day of April, 1858; second, all such taxes as the defendant Twombly may have paid on the lands, since the purchase, with like interest from the time of payment of each; and third, the value of any improvement on the land made by the defendants or either of them; and upon the payment into court by the complainants, of the sum so found to be due, upon confirmation of the master's report, the court below is further directed to render a decree declaring the sale of said lands by the said sheriff null and void, and canceling and annulling the certificate of purchase, and the sheriff's deed obtained thereunder, and quieting the title of the complainants. The costs in this court to be paid by the appellees, and those in the court below by the appellant.

GAINES VS. CRAIG.

Under *sec.* 1, *ch.* 133, *Gould's Digest*, which provides that suits at law may be commenced by filing in the clerk's office "a note, or writing obligatory, or due bill, or other evidence of debt," on which a summons or capias may issue, a plaintiff cannot commence an action by filing an open account.

Nor could the plaintiff commence an action by filing a sealed agreement which on its face shows no cause of action, and upon which a right of action could only be shown by auxiliary evidence.

Nor was it the intention of the statute that actions of debt or assumpsit should be joined with covenant in one suit.

Error to Chicot Circuit Court.

Hon. JOHN C. MURRAY Circuit Judge.

GARLAND & RANDOLPH, STILLWELL & WOODRUFF, for plaintiff.

Opinion prepared by E. H. ENGLISH, ESQ.—*See note, page* VIII.

On the 16th of April, 1861, Abner Gaines filed in the office of the clerk of the circuit court of Chicot county a promissory note, executed to him by Louis E. Craig for $1,000.00, bearing ten per cent. interest, etc. Also an open account in which he charged Craig with the amount of the note and interest due upon it, and an additional item of $1500.00 for contingent fee claimed by Gaines for attending to the interest of Craig, as an attorney, in a contest about the validity of the will of Junius W. Craig. Gaines also filed a sealed instrument signed by him and Craig, which was referred to in the account filed, by which it was agreed between the parties, in substance, that in consideration that Gaines had agreed to prosecute and defend the interest of Craig in and under the will of Junius W. Craig, Craig agreed to give him his note, with security, for $1,000.00, payable 1st of July, 1861, bearing ten per cent. interest from maturity; and further agreed to enter into an obligation, with security, to Gaines, con-

ditioned that on the termination of the suit then pending in the Chicot circuit court in relation to the will of Junius W. Craig, if any will should be substantiated, Craig was to pay to Gaines the sum of $1500.00.

Upon the filing of the above papers, affidavit, bond, etc., a writ of attachment was issued against Craig, and Joshua M. Craig was summoned as a garnishee.

At the return term, Lewis E. Craig appeared and moved to strike out the papers filed as the foundation of the suit, because the plaintiff had filed no declaration or statement setting out his cause of action, etc. The court overruled the motion as to the promissory note, but struck out the account and the agreement filed, and the plaintiff excepted.

No further defence being made, a judgment was rendered against Lewis E. Craig, for the amount of the note and interest, and also against Joshua M. Craig, upon his answer as garnishee, and Gaines brought error.

The plaintiff doubtless attempted to bring an informal suit under *section* 1, *ch.* 133, *Gould's Dig.*, *p.* 844, which provides that: "Suits at law may be commenced in any of the circuit courts, etc., by filing in the office of the clerk, etc., a note, or writing obligatory, or due bill, or other evidence of debt, which note, writing obligatory, or due bill, or other evidence of debt, shall be a sufficient declaration on which a writ of summons, or *capias ad respondendum* against the person, or of attachment against the property of the defendant, shall be issued."

The promissory note was the only "*evidence of debt*" filed. The open account was no *evidence* of debt within the meaning of the statute; nor was the sealed agreement. It showed upon its face no cause of action, and a right of action upon it could only be shown by such auxiliary averments as must be made by a declaration. The liability of Craig upon the instrument depended upon a contingency—the rendering of service by the plaintiff as an attorney: the termination of the suit in relation to the will of Junius W. Craig; the establishment of a will, and the failure of

the defendant Graig to execute the obligation, with security, stipulated for in the written agreement.

The court below properly struck out the sealed agreement for another reason: Covenant would be the proper form of action upon it, while debt or assumpsit only could be brought upon the note, and it would be such a disregard of the rules of pleading as the statute hardly contemplated to permit them to be joined in one suit. See *Gatton vs. Walker*, 4 *Eng.*, 199.

The judgment must be affirmed, and if this were a case where damages could be imposed for the prosecution of a writ of error without plausible grounds, we should be much inclined to impose them.

OSBORN, EX PARTE.

The judgments of a circuit court held, at a time other than that prescribed by law, are void, as held in *Brumley vs. The State*, (20 *Ark.*, 77.) 24 479 59 335

The ordinance of the convention of 1864, which ordained that all laws in force in this state on the 4th of March, 1861, are still in force, etc., necessarily repealed, by implication, the act approved November 18th, 1861, which provides for holding the terms of the circuit court of Pulaski county; and revived the act of 21st January, 1861.

The rule of repeal of statutes by implication is received with disfavor; but where a statute is revived, which is totally inconsistent with and repugnant to a later statute upon the same subject, as where effect cannot be given to both, the rule must apply.

Motion for perpetual Supersedeas of Judgment.

GALLAGHER & NEWTON, for the motion.

ROSE, contra.

Mr. Chief Justice WALKER delivered the opinion of the court.

This case comes before us upon a motion for an absolute supersedeas and perpetual stay of the execution of the judgment of the Pulaski circuit court, rendered at its adjourned term, holden on the fourth Monday after the fourth Monday of August, 1865, at which term Osborn was convicted of murder in the second degree, and sentenced to the penitentiary for the term of five years: from which judgment an appeal was taken, and is now pending in this court.

The ground upon which the motion is predicated, is, that the trial, judgment and sentence of the defendant were had at a time, not provided by law for holding the circuit court in the county of Pulaski, and that, therefore, the judgment and sentence of the court are void, and should be perpetually superseded and stayed.

In order to determine this question it becomes necessary to ascertain whether the circuit court of Pulaski county was, or was not held at a time provided for by law; because, if it was not, it is very evident that the proceedings had in the case are *coram non judice*, and should be perpetually superseded and stayed. That such should be the case is fully settled by this court in the case of *Brumley vs. The State*, 20*th Ark. Rep.*, 77.

By reference to the statute fixing the times of holding the circuit court in Pulaski county, we find that, approved November 18th, 1861, which provides for holding the court in said county on the fourth Mondays after the fourth Mondays in March and and September, the latest. This act was passed after the ordinance of secession. That at the time this act passed, there was a state government in existence, under which its several departments might lawfully act, was definitely settled at the present term of the court in the case of *Hawkins vs. Filkins*. The act fixing the time for holding the court, was neither in violation of the constitution of the United States, nor of the state of Arkansas, was a proper subject of legislation, and the court holden thereafter in said county whilst that act remained in force, to be

a legal court must (as held in *Brumley vs. The State*,) have been holden at the times prescribed by law.

It is contended by counsel that this act was repealed by an ordinance of the convention held in January, 1864, which is in the following words: "And it is further hereby declared that all the laws in force in this state on the 4th of March, 1861, are still in force, not inconsistent with the provisions of this constitution, and which have not expired by limitation therein contained." By this ordinance, the code of statute laws in force on the 4th of March, 1861, was declared to be in force, or more properly, adopted as a code of laws for the administration of the state government under the new constitution. There is no clause expressly repealing the laws passed by the legislature of Arkansas after the 4th of March, 1861; but it is contended that they were by necessary implication repealed by force of the maxim *expressio unius est exclusio alterius*. In other words, that inasmuch as the convention, by ordinance, declared the laws of the 4th of March in force, it must be understood as having intended that no other laws than those should be in force. This rule of repeal by implication has been received with disfavor, and is quite limited in its application. 2 *Dwarris on Stat.*, 638, 673.

It is worthy of remark that this is not an ordinary case in which a single statute was passed, to stand in connection with other existing acts; but it was declaring in existence a code of laws for the government of the state under a new constitution, just such as is found in many of the scedules or ordinances which accompany every change of state government, after framing a new constitution: and it is not probable that it could have been the intention of the convention that any other code of laws, or any laws whatever should remain in force. Should we, however, assume that it was the intention of the convention to declare the act of 21st January 1861, in force, and to leave the act of the 18th November, 1861, unrepealed and in force also, the result would be, that there would be two acts in force fixing different times for holding the circuit court in Pulaski county. And when such is

the case, the rule is that the latter act repeals the former. *Sedgwick on Stat.* 125.

In this case, therefore, it necessarily follows that the declaring of the act of 21st of January, 1861, in force, was by necessary implication a repeal of the act of 18th November, 1861.

In support of this conclusion we have a decision of the supreme court of the state of Maine, where the same question arose under circumstances not unlike those in the case under consideration. In that case, it was argued by counsel that the statute was not repealed, because a subsequent statute did not expressly repeal it—because the second statute contained nothing repugnant to it—because the act which separated Maine from Massachusetts did not repeal it, and was not inconsistent with the situation of the new state. MILLER, C. J., when considering this question, said: "It is necessary to consider the reasons which occasioned the introduction of the before mentioned provisions into the act of separation. It was evidently designed to prevent the confusion consequent upon the suspension of law, and the injury which would thereby result to the community and individuals. It was for the purpose of giving time to the legislature of this state, to re-enact, modify or repeal those laws as, on consideration, they should determine most for the interest, and best adapted to the interest of the state," and held, that where the legislature had revised the subject matter of any of the statutes of Massachusetts, and enacted such provisions as they deemed suitable to the wants of the people of the state, the former statutes are to be considered as no longer in force, though not expressly repealed. *Towle vs. Manett*, 3 *Greenleaf Rep.*, 22.

So, too, where some parts of a revised statute are omitted in the revising act, the parts omitted are not to be deemed as revived by construction, but are to be considered as annulled. *Smith's Com. on Stat. and Cons. Law*, 903. A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as on reason and common sense, operate to repeal the former. *Id.*,

904, *Goodnow vs. Buttrech*, 7 *Mass.*, 142; *Bartlett vs. King*, 12 *Mass.*, 545.

After a careful consideration of this ordinance, taken in connection with the other acts of the convention, we thing it falls within the spirit of the rule laid down in the cases above referred to, and that it was evidently the intention of the convention to declare the laws of the state which were in force on the 4th of March, 1861, a code of laws to be in force in the state to the exclusion of all other laws, which laws so in force on the 4th of March, 1861, were to take effect and be in force from and after the adoption of the constitution of January, 1864, which was adopted by the people of the state to whom it was submitted for ratification and approval on the 16th day of March, 1864; from which time all other laws were, by necessary implication, repealed.

The acts of the legislature of Arkansas passed after the 4th of March, 1861, not in conflict with the constitution of the United States, nor of the state of Arkansas, were valid; and acts done under them whilst in force and rights acquired, remained valid and effectual, as if no such repeal had been made. *Smith* says that, "the rule that vested civil rights, acquired under law, are not affected by a repeal, is founded in good sense and reason, and is consistent with the fundamental principles of natural justice." *Com. on Stat.*, 881; *North Canal Street Road*, 10 *Watts*, 351; *Illinois & Michigan Canal vs. City of Chicago*, 14 *Ill. Rep.* 337.

There is nothing in the case of *Hawkins vs. Filkins*, which in any manner conflicts with the conclusions at which we have arrived. The question considered in that case was whether there existed a state government after the ordinance of secession, under which the several departments of the state government remained, competent to make and execute the laws within the state, and it was held that such government did exist, and that the administration of the state government under it was valid except when in conflict with the constitution and laws of the United States: that the convention that framed the constitution of 1864, had not the

power to declare void *ab initio*, the acts of the convention of 1861, and the entire action of the state government under it; and that upon a fair construction of the ordinance, the convention had not intended to do more than to declare the action of the convention of 1861, and of the state government under it, void so far only as such action was in conflict with the constitution and laws of the United States. The question as to whether the convention of 1864, had power to repeal the acts of the legislature, whether before or after the passage of the ordinance of secession was not before the court in *Hawkins vs. Filkins*. In that case, the judgment, the validity of which was under consideration, was renderd in September, 1861, and before the act of November, 1861, which changed the times of holding the circuit court of Pulaski county, had passed, and consequently no question as to the effect of that law could have been considered.

Looking into the record in the case before us, we find that the court that tried the case of *The State vs. Osborn*, was held at the regular term of the court, appointed for the holding of said court under the act of the 21st of January, 1861, which act was, by the ordinance of the convention of 1864, declared to be in force; and consequently, that the judgments and decisions of said court within its proper jurisdiction were valid.

The motion for perpetual supersedeas is denied.

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MATTHEWS VS. THE STATE.

Where an offence and an exception to it are contained in the same clause of the statute, an indictment must charge that the defendant is not within the exception; otherwise, where the exception is in a subsequent clause or statute. (5 *Eng.* 301.)

Appeal from Columbia Circuit Court.

Hon. JOHN T. BEARDEN, Circuit Judge.

GARLAND, for appellant.

JORDAN, Attorney General, contra.

Mr. Chief Justice WALKER delivered the opinion of the court.

The defendant was indicted in the Columbia circuit court, tried and convicted of larceny. A motion was made in arrest of judgment which was overruled, and the defendant appealed to this court.

The indictment charges the defendant with having stolen a hog, and the objection to its sufficiency is, that it does aver that the hog was either under twelve months old, or was marked.

It is true that hogs and cattle over one year old, running in the woods unmarked or branded, if taken by one not the owner, such taking is not larceny, but this is a separate and distinct act from that which declares the offence of larceny, and fixes its punishment; and when such is the case, it is not necessary when charging the offence, to notice this exception or qualification. It is only when the exception is found in the enacting clause, that it becomes necessary to show by averment that the offence does not fall within the exception. Such was held to be the law in the case of *Brittin vs. The State*, 5 *Eng.*, 301, and upon the authority of that case, we will hold the indictment in this case good.

Let the judgment of the Columbia circuit court be affirmed.

Belding vs. Godwin, ad.

The only point insisted on in this case was decided in *Hawkins vs. Filkins, ante.*

Appeal from Chicot Circuit Court.

Hon. Wm. M. Harrison, Circuit Judge.

Garland, White & Nash, for appellant.

Mr. Justice Compton delivered the opinion of the court.

At the January term, 1866, of the probate court of Chicot county, Albert Belding, a creditor of the estate of W. T. Ferguson, deceased, moved the court to declare void letters of administration which had been theretofore granted to Allen Godwin, on said estate, and to order citation to such persons as had the prior right to administer, to appear and apply for letters, and in the event they should not, that letters be granted to him as creditor as aforesaid.

The grounds of the motion are, first: that the letters to Godwin were granted by the court after the passage of the ordinance of secession, and before the state government establised in 1864, went into operation; and second: that no administration bond, etc., appeared of record.

The probate court overruled the motion, and it appearing that there was reason to believe that an administration bond had been filed and mislaid, the court ordered Godwin to enter into bond *nunc pro tunc*, and proceed with the administration. From this decision Belding appealed to the circuit court, where, on due consideration of the points excepted to, the judgment of the probate court was affirmed. The case now comes before this court, and the only point insisted on in the argument here is the same as that determined in *Hawkins vs. Filkins*, at the present term. The principle decided in that case is the law of this. Let the judgment be in all things affirmed.

BENNETT, AD. VS. WORTHINGTON.

The correct rule of construction of statutes is, that where the will of the legislature is clearly expressed, the courts should adhere to the literal expression of the enactment, without regard to consequences; and every construction derived from a consideration of its reason and spirit should be discarded.

Where no exception is made in a statute of limitations, the courts can make none, whatever may be the hardship in individual cases; and so, the closing of the courts in time of civil war, not being a case excepted from the operation of the act of limitations, that fact is no answer to the plea.

By virtue of an act of the legislature, approved December 1st, 1862, suspending all acts of limitation and non-claim from the date of its approval, the statute of limitation was suspended until the 16th of March, 1864, when that act was repealed by the adoption of the present constitution—so, the intervening time is not to be computed in determining the period of limitation, when properly pleaded.

Appeal from Chicot Circuit Court.

Hon. W. M. HARRISON, Circuit Judge.

GARLAND & NASH, for appellant.

We submit the following propositions:

Statutes of limitations admit of an equitable as well as legal construction. *Smith's Com.*, 710, 814 *et seq.*; 18 *Wend.*, 131.

They are regarded as statutes of repose and presuppose a state of peace and access to legally constituted tribunals. *Angell on Lim.* 9 *et seq.*; 5 *Peters*, 470; 1 *Peters*, 360.

In times of war and civil tumult when the courts are closed, our civil rights are merely held in abeyance without injury till the return of law and good government: *et silet leges inter arma.* 2 *Co. Inst.* (*first Amer. Ed.*) *Plowden's Rep.* 9, 6; *Angell on Lim.*, *sec.* 488; 1 *John. Cas.*, 76; *McIver vs. Ragan*, 2 *Wheat.*

There were no legally constituted courts held in the state of

Arkansas from the time of secession till the reorganization of the state under the federal government.

The thirty-second section of our limitation act is broader and more comprehensive than the provision "beyond seas," in 21 *James 1st.*, and the case at bar comes within its letter, spirit and reason.

If there is any doubt about the construction of a statute, such a construction should be placed upon it as will result in the least injury to persons affected by it.

SUTTON, for the appellee.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of assumpsit brought, in the circuit court of Chicot county, by Caleb P. Bennett as administrator of the estate of John H. Steed, deceased, against Elisha Worthington, on two promissory notes, due and payable, the one, on the 22d day of March, 1860, and the other on the 21st day of January, 1861. The defendant pleaded the statute of limitations, and the plaintiff replied that, after the accrual of the cause of action, to-wit: from October, 1861, to October, 1865, the said circuit court of Chicot county was closed, in consequence of the existence of the late civil war, so that legal process could not be issued, and that he brought his said action within five years next after said court was opened. To this replication a demurrer was sustained in the court below, and the plaintiff saying nothing further, final judgment was rendered, from which he has prosecuted an appeal to this court.

It is provided by section 16 of the statute of limitations pleaded in this case, that if any person entitled to bring an action, in this or any other act of limitations now in force, specified, shall at the time of the accrual of the cause of action, be under twenty-one years of age, or insane, or a married woman, or imprisoned beyond the limits of the state, such person shall be at liberty to bring such action within the time now specified by law for bringing the same after such disability shall have been removed. And

it is insisted that, although the plaintiff does not come within the letter of any of the before-mentioned exceptions, yet, inasmuch as there was no court in which he could assert his right, for the space of time mentioned in the replication, it ought to be held, upon principles of equitable construction, that the act of limitations did not run during that period. No case has ever come before the American courts, upon a state of facts like that here presented; because, at no time, from the formation of the government until the recent unhappy political differences, was our country afflicted with the calamities of civil strife. But when we turn to the mother country, from whence the common law is derived, and whose people have been often involved in domestic war, precedents in point are not wanting.

The earliest English case is that of *Prideaux vs. Webber*, 1 *Lev.*, 31, decided in the court of King's Bench, 13 *Car.*, 2, in which it was held that, though the government was usurped, and the courts closed, the running of the statute of limitations was not affected; and the reason assigned was, that the statute contained no such exception, and that infants would have been bound thereby had they not been excepted from the operation of the act. So in *Lee vs. Rogers*, 1 *Lev.*, 111, it is said that in a suit by *Brenion vs. Evelyn*, in the common pleas, it was adjudged that the closing of the courts in consequence of civil war, could not defeat the statute of limitations, it not being a case excepted from its operation. The next case is *Hall vs. Wyburn*, 2 *Salk.*, 420, in which it is laid down that, in *Bynton's case*, it was held by BRIDGMAN, C. J., that though the courts were shut so that no suit could be brought, yet the statute would bar the action; because as is there said, the statute is general and must affect all cases, which are not specially exempted. And this decision, it was said in the subsequent case of *Aubry vs. Fortescue*, 10 *Mod.*, 206; was often approved by Lord Chief Justice HOLT. In *Beckford et al. vs. Wade*, 17 *Ves.*, 87, *The Master of the Rolls* (Sir WILLIAM GRANT,) in discussing the exceptions in the statute of limitations, or possessory law of Jamaica, refers to and recognizes these earlier English decisions;

and adverting to the case of defendants absent, or out of the realm before the statute of Queen Anne, he said: "It was in vain to attempt upon general reasoning in many cases to introduce an exception in favor of a plaintiff in a case, where the defendant was out of the realm: a most reasonable exception undoubtedly to be made, but which the statute had not made. A plaintiff out of the realm, may prosecute a suit by attorney; but when defendant is out of the realm, it is very hard to call upon the plaintiff to institute a suit, which in most cases must be wholly without fruit; yet, until the statute of Queen Anne was made, that case formed no exception, and the statute of limitations barred the action." And he laid down the rule in such cases to be that general words in a statute must receive a general construction, unless there is in the statute itself some ground for restraining their meaning, and that to arbitrarily add to or take from that which is expressed in the statute, under the doctrine of inherent equity, is not allowable.

In *Rhodes vs. Smethurst*, 6 *Mees. & Welb.*, 351, decided in the Exchequer Chamber, in 1840, the action was upon a promissory note, and the defendant pleaded the statute of limitation. Six years was the statutory bar, and the plaintiff replied that the cause of action accrued within six years before the death of the maker of the note, and that in consequence of litigation in the ecclesiastical courts, no administration was granted until the 18th June, 1835; that he commenced his action on the 12th of September following; and that the periods which elapsed between the accrual of the cause of action, and the death of the maker of the note, and between the grant of administration to the defendant and the commencement of the suit, did not together amount to six years. There being no exception in the statute applicable to such case, the court held that the statute having begun to run continued to do so, notwithstanding that from the death of the maker of the note until administration granted, there was no one whom the plaintiff could sue. It was argued in that case, as it has been in this, that as no laches could be im-

puted to the plaintiff, the period of time during which there was no person to sue, ought to be excluded from the calculation, by an equitable extension of the act. "This argument," said Lord Chief Justice DENMAN, who delivered the opinion of the court, "might be entitled to some weight, if the cause in question had for its object the remedying of some inconvenience under which plaintiffs suffered, in which case it might be extended by construction to reach a case not within the words, but within the mischief intended to be remedied. But the object of the statute is quite different; it was passed for the benefit of defendants, to exempt them from being called to account in respect of transactions long gone by, which it might not be easy to explain at a distance of time." And in further response to the argument, he said: "The case of *Prideaux vs. Webber*, 1 *Lev.*, 31, in which the statute was held to run, though the courts of law were shut in consequence of the rebellion, shows that this clause of the act is to be construed strictly against plaintiffs," and that the act of 1 *Will. & M.*, *c.* 4, by which it was enacted that the space of time from the abdication of James II, to the accession of *William and Mary*, "should not be accounted any part of the time within which any person, by virtue of the statute of limitations, must bring his action, is in accordance with this view of the law."

These authorities and others that might be cited abundantly show how the law has been settled in England touching acts of limitation, essentially the same as our own in regard to the particular provision under consideration; and it will be found, on examination, that the principles on which the English decisions rest, have been fully recognized and adopted in the American courts. Thus, in *Sacia vs. DeGraff*, 1 *Cow.*, 356; which was on a promissory note, the plaintiff, to take the claim out of the statute of limitation, relied on a discharge of the defendant, under an act passed by the legislature of New York for the benefit of insolvent debtors. The discharge was obtained before the note fell due, and consequently before the statute began to run. Afterward,

and before suit brought, the insolvent debtor's law was declared unconstitutional by the supreme court of the United States; and it was contended in argument that the case was clearly within the equity of that provision of the statute which prevents its running where there is an incapacity to sue; because, until the insolvent law was declared a nullity, the courts were practically closed against the plaintiff, and his power to sue suspended. But SAVAGE, C. J., in delivering the opinion of the court, said: "By the 2d proviso to the 5th section of the act of limitations, excuses for disability in the plaintiff, are confined to infancy, coveture, insanity and imprisonment. The only excuse allowed by the statute, arising from the act of the defendant, is his being out of the state when the cause of action accrued. Though the defendant's virtual protection from prosecution by his discharge, produces the same result as his absence from the state, yet we are not warranted by any rule of construction, in deciding, that every cause which produces the same effect as the one mentioned in the act, comes within it. It is true, that the reason why the absence of the defendant from the state excuses the plaintiff from prosecuting, is, that the defendant is beyond the reach of the process of the court: and the defendant's discharge placed him equally out of the reach of any recovery against him, until the decision by the supreme court of the United States, in *Sturgis vs. Crowingshield.* But it is not for the court to extend the law to all cases, coming within the *reason* of it, so long as they are not within the *letter.* Several cases of equal difficulty may be supposed, and have doubtless often occurred, which have never been holden within the exceptions of the statutes." In *Hudson vs. Carey*, 11 *Serg. & R.*, 10, the same question came before the supreme court of Pennsylvania, upon an insolvent law of that state, which had been declared unconstitutional by the supreme court of the United States, and a like conclusion was reached—TILGHMAN, C. J., remarking that to stop the running of the statute, under such circumstances, would be an assumption of legislative power. And Chancellor KENT, in *Demorest vs. Wynkoop*, 3 *John. Ch. Rep.*,

146, said that it would be not only impolitic, but contrary to established rule, both in law and equity, to depart from the plain meaning and *literal expression* of the statute.

The same principle was discussed and applied in *McIver vs. Ragan*, 2 *Wheat.*, 24. There, the plaintiff claimed under a grant from the state of North Carolina 40,000 acres of land, including the land in the possession of the defendant, and for which the ejectment was brought. The defendant had been in possession more than seven years—the term of limitation prescribed by the law of Tennessee—and the plaintiff in order to avoid the statutory bar showed that a large portion of the 40,000 acre tract lay within the Indian boundary, though that which was held by the defendant did not; that no corner or course of the tract was marked, except the place of beginning, and therefore, without a survey, it was impossible to prove that it included the land in dispute. But no survey could be made, because the laws of the United States prohibited the surveying or marking any lands within the Indian country reserved for the Indians, by treaty. Upon this state of facts, the supreme court of the United States held that the plaintiffs were barred. In answer to the argument, that the plaintiffs, though not within the letter, were within the equity of the exceptions mentioned in the act of limitations, the court said that the claim of the plaintiffs to be excepted from the operation of the act was founded on the impediments to the assertion of their own title, and that whenever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception: and that it would be going far for the court to add to those exceptions. "It has never been determined," said MARSHALL, C. J., who delivered the opinion of the court, "that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though created by the legislature, shall take such case out of the operation of the act of limitations unless the legislature shall so declare its will." In the *State Bank vs. Morris et al.* 13 *Ark.*, 291, this court said: "The statute which

creates the limitation, must also create the exception: we know of no law or decision to the contrary." And in *Pryor et al. vs. Ryburn*, 16 *Ark.*, 671, this principle was applied to the limitation act concerning slaves, in which there was no saving in favor of any class of persons, and the court held that where the legislature makes no exception in favor of infants, married women, etc., the courts can make none.

The correct rule, as we apprehend, to be extracted from the authorities, is, that where the will of the legislature is clearly expressed, the courts should adhere to the literal expression of the enactment, without regard to consequences, and that every construction derived from a consideration of its reason and spirit should be discarded. This rule is well established by the American as well as by the English decisions. In England it has been uniformly applied to cases growing out of the domestic wars of that country; and no good reason is perceived why it should not be applied here in like cases. To deny its application would be not only a violation of the rule, but would be, as we think, an assumption of legislative power; because it would be but supplying, by forced construction, a distinct exception which the legislature had omitted to make. The enactment was designed to be, and is, a statute of repose; and the courts, by adhering strictly to its plain letter, will best avoid those embarrassments, consequent upon an unfortunate equitable construction, which, at one time, attended the interpretation of the statute, in the English courts, on the subject of new promises and acknowledgments, and rendered it practically useless in one of its leading provisions.

The conclusion is: that the closing of the courts in time of civil war, not being a case excepted from the operation of the act of limitations, the plaintiff's replication was no answer to the defendant's plea. The replication was also defective upon another ground: the supposed disability is alleged to have accrued *after* the accrual of the cause of action; and it is well settled, that when the statute has once begun to run, no subsequent disability will stop it. (*Rhodes vs. Smethurst, supra; Angell on Lim.* (2 *Ed.*)

206, *and authorities there cited;*) besides, in this state, it is expressly so enacted by section 31 of the statute.

We are aware that cases of individual hardship may arise—indeed the same may be said of any system of jurisprudence that can be devised—but this furnishes no reason why a fixed rule of law should be disregarded. Hardships will be the less likely to occur, however, from the fact, that the legislature, at the session of 1862, passed an act suspending the collection of debts; and afterwards, at the same session, passed another act suspending the statute of limitations as to all debts, "the collection of which is *now* suspended by law." We have examined these acts, and the court is of opinion that, although the former act was declared unconstitutional by this court in *Burt vs. Williams*, the latter act operated, nevertheless as a suspension of the statute of limitations until repealed—or; in other words, that by force of the language employed, the operation of the latter does not depend upon the validity of the former act. The legislature believed the collection of debts had been suspended, and acting on that belief, not only *intended* to, but *did* suspend the statute of limitations. That they were mistaken in their views of the law as to the validity of the former act is not material. By reference to the two enactments, in connection with the decision of this court, in *Burt vs. Williams*, it will be found that the latter act suspends all acts of limitations and non-claim from the date of its approval; the 1st December, 1862—until it was repealed by the adoption of the present constitution—on the 16th day of March, 1864, as held in *Osborn, ex parte*, at the present term. So that the space of time from the 1st of December, 1862, to the 16th of March, 1864, is not to be taken as any part of the time within which any person under the statute of limitations is required to bring his action.

Upon the pleadings in the case before the court, however, the act of December 1st, 1862, can avail the plaintiff nothing. It never having been published, he probably was not aware of its existence.

Let the judgment be affirmed.

24 496
86 324

BLANKS VS. RECTOR ET AL.

An execution issued against an administrator on a judgment against the intestate, is irregular and void, whether the judgment be against the intestate alone, or jointly with other defendants.

Executions may be amended, in matters of form; and for clerical errors or omissions before sale; but not in matters of substance.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

RICE, for the appellant.

When there are more defendants than one in a judgment, and one dies, that severs the judgment and no revivor is necessary against the survivors, *Finn as ad. vs. Crabtree as adm'r.*, 12 *Ark.*, 597; and the judgment being severed, execution may be issued against the survivors. When one dies the judgment against the others is as distinct and several as if rendered against them alone originally. 2 *Tidd's Pr.*, 1009; 19 *Wend.*, 644; 12 *Ark.*, 394.

The execution in this case is really only against the survivors. The name of Trigg's ad., is but surplusage, but may be taken as suggestion of his death: or the amendment ought to have been allowed. *Thompson vs. Brumage*, 14 *Ark.*, 59.

WATKINS & ROSE, for the appellees.

The execution was properly quashed since it could not run against a deceased person's administrator. *Bentley vs. Cummins*, 4 *Eng.*, 48; 18 *Ark.*, 414; *id.*, 421; 22 *Ark.*, 573.

After the death of one defendant there should have been a *scire facias* to revive. *Erwin vs. Dundas*, 4 *How.*, *U. S.*, 73.

Mr. Justice CLENDENIN, delivered the opinion of the court.

We learn from the record in this case, that on the 8th of Novem-

ber, 1860, the appellant recovered, in the circuit court, a judgment against John T. Trigg and Henry M. Rector: that execution was issued on said judgment and levied on personal property; and that Trigg and Rector, on the 12th of April, 1861, executed and delivered to the sheriff a delivery bond for the delivery of the property on the 6th of May, 1861, with the appellees, Peay and Brown, as their securities; that the property was not delivered, the execution was returned unsatisfied and the delivery bond forfeited. That on the 24th of August, 1866, an execution was issued on the forfeited delivery bond, against Edmund Burgevin, administrator of Trigg, (the execution having recited the death of Trigg and the appointment of Burgevin as administrator) Rector, Peay and Brown, which was levied on the property of appellees, Peay and Brown. At the return day of the execution, the defendants in the execution and appellees in this court presented their petition in the circuit court, setting out in full the foregoing statement, and also filed their motion to quash the said execution for the following reasons:

"1st. That said execution is improperly issued against said Burgevin as administrator of said Trigg.

"2d. That the said execution was issued before there was any revivor of the said judgment."

After the filing of the petition and motion, the appellant filed his motion to amend the execution, "by striking out the name of Edmund Burgevin administrator, and by suggesting on the face of said writ the death of Trigg, said Trigg having died since said judgment was rendered." Both motions, to quash and to amend, were heard at the same time. The court overruled the motion to amend, and sustained the motion to quash the execution; and the appellant excepted and appealed to this court. At the hearing of these motions, it was admitted that Trigg had died after judgment, and before the execution was issued.

The first question in the consideration of this case, is as to the validity of the execution.

This execution was issued after the death of Trigg, against

Burgevin as administrator of Trigg, Rector, Brown and Peay. The execution was clearly irregular. The law, we think, is well settled, that an execution issued and bearing teste after the death of the testator is irregular and void. 5 *Eng.*, 541; 18 *Ark.*, 414, 421; 22 *Ark.*, 573; 1 *Cowen*, 740; 4 *Howard, U. S. R.*, 76; and we think the law is equally applicable, where there is more than one defendant in the judgment.

In the case of *Woodcock vs. Bennett*, 1 *Cowen.*, 740, in which a question similar to the one now before us, was argued, the court say: "It is no answer to say that one of the defendants was living, who might avoid the execution, and has in fact, procured it to be set aside. The objection is, that the law forbade the issuing it, so as to affect the representatives of the deceased defendant."

It is a settled rule that the execution as issued must be warranted by the judgment. 2 *Tidd*, 1029.

If the death of Trigg had been suggested of record, we think the execution could properly have issued against the surviving defendants in the judgment. 4 *Howard, U. S. R.*, 76.

Another of the grounds assigned for error is that the court below overruled the appellant's motion to amend the execution.

It has been decided by this court in the case of *Thompson vs. Bremage*, 14 *Ark.*, 59, that executions may be amended in matters of form, and we have no doubt the same rule should apply as to clerical errors or omissions, before sale under the execution; but we can find no authority that sustains the position, that an execution can be amended in matters of substance. To have allowed the amendment asked for, the court would necessarily have had to enquire of facts outside of its own record; for it is not contended that the records of the circuit court showed that Burgevin as administrator of Trigg, was a party to the judgment, or that the death of Trigg had been suggested of record; consequently there was no record of the circuit court to amend by; and therefore, the execution being illegally and improperly issued, the circuit court did not err it its judgment in quashing it.

The judgment of the circuit court is affirmed.

24 499
83 519

TRAMMELL ET AL VS. BASSETT.

Obedience is the first duty of a soldier; he has no right to require the reasons of orders, or consider the consequences of his acts under them; and may prove that he acted under orders in justification, when sued. But officers have a discretion in effecting that which they are required to perform, and will be held to a more strict account for acts done by them.

Where the bill of exceptions states facts different from the record this court must be governed by the record. (17, *Ark.*, 532.)

It is a matter within the discretion of the court to permit additional pleas to be filed after issue joined; and if pleas are filed out of time, according to the rules and practice of the court, it is within the proper exercise of the power of the court to order them stricken from the files.

Where the admission of a party is offered in evidence against him, it is the well settled rule of law that the whole admission is to be taken together—all that he said at the time in connection with his admission should be permitted to be proved.

On issues to the pleas of not guilty and limitations, in an action of trespass, the defendant will not be permitted to introduce evidence in mitigation of damages—such evidence not being applicable to the issues.

Testimony pertinent to the issue, and tending to prove circumstances showing the connection of the defendant with the trespass complained of, cannot be deemed of prejudice to the defendant and illegal.

All persons present and participating in a trespass are deemed equally guilty; and if one be accidentally present and not consenting to or participating in the act, it devolves upon him to prove his innocence.

The taking and carrying away the property of another without his consent is a conversion.

The reading of the preamble to the constitution to the jury, by the court, or other matter not pertinent or applicable to the issues in the case, is objectionable and should not be encouraged.

Appeal from Washington Circuit Court.

HON. ELIAS B. HARRELL, Circuit Judge.

WALKER for the appellant.

It is insisted for the appellants that the court erred in sustaining

the demurers to the 2d and 3d pleas, and in striking out the 5th. Soldiers cannot be held liable for legitimate acts done in the prosecution of war. *Halleck on Int. Law, chap.* 19, *sec.* 31, *p.* 348: 5 *Wheat.* 152. The war was a civil war. 2 *Black's Rep.* 635; and there is no distinction in the usages of war, whether it be a civil war or a foreign war. 7 *Wheaton*, 337; *The Tropic Wind, Law Rep.*, (*July*, 1861,) *p.* 151; *Halleck's Int. Law, ch.* 14, *secs.* 7, 8, *p.* 333, *Lawrence's Wheat. Int. Law, part IV., ch.* 1, *sec.* 7–10. Soldiers must obey, not act on their own discretion. *Vattel*, 293, 401. See opinion of NEWMAN, J., in *Hughes vs. Litsey et al., American Law Register* (January, 1866,) 148—158.

As the admissions of the defendant were proved by the plaintiff, his explanation or justification made at the same time should have been received in evidence.

The instructions are abstract and illegal and tended to confuse the minds of the jury—particularly the preamble to the constitution—certainly the defendants were not required to prove their innocence.

GREGG for the appellee.

It is submitted that if a party voluntarily engage in the violation of law by rebellion, or otherwise, he is not excusable in trespass, because large numbers are acting in concert, and under men or officers of their own selection and in an organized form.

The court properly sustained the motion to strike out the 5th plea. It was not filed in apt time—the issue having been made up at the previous term; and to have allowed the plea to stand would have been prejudicial to the plaintiff. *Sec.* 53, *ch.* 133, *Gould's Dig.*; 2 *Eng.* 117; 5 *Eng.* 443.

The record does not state that leave was granted to file the plea after the issues had been formed, nor the reasons for striking it from the files; and if the bill of exceptions states facts inconsistent with the record entries, the record must prevail. 17, *Ark.*, 332; 5, *Eng.*, 449.

We submit that there was error in receiving or rejecting evidence.

The testimony tended to show that the parties had engaged together for a common purpose, and hence the instructions of the court were not erroneous. Instructions are not erroneous if there is any evidence from which the jury might infer the fact; nor will the court reverse a judgment on account of instructions unless they are prejudicial to the party. *McNeill vs. Arnold*, 22 *Ark.*, 477; *Swinny vs. State*, *Ib.*, 215; *Patterson vs. Fowler*, *Ib.*, 396.

Mr. Justice CLENDENIN delivered the opinion of the court.

On the 28th of July, 1865, the appellee, Bassett, commenced his action of trespass, against the appellants Leonard Trammell, George S. Trammell and Baker Pidcock, Daniel T. Smith, Jackson Dyer and George W. Drain. At the May term, 1866, all the defendants appeared. Smith filed his plea in abatement, and the other defendants their plea of not guilty, and also special pleas of justification. The plaintiff admitted the truth of Smith's plea, and he was discharged. The plaintiff joined issue on the plea of not guilty, and demurred to each and all of the special pleas. The demurrer was sustained, and defendants then filed their plea of the statute of limitations, upon which issue was made up, and on the application of the defendants the cause was continued.

At the next term of the court in August, 1866, defendants, Leonard Trammell, Dyer and Drain, filed an additional special plea, and at the same time, defendants, Pidcock and Dyer filed an additional special plea, and defendant George S. Trammell, also, filed his additional special plea, all of which said pleas, the plaintiff moved to strike from the files, the motion was sustained, and the pleas stricken from the files, to which defendants excepted, and incorporated their pleas in the bill of exceptions. The case was then submitted to a jury, and a verdict found against defendants, Leonard Trammell and George S. Trammell,

and in favor of Pidcock, Dyer and Drain. During the trial, the defendants excepted to decisions of the court, in regard to the admission and exclusion of testimony, and also to instructions given by the court, and the charge of the court; all of which exceptions appear by the record of the case. Leonard and George S. Trammell appeal to this court and assign for error:

1st. The circuit court erred in sustaining the demurrer to the several pleas of justification.

2d. The court erred in striking from the files the pleas of justification.

3d. The court erred in permitting illegal testimony offered by plaintiff to go to the jury.

4th. In refusing to permit testimony offered by appellees to go to the jury.

5th. In giving illegal instructions to the jury.

We will proceed to notice the assignments of error in the order in which they are stated; and in doing so it will be necessary to copy one of the numerous and voluminous pleas (all the others demurred to being substantially alike,) filed in this closely and well prosecuted and defended case; it being necessary to do so, to examine its merits as a valid and legal defence.

The plea is as follows:

"And the said defendants, Leonard Trammell, Jackson Dyer and Geo. W. Drain, for a further plea in this behalf, (by leave of the court) for that purpose had and obtained, as to the said seizing, taking, leading, driving, hauling and carrying away the goods and chattels in plaintiff's declaration mentioned, and therein supposed to be done by these defendants, they the said defendants say *actio non*, because they say that before the time when, in plaintiff's declaration mentioned, to-wit: on the 7th day of May, 1861, and from thenceforward, continually, until and at and after the time when, etc., in the said counts in said plaintiff's declaration mentioned, to-wit: in the county of Washington, and state of Arkansas, aforesaid, there had been inaugurated and then existed a civil war, by and between the states of Virginia, North Carolina,

South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Arkansas, Louisiana and Texas, and the people thereof, who claimed and assumed to have established a separate government from the other states of the United States, of the one part, and the government of the United States and the people of such other states, and the territories of the United States and the people thereof, of the other part, in the prosecution of said civil war so inaugurated and existing, Stephen B. Enyart, before the time when, etc., in said several counts in said declaration mentioned, to-wit: on the 10th day of June, 1864, at the county and state aforesaid, was duly appointed and commissioned by the so-called Confederate States, as captain in the military service thereof, under and by virtue of which commission and appointment, he, the said Stephen B. Enyart, assumed to act, and did act as captain as aforesaid, at the time when etc., and as such was vested with full power and authority to command and did then and there command a company of men to serve and do duty as soldiers in said civil war as aforesaid, in the service of the so-called Confederate States: and the said defendants say, that before the time when etc., in the said several counts in said plaintiff's declaration mentioned, to-wit: on the 10th day of June, A. D. 1862, and continuously thereafter, and at and after the time when etc., in said counts in said declaration mentioned, they had been, and were resident citizens of the county of Washington, in said state of Arkansas, and liable under the laws of said state to perform military duty, and was before the time when etc., in said counts mentioned, regularly enrolled and mustered into the service of the so-called Confederate States, to do duty and service in said company, and under the command of the said Stephen B. Enyart as such captain in the prosecution of the said civil war, and being such soldiers in such company under the command of the said Stephen B. Enyart, as such captain and while the said S. B. Enyart was, and was acting as a captain in the said service of the said so-called Confederate States, and whilst these defendants were subject to the order and command of the said Stephen B.

Enyart as captain as aforesaid, they the said defendants as such soldiers, in such service and under and in obedience to the express command and order of said Stephen B. Enyart given as such captain at the time when etc., in the said counts in said declaration mentioned, did seize, take, drive, lead, haul and carry away the goods and chattels, the property in the said declaration in the several counts thereof mentioned, to-wit: at the county aforesaid, as it was lawful for them to do, as they were required to do by the order and command of the said Stephen B. Enyart, captain as aforesaid, so given as aforesaid, which are the same supposed trespasses in said counts in said declaration mentioned, and whereof the said plaintiff hath complained against them, and this they are ready to verify etc."

This plea, in substance, set up the existence of a civil war, that the defendants were soldiers in that war; and that the acts done were done by order of their commanding officer; (naming him) and presents the question whether a private soldier in time of war can justify his acts by virtue of the orders of his commanding officer.

That a civil war existed at the period shown by the pleadings in this case, there can be no question. We have, at the present term of this court, in the case of *Hawkins vs. Filkins*, fully recognized and decided that point; and therefore, there being a war, and these defendants being soldiers in that war, what was their duty?

We think it may be laid down, as a well settled proposition, that obedience is the first duty of a soldier. It is not for him to ask the reason for the order he receives, or the act he is to do, or to consider the consequences of the act. He must obey. To him the maxim of despotism, that "to hear is to obey," is more nearly applicable than to any other class of society. If such be the rule applicable to the private soldier, he should certainly be permitted to prove it in his justification.

It is no doubt upon this principle that the law holds *officers* to a more strict account for acts done by them, than it does the

private soldier, and that officers have a discretion in effecting that which they are required to perform. And this question incidentally came up before this court at the present term in the case of *Taylor vs. Jenkins*, in which the court say: "and while officers may exercise a discretionary power in effecting that which they are required to do, soldiers under their command have no such discretion; they act under orders, are in fact the instruments through which orders are carried into effect." *Vattel* says: "The troops, officers and soldiers, and in general all of those by whose agency the sovereign makes war, are only instruments in his hands to execute his will and not their own," which we again repeat and re-affirm as the law applicable to the question now before us. And applying it to the pleas in this case we think the circuit court erred in sustaining the demurrer to the pleas.

The next cause assigned for error is the decision of the court, striking the pleas of appellants from the files.

It will be seen from the statement of the case that these pleas were filed after the issues were made up, and at a subsequent term. The record does not show that they were filed by leave of the court, although the bill of exceptions does so recite it. Where the bill of exceptions states facts different from the record, we must be governed by the record. 5 *Eng.*, 449; 17 *Ark.*, 532.

It was a matter clearly within the discretion of the circuit court, to permit these pleas to be filed; and if filed out of time, according to the rules and practice, it was in the proper exercise of the power of the court to order them stricken from the files.

The third error assigned is, that the court permitted illegal testimony, offered by the plaintiff, to go to the jury.

It appears by the bill of exceptions, that the plaintiff, to maintain the issue on his part, proved by three witnesses that defendant Leonard Trammell, in the latter part of August, 1862, and while he had the property in possession, within about a quarter of a mile of plaintiff's, stated to them that he took the properry, the cattle and sheep in the plaintiff's declaration mentioned; that at the time of making such statement the defendant, Geo. S. Tram-

mell was with him; and that they were driving off the property. The plaintiff also proved that in the evening of that day, the defendants, Drain, Pidcock and Dyer, and others, came with other property and staid at Johnsons; and that Leonard Trammell, apparently, had control of the property brought in; that next morning they all went off together, carrying off the property of the plaintiff, and the property brought in by the other parties; that the same was taken to McGuire's and sold by Capt. Enyart; that Trammell, in the statement he made, also stated the property was taken for the use of the families of those who were fighting for their country. Plaintiff also proved the value of the the property. And defendants then proved that defendants Drain, Dyer and Pidcock, and the Trammells were all engaged in the business of gathering up stock on the creek at the time, and met together on the night of the day of the taking of the property at Johnson's, stayed all night together, and went off together next morning, driving the stock that had been gathered up and taken at different places; which was all the testimony given in the cause.

We have copied this statement from the bill of exceptions.

We cannot conceive how this testimony could prejudice the defendants, who are now the appellants in this court. The defendants, who might possibly complain, are not before us. They have been discharged by the verdict and judgment. The testimony, so far as defendants Trammell are concerned, was pertinent to the issues, and proved circumstances showing their connection with the tresspass.

The fourth cause of error is that the court erred in refusing to permit testimony offered by the defendant, to go to the jury.

The bill of exceptions No. 3, states that the plaintiff introduced William Yerk, who testified that Leonard Trammell, one of the defendants, in the month of August, 1862, admitted while he had them in possession, in a conversation with witness, that he took the property, the cattle mentioned in the declaration, and thereupon, on cross-examination, the defendant offered to

prove by said witness, that in the conversation mentioned in his examination in chief, the said Trammell also stated that they, the parties, were in the Confederate States service, and took the property in obedience to the command of the officers, and for the use of the Confederate States government, to aid in carrying on the war against the government of the United States. To the proving of which plaintiff objected, and the court sustained the objection and refused to permit the witness to testify. This was error. It is the well settled rule of law, that the whole admission is to be taken together. All that the party said at the time in connection with his admissions should be permitted to be proved. 1 *Greenleaf*, *sec.* 201-2.

We also learn from the bill of exceptions No. 4, that the defendant offered to prove in detail, (and which is set out in his bill of exceptions,) in mitigation of damages, the same facts which he had averred in his plea that had been stricken from the files, but that the court refused to permit him to make such proof. The averments in the plea stricken out were substantially the same as those in the plea copied in this opinion, with the additional averments that the plaintiff was inimical to the Confederate States, and that the goods taken were for the use of the Confederate States.

We do not think that the circuit court erred in refusing to permit this testimony to go to the jury. The only isues in the case were the pleas of not guilty and the statute of limitations, and the evidence offered was not applicable or pertinent to these issues, and could not be introduced in mitigation of damages. See *Greenleaf on Evidence*, *p.* 288-9, 1 *Chitty's Pleading*, 415.

The fifth cause assigned for error is as to the instructions and charge of the court.

The bill of exceptions shows that the court, of its own motion, instructed the jury as follows:

1st. If three or more persons assemble for the purpose of doing an unlawful act, and in furtherance of that purpose, the unlawful act is done by part or all the persons assembled for that pur-

pose, all will be equally guilty, and if any person happen to fall in with the company, and is present when the unlawful act is committed, that person to excuse himself must show that he was there for another purpose, and not to assist in or sanction the perpetration of the unlawful act.

2d. If A takes the property of B, without B's consent, and carry it away, the moving the property is a conversion. It is not material what disposition of the property was made, if it was not returned to B it is a conversion.

3d. If you believe from the evidence before you, that the defendants, or either of them, took the property of the plaintiff without his consent within three years next before the commencement of this suit, you should find for the plaintiff, and assess such damages as you may think right against all the defendants that you believe participated directly or indirectly in the taking the plaintiff's property.

4th. If you believe from the evidence before you that the defendants or any of them took the property of the plaintiff without his consent; or if they did take it, if it was done more than three years before the filing of this suit, you should find for the defendants.

And the bill of exceptions also shows that the court, against the objections of the defendants, at the time stating that he did not do so particularly as instructions, read to the jury from the constitution of the state of Arkansas, as follows, to wit: We the people of the state of Arkansas, having the right to establish for ourselves a constitution in conformity with the constitution of the United States of America, recognizing the legitimate consequences of the rebellion, do hereby declare the entire action of the state convention of the state of Arkansas, which assembled in the city of Little Rock, on the 4th of March, 1861, was and is null and void, and is not now, nor ever has been binding and obligatory upon the people. That all the action of the state of Arkansas under the authority of said convention, of its ordinances, or of its constitution, whether legislative, executive, judicial or military,

(except as hereinafter provided) was and is hereby declared null and void. Provided that this ordinance shall not be so construed as to affect the rights of individuals, or change county boundaries, or county seats, etc., etc.

We can see no serious legal objection to these instructions as given by the court. Taking them together, and applying them to the evidence in the case, we think they were properly given to the jury. We cannot, however, discover what law applicable to the issues in this case, was to be found in the preamble to the constitution of this state, read by the court, (over the objections of the defendants,) "not as instructions," as we learn from the record; but for what purpose it was read, the record does not inform us. It is very well, and no doubt proper, that all the citizens should be instructed as to the provisions of the constitution under which they live, as they should be in regard to all their social and moral duties; but there is a time for all things, and we think it would be more proper to instruct at a time, when their minds were not occupied with the duty of trying a solemn issue between their fellow citizens; and while we do not think that there was any legal error in this action of the court, or that the minds of the jury were confused by it, and diverted from the issue they were to decide, still we think that the practice of reading matter to the jury not pertinent or applicable to the issues, is objectionable and should not be encouraged.

But because the court erred in sustaining the demurrers to the defendants' pleas, and in excluding proper testimony, this cause must be reversed.

TRAMMELL ET AL. VS. BROOKS.

Appeal from Washington Circuit Court.

Mr. Justice CLENDENIN delivered the opinion of the court.

The points in this case being similar to those decided in the case of *Trammell et al. vs. John N. Bassett*, at the present term, must be governed by the decision in that case, and is reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

JUNE TERM, A. D. 1867.

KILLIAN VS. ASHLEY ET. AL.

24 511
64 471

24 511
68 426

24 511
77 56

Where a third party indorses a note, in blank, at the time it is executed, he is bound as security as fully as if he had written his name on the face, under that of the maker. But if such indorsement be made at a subsequent time, it is, in effect, a new contract—a guaranty, and to be valid, must be made upon a sufficient consideration.

An endorsement in blank by a third party gives to the payee or indorsee an implied power to write above it, the most absolute terms of guaranty, and is a promise in writing to answer for the debt of another as contemplated by the statute of frauds.

A valid contract of guaranty indorsed upon an instrument of writing, passes by assignment, to the assignee, and vests in him a right of action in his own name against the guarantor.

The release of a substantial security for the payment of a debt, in consideration of

the guaranty of a third person, is a sufficient consideration to support the contract of guaranty.

Where a guaranty is absolute and unqualified—as a guaranty in blank may be considered to be—and for the payment of a debt fixed and definite in terms, demand and notice are unnecessary.

The liability of an indorser and guarantor is several—upon separate contracts; and a joint action will not lie against them.

Where the blank indorsement of a third party is alleged to have been made at the time of the execution of the bond he may be sued as maker jointly with the payee as assignor.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

CLARK, WILLIAMS & MARTIN, for the appellant.

That the maker, indorser, and guarantor who subscribes a note on the back for that purpose, may be joined in debt for the recovery of the note is well settled under our statute, and understood to need reference to no authorities; nor is it necessary to refer to any on the point, that the releasing of a valid lien upon lands held by the payee in security for the payment of a bond would be a good consideration for the guarantor's undertaking.

In setting out a contract of guaranty in the declaration, it is not necessary to allege that the same or some memorandum thereof was in writing and signed by the party, 1 *Chitty's Pl.*, 222. If the contract was not in writing, the statute of frauds must be pleaded, or is a matter of evidence. 1 *Saund.*, 211, *note* 2; 2 *Salk.*, 519; 3 *Burr.*, 1890; 1 *Saund.*, 276, *note* 2. It is only necessary to allege a good contract of guaranty without reference to the statute of frauds; and if the case is within the statute, the court will presume the contract to be in writing until the contrary appears by plea, or on the trial.

But in this case the contract of guaranty, as alleged in the declaration, is an original undertaking to pay the debt for a valuable and independent consideration, and is not within the statute.

1 *Saund.*, 211, *a note* 2; 1 *Wils.*, 305; *Parsons on Con.*, 9; *Allen vs. Thompson*, 1 *N. Hamp.*, 32; *Nelson vs. Dubois*, 13 *John.*, 173; 8 *Wend.*, 404; *Meyer vs. More*, 15 *John.*, 425; *Farley vs. Cleavland*, 9 *Cow.*, 639; 15 *Wend.*, 342. But if this case is within the statute of frauds, and it is necessary to allege that the contract was in writing, the averment that the guarantor had endorsed the instrument in blank by way of guaranty for a valuable consideration, is a sufficient compliance with the requirement of the statute—such endorsement authorizing the holder to fill up the blank, by writing over the name a guaranty for the payment of the note. *Nelson vs. Dubois*, 13 *John.*, 175; *Riddle vs. Stephens*, *Law Reg.*, *for Sept.*, 1866, *page* 651; 20 *John.*, 365; *Story on Bills*, *sec.* 215.

As a general rule a contract of guaranty is not assignable at common law, because the contract was personal to the party, and the guaranty an inducement to the credit; but in this case the contract of guaranty was not the inducement to the making of the bond, but was given after the date of the bond and upon another and independent consideration. It is an original undertaking, not personal to the payee of the bond, but a security for its payment, and runs with the bond into the hands of the assignee. But if this were not so, our statute makes all contracts assignable, (*Dig. ch.* 15, *sec.* 1—9.) *Parsons on Con.*, 3, 4; 24 *Wend.*, 456; 26 *Wend.*, 425; 8 *Greenl. Rep.*, 234; *Story on Bills*, *secs.* 456, 457, 458, *note* 2.

The liability of the guarantor is absolute, and not conditional, therefore demand and notice were not necessary; 13 *Verm.*, 93; 2 *Har.*, 24; 1 *Story*, 22; 3 *Greenl. Rep.*, 332; 24 *Wend.*, 35, 82; *Chitty on Bills*, 353.

WATKINS & ROSE, for the appellees.

The endorsement of William E. Ashley, if it could amount to anything, was an engagement to answer for the debt of another and could not bind him unless there was a memorandum in writing. *Gould's Dig.*, *ch.*, 74, *sec.* 1; and to charge him it was

necessary to allege and show a consideration. *Tenny vs. Price*, 4 *Pick.*, 385; *Aldridge vs. Turner*, 1 *Gill & John.*, 427; *Hunt v. Brown*, 5 *Hill N. Y.*, 145; *Violet vs. Patton*, 5 *Cranch*, 142. A guaranty, to charge the guarantor, must contain all the material facts *on its face*, and if it does not it is void under the statute, and cannot be aided by parol proof. *Allison vs. Rutledge*, 5 *Yerg.*, 193; *Nelson vs. Boynton*, 3 *Metc.*, 396; *Clark vs. Russell*, 3 *Dallas*, 415.

If the endorsement of William E. Ashley, constituted a guaranty, the plaintiff could not recover unless he alleged that demand had been made of the maker of the note, and due notice of his refusal to pay had been given to the guarantor. *Sage vs. Wilcox*, 6 *Conn.*, 81; *Given vs. Dodge*, 2 *Hammond*, 430; *Dale vs. Young*, 2 *McLean*, 557.

This, like all other contracts, must be construed according to the intention of the parties: and had W. E. Ashley designed to bind himself as maker, he would have signed the note instead of endorsing it. That upon this endorsement he cannot be charged as maker, see *Tenny vs. Price*, 4 *Pick.*, 385; *Wen vs. Kettredge*, 7 *Mass.*, 233; *Good vs. Jones*, 9 *Misso.*, 866; *Spiers vs. Gilmore*, 1 *Coms.*, 324; *Pierce vs. Mann*, 17 *Pick.*, 244; *Edward on Bills*, 219.

A guaranty, though written on the same paper with the note, does not pass to the assignee of the note, so as to enable him to sue on it in his own name, though by the transfer of the note he may become the equitable owner of the contract of guaranty. The contract of guaranty is a collateral contract, and is not a part and parcel of the note itself. See *Turley vs. Hodge*, 3 *Humph.*, 73; *McDoal vs. Yeomans*, 8 *Watts.*, 361; *Smith vs. Dickinson*, 6 *Humph.*, 261; *Pierce vs. Mann*, 17 *Pick.*, 244; *True vs. Fuller*, 21 *Pick.*, 140; *How vs. Kemble*, 2 *McLean*, 103; *Preston vs. Davis*, 8 *Ark.*, 167.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of debt brought by Killian against the

defendants, Joseph O. and William E. Ashley, upon a writing obligatory, executed on the 12th of February, 1859, by William B. Easley to Joseph O. Ashley, for one thousand dollars, and assigned by Joseph O. Ashley to James B. Keatts, and by Keatts to the plaintiff. Upon the back of the writing obligatory the name of William E. Ashley is endorsed in blank.

The declaration contains two counts; the first is against Joseph O. Ashley as endorser, and William E. Ashley as guarantor. The second is against Joseph O. Ashley as endorser and William E. Ashley as maker. The defendants filed separate demurrers to each count of the declaration. The demurrers were sustained, and judgment rendered thereon in favor of the defendants, from which the plaintiff appealed.

The insufficiency of the declaration, and more particularly the first count, was questioned upon several grounds, which we will proceed to consider.

In the first count William E. Ashley is declared against as guarantor; and as the endorsement was made in blank, without date, it is not certain whether he should have been declared against as security or guarantor. If he endorsed the writing obligatory at the time it was executed by Easley, then he is bound as security for the payment, as fully as if his name had been written immediately under that of Easley, the principal. The mere fact that the name was written upon the back of the instrument, did not change the nature of his liability; it was not the making of a new contract, but simply becoming security for the payment of the one then being made. But if William E. Ashley endorsed the writing obligatory, after it was executed and delivered, such endorsement was in effect a new contract, and to be valid, should be made upon sufficient consideration. As against him, it created a distinct liability. *Tenny vs. Prince*, 4 *Pick. R.*, 387. By endorsing the obligation in blank, he gave to the payee or assignee, an implied power to write above it, the most absolute terms of guaranty. *Webster vs. Cobb*, 27 *Ill. R.*, 446; *True vs. Fuller*, 21 *Pick. R.*, 142. If William E. Ashley

had desired to limit or qualify the terms of his guaranty, he should have done so when he made the endorsement; but when he sent forth the instrument with his name upon it, he is held to have given his implied consent to be bound by such terms as the holder of the obligation might fix upon him, in his character as guarantor.

The defendant's counsel contend that, admitting the legal liability of William E. Ashley to pay, as guarantor, to Joseph O. Ashley, the payee, the contract of guaranty did not pass by the assignment of the writing obligatory to the plaintiff: that there is no privity of contract between William E. Ashley and the plaintiff, and that, consequently, the plaintiff has no right of action against him. *Smith et al. vs. Dickinson*, 1 *Humph. R.*, 261, decided upon the authority of *True vs. Fuller*, 21 *Pick.*, 140, and some others are cited as authority in support of this position; and an examination of them would seem to sustain the position assumed by counsel. But we find other and later decisions which hold differently upon reason and authority, which accord with the rights of parties, holders of negotiable paper. Our own statute has placed sealed and unsealed instruments upon the same footing, they are alike assignable, and enter largely into the business transactions of the country. It was evidently the intention of the legislature to facilitate their circulation, as a species of exchange, by vesting in the assignee the same interest which the assignor had. An endorsement by a responsible party after the execution of the instrument, gave to it an additional credit, and although a new undertaking, it is, nevertheless, so attached to, and connected with the original contract as to become, in some respects, a part of it. *McLarren vs. Watson's ex'r.*, 26 *Wend.*, 425; *Webster vs. Cobb*, 27 *Ill. R.*, 466; *Cooper & Peabody vs. Dedrick*, 22 *Barb. Rep.*, 516, sustain us in the opinion that the contract of guaranty endorsed upon the writing obligatory, passed with it, by virtue of its assignment to the assignee, partakes of its negotiability, and vests in the assignee a right of

action, upon the contract of guaranty, against William E. Ashley, the guarantor.

The objection to the first count, that the contract of guaranty is without consideration, is not well taken. It is averred that Joseph O. Ashley held a lien upon a tract of land for the payment of the writing obligatory of Easley, which he released in consideration that William E. Ashley would guaranty the payment of the debt by endorsing the writing obligatory. We have no means of knowing whether William E. Ashley was benefited by this endorsement or not; he may, or may not have been interested in removing the lien from the land; but be that as it may, Joseph O. Ashley was certainly prejudiced by giving up this additional security for the payment of his debt, which is a sufficient consideration to uphold the contract of guaranty. *Howard vs. Kearstead*, 20 *Ill. R.*, 373.

It is further objected to this count, that it does not aver demand, and notice of non-payment of the debt to William E. Ashley. Whether this objection is well taken, or not, must depend upon the nature of the contract. As a general rule, it would seem that where a continuing guaranty is made, one which relates to future transactions upon the happening of which an absolute liability to pay must depend, the guarantor has a right to know whether such contingencies have happened, and is entitled to notice before he can be held liable upon his guaranty. *McCollum, et al. vs. Cushing et al.*, 22 *Ark. R.*, 540. But where the guaranty is for the payment of a debt fixed and definite in terms, and is absolute and unqualified, as we have seen the assignee had a right to make it, demand and notice are unnecessary. Easley had become bound to pay $1,000 on a given day, and William E. Ashley, by his unqualified guaranty of payment, became responsible for the payment of the debt according to the terms of the writing obligatory, as held by this court. *Lane vs. Lavillian*, 4 *Ark. R.*, 85; *Harrell vs. Miller*, 21 *Ill. R.*, 637; *Webster vs. Cobb*, 27 *Ill. R.*, 465. Such being the effect of the guaranty, it was unnecessary to aver demand and notice.

The liability of William E. and Joseph O. Ashley was upon separate contracts. They were not jointly liable, and upon this ground the demurrer to the first count was properly sustained, as held by this court in the case of *Preston vs. Davis*, 8 *Ark. R.*, 167; *Goodle & Jones vs. Jones*, 9 *Mo. R.*, 866.

It is true, as contended by counsel, that a promise to pay the debt of a third person must, under the statute, be in writing; but from the legal effect of the endorsement, coupled with the authority to fill up the blank with the written guaranty to pay, we must hold this to be a guaranty or promise in writing to pay, and is not void under the statute.

Having thus considered and disposed of the objections to the sufficiency of the first count, we will proceed to consider the sufficiency of the second count, in which William E. Ashley is sought to be charged as maker and Joseph O. Ashley as endorser. If in point of fact William E. Ashley endorsed the writing obligatory at the time it was executed by Easley, he thereby became security for Easley, and jointly bound with him to pay, and is properly declared against as maker and properly joined with Joseph O. Ashley who was the assignor. *Tenny vs. Prince*, 4 *Pick. R.*, 387; *Robertson vs. Pebles*, 17 *Ohio R.*, 36; *Carr vs. Rowland*, 14 *Texas R.*, 278. The count is in the usual form, and we think in all respects sufficient. The pleader has chosen to fix the date of the endorsement of William E. Ashley as having been made at the time the writing obligatory was executed, and so we must, upon demurrer, consider it as having been made. If in point of fact there is a misstatement of time, in the further progress of the trial the defendant may avail himself of it, but of that we are not now called upon to consider.

In view of the whole case and the questions of law raised by demurrer, we are of opinion that the demurrer to the first count was properly sustained on account of the misjoinder of parties; and that the circuit court erred in sustaining the demurrer to the second count, and for this error the decision of the circuit court must

be reversed, and the cause remanded with leave to the plaintiff to amend the first count in his declaration, and for further proceedings.

BUCKINGHAM VS. HALLETT ET AL.

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The decree of confirmation of a tax title can have no effect to preclude a party in possession of the land from the benefit arising from lapse of time prior to the rendition of the decree—the proceeding for confirmation being in nowise a possessory proceeding; and held in this case: that as the full period of limitation had elapsed, whether the cause of action accrued on the day of the tax sale, at the expiration of the time allowed for redemption, or at the date of the collector's deed, it was immaterial to inquire on which day the purchaser's right to sue commenced.

Error to Perry Circuit Court.

Hon. THOMAS BOWLES, Circuit Judge.

FORD, for the plaintiff.

CLARK, WILLIAMS & MARTIN, for defendants.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff in error for the recovery of the possession of a tract of land lying in Perry county. The verdict and judgment in the court below were for the defendants; the plaintiff moved for a new trial, which motion was overruled, and the case now comes before this court for consideration.

The only question necessary to be decided is, whether or not

the plaintiff's right of action was barred. It appears that the land in controversy was sold for taxes, on the 5th day of November, 1849, and that the plaintiff became the purchaser, to whom the collector executed a deed, bearing date the 27th day of February, 1851; that on the 5th day of April, 1859, the plaintiff procured a decree of the circuit court confirming the sale, and on the 6th day of October, 1860, brought ejectment.

At the trial the defendants proved that they had been in the continuous adverse possession of the land for the space of twenty-five years next before the commencement of the plaintiff's action, and relied on the statute of limitations of ten, and of seven years.

It is immaterial to inquire whether the plaintiff's right to sue accrued at the date of the tax sale, or at the expiration of the time allowed for redemption, or at the date of the collector's deed; because, if at either of the first mentioned periods, the act of limitation of ten years, then in force, was applicable, and if at the date of the collector's deed, the limitation act of seven years, passed the 4th of January, 1851, applied. So that, in either view, the statutory bar was complete before the commencement of the suit, unless the decree of confirmation entered on the 5th of April, 1859, had the effect to preclude the defendants from any benefit in this controversy, arising from lapse of time prior to the rendition of the decree. There is nothing in the terms of the decree that would warrant the conclusion that it did so operate, nor could there be consistently with the provisions of the enactment, under which the proceedings for confirmation were had.

The statute provides that the purchaser, after publication "calling on all persons who can set up any right to the land so purchased, in consequence of any informality or any irregularity or illegality, connected with such sale, to show cause," at the time and place fixed by the statute, "why the sale so made should not be confirmed," may, on proof of such notice, apply to the circuit court for confirmation of the *sale*; and it is made the

duty of the court, in case no cause to the contrary is shown "to *confirm* the *sale* in question;" but in case it shall appear that the sale was made contrary to law, it is the duty of the court "to *annul it.*" It is further provided that the decree of the court confirming the sale "shall operate as a complete bar against any and all persons who may thereafter claim said land in consequence of informality or illegality in the proceedings, and the title to said land shall be considered as confirmed and complete in the purchaser thereof," with saving in favor of infants, etc. And it is also provided that in case any purchaser shall not deem it necessary to use the remedy conferred by the act, then the sale shall have the same effect only as is given to it by existing laws. *Gould's Dig.*, *chap.* 170, *secs.* 2, 4, 6, 8.

From these several provisions the conclusion must necessarily be, that the special proceeding for confirmation, authorized by the statute, is in no wise a possessory proceeding. The possession of the land, in such case, is not matter in issue, and the decree does not affect it, but relates to and affects the sale only, operating as a bar against all persons except those saved from the operation of the act, who may thereafter claim the land in consequence of any illegality connected with the sale. As has been seen, the purchaser may or may not, at his option, proceed for confirmation. If he does not, the legality of the sale may be questioned whenever he asserts his title to the land; but if before asserting his title, he procures a decree of confirmation, then all inquiry as to the validity of the sale is cut off. This is conceived to be the difference between a tax-title that has not been, and one which has been confirmed. Where there has been no confirmation, the right of the party in possession, to avail himself of the statute of limitations to defeat a recovery by the purchaser, has never been denied, and we think it sufficiently clear that he may do so, where the sale has been confirmed, although it becomes necessary, in order to make out the period of limitation, to embrace time which may have elapsed subsequent to the sale and prior to its confirmation; because, as before remarked, the pos-

session not being matter in issue between the parties, the decree of confirmation does not operate as an estoppel on the party in possession, to do so.

It is not deemed necessary to consider the other questions discussed by counsel, as upon the whole record the judgment is correct and must be affirmed.

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Bowman vs. Worthington.

Where by statute jurisdiction over particular subjects of equity is conferred, or given to common law courts, the entire body of law administered in the equity courts of this country attaches; but the subject of divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction; and in such cases the courts have no other powers than those expressly conferred by the statute.

Alimony being an incident to a divorce, the courts of this state, under our statute, can only grant it in connection with the decree of divorce; and have no jurisdiction to entertain an application for alimony where the decree has been granted by another tribunal.

Where a divorced wife marries again she has no right to alimony or support from the first husband, either during the life, or after the death of the second husband.

Appeal from Chicot Circuit Court in Chancery.

Hon. Wm. M. Harrison, Circuit Judge.

Pike & Adams, Albert Pike & Son, for appellant.

Undoubtedly the court of chancery, in England, had no jurisdiction in matters of divorce and alimony. But our statute, ch. 59, sec. 3, provides that the circuit court, "sitting as a court of chancery, shall have jurisdiction in all cases of divorce and alimony, or maintenance," like proceedings being had as "in other

cases on the equity side of said court." It is true that sec. 9 provides that "when a decree shall be entered," the court shall make such order touching the alimony of the wife, as from the circumstances of the parties, and the nature of the case, shall be reasonable; and that there is no express provision giving an independent jurisdiction to decree alimony, where there has been a decree for a divorce, and no order in respect to alimony.

We have no ecclesiastical courts, and if, after a judicial or legislative divorce, leaving the matter of alimony untouched, there remains a right to have alimony, the remedy to enforce this right must of necessity be in chancery, since, otherwise, it would be a right without a remedy. It is but a question whether the statute gives the circuit court, in chancery, all the powers of the ecclesiastical court, in regard both to divorce and alimony or only a part of such powers. This court settled this in *Rose* vs. *Rose*, 9 Ark., 512.

The legislature of Kentucky *could* not act on the matter of alimony, that being reserved for judicial investigation. If, as is admitted, the divorce was valid and effectual, it left the right to maintenance unimpaired, and there must be a remedy for it.

That the divorce was valid, the legislature of Kentucky having power, as parliament had, to enact it, see *Satterlee vs. Matthewson*, 2 *Peters* 413; *Story, Confl. of Laws*, § 202; 2 *Kent*, 110; *Opinion of the judges of Maine*, 4 *Shepl.* 479; *Wright vs. Wright*, 2 *Maryland* 429; *Cabell vs. Cabell*, 1 *Metc.* (*Ky.*) 319; 1 *Bishop, Book* vi: *ch.* xxxiv; *Starr vs. Pease*, 8 *Conn.* 541; *Berthelemy vs. Johnson*, 3 *B. Mon.* 90; *Hull vs. Hull*, 2 *Strobh. Eq.* 174; *Bingham vs. Miller*, 17 *Ohio* 445; *Levins vs. Sleator*, 2 *Greene* (*Iowa*) 604; *Townsend vs. Griffin*, 4 *Harring.* 440; *Holmes vs. Holmes*, 4 *Barb.* 295; *Maguire vs. Maguire*, 7 *Dana* 181; *Crane vs. Meginnis*, 1 *Gill & Johns.* 463; *Jamison vs. Jamison*, 4 *Md. ch.* 289; *Jones vs. Jones*, 2 *Jones* (*Pa.*) 350; *Ponder vs. Graham*, 4 *Flor.*, 23.

If the complainant, legally divorced in Kentucky, where she was married, had a right to alimony afterwards to be decreed to

her, that right is valid everywhere; and if not enforceable here, in equity, there is a clear and undeniable right, for which, on technical grounds, there is no remedy. The jurisdiction is necessarily cast upon the court of chancery, because the jurisdiction in regard to marriage contracts and breaches of them is given generally to that court. See *Almond vs. Almond*, 4 *Rand.*, 662; *Story Confl. of Laws*, *sec.* 230, *b.*

On the question whether a separate independent suit for alimony can be maintained, it is useless to quote the law and decisions in respect to alimony applied for where there has been no divorce, and none is asked for, but the parties propose merely to live separate; as in *Ball vs. Montgomery*, 2 *Ves. Jr.*, 191, 195.

In *Richardson vs. Wilson*, 8 *Yerger* 67, the husband had obtained a legislative divorce, the act providing that nothing contained in it should deprive the woman of her right to alimony if by law she were entitled to it. She filed a bill for alimony, and it was granted by the court. See *Crane vs. Meginnis*, 1 *Gill & John.*, 463; *Wright vs. Wright's Lessee*, 2 *Maryland*, 429; *Jamison vs. Jamison*, 4 *Maryland Ch. Rep.*, 289; *Dunnock vs. Dunnock*, 3 *Maryland Ch. Rep.*, 140.

In *Almond vs. Almond*, 4 *Rand.*, 662, the court admitted the English doctrine, but followed *Purcell vs. Purcell*, 4 *Hen. & Munf.*, 507, in giving alimony upon a mere separation, deeming the reasoning of the chancellor on the point of jurisdiction sound.

In North Carolina, the courts of equity have always exercised the same jurisdiction. *Anon.*, 1 *Hayw.*, 347; *Spiller vs. Spiller*, 1 *Hayw.*, 482; *Knight vs. Knight*, 2 *Hayw.*, 101.

So also in Kentucky: *Lockridge vs. Lockridge*, 3 *Dana*, 28; *Butler vs. Butler*, 4 *Litt.*, 201; *Boggess vs. Boggess*, 4 *Dana*, 307; *Wooldridge vs. Lucas*, 7 *B. Monr.*, 49.

And in South Carolina: *Jelineau vs. Jelineau*, 2 *Desaus.*, 45; *Prince vs. Prince*, 1 *Richards. Eq.*, 282; *Threewitts vs. Threewitts*, 4 *Desau.*, 560; *Prather vs. Prather*, *id.* 33; *Mattison vs. Mattison*, 1 *Strobh. Eq.*, 387.

And in Alabama: *Glover vs. Glover*, 16 *Ala.*, 440; *Wray vs.*

Wray, 33 *Ala.*, 187: where the granting of alimony is declared to be an exercise of an original jurisdiction in the court of chancery.

It has been held in Mississippi that a party is not compelled to proceed for divorce and alimony by one and the same bill; but if the question of alimony is not settled in the divorce suit, the wife may *afterwards* sue for it by separate bill, in the same or in another court of competent jurisdiction. *Shotwell vs. Shotwell*, *Sm. & M. Ch.*, 51; *Lawson vs. Shotwell*, 27 *Miss.*, 630.

It was greatly relied on in the court below, that after remaining single for several years, Mrs. Worthington married again. The law encourages this, and discountenances those judicial separations by which, as in some states, a party is virtually divorced, but not at liberty to marry.

When she married again, if her alimony had been already fixed by a court in Arkansas, the court could under the statute have diminished it. In *Albee vs. Wyman*, 10 *Gray*, 222, when a divorced wife re-married, the court reduced the amount of alimony to a nominal sum, for the reason that it was not *necessary* or *proper* to charge her former husband for her future support. The court said that by the second marriage she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of the alimony. Certainly, when she became a widow again, and dependent on her parents, this reason ceased. The marriage did not *annul* her right to alimony. There is no such penalty on marriage. It is not a condition of the grant of alimony, that the divorced wife shall not marry again. It is exceedingly doubtful whether section 12 of our statute relates to any thing more than *temporary* alimony *pendente lite*, and whether a subsequent marriage of the wife would, in this state, warrant the court in reducing the amount of alimony, any more than it would impair her right to dower, or a distributive share in her husband's estate. Why should it? The whole had to depend on the facts creating her right to alimony. And these, if she had obtained a decree, would have been the facts existing, and *as* they

existed, when the alimony was decreed. *Forrest vs. Forrest, ub. sup;* 2 *Bish. sec.* 488.

SUTTON, and GARLAND & NASH, for appellee.

Jurisdiction in divorce and matrimonial causes, including alimony, is conferred upon the circuit court, sitting as a court of chancery. But the subject of divorce and all incidental questions are not subjects of equitable jurisdiction; courts of equity in England did not exercise jurisdiction over them. The court, therefore, in cases of this kind, must look to and be governed by the statutory provision. It has no other powers than those expressly thus conferred. And while it may sit as a court of chancery, it is not to be understood as exercising inherent chancery powers, but as a court limited, guided and directed by express statutory provisions, over a subject matter never belonging to chancery jurisdiction. It is then the circuit court, invested expressly by statute, with authority to investigate and try cases of this kind, by rules of proceeding adopted and practiced in courts of chancery. The first and main question then to be determined in the commencement of this investigation is, what authority has this court to grant the relief prayed for in this bill—or decree alimony in any case. The question is not whether a court of chancery will entertain a bill supplemental to a legislative or parliamentary divorce, in the state of Arkansas. We are not called upon to discuss the powers of a court of chancery in this case, for a court of chancery under our laws has no jurisdiction over the subject matter of this suit whatever. The statute points out the court, and the only court that can entertain the jurisdiction, and this express authority excludes the jurisdiction of all other courts. This express statutory provision, not only locates the jurisdiction, but it details the manner, the time when, and the circumstances under which, alimony may be adjudged, and the causes for which it may be adjudged to the complainant or any other individual applying to the courts of Arkansas. The provision of law referred to is an original one, confirming, confining,

and limiting and directing the exercises of the powers of this court over the subject of alimony—the subject matter of controversy in this case.

The first section of our law, *chap.* 59, *Ark. Dig.*, enumerates the causes for which a divorce may be granted, and the only causes. The 3d section locates the jurisdiction, "for all cases of divorce and alimony." The 4th section defines the necessary qualifications of the bill of complaint, and the 9th section provides, "when a decree (of divorce) shall be entered, the court shall make such order touching the alimony of the wife as from the circumstances of the parties and the nature of the case shall be warrantable," and in 11th section "the said circuit court shall have power to enforce the performance of any decree for alimony by sequestration or other lawful ways and means."

Statutes in cases of this kind are to be strictly construed. See *sec.* 575, *Bishop M.* and *D.*; and *Harrington vs. Harrington*, 10 *Vt.*, 505, under a statute similar to ours. The court said: "The statute gives the court, which in application for divorce, acts as a court of law, no power to grant alimony, except after divorce granted." And in Massachusetts a late case holds "that until *stat.* 1855, *c.* 137, expressly conferred the authority on the courts, they could not order temporary support." A different rule of construction, however, prevails in New York, Kentucky, New Jersey, and other states, but mainly because the jurisdiction of cases of divorce, alimony, and matrimonial causes are, in those states conferred upon courts of equity generally. By our statute, section 9, alimony is incidental with divorce, and inseparable from it by any fair construction. See also section 549, and following sections, and note 1, *Bishop, M.* and *D.*; 2 *Story's Equity*, *sec.* 1422.

Alimony has no common law existence as a separate independent right. It does not follow a divorce, as a matter of course, or as a matter of right, but when found, it comes as an incident to a proceeding for some other purpose, as for a divorce for certain causes. No court in England has any jurisdiction to grant it,

when it is the only thing or only relief sought. See *Ball vs. Montgomery*, 2*d Vesey, Jr.*, *p.* 195; *Duncan vs. Duncan*, 2*d Vesey, Jr.*, 385; *Rees vs. Watts*, 9 *Watts*, *p.* 90—93; *Head vs. Head*, 3*d Atk.*, 547; *Lawson vs. Shotwell*, 27*th Miss.*, 630. *Bankstone vs. Bankstone*, 27*th Miss.*, 692. And this doctrine is laid down and expressly decided in the cases of *Duval vs. Duval*, 13*th Mass.*, 264; *Jones vs. Jones*, 16*th Maine*, 308; *Dean vs. Richardson*, 5*th Pick.*, 161; *Blaker vs. Cooper*, 7, *S. and R.* 500; *Smith vs. Smith*, 3 *S. & R.*, 248; *Parsons vs. Parsons*, 9, *N. H.* 509. It is laid down by Bishop, on Marriage and Divorce, that the better opinion appears to be that the English courts of chancery have no power to entertain a bill for alimony supplemental to a parliamentary divorce.

The supreme court of Indiana refused to give a wife, who had been divorced in Kentucky, alimony out of her former husband's lands, situated in the former state. *Fishlie vs. Fishlie*, 1 *Blackf.*, 360. The court of chancery of New Jersey, holds that it has no power to decree alimony, except as concomitant with divorce, or under the statute of that state. See *Yule vs. Yule*, 2*d Stock*, 138. The supreme court of Missouri held in *Doyle vs. Doyle*, 26 *Mo.*, (5 *Jones*,) that it had no power to decree alimony, but as incidental to a divorce, except when the power is given by statute.

The case now before the court rests mainly upon its analogy to *Richardson vs Wilson*, 8 *Yerger*, 67. But in that case both parties were residents of Tennessee, and the divorce was obtained by the husband without notice to the wife, but with an express saving of her right to alimony.

By the second marriage with another man, complainant closed the door of reconciliation in the face of the defendant, and also the door of the courts against admitting or even sustaining her supposed claim for alimony, out of the property of the injured and discharged husband. When the vinculum of marriage is snapped, if the man dies, the woman will not be his "widow, nor entitled as such in dower and a portion of his personal property."

Levins vs. Slatter, 2*d Greene's Iowa Rep.*, 604; 27 *Maine* 212; 8 *Blackf.*, 218.

Alimony is sustenance given at the discretion of the court, to the wife out of the property of the husband. By the contract of marriage the husband assumes the duty and obligation to support his wife, and the law enforces this duty. If the husband is guilty of a breach of marital duty sufficient in extent and kind to justify a judicial separation, the law does not in consequence thereof release the husband from his obligation to maintain his wife, although the bonds of matrimony may be dissolved. But when the wife seeks and obtains a divorce *a vinculo*, and marries again, she thereby fixes upon another and different man, the obligation to support or maintain her. And two liabilities to pay alimony cannot exist at the same time; by accepting one and enjoying its benefits, she discharged the former. *Albee vs. Wyman*, 10*th Grey*, *p.* 230. The reason for awarding alimony, or the maintenance of the wife, in consequence of the second marriage failing, the law itself ceases.

If where alimony has been decreed, a subsequent marriage will abate it, or reduce it to a nominal sum, upon an inquest to inquire into the right of alimony, or an application to have alimony assigned, should not the subsequent marriage be deemed and considered a conclusive bar to the action? Can reasonable doubt interpose in a case so clear and so obviously just? Do not all our feelings revolt at the idea of requiring any man to pay alimony for the future support of another man's wife? In a late case decided in England, *Fisher vs. Fisher*, *Swabey & Tristram's Reports*, *page* 410, the effect of a second marriage after alimony or before alimony is expressly decided.

Mr. Justice CLENDENIN delivered the opinion of the court.

On the 13th of March, 1866, the complainant, Mary H. Bowman, filed her bill of complaint against Elisha Worthington; and afterwards, on the 26th of June, 1866, filed an amendment to said bill. It appears from the allegations of the original and

amended bills, that the complainant, on the 10th day of November, 1840, intermarried with the defendant in the state of Kentucky, and went to reside with her husband, in the state of Arkansas; that she lived with her husband in Arkansas about five months, when, in consequence of the adultery of her husband, she separated from him, and returned to the house of her parents in Kentucky, where she remained until the year 1843, when she applied to the legislature of that state for a divorce, and on the 4th of March, 1843, by a special act, in which many other persons were included, the bonds of matrimony between her and her husband were annulled on her part, and she was restored to all the rights and privileges of an unmarried person, and to her maiden name: [no cause for divorce was mentioned in the act of the legislature of Kentucky.] That she continued to live in her father's family in Kentucky until the 14th of October, 1847, when she intermarried with Benjamin H. Bowman, and after living for two years in Kentucky, removed with him to Louisiana, where they lived until his death, in 1854, when she returned again to Kentucky, and thenceforward resided with her parents: That Worthington was quite wealthy; that she demanded alimony of him, but he refused to pay any thing for her support, and proceeded to convey away his property, which was of the value of two hundred thousand dollars: That she never condoned his adultery, nor was herself guilty of any impropriety; and prays that alimony may be decreed to her. These are the substantial facts of the bill and amendment as pleaded.

To this bill, the defendant interposed his demurrer, setting out, among other things, the following causes:

1st. That the power of the circuit court to grant alimony depends entirely on the statute, by which alimony is dependent upon and incidental to a divorce from the bonds of matrimony, granted by the same court.

2d. That the marriage had been annulled by the act of the Kentucky legislature, and that alimony can only be awarded to a wife, *as such*, out of the property of her husband, *as such*, in

virtue of a subsisting marriage *status*, and that after a divorce granted, the court could have no jurisdiction of a bill for alimony.

3d. That the legislature which granted the divorce made adequate provision for the complainant, and the circuit court in Arkansas could not assume jurisdiction to try issues that might have been determined before that tribunal.

4th. That the relief sought is barred by lapse of time, and also by the statute.

6th. That the complainant married a second time. That would have revoked alimony if it had already been granted, and so created a bar to the relief sought.

The demurrer was sustained and the bill dismissed, and Mrs. Bowman appealed.

We have thus presented for our determination the questions raised by the bill and demurrer, which have never been decided by this court; and we have, consequently, bestowed upon them all the consideration which their delicacy and importance demand, and have given to the authorities cited by the counsel, and such others as our investigations have led us to, our earnest and thoughtful attention and reflection. Owing to the peculiar jurisdiction of the English courts upon this subject, until the year 1858, we have not been able to find that light and information which we expect to find, and do generally find, to aid us in our judgment in the adjudications made by the great and learned of the profession in the country from which we get the foundation of most of our law: nor have we found many cases in the American courts where the same points as in this were before the courts and adjudicated by them.

The application in this case is for alimony. We do not understand the bill to pray for any thing else.

By our statute of divorce, *chap.* 59 *Digest*, jurisdiction in divorce and matrimonial causes, including alimony, is conferred upon the circuit court, sitting as a court of chancery. The statute is an original provision, no part of the English ecclesiastical law having been expressly adopted in this state. Where by statute

jurisdiction over particular subjects of equity is conferred, or given to common law courts, the entire body of law administered in the equity courts of this country attaches to the matter immediately on the jurisdiction being created. But the subject of divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction. Courts of equity in England did not exercise jurisdiction over them; they were confined to the ecclesiastical courts, they alone adjudicated upon them. During the commonwealth, the ecclesiastical courts were abolished, and the courts of chancery, for a time, in virtue of special authority given in their commissions, took jurisdiction of these causes, but after the restoration an act of parliament confirmatory was passed to justify this assumption of jurisdiction. The eccelsiastical courts in England retained exclusive jurisdiction of divorce and matrimonial causes, until the 20th or 21st year of Victoria by act of parliament the jurisdiction was transferred to a new court, styled "the court of divorce and matrimonial causes."

The circuit courts of this state, sitting as courts of chancery, have jurisdiction of all cases of divorce and alimony by virtue of the statute. The court, in cases of this kind, must look to and be governed by the statute; it has no other powers than those expressly conferred, and while it may sit as a court of chancery, it is not to be understood as exercising inherent chancery powers, but as a court limited and guided by express statutory provisions, over a subject matter never belonging to chancery jurisdiction. It is then the circuit court, invested expressly by statute with authority to investigate and try cases of this kind by rules of proceeding adopted and practiced by courts of chancery.

The question then arises, has the circuit court, sitting as a court of chancery, jurisdiction to grant the relief prayed for, and decree alimony?

Our statute points out the court that can entertain jurisdiction; it not only locates the jurisdiction, but it details the manner, the time when, and the circumstances under which alimony may be

adjudged, and the causes for which it may be adjudged. The first section of our statute, *chapter* 59, *Digest, Ark.*, enumerates the causes for which a divorce may be granted. The 3d section says: "The circuit court sitting as a court of chancery, shall have jurisdiction in all cases of divorce and alimony, or maintenance, and like process and proceedings shall be had in said cases, as are had in other cases on the equity side of the court, except that the answer of the defendant need not be under oath." The 4th section defines the necessary qualifications of the bill of complaint, and the 9th section provides that "when a decree shall be entered, the court shall make such order touching the alimony of the wife, and care of the children, if there be any, as from the circumstances of the parties and the nature of the case, shall be reasonable;" and in the 11th section, it is enacted that "the circuit court shall have power also to enforce the performance of any decree or order for alimony and maintenance, by sequestration of the defendant's property, or by such other lawful ways and means as are according to the rules and practice of the court."

Alimony is the allowance which a husband, by order of the court, pays to his wife being separate from him for her maintenance. *Bishop on Marriage and Divorce*, 549. This definition is substantially the same as that given by other American, and the English authorities, and may be said to be only applicable to divorces *a mensa et thoro*, because it presumes the relation of husband and wife still to exist, although the parties are separated by virtue of the decree of a competent court, and is peculiarly applicable to the divorces granted by the courts in England prior to the year 1858, for in England, previous to that year, no judicial divorces, dissolving the bonds of matrimony originally valid, were allowed.

The allowance of alimony may be for the use of the wife, either during the pendency of the suit, in which case it is called alimony *pendente lite*, or, after its termination, called permanent alimony. It has no common law existence as a separate independent right, but wherever found it comes as an incident to a

proceeding for some other purpose, as for divorce; no court in England having any jurisdiction to grant it, where it is the only thing sought. *Bishop on Marriage and Divorce*, 550, and the authorities cited.

As we have before suggested, we have been able to find but few adjudications upon a point similar to the one we are now considering. In the case of *Shotwell vs. Shotwell*, 1 *Smedes & Marshall, Chancery Reports, page* 51, and which is a case and application similar to the one before us, except that there had been a judicial decree of a competent court of the state of Mississippi, dissolving the bonds of matrimony, the chancellor says, "That a separate suit by bill or petition, may be maintained for alimony, after a decree for a divorce in which such claim was omitted, if there was no express act of the wife waiving her right thereto." But this opinion of the chancellor was, we think, subsequently overruled by the supreme court of Mississippi, in the case of *Lawson vs. Shotwell*, 27 *Miss. Rep.*, 631, (and which appears to be a branch of the case of *Shotwell vs. Shotwell.*) The supreme court, in alluding to the decree for divorce that had been granted, and its effect and operation, say, "The constitution authorizing the legislature to give the circuit courts 'equity jurisdiction in all cases whereof the thing or amount in controversy does not exceed five hundred dollars; also in all cases of divorce and for the foreclosure of mortgages;' the legislature, by the act March 2, 1833, organizing the circuit courts among other things, declares in the language of the constitution, in defining the equity jurisdiction of those courts, that it shall extend to cases of divorce," etc. The court further say, "The question then comes up for decision whether the law, by investing the courts with full power to decree a divorce, intended that the court might go further and decree alimony, or an allowance to the wife out of the husband's property." "The authorities on this subject, almost without exceptions, agree that alimony is allowed only as in incident to some other proceedings, which may be legally instituted by the wife against the husband as such, for instance, as an action

for the restitution of conjugal rights, divorce, etc.; in which cases temporary alimony is allowed pending the suit, and permanent alimony on rendering the final decree in a divorce case, in favor of the wife." And the court again say that, "Having decided then, that the jurisdiction of the circuit court was full and complete in the divorce case, as to the matters now in controversy, at least so far as the claim for alimony is concerned, and the complainant having failed to ask a decree in this respect, the question is, whether the present bill shall be entertained by the superior court of chancery; while equity inclines, at the proper time and in the proper mode, to administer justice on a liberal scale, in favor of an injured wife, against a guilty husband, yet it can dispense with none of those statutory rules constituting part of the system, in her favor, any more than in the case of a less favored party. Matters which appropriately belonged to the case in the circuit court, and which might, by ordinary diligence, have been embraced in its decree, or final action, ought not, upon principles of policy, to be again litigated between the same parties in another court." And the court, after saying that the bill cannot be entertained, say, "We do not intend to intimate that there may not be cases in which an original bill, after a decree for a divorce, could not be maintained. A good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason, must depend upon the facts of the case when presented."

Another case, to which our attention has been drawn by the counsel of Mrs. Bowman, is the case of *Richardson vs. Wilson*, 8 *Yerger*, 67. This is a peculiar case, and if the courts of Tennessee had the equitable jurisdiction to entertain it, (which we are to suppose from the decision they had) particularly addressed itself to their consideration. Wilson, the husband, presented to the legislature of Tennessee, a petition for divorce, without the knowledge of the wife, and the legislature passed an act divorcing the parties, which act contained a proviso: "That nothing in this act shall deprive the said Mary Ann, of her right to alimony,

if by law she is entitled to the same." The wife brought her bill for alimony, and Wilson defended, armed as he supposed with the weapon he himself had procured from the legislature, but the court decided that it cut both ways, that while it cut him loose from the bonds of matrimony, it carved out of his estate a maintenance and support for her who had been his wife—intimating also, that even without the proviso to the act, the court would have maintained her right to alimony. Justice PECK, (concurring with Chief Justice CATRON, who had delivered an opinion) in an opinion replete with interest, says: "If the legislature have, while the act of 1799 was in force, stepped in the place of judicial authority and granted the divorce, cannot the courts of justice take up the cause, exactly where the legislature left it, and make inquiry, as if the divorce had been then and there granted by the court."

We are not advised what are the particular features of the act of 1799 of the state of Tennessee, under which the court acted, so as to be able to compare it with the provisions of our statute, under which we are called to decide.

We have also been referred to the case of *Fishlie vs. Fishlie*, 1*st Blackford*, 360, as in point to strengthen the position that a bill for alimony as a separate claim cannot be maintained, but as we have not been able to procure the volume referred to, we can only refer to it, as we find it alluded to approvingly by Mr. Bishop in his well considered work on marriage and divorce.

The only direct decision upon this point we have been able to procure, made by the English courts since the passage of the act 20 and 21 Victoria, establishing a court for dower and matrimonial causes, is the case of *Winstone vs. Winstone and Dyne*, 3 *Swabey & Tristam's Reports*, 245; and from the section of the law given in the opinion, it will be seen that it is like our statute, a law giving to a court jurisdiction in certain and specified cases. The case was a petition for permanent alimony after a decree for dissolution. The 32d section of the law by which the court acquired jurisdiction to decree alimony is: "The court may, if it

shall think fit, on any such decree (i. e. for dissolution of marriage) order that the husband shall, to the satisfaction of the court, secure to the wife, such gross sum of money or such annual sum of money, for any term not exceeding her own life, as, having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties it shall deem reasonable." After referring to the circumstances in the case, the judge ordinary says: "This is a novel attempt with respect to permanent alimony," "any thing in the nature of permanent alimony in a case of dissolution of marriage is the creature of the 32d section of the divorce act. I cannot think that the 32d section intended that after a decree *nisi* of dissolution obtained against the wife she should be at liberty to file her petition for alimony."

BISHOP, in his work on marriage and divorce, 553, 554, after referring to some of the courts that had maintained the chancery jurisdiction to grant alimony, says: "The inherent jurisdiction to grant alimony is also acknowledged in Virginia, Kentucky, in South Carolina and in Alabama," referring to cases in those states. But he says, "these are exceptions to the general rule, and departures likewise from principle. In some of the other states, the jurisdiction has been expressly denied, in some others by necessary implication, and probably it could not now be established in any state where it had not already been maintained, though there is some strength of argument and some apparent weight of authority in favor of the jurisdiction."

From the views thus given, and the authorities we have examined, we have come to the conclusion that alimony being an incident to the divorce, by the peculiar phraseology of our statute, the courts of this state can only so grant it, and that in connection with the decree, and that the circuit court has not jurisdiction to entertain a separate application for alimony.

We have arrived at this conclusion with some reluctance, for we would have preferred, if we could have done so consistently with our views of the law, to have favored the jurisdiction, that the complainant might have got the relief she asked; but we

believe she is now without the remedy she might have availed herself of at the time she was compelled by the conduct of her husband to leave him. In 1841, when she left her husband, the same law was in force that is in force now, and she could have availed herself of it, and got such relief as the law and the courts can give in such cases; she then had a right and a remedy to enforce her right; but she thought proper to resort to a tribunal in her native state and it granted her all she asked—to be released from an unkind and adulterous husband, and to be restored to her maiden name.

But should we be mistaken in the view we have taken of this point in the case, there is another raised by the bill and demurrer, which we think would defeat the application.

The bill shows that the complainant was divorced by the legislature of Kentucky in 1843, and that in 1847, she married Benjamin H. Bowman, who died in 1854, and that she is now the widow of Bowman. In this state of facts, and taking the broadest definition of alimony, that it is that portion of the estate of the husband which the court allows to the wife, on her divorce from him, for her support and maintenance, can we say that she is now entitled to such support and maintenance? She is the widow of Bowman, and as such entitled to dower in his estate. If she is entitled to alimony now, she would have been so in 1847, after her second marriage, and if suit had been brought in his life time, he must have joined his wife in such suit, and the second husband and his wife would prosecute the first husband for the maintenance and support of the wife. We do not suppose the law ever contemplated or would encourage such a proceeding.

By the contract of marriage the husband assumes the obligation to support his wife. It is his duty to do so, and the law will enforce the duty, and although the bonds of matrimony be dissolved, still if the wife claims it in proper time, and before the proper tribunal, the law will enforce her claim. But when the wife seeks a divorce *a vinculo*, and marries again, she fixes upon the new husband the obligation to support her. If the complainant

in this case had presented her application for divorce and alimony under our statute, and she had been divorced and alimony assigned to her, and she had again married, we have no doubt it would have been in the power of the court that granted the divorce and allowed the alimony, to have ordered its payment to cease; and upon this point, the effect of a second marriage, we have the light of direct adjudication.

In this case of *Albee vs. Wayman*, 10 *Grey*, 222, a divorce *a vinculo* and alimony had been decreed. Mrs. Wayman married again, and in consequence of that marriage, the court say, "the application for a divorce and alimony was her own affair, a voluntary act of hers, instituted for her benefit; so long as she remained unmarried, no ground existed for lessening the amount of such alimony, while of course it was open to her application for increase for good cause. By her act of subsequent marriage, she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of the alimony;" and it was reduced to a nominal amount.

In the case of *Fisher vs. Fisher*, 2*d Swabey & Tristam's Reports*, 411, the court say: "If hereafter the petitioner" (who had petitioned for divorce and alimony) "should become guilty of immorality, it would be unreasonable to call upon the former husband to maintain her. Again, if she avails herself of the freedom conferred by the decree of this court, and marries again, it would be unreasonable to compel the former husband to support her." And, again, in the case of *Sidney vs. Sidney*, 4, *Swabey & Tristam's Reports*, 180, the same doctrine is announced.

These authorities we think to be in accordance with the law, with propriety and good sense; and we therefore hold, because of the second marriage, the complainant in this case is not entitled to have maintenance and support decreed to her from her first husband. And having disposed of the case upon the two points considered, we deem it unnecessary to consider or decide upon the others made by the demurrer.

The decree of the circuit court dismissing the bill is affirmed.

BUSBY VS. ATKINS.

The case of Roane vs. Green & Wilson, *ante*, approved.

Mr. Chief Justice WALKER said:

The questions of law presented for our consideration in this case, are substantially the same as those decided in the case of *Julia Roane vs. Green & Wilson* at the last term of this court; and that decision is decisive of the questions presented in this case.

Appeal from Jefferson Circuit Court.

Hon. W. M. HARRISON, Circuit Judge.

YELL for appellant.

MONTGOMERY ADM'R. VS. ERWIN.

A valid release given to one of several trespassers, enures to the benefit of his co-trespassers as fully as if directly given to them.

It is error to assume, in the instructions to the jury, the existence of the facts in issue. (See 14 *Ark.*, 29; 550; 16 *id.* 593.)

Where the infancy of a party is pleaded to avoid his act, and the infancy is denied and his affirmance of the act after arriving at mature age is averred, the court, in instructing the jury that the act was binding upon the party, should add, if the jury find from the evidence that he was of age when the act was done, or affirmed it after he became of age.

Error to Prairie Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

WATKINS & ROSE and TURNER, for appellant.

The proofs show that Semantha Edwards, whose negroes had been abducted, run off and sold by the appellee, refused to relinquish her right to the negroes; that she was illiterate, but the contents of the alleged release were not read or explained to her, and she evidently intended only to relieve the appellee from criminal liability; that the compromise (or whatever it be) was in fact made and executed by Fielding Price who received the entire consideration, and that Semantha Edwards was an infant at the time of those transactions, and died before she was twenty-one years old.

The verdict for defendant in the court below was not only without but against evidence, and a new trial should have been granted. See authorities cited in brief for appellant in *Allen et al. vs. Grider* at this term.

As to the rights of the infant Semantha Edwards, or of her representative upon this record, see *Vaughan vs. Parr*, 20 *Ark.*, 600; and *Harrod vs. Myers*, 21 *Ark.*, 592.

In the second and third instructions given to the jury, for the defendant, the court below, in the face of all the evidence and the issues, assumed as facts, that Semantha Edwards had executed what is called a release, when really it was not her act and deed —that it was binding on her, when in truth she received no consideration for it—that she was of age or had ratified the paper after attaining her majority, though all the testimony (there was none to the contrary) on that point, was that she died before coming of age. In all the cases, down to one decided within the last few days, wherever such instructions have come under the notice of the court, they have met with unqualified condemnation. *Floyd vs. Ricks*, 14 *Ark.*, 295; *State Bank vs. McGuire*,

ib., 537; *Burr vs. Williams*, 20 *Ark.*, 172; *Armistead vs. Brooke*, 18 *Ark.*, 526.

The title of plaintiff's intestate, and conversion of the property by defendant were not questioned, and there was really no evidence to sustain any one of the seven pleas interposed.

CLARK, WILLIAMS & MARTIN, for defendant.

The instrument executed on the compromise with the Straceners, is not only sufficient to exonerate them—the consideration being received, (1 *Campbell* 249; 4 *Esp. Rep.*, 85,) but is a technical release under seal and imports a consideration upon its face, and when given to one joint trespasser releases all. *Hasting vs. Dickerson*, 7 *Mass.*, 153; *Snell vs. Sparrow*, 16 *ib.*, 24; *Upham vs. Smith*, 7 *ib.*, 265; 2 *Har. & McHen.*, 121; 8 *J. R.*, 54; *Franklin vs. Hutt*, 7 *J. J. Marsh.*, 358.

A release of one of several joint debtors, or joint and several debtors, is a release of all. 14 *Pick.*, 123; 17 *Mass.*, 581. So where a sum of money is received from one of several joint trespassers, and a receipt given therefor in full of his trespass, this operates as a discharge of the other joint trespassers, and the action can no longer be maintained against either of them. *Gilpatrick vs. Hunter*, 11 *Shep.*, 18; *Snow vs. Chandler*, 10 *N. Hamp.*, 92; 2 *Hen. & Munf.*, 358; 18 *J. R.*, 459.

The evidence given to prove the infancy of plaintiff's intestate, when properly sifted and compared with the circumstances stated, does not sustain the allegation of infancy.

Mr. Chief Justice WALKER delivered the opinion of the court.

The plaintiff, as administrator, brought his action of trover against the defendant for two negroes. A verdict and judgment were rendered for the defendant. The plaintiff filed his motion for a new trial, which was overruled; exceptions taken, in which the evidence and instructions of the court are made part of the record.

The errors complained of, not embraced in the motion for a

new trial, or waived by pleading over, will be considered as abandoned.

The second ground assigned for a new trial is that the court erred in refusing to give the fourth instruction asked by the plaintiff, and in giving the second and third instructions asked for by the defendant. The objectionable part of the fourth instruction was that the compromise with Michael Stracener for any injury he may have done plaintiff's intestate, was no defence for the defendant, Erwin, in this action. Under the issue formed, we think the court properly refused to give this instruction. The defendant had plead in bar of the action that the plaintiff's intestate had compromised with Michael and William Stracener, and that for a valuable consideration she had, by deed or bond, released all her right of action as to them. There was evidence tending to prove that these parties stood in the relation of co-trespassers with the defendant in taking the negroes under this issue and with these facts in evidence, if the defendant had succeeded in showing a valid release to the Straceners, his co-trespassers, such release would have enured to defendant's benefit as fully as if given directly to him.

The second instruction given by the court at the instance of the defendant, was "that the release of Michael Stracener was a valid release of all parties claiming under him in regard to the matter so released." It will readily be perceived that the court, in this instruction, declared the existence of the most material matter in issue, that is, whether there was, or not, a valid release. The defendant had pleaded a release; the plaintiff replied that his intestate was an infant, and was not for that reason bound by the release. The defendant rejoined, first, denying that plaintiff's intestate was a minor; and second, that after plaintiff's intestate arrived at mature age she had affirmed her deed, so made whilst an infant, whereby it became valid and binding upon her. This was a matter of fact to be found by the jury, and it was error for the court to declare the release a valid release. In *Floyd vs. Ricks*, 14 *Ark.* 29; *State Bank vs. McGuire*, *id.*, 550;

and *Atkins vs. State*, 16 *Ark.*, 593, as well as in several later decisions, this court has held it to be error to assume the existence of facts which are in issue to be tried, in giving to the jury instructions.

The third instruction, when taken in connection with the second was also erroneous. The court had in the second instruction declared the release valid, and although it was true that if they should find that Stracener, to whom the release was given, and the defendant were co-trespassers in taking the negroes and running them off, the release of Stracener would enure to the benefit of the defendant, the instructions should have gone further and instructed the jury that in order to make the defence valid, they must also find from the evidence, that the plaintiff's intestate was of age when the deed was made, or that after she became of age, she affirmed the deed of release made whilst a minor.

Several other questions in regard to the validity of the release have been argued by counsel, which would more properly have arisen upon demurrer to the pleadings, but which, under the issue formed, we deem unnecessary to notice.

Independent of the erroneous instructions given, in view of the whole of the evidence, we are of opinion that the jury not only decided in favor of the defendant against the weight of evidence, but without evidence.

Under the general issue there was no conflict of evidence as to the title of the plaintiff to the slaves, nor of the taking and conversion by the defendant. Under the first rejoinder the proof was upon the plaintiff: under the second, it was upon the defendant, who upon that issue offered no evidence whatever. But it appeared from the evidence of the plaintiff that his intestate was a minor when the deed was made, and died before she became of age.

Let the judgment of the circuit court be reversed and the cause remanded for further proceedings.

UPHAM VS. DODD.

A landlord, under sec. 14, ch. 100, *Dig.*, *p.* 685, has a lien upon the crop grown upon his land, which he may enforce in the mode pointed out by the statute in preference to all other claims against the tenant; but he has no title to such crop or any part of it by virtue of such lien.

A sale of a certain quantity of lint cotton—part of an unginned crop—neither delivered, separated from the bulk, marked or otherwise identified, is but an agreement to sell and deliver that quantity; and the vendee acquires no title to the property under such contract. (*Beller vs. Block*, 19 *Ark.*, 567.)

Appeal from Woodruff Circuit Court.

Hon. L. B. MACK circuit judge.

J. H. PATTERSON and GARLAND & NASH, for appellant.

1. We take it, there was no evidence at all showing any sale of the cotton—no specifying the property—no delivery; but a mere general agreement that Dodd was to have some cotton, but it was not pointed out, marked or delivered. According to the rule laid down in *Beller vs. Block*, 19 *Ark.*, 566, there was in truth no sale of the cotton so as to give Dodd title to it. And see *Pothier on Contracts of Sale*, 190 *et seq.* (§ 307 *et seq.*)

2. If he had not the property in himself, he had only a lien on it by virtue of his being the landlord of Elder, and this would, in no event, give him a right to the property, but merely a lien on it. So, in any event, the finding of the jury was incorrect. No property could be adjudged in him (Dodd,) and therefore no damages could be found. *Gould's Dig.*, *p.* 685, *sec.* 14, *chap.* 100; *Acts* 1860–61, *p.* 101, 2.

3. The first instruction of Upham should have been given. It but spoke the law when it said if Dodd agreed to take certain property in payment he waived his lien. If he relied on his special contract in payment of his claim for rent, the lien is at an

end. See *Cross on Lien*, 9 *Law Lib. p.* 44* *et seq.;* 16 *Ves.* 279; 1 *Parsons on Con.* 681 *n.* (*a*), *Adams Eq.* 128-9* (3 *Amer. Ed.*) 3 *J. J. Marsh.*, 553.

4. The second instruction should also have been given. It but recognizes the doctrine that in all proceedings under a statutory remedy, the statute must be strictly followed. *Hardeman vs. Shumate Meigs, Rep.* 398, 403; *Lawrence vs. Jenkins*, 7 *Yerg.*, 494-7; *Edwards vs. Davis*, 16 *J. R.* 281.

Then if Dodd relies upon a sale of two bales of cotton he fails in his proof, as there was no such sale as the law contemplates. If he stands on his lien he has not pursued it as the law directs and his judgment is illegal.

WATKINS & ROSE for appellee.

I. By express law every landlord has a lien on the crop grown on the demised premises in any year. *Gould's Dig.*, *p.* 685. It is the essence of a lien that the party claiming it has the possession of the chattel upon which the lien exists; 5 *Ham.*, 88. Property in the hands of a third person having a claim thereon is not attachable in a suit against the general owner. 1 *Gallis.*, 419.

On the above propositions it was immaterial whether there was a sale of the cotton to Dodd or not. If there was no sale, Dodd's right by virtue of his lien as against Upham's attachment is unquestionable. If there was a sale then the verdict is right. In regard to the objection to the sale that there had been no delivery, it is sufficient to say that delivery was unnecessary, because in legal contemplation it was already in the possession of Dodd by virtue of the statutory lien. To insist on a delivery in such a case would be a work of supererogation.

II. The instructions asked for on behalf of Upham were properly refused.

The first instruction is founded on a supposed waiver of the lien by agreement to receive "certain property" in payment.

There was no waiver or abatement of the lien on the cotton

because the "certain property" happened to be this same cotton upon which Dodd already had a lien by statute, and as to that there was no relinquishment of possession—no additional security taken, nor other constructive abandonment of lien.

As to the last two instructions they were properly refused, as the landlord has his option to elect a legal or equitable remedy; and because no one particular mode is prescribed by the statute to the exclusion of others. Furthermore this is not a proceeding to enforce a landlord's lien—it is a proceeding by interplea under the statute.

Mr. Chief Justice WALKER delivered the opinion of the court.

The material facts in this case may be thus briefly stated. Dodd, the owner of a plantation in Woodruff county, rented part of it to one Elder, under an agreement to furnish Elder with a team and implements for farming, and supplies of subsistence—Elder to cultivate the land and to give to Dodd one half the crop raised. That with the exception of twenty-five bushels of corn, Dodd furnished nothing, and refused to do so; told Elder that "he would not make any thing any how, and that he (Elder) would have to take the crop and do the best he could with it:" That Elder thereupon applied to Upham and obtained from him supplies; that being left without a horse, he procured and used an ox in plowing the crop. After the crop of cotton (less than four bales) had been picked and housed in the seed, (except about two hundred pounds of seed cotton which was afterwards picked and housed with the crop,) Upham sued out an attachment against Elder, and had the cotton, then housed upon the land of Dodd, but in possession of Elder, attached. On the morning of the day the attachment was levied, but before the levy, Dodd came to Elder and made an agreement with him, that Elder, for the use of the land, was to let Dodd have two bales of lint cotton, not to weigh less than 485 pounds each. That no delivery of the cotton was made, nor any part of it set apart to him.

Dodd appeared in court, and under the statute, was permitted

to file his interplea; in which he set forth that the cotton attached was his property; to which the plaintiff, Upham, answered that the cotton attached was the property of Elder, and not his, Dodd's. This issue was submitted to a jury, and verdict and judgment for Dodd. A motion for new trial was overruled, Upham excepted and has brought the case here by appeal.

The whole question at issue turns upon the right of property in the cotton under the state of case thus presented.

As landlord, there can be no question but that Dodd, under the provisions of the 14th *section of the statute*, *Dig.*, *page* 685, held a lien upon the crop of cotton grown upon his land, and had an unquestionable right to subject it to the payment of the debt for rent, in preference to all other claims against Elder, (the tenant.) But however perfect this lien may be upon the property, it vested in Dodd no title whatever to the property itself. It was still Elder's property, subject, however, to Dodd's lien under the statute, and in the mode there pointed out. In the case of *Davis vs. Parks*, reported in *6th Yerger R.*, *p.* 252, suit was brought by the landlord against one who had purchased cotton from his tenant, claiming title to it as landlord under a statute lien, much like that given by our own statute. CATRON, Chief Justice, who delivered the opinion of the court, said that the landlord could not maintain his action against the purchaser of the cotton; that the title to the cotton did not vest in him by reason of his lien upon it; that if such were the effect of the lien, even the miller who took toll for grinding, or the owner of a gin, for picking cotton, might be subjected to suit. But that such lien may be enforced by judgment and execution against the tenant, and that a levy of execution, when made, shall have precedence over all other debts for the length of time given by the statute. In the case of *Hardeman vs. Shumate*, 1 *Meigs Rep.*, 398, the same question came up and the former opinion of the court was reviewed and affirmed. The court held that "the landlord had no property in or right to the crop grown by his tenant, and could maintain no action grounded upon any taking of, or trespass to it: that the landlord's debt is

entitled to satisfaction out of the crop growing, precedent to all other debts of the tenant, and this precedence is preserved by bringing suit for the debt within the three months after the debt falls due, and prosecuting it to judgment, the lien of which judgment and the execution thereon take date from the day the rent fell due."

Such, in our opinion, would have been the rights of Dodd in this case, under our statute, admitting it to be true, as contended for by the appellee's counsel, that there existed a lien in this case upon the crop of cotton in favor of Dodd.

But it is insisted, that if in this counsel should be mistaken, still Dodd, by virtue of his contract with Elder, became the owner of two bales of the cotton, and that, to that extent at least, the cotton levied upon was his.

There is no conflict in the evidence, with regard to the terms of the agreement between Dodd and Elder with regard to the cotton. The question is; whether it was so separated from the bulk of the cotton, marked, or otherwise identified, as to distinguish it as his, or delivered. We think not. From the then condition of the cotton, most of which was seed cotton in the bulk, the balance in the field unpicked, considered in connection with the acts and declarations of the parties, and the contract made between them, it is apparent that something remained to be done before the sale was consummated. The cotton was in the seed, yet the contract was not for seed cotton, but for two bales of lint cotton baled, the bales to weigh 485 pounds. It was in bulk, not separated, and yet the contract was for a specific quantity. It is not pretended that any amount of cotton whatever was either set apart or delivered. The most that can be made of the contract is, that it was an agreement to sell and deliver a certain amount of ginned cotton—two bales at given weights. Under such a contract Dodd acquired no title to the property.

This question was considered and definitely settled by this court in the case of *Beller vs. Block*, 19 *Ark. Rep.*, 567, in which it was held: "That no sale is complete so as to vest in the vendee

an immediate right of property so long as any thing remains to be done between the buyer and seller in relation to the goods. The goods sold must be separated and identified by marks and numbers, so as to be completely distinguished from all other goods, or from the bulk or mass with which they happen to be mixed."

From this view of the questions of law presented for our consideration, it is evident that the court erred in the instructions given to the jury. The distinct issue to be tried by the jury, was, whether the property upon which the attachment was levied, was the property of Dodd, the claimant, or Elder, the defendant in the attachment suit. And as we have seen that Dodd could acquire no such title to the property by force of a mere lien upon it, as to entitle him to recover it as his own, and that he acquired no title by his contract of purchase, there remains no shadow of ground upon which either of the instructions, or the finding of the jury, can rest.

Judgment reversed.

STATE USE ETC. VS. CROFT.

The declaration, in a suit upon a county treasurer's bond, avering that a specified sum, as appeared by the books, remained in the treasurer's hands; that he had been summoned by the county court to settle his accounts but had failed to do so; that the court struck the balance due by him, and that he is justly indebted to the county as treasurer in such sum, which he had neglected and refused to pay, held sufficient to charge the sureties in the bond, without the averment of a formal judgment being rendered by the county court.

Appeal from Greene Circuit Court.

Hon. Z. STODDARD, special judge.

WATKINS & ROSE, for appellant.

I. The declaration contains, substantially, the averments which it was insisted, were wanting.

1. The act of January 11th, 1851, under which the bond sued on in this case was given did not require as a prerequisite to suit, that the county court should render a judgment against the obligor for the balance due. If it be a prerequisite, then we insist that the stricking of the balance by the court is the same thing, in effect, as the rendering of the judgment; because, rendering judgment is the act of the mind of the court rather than the mere formula of causing it to be entered at length upon the record.

2. That the book referred to in the declaration is a record of the court, sufficiently appears from the averments.

II. If these averments are wanting, their absence is of no material consequence, since the declaration is sufficient without them.

1. A breach is well assigned if it be in the words of the contract, or in words co-extensive with its legal import. Its object is to apprise the opposite party of what he is called upon to answer. *Phillips & Martin vs. Gov.*, 2 *Ark.*, 389. Surplusage is not a subject of demurrer. *Stephens on Pl.*, *p.* 424; *Comyn's Dig.*, *Tit. Pleader*, *C.* 28, *E.* 2. The condition of the bond is that Poole should pay over all moneys that might come to his hands by virtue of his office, etc. The breach (rejecting all the other averments as surplusage,) is that there came to his hands, as such officer, $805.01 more than he paid out, and that he is justly indebted, etc., in said sum. This would seem to be, within the rules, a sufficiently direct and positive averment of the receipt and non-payment of the amount by Poole.

Mr. Chief Justice WALKER, delivered the opinion of the court.

This is an action of debt, brought in the name of the state, for the use of the common school commissioner and of the county of Greene, against the defendant, as security upon the official bond of the county treasurer of that county. The defendant demurred

to the declaration and assigned numerous causes of demurrer, all of which were overruled except the third, fourth and seventh causes, which were sustained, and for which the declaration was adjudged insufficient. The third ground of demurrer is, that it is not averred that the defendant is indebted to the county. The fourth cause is, that it is not averred that the county court had adjusted the account, found the balance due, and rendered judgment against the defendant for it. The seventh cause of demurrer is, that there is no breach of the condition of the bond.

The defendant, as the security of Pool, who was elected county treasurer, entered into bond conditioned that Pool would faithfully discharge the duties of treasurer of common schools, and should pay over all moneys which should come to his hands by virtue of his office, to the proper claimants, and in all things demean himself in office according to law. Pool entered upon the duties of his office, and as such officer received eight hundred and five dollars and one cent more than he paid out for the use of common schools of said county.

Under the statute, it became the duty of the treasurer to make settlements with the court, and to pay over the balance of the money received by him as such, to those entitled to receive it. Upon the failure of the treasurer to make settlement, and pay as required by law, and by the condition of his bond, it is made the duty of the county court, (whose duty it is to have an account kept of the amount of money received and the amount paid out and expended by the treasurer,) to cause settlement to be made with the treasurer, to ascertain the state of accounts, and strike the balance, if any, due by him. This it was necessary to do, in order to fix the liability of the treasurer and his securities upon the bond; and in an action upon the bond for a breach thereof, in failing to account and pay over money was a necessary averment, as held by this court in *Jones et al. vs. The State use etc.*, 14 *Ark. Rep.*, 170, and in several other cases. This is the only material question presented by the demurrer, and it only remains

for us to determine whether this averment has been sufficiently made.

It is averred that the sum of eight hundred and five dollars and one cent, as appeared from the books, remained in the treasurer's hands; that he was summoned to appear in court and settle, but failed to do so, and that the court *struck* that sum as the balance against him; that he failed to make settlement with the court at the time required by law, and is justly indebted as such treasurer, to the county, in the sum of eight hundred and five dollars and one cent for the use, etc., which he neglected and refused to pay over, or any part thereof, or the sum of ten thousand dollars, or any part thereof, either to his successor or to the plaintiff for the use etc., although said court struck a balance against him for such sum so found due from him to the school fund by said court, as the records of said court show.

Without following the precise order and connexion of these averments, (interspersed with which is much superfluous matter,) we have given what we suppose to be the substance of the averments; upon a fair consideration of which we think them sufficient to bring this case within the spirit of the rule laid down in our former decisions referred to, which we do not understand as deciding that there must in such cases be a formal judgment rendered for the amount ascertained to be due. The material matter is to liquidate and settle the amount actually due; it is the more appropriate, if not the peculiar province of the county court to do this; for, as remarked in the case of *Jones et al. vs. The State*, unless settled by the county court, whose province it is to have the accounts kept and to make settlement, the whole subject of settlement and account would be transferred to the circuit court, upon an issue as to the amount of damages.

When the action of the county court in this case is considered with the additional facts averred; that Pool and his securities were summoned to appear in court and make settlement, and had failed to appear, and that the books showed the balance due, which was *struck* by the court, followed by a breach that the

balance of $805.01 was found due and struck against Pool as due to the school fund by the court *as the* records of the court show, we think they amount, substantially, to an averment that the county court proceeded to settle, adjust and determine the amount really due from the treasurer to the common school fund, and that such adjustment and settlement are shown by the records of that court.

Thus considering the questions presented by the demurrer, we think the declaration sufficient to charge the defendant.

Let the judgment of the circuit court be reversed.

Yell vs. Snow.

The principles decided in *Roane vs. Green & Wilson*, approved.

On demurrer the court will consider the sufficiency of the previous pleading.

The suit by petition in debt must be brought by the parties to whom the note was given, not by one of several payees, unless there be an assignment, which must be averred.

Appeal from Jefferson Circuit Court.

Hon. Wm. M. Harrison, Circuit Judge.

Yell for appellant.

Rice for appellee.

Mr. Chief Justice Walker delivered the opinion of the court.

The plaintiff, Snow, filed in the Jefferson circuit court, the following petition:

"Your petitioner, William D. Snow, the plaintiff in this cause, states that he is the legal owner of a bond against H. P. Yell, as administrator of S. Gaster, dec., James Yell and H. P. Yell, (the

said James Yell being alone sued in this action) to the following effect:

PINE BLUFF, ARK., January 23, 1863.

$1,000.

One year after date, we promise to pay Snow & Ketchum or order the sum of one thousand dollars (borrowed money,) with eight per cent. interest per annum thereon from date until paid. Witness our hands and seals.

H. P. YELL, [*Seal.*]
as adm'r of S. Gaster, dec.
JAMES YELL, [*Seal.*]
H. P. YELL, [*Seal.*]

Yet the debt remains unpaid, therefore he demands judgment for his debt and damages for the detention thereof, together with his costs.

B. F. RICE, attorney for plaintiff.

To this petition the defendant, Yell, filed several special pleas, to which the plaintiff demurred. The demurrers were sustained by the court, and the defendant, electing to rest upon his demurrer, final judgment was rendered against him, from which he has appealed to this court.

The defence attempted to be set up in the pleas was the same as that interposed by *Julia Roane* in the case of *Green & Wilson* against her, decided at the last term of this court, and upon the authority of that decision, the pleas were fatally defective.

But the counsel for Yell contends that, conceding the pleas to be insufficient, yet as the petition was also insufficient, the court below should have given judgment upon the demurrer in favor of the defendant, upon the familiar rule that upon demurrer to the plea the court must look into the sufficiency of the declaration, and give judgment against the party who commits the first error.

Upon examination of the petition it will be seen that Snow, the plaintiff, claims to be the legal owner of a writing obligatory executed by the defendant and others to Snow & Ketchum. It

was to them, and not to William D. Snow individually, the defendant was bound to pay. It is a familiar rule that the action must be brought in the name of the party in whom the legal interest in the contract was vested, (1 *Ch. Pl. p.* 2,) which has been repeatedly recognized by this court, commencing with *Phillips vs. Brown*, 1 *Ark. R.*, 61; and in a late case, *Hardie vs. Mills*, 20 *Ark. R. p.* 154, the same state of pleading was presented as in this case. In that case, suit by petition was brought by Mills, upon a bond payable to Jackson & Mills. Upon demurrer the petition was held insufficient, because in Jackson & Mills were vested the legal title and right of action, and unless assigned to the plaintiff (which, if done, should have been averred) there was no right of action in Mills alone.

Fully recognizing the correctness of this decision, we must hold the petition for like reasons insufficient in this case; and upon demurrer to the defendant's pleas, the court should, under the state of the whole pleading, have rendered judgment for the defendant.

Let the judgment be reversed.

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DENTON VS. BROWNLEE, HOMER & CO.

There can be no suspension of the statute of limitations under the 3d and 7th sections of the act approved 31st May, 1864, (*Acts of* 1864–5, *p*, 45,) if the act is constitutional, unless it is shown that the party belonged to that class of persons as to whom the collection of debts was suspended.

The case of *Bennett ad. vs. Worthington, ante*, approved.

The provision of the 32d section of the limitation act (*Gould's Dig., ch.*, 106,) does not give the plaintiff the benefit of the exception where the improper act of the defendant is done after the cause of action has accrued—the disability of

the plaintiff to sue in consequence of the act of the defendant, must exist at the time the cause of action accrues.

The issue to a replication setting up matter insufficient to avoid a good plea, is immaterial, and the judgment rendered thereon erroneous.

Appeal from Carroll Circuit Court.

STILLWELL & WASSELL, for appellant.

GREGG for appellees.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of debt brought by Brownlee, Homer & Co., against Denton on a promissory note for $505.86, due and payable on the 30th September, 1860.

The defendant pleaded, 1st. That the cause of action did not accrue within five years next before the commencement of the suit; and 2d, That after the making of the promissory note, the plaintiffs aided and abetted the so-called Confederate States in the late rebellion, giving money, arms and subsistence to the insurgents. This latter plea was stricken out, and properly so, as is conceded by the counsel for the appellant; leaving as the only defence to the action, the plea of the statute of limitations, to which the plaintiffs filed five replications.

The first replication alleges "that the promissory note sued on was made prior to the 1st day of January, 1864." The object of this replication was to bring the defendant within the provisions of an act of the legislature, approved 3d May, 1864. The act provides that no suit "for the collection of debts contracted by persons now in the military service of the United States, or of the state of Arkansas, prior to the 1st day of January, 1864, shall be brought in any court of this state so long as said persons are in said military service:" and it further provides "that the statute of limitations shall not take effect against debts, the collection of which is suspended by this act." (*Acts* 1864–5, *p.* 45, *secs.* 3, 7.) Waiving the question as to whether the provisions of the act above quoted, are constitutional or not, it is sufficient to

remark that the replication does not aver that the defendant belonged to that class of persons as to whom the collection of debts was suspended. Unless he was of that class, there could be, as to debts against him, no suspension of the statute of limitations. The court therefore erred in overruling the defendant's demurrer to this replication.

The second replication alleges that, after the accrual of the cause of action, the ordinary course of judicial proceeding was so interrupted, by reason of the late civil war, that suit could not be commenced against the defendant, and that the plaintiffs commenced their suit within five years next after the accrual of said cause of action—the time during which judicial proceedings were so interrupted not being deemed and taken as any part of said period of five years. This replication is substantially the same as that in the case of *Bennett adr. vs. Worthington*, decided at the last term of this court, where it was held that the replication was no answer to the defendant's plea. Hence there was error in overruling the demurrer to this replication.

The third replication having been held bad on demurrer, no question arising upon it, is presented for the consideration of this court.

On the fourth and fifth replications issues were made up and submitted to the jury, who found for the plaintiffs, and judgment was rendered accordingly, for the debt and damages, with costs of suit, to reverse which the defendant appealed. Upon this state of case it remains to be determined—first, whether the fourth and fifth replications were defective; and, second, if defective, whether the defect is cured by the verdict.

The fourth replication alleges that, after the accrual of the cause of action, the defendant, on to wit: the 6th day of May, 1861, by an improper act of his own, to wit: by engaging with divers other persons in rebellion and war against the lawful authority and government of the United States, and of the state of Arkansas, for a long space of time, to wit: until the 18th day of April, 1864, prevented the commencement of the plaintiffs'

action, and that the plaintiffs brought their said action within the time limited by law for bringing the same after the commencement thereof ceased to be so prevented. This replication involves a construction of the 32d section of the limitation act (*Gould's Dig.*, *chap.* 106,) which provides that, "if any person, by leaving the county, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented." Without discussing other objections that might be taken to the replication, it may be observed that the section of the act on which it is based, contains no express provision to the effect that the plaintiff shall have the benefit of the exception where the improper act of the defendant is done *after* the right of action has accrued, nor is such provision apparent by necessary implication. If, instead of allowing the plaintiff the full period of limitation, in which to sue, after the hindrances indicated have ceased to exist, it had been provided that the space of time during which such suit could not be brought, should not be taken as part of the time limited for the commencement of the action, as is provided by the 30th section of the same act, in cases where the suit is stayed by injunction, it might be inferred that it was the intention of the legislature to allow the plaintiff to take advantage of the exception, though the wrongful act of the defendant was done after the accrual of the right of action. As a general rule, when the statute of limitations once begins to run, it continues to do so until the bar is complete, unless provision is otherwise made, and the section under consideration makes no such provision. It merely provides for a disability in the plaintiff, arising from the act of the defendant, and we think the disability must exist at the time the cause of action accrues: indeed this conclusion would seem to be unavoidable, in view of the 31st section of the statute, which enacts that no person shall avail himself of any disability in the act mentioned unless the disability existed at the time the right

of action accrued. We are aware that a different view seems to be intimated in *Peters vs. Harris*, 6 *Eng.*, 294, but in that case, the replications did not raise, nor did the court decide the question now presented. The replication in this case expressly avers that the act of the defendant, which it is alleged prevented the commencement of suit, was done *after* the accrual of the cause of action, and for this reason we hold it insufficient.

The fifth replication is, in substance, the same as the second, and upon the authority of *Bennett adr. vs. Worthington, supra*, is no answer to the plea.

The fourth and fifth replications being defective, the only remaining question is whether the defect is cured by the verdict. In *Hughes vs. Sloan*, 3 *Eng.*, 146, this court adopting the language of Mr. Chitty in his work on pleading, lays down the general rule to be that "When there is any defect, imperfection or omission in pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue proved to be such as necessarily required, on the trial, proof of the facts, so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the judge would have directed the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." Applying this rule to the replications in the case before us, it is manifest that they are not cured by the verdict. The replications do not contain a defective statement of matter which, if properly stated, would have been good in avoidance of the plea, but the matter set up is, itself, insufficient. The issues formed were, therefore, immaterial, and the judgment rendered thereon erroneous. *Hughes vs. Sloan*, 3 *Eng.*, 146; *Lowry vs. Drake's heirs*, 1 *Dana*, 46.

Let the judgment be reversed and the cause remanded with leave to the plaintiffs to reply *de novo* to the defendant's plea, if they shall desire to do so.

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HAMPTON ET AL. VS. PHYSICK, ADM'R.

Although the probate court may fail to make an order vesting the entire estate of a deceased husband in the widow, when it does not exceed three hundred dollars, she may, in a proceeding against her to account for the estate, show that it did not exceed that sum, and thus avail herself of the benefit of the statute.

Appeal from Hot Spring Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

GARLAND & NASH, for appellants.

If the estate amounted to only $300, Mrs. Jackson did not take the proper course to have it given to her. There was no petition to court, no order of court. The statute upon which she relies was not complied with. *Gould's Dig., ch.* 4, *p.* 104, *sec.* 3.

According to the testimony the value of Jackson's estate is variously estimated; but there is no doubt that the estate was worth more than $300; that Jackson paid in his life time a portion of the purchase money on the land, and that Mrs. Jackson paid the other out of personalty of the estate. Equity will regard her simply as a trustee for the estate and hold the land as property belonging to Jackson's estate. *Hill on Trustees*, 114, 534, (*2d Amer. Ed.*;) *Adams Equity*, 143, (*3d Amer. Ed.*)

WATKINS & ROSE, for appellee.

On the merits, the bill was properly dismissed, as the answer and proof show.

The suit was revived on the suggestion of the complainants below, against the heirs of Priscilla Adams without naming them; it results that no decree could have been rendered in favor

of those complainants, and they have no ground of appeal from the appeal from the decree dismissing their bill, even though it had not been done on the merits.

Mr. Justice COMPTON delivered the opinion of the court.

The bill in this case alleges that James Jackson died intestate, on the 15th day of June, 1852, leaving him surviving Priscilla Jackson, his widow, and the complainants his only heirs at law and distributees; that at the time of his death, he was the owner of a tract of land lying in Hot Spring county, and of personal property of the value of about eleven hundred dollars; that he purchased the land in 1851, from George C. Miller, who executed to him a title bond for the same, and that, when Jackson died, the greater part of the purchase money remained due and unpaid to Miller; that no administration on his estate was ever taken out; that Mrs. Jackson, the widow, sold and appropriated to her own use the entire personalty, and that she paid Miller the residue of the purchase money for the land out of the assets of the estate, and took a deed for the same in her own name and for her own use.

The bill prays an account of the personalty so converted; and for partition of the realty, after first assigning dower to Mrs. Jackson, etc.

The proof read at the hearing in the court below does not sustain the case made by the bill. It appears that, although James Jackson purchased the land from Miller and paid him part of the purchase money therefor, he conveyed his interest in the same to his sons, Pleasant and Branson Jackson, shortly before his death, by assignment to them of Miller's title bond; that Pleasant and Branson died without having paid the residue of the purchase money to Miller, and leaving them surviving Mrs. Jackson, their sole heir at law and distributee, who, as such, became the owner of their entire estate; that, afterwards, Mrs. Jackson purchased the land from Miller for the sum of seven hundred dollars, who executed to her a deed, bearing date the

15th of June, 1853, she having paid the purchase money for the same with her own property, the larger portion of which came to her as next of kin to her two sons, Pleasant and Branson. James Jackson was not, therefore, the owner of the land in controversy, at the time of his death. The evidence also clearly shows that his entire estate did not exceed, in value, the sum of three hundred dollars. In such case, the statute provides that the probate court shall make an order vesting the estate absolutely in the widow, (*Gould's Dig.*, *ch.* 4, *sec.* 3;) and although it does not appear that such a decree had been rendered, vesting the estate in Mrs. Jackson, it was, nevertheless, competent for her to show, as she did do, that the value of the estate did not exceed three hundred dollars, and thus avail herself, in this proceeding of the benefit of the statute.

According to the view we have taken, the circuit judge, sitting in chancery, did not err in dismissing the bill for want of equity, and the decree must be affirmed.

CRAWLEY VS. RIGGS ET AL.

Where the vendor conveys land by deed, taking the note of the vendee for the purchase money, a mere assignment of the note does not transfer to the assignee the benefit of the vendor's lien upon the land for the payment of the purchase money, (18 *Ark.*, 157)—the lien of the vendor being personal to him, and not assignable unless under some peculiar equitable circumstances. (14 *Ark.*, 634.) But the peculiar equitable circumstances under which the vendor's lien follows the notes in the hands of an assignee do exist, where the assignment is made as collateral security for the notes of the vendor; the assignee, in such case, holding the lien as well for the benefit of the assignor as for himself, is subrogated to all his equities.

Appeal from Jefferson Circuit Court in Chancery.

Hon. WM. M. HARRISON, Circuit Judge.

ENGLISH for the appellant.

Riggs had a vendor's lien on the land he sold to Harris to secure the two notes which Harris gave him for the purchase money; and he assigned the two notes to Crawley as collaterals. The appellant seeks by this bill to collect the collaterals by enforcing Riggs' lien for the benefit of Riggs, and the case stands just as if Riggs himself had filed the bill to enforce the lien.

In *Shall as ad. vs. Biscoe et al.*, 18 *Ark.*, 142, the question whether the lien of the vendor passed with the assignment of the note for the purchase money was fully discussed and decided. On page 162, the court, quoting from a decision of New York, say: "If the note is assigned or transferred to a third person for his benefit, the lien of the vendor is gone forever. The reason is there is no peculiar equity in favor of third persons. But that does not apply where, as in this case, the transfer is only for the purpose of paying the debt of the vendor so far as it may be available, and is therefore for his benefit. There the equity (the vendor's lien) continues." The case quoted from is *Hallock vs. Smith*, 3 *Barbour*, *S. C. R.*, 272.

The case now before the court falls within this rule. Here the assignment was not in the ordinary course of business, but the notes were assigned as collaterals and are still held as collaterals, for the benefit ot Riggs.

MCCRACKEN for appellees.

The solicitor for the appellees submits the following points and authorities:

The assignment of the notes for the purchase money did not carry with it the lien on the land in said transcript described, and vest in the appellant the right to foreclose as in his bill is claimed. And hence the demurrer of the said defendant Harris

to the said appellant's bill in the court below was properly sustained, and said bill dismissed for want of equity. See *Moore & Cail admr. vs. Anders*, 14 *Ark.*, 628; *Pettit et al. vs. Johnson et al.*, 15 *ib.*, 55; *Shall as ad. vs. Biscoe et al.* 18 *Ark.*, 142.

Mr. Justice CLENDENIN delivered the opinion of the court.

The complainant, and appellant, filed his bill in the circuit court in chancery, alleging in substance: that on the 4th of July, 1860, Zachariah Riggs, the intestate of Ann V. Riggs, administratrix, being indebted to W. G. Crawley for a tract of land, executed to W. G. Crawley a writing obligatory for $2,394.64 of that date, payable on the 1st January, 1861, which W. G. Crawley, before the death of Riggs, assigned to J. F. Crawley (the complainant in the bill and appellant in his court:) that the obligation had been duly probated by J. F. Crawley against the estate of Riggs: that Riggs, on the 10th of December, 1859, sold to J. W. Harris a tract of land in Jefferson county for the consideration of $1100 in cash, and $1,341.50 to be paid on the 1st of January, 1861, and a like sum to be paid on the 1st of January, 1862, with interest, which deferred payments were evidenced by the notes of Harris to Riggs, dated and payable as stated: that at the date of the sale, Riggs executed to Harris a deed for the land, specifying on the face of the deed the two notes for the deferred payments, which deed was duly recorded: that Riggs, being so indebted to W. G. Crawley, by the writing obligatory of July 4, 1860, and the lands which he had purchased from Crawley being liable therefor, he some time prior to the 25th December, 1865, to induce W. G. Crawley to release said lands and make a deed therefor, assigned to him the two notes of John F. Harris, it being understood that the notes so assigned as collateral security for the payment of said writing obligatory given by Riggs to William G. Crawley, and that when the same were collected, the money should be applied to the payment of said writing obligatory: that afterwards, when Wm. G. Crawley assigned the writing obligatory of Riggs to John F. Crawley, he also assigned to him the two notes of Harris: that

Harris had paid complainant $740, which had been credited on the writing obligatory of Riggs, and also on the two notes of Harris, and that no other payments had been made.

The prayer of the bill seeks to enforce a lien on the lands sold by Riggs to Harris, for the satisfaction of the balance due on the notes given by Harris for the lands sold to him by Riggs.

Mrs. Riggs, the administratrix of Riggs, answered the bill, admitting it to be true, and praying that after the payment of the writing obligatory of Riggs to W. G. Crawley, and by him assigned to the complainant, the balance due on the notes of Harris should be decreed to her as such administratrix.

Harris demurred to the bill, and the court having sustained the demurrer, Crawley appealed.

There can be no question that if Riggs, the vendor was alive, and had the notes of Harris in his possession, he could enforce the lien upon the lands sold to Harris; so if the notes were in the possession of the personal representatives of Riggs, they could enforce the lien. This court, in the case of *Shall as adr. et al. vs. Biscoe et al.* 18 *Ark.*, 157, on this point, say: "It is very well settled in England and in most of the states of this union, that, in equity, the vendor of land has a lien for the purchase money, not only against the vendee himself and his heirs and other privies in estate, but also against all subsequent purchasers, having notice that the purchase money remained unpaid. The lien exists although there be no special agreement for that purpose, and notwithstanding the vendor conveys the land by deed, and takes the note or bond of the vendee for the purchase money. To the extent of the lien the vendee becomes a trustee for the vendor and his heirs, etc., and all other persons claiming under him with such notice, are treated in the same predicament."

The question then arises: the lien for the purchase money being perfect in Riggs, could he, by the assignment of the notes for the purchase money, assign the lien he had as vendor?

The American decisions on this point are very much in conflict. But this court in the case of *Shall adm. et al. vs. Biscoe et al.*, after

a very full review of the decisions, remark, "that the weight of authority is, that where the vendor conveys the land by deed, taking the note of the vendee for the purchase money, a mere assignment of the note does not transfer to the assignee the benefit of the vendor's lien upon the land for the payment of the purchase money." And in the case of *Moore & Cail, admr. vs. Anders*, 14 *Ark.*, 634, the court say: "The weight of authority, no doubt, is, that the equitable lien of the vendor is personal to him, and is not, unless under some peculiar equitable circumstances, assignable." This being the law we must inquire whether this was an assignment by Riggs to Crawley in the ordinary course of business, which would deprive Crawley of the lien, or whether it was not such a transfer of the notes to Crawley, presenting such peculiar equitable circumstances as would subrogate Crawley to the lien of Riggs upon the land sold to Harris, and whether the equity does not continue.

Riggs, it appears, was indebted to W. G. Crawley, for a tract of land, in the sum of $2,398.64, bearing interest; soon afterwards, Riggs sold a tract of land to Harris, and Harris owed him a balance (evidenced by notes bearing interest for $2,683.00.) Riggs, to get title to his land from Crawley assigned Harris' notes to Crawley as collateral security, and W. G. Crawley assigned both the notes of Riggs and the two notes of Harris to John F. Crawley, and Harris recognizing the transaction paid to J. F. Crawley, the complainant, $740, which was credited on his own notes and also on the note of Riggs.

Riggs could, at any time before his death, and his representatives could, afterwards, have paid his note to Crawley, and have taken back the notes of Harris, and enforced his lien. He had not, according to the bill, absolutely and unqualifiedly parted with the notes; they were collaterals in the hands of Crawley for the payment of Riggs' own debt, and under these circumstances, the equity continued with the notes. And we think that Crawley, the complainant, may well be subrogated to the lien which Riggs would have had in his lifetime, and his representatives

have now, on the payment of the debt of Riggs to Crawley. The complainant is entitled to enforce the lien; it is partly for his benefit, but generally for the benefit of the estate of Riggs; and two suits are not necessary to do that which can be done by one. Equity abhors a multiplicity of suits, and we will not require the complainant to prosecute his claim against the estate of Riggs and after its payment, that Riggs' representative shall proceed to enforce the lien against the land sold to Harris.

Judge STORY says: "The lien of the vendor is not confined to himself alone, but in case of his death, it extends to his personal representatives. It may, also, be enforced in favor of a third person, notwithstanding the doubts formerly expressed by Lord Hardwick; as for example, it may be enforced by marshaling assets, in favor of legatees and creditors, and giving the benefit by way of substitution to the vendor, when he seeks payment out of the personal assets of the vendee. *Story's Eq. Jurisprudence, chap.* 33, *Sec.* 1227. And in the case of *Halleck vs. Smith*, 3 *Barb. S. C. R.*, (*N. Y.*) 272, the court say, in referring to a point similar to the one before us, "If the vendor take a note or bond from the vendee, for the purchase money, that is no waiver of the lien, for such instruments are only evidences of the debt. But if the note or bond is transferred to a third person, for his benefit, the security is gone forever. The reason is, that there is no peculiar equity in favor of the third person. But that does not apply where, as in this case, the transfer is only for the purpose of paying the debt of the vendor, so for as it may be available, and is therefore for his benefit. There the equity continues."

We therefore think, from the facts of this case, as shown by the bill, and the authorities we have examined, that the circuit court in chancery erred in sustaining the demurrer to the bill, and its judgment must be reversed, with instructions to overrule the demurrer to the bill, and to permit the defendant Harris to answer if he wishes to do so.

WADE VS. BRIDGES AD. AD LITEM.

According to the forms and rules of pleading a plea in abatement is defective, which does not pray for a particular and proper judgment; and in such case the court will not give the proper judgment on the whole record as on pleas in bar, (18 *Ark.*, 359.)

A plea which sets up a defective defence, or a defence defectively stated, must be met by demurrer, not by motion to strike out. (6 *Ark.*, 196; 16 *id*, 669.)

It is error to adjudicate and render judgment in favor of a plea to which there is no issue.

The 10th section, chap. 1 *Gould's Digest*, authorizing the appointment, by the courts, of *administrators ad litem*, is not in violation of the constitution.

Error to Dallas Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

WARKINS & ROSE for plaintiff in error.

This court should give such judgment, upon the whole record, as the court below ought to have given. *Digest, title Practice in Supreme Court, sec.* 37.

The plea in form was a plea in bar, but the matter set up was only pleadable in abatement, and the motion to strike out the plea ought to have been sustained. *Mandel vs. Peet, Sims & Co.* 18 *Ark.*, 236; *Lounds, Orgill & Co.*, vs. *Brown et al.*, 22 *Ark.*, 359; *Edmondson vs. Carnall*, 17 *Ark.*, 285.

The plea was sustained, costs adjudged against the plaintiff and the attachment dissolved—all done without any issue upon the plea or trial of it. And the plea was frivolous—the alleged defect in the affidavit being so obviously a mere clerical misprision, that it should be considered as amended. *Mitchell vs. Conley* 13 *Ark.*, 420.

The plea was interposed by a party called Administrator *ad litem.* It is submitted the act of January 10th, 1851, authorizing any court to appoint a special administrator, is unconstitu-

tional, because in parceling out jurisdiction, that relating to estates of deceased persons is confided to courts of probate. The administration law was designed to be a complete harmonious system. *Barrassien vs. Odum*, 17 *Ark.*, 122; *Walker vs. Byers*, 14 *Ark.*, 247; *Bennett vs. Dawson*, 18 *Ark.*, 334; *Homer vs. Hanks*, 22 *Ark.*, 573; *Brown vs. Merrick*, 16 *Ark.*, 612.

Without qualification, without bond or security, without letters, without accountability, with all powers for harm, and none for good, a special administrator, if his acts are binding on the estate he assumes to represent, is a monstrosity, in view of the administration system, and the act in question ought to be strictly construed. On principle, the plea, to be sufficiently certain, ought to have alleged that there was no administration on the estate; and if the act is to be sustained, it should be construed in *pari materia* with the general administration law, and the special administrator required to make affidavit and give bond, as in all other cases, before he could act in a representative capacity, so as to bind the estate.

Mr. Justice CLENDENIN delivered the opinion of the court.

This was a proceeding by attachment in the circuit court of Dallas county, by petition, against Miller W. McCraw. The petition, writ and return, as well as the bond and affidavit are copied in the transcript.

At the March term, 1866, there being no personal service upon the defendant, an order of publication was made, and at the September term, 1866, the following order appears: "came said Wade by attorney, and suggests and shows to the court that said McCraw has departed this life;" and on another day of the term after is the following order, "came the plaintiff by attorney, and on his motion it is ordered that William U. Bridges be appointed administrator ad litem in this case."

The administrator ad litem appeared and filed the following plea:

"And the said defendant comes and defends the wrong and

injury, and says that the affidavit filed herein is insufficient in this, that said affidavit says 'remove his goods and effects of this state,' whereas it should have stated, 'remove his goods and effects out of this state,' and this he is ready to verify, wherefore he prays judgment," annexed to which is an affidavit in good form.

The plaintiff moved to strike out this plea, which motion was overruled, and judgment for cost of motion entered. The record then states the following: "Said plea in abatement is submitted on argument of counsel and by the court sustained," and judgment for costs on said plea is given, "and that the attachment in this case be dissolved." To which the plaintiff excepted.

The defendant then entered his appearance, but making no other defence, final judgment was rendered for the plaintiff and he sued out his writ of error; and we have thus before us the record.

The plaintiff assigns for error:

1st. That the court refused to strike out the plea in abatement.

2d. That the court erred in sustaining the said plea in abatement.

3d. The court erred in dissolving the attachment.

And the counsel of the plaintiff in their argument submit to us, and question the constitutionality of the law of this state, authorizing the circuit courts to appoint administrators *ad litem.*

We have had some difficulty at arriving at the conclusion, whether this plea is a plea in bar or in abatement. It has some of the requisites of both. As a plea in abatement, (for which we suppose it was intended,) according to the forms and rules of pleading, it is defective, both in its commencement and conclusion. It does not pray for any particular judgment, and without the defendant prays a particular and proper judgment in abatement, the court are not bound to give the proper judgment upon the whole record, as they would be in pleas in bar. 18 *Ark.*, 359; 10 *East*, 87.

This, then, being a defective plea could it be reached by the

motion to strike out? We think not. This court has heretofore held that a plea which merely sets up a defective defence, or a defence defectively stated, should be met by demurrer. *Wilson & Turner vs. Shannon and wife*, 6 *Ark.*, 196; *Alexander vs. Foster*, 16 *Ark.*, 669; *Allis vs. Bender*, 14 *Ark.*, 627. And therefore the circuit court did not err in overruling the plaintiff's motion to strike it out.

But we think that the court erred in sustaining the plea: There is no record showing that there was any issue to the plea for the court to determine, (even if the court could try an issue made upon a defective plea,) the record only stating that said plea in abatement is "submitted to the court on argument of counsel and by the court sustained."

As this case will be again before the circuit court, it is necessary for us to notice, and dispose of the question raised by the counsel, as to the constitutionality of the law authorizing the appointment of administrators *ad litem.*

The 12th section of the 7th article of the constitution of this state prescribes that, "the qualified voters of each county shall elect a county and probate judge, who shall hold his office for two years, and until his successor is elected and qualified. He shall, in addition to the duties that may be required of him by law, as a presiding judge of the county court be a judge of the court of probate, aud have such jurisdiction in matters relating to the estates of deceased persons, executors, administrators and guardians, as may be prescribed by law, until otherwise ordered by the general assembly."

The section of the law deemed objectionable to this provision of the constitution is as follows: "In all cases where suits may be instituted, and either plaintiff or defendant may die pending the same, it shall be lawful for the court, before which suit or suits may be pending, on motion of any party interested, to appoint a special administrator, in whose name the cause shall be revived, and said suit or suits shall progress in all respects in his name

with like effect, as if the plaintiff or defendant, (as the case may be,) had remained in full life." *Sec.* 10, *ch.* 1, *Digest.*

It will be seen by the the provision of the constitution that the probate court have the exclusive jurisdiction in all matters connected with administrations, until otherwise directed by the general assembly; and that by the section of the law, the general assembly, in January, 1851, provided for the appointment of administrators *ad litem.*

While we recognize the law heretofore decided by this court, that the administration laws of this state are, and are to be considered as a consistent and harmonious whole, we do not think that the section of the law under consideration is liable to the objection of marring that harmony and consistency. It is no part of the administration law, nor do we suppose the legislature so intended it to be. It was enacted after the administration laws were in force, and neither to cure their defects, nor impair their efficiency, but for the purpose of aiding parties litigating causes in the circuit courts, in their early and speedy adjudication. It was not intended that the person so appointed, should have any of the ordinary powers of a regular administrator. He is in court alone for the purpose of prosecuting or defending the particular suit, in which he is appointed; he is not liable for costs, and upon the appointment of a general administrator, or the rendering of the final judgment his duties and powers cease. *Secs.* 10, 12, *ch.* 1, *Digest.* The appointment of guardians *ad litem* may be said to be liable to the same objection, as that made to administrators *ad litem*, because minors are peculiarly the objects of jurisdiction and care of the probate courts. Yet we know that it is the constant practice, justified by the law as we believe, and we are not aware that objection is ever made to such appointments; and the courts always recognize the proceeding as valid.

With the policy of the law we have nothing to do; we can only construe it in connection with the constitution, and if in our view it is not in conflict with the constitution, it is our duty to carry out the expressed will of the legislature.

From the view we have thus taken of the section under consideration, we do not think it is in conflict with the constitutional provision before referred to.

But for the error before referred to this case must be reversed, and remanded to the circuit court with direction to that court to permit the parties to amend their pleadings if they wish to do so, and otherwise to proceed according to law and this opinion.

Mr. Justice Compton did not sit in this case.

McCravey vs. Cox.

The service of a writ of summons upon Jonathan McCarver is not a legal notice to John McCravey to appear and defend.

Error to Washington Circuit Court.

Hon. Elias Harrell, Circuit Judge.

J. D. Walker, for plaintiff.

Gregg, contra.

Mr. Chief Justice Walker delivered the opinion of the court.

This is an action of trover. At the return term the defendant made default; judgment was rendered, and at the next term of the court, a jury assessed the plaintiff's damages, upon which judgment was rendered, to which a writ of error has been prosecuted from this court. The defendant made no appearance in the court below, and the only question is, whether there was or not

service upon him. The plaintiff in error contends that there was not.

Upon referring to the record, we find a declaration and writ, followed by judgment against John McCravey. The return made by the sheriff upon the writ is, that he "executed the within writ on the within named Jonathan McCarver." That the two names are essentially different needs no argument. The service of the writ upon Jonathan McCarver was not notice to John McCravey to appear and defend the suit, any more than if no return whatever had been made upon the writ. In point of fact, it may be true that the summons was served upon the defendant, but that the sheriff made a mistake in writing the return upon it. If such was the case, the plaintiff had it in his power to have the return amended according to the facts; but this he has failed to do, and as appears from the record the return is insufficient to charge the defendant with notice.

The judgment of the circuit court must be reversed, and the cause remanded; and as the defendant has made himself a party to the record by prosecuting his writ of error in this court, he will be held as chargeable with notice in the court below, with leave to make such defence as he would have been entitled to make at the return term of the writ, if regularly served upon him.

KELLER VS. HENRY.

A declaration in an action of forcible detainer, under the latter clause of the 3*d section, chap.* 72, *Gould's Dig.*, alleging that the plaintiff "was entitled thereto and lawfully possessed of" certain lands, "which possession of right then belonged to the plaintiff, which right plaintiff in nowise alienated, transferred or conveyed away; but that the defendant afterwards lawfully and peaceably obtained possession of the land, and long after the termination of his right of

possession thereof, has held and detained, and now holds the same unlawfully, and by force after demand," will not be held bad on motion in arrest of judgment, though it might be so held on demurrer.

After verdict and judgment for the plaintiff, the judgment will not be arrested unless the record clearly shows a defective cause of action. Every intendment is to be made in favor of the declaration, and whatever is implied, or is inferable from the state of the pleading will be presumed in favor of the pleading and judgment.

The latter clause of the third section of said act was intended to provide for a class of cases where the defendant does not enter by force and violence, and yet does not enter by any agreement with the owner of the land; as where he enters peaceably upon premises which are at the time vacant, without the consent of the owner if absent, or without his objection if present; and holds the same unlawfully and by force, after demand made therefor in writing.

In construing the several sections of the said act, so that they may be in harmony with each other, the court considers that the phrase "lawfully and peaceably obtain possession," was not intended to apply alone to cases where the defendant entered under a lease from the owner, or by his express consent; but also to cases where the entry is such as to negative the idea of a forcible intrusion in the first instance, though not by express consent.

Where the sheriff's return of a writ of forcible detainer shows a personal service on the defendant, in substantial compliance with the statute, his return is not invalid because he fails to return a bond as required in such cases, although such failure may subject him to liability as an officer.

In an action of this kind the jury cannot assess damages in favor of the plaintiff. The only judgment which the plaintiff can have, is for costs. (*Gould's Dig., ch.* 72, *sec.* 16.)

Appeal from Washington Circuit Court.

Hon. ELIAS HARRELL, Circuit Judge.

J. D. WALKER, for the appellant.

The action of unlawful detainer is based on contract, either express or implied. The relation of landlord and tenant must exist. See *McGuire vs. Cook*, 13 *Ark.*. 460; *Miller vs. Turner*, *ib.* In his declaration, appellee expressly declares that the "right of possession belonged to him, and that he had never alienated transferred or conveyed away the same." How, then, could a

contract, express or implied, have existed? The declaration expressly negatives a contract.

Title cannot be drawn in question in this action, and if defendant was in possession without license from the plaintiff, and had not entered with force, ejectment was the remedy. *Miller vs. Turney*, 13 *Ark.*, 388.

Although courts will presume, after verdict, that the averments in a declaration are proven, they cannot presume that a cause of action is proven where none is stated, and it is error to render judgment. *Bedell vs. Stevens*, 8 *Foster*, (*N. H.*,) 118.

The return of the sheriff shows no such service as authorized the court to render judgment by default. The return does not show the taking of any bond whatever; and the sheriff is expressly prohibited from executing the writ unless bond is given; and he is required to make return of the facts. See *secs.* 11—12, *chap.* 72, *Dig.*

It is insisted for appellant that the judgment should have been arrested: 1st. On account of the failure of the declaration to show a contract expressed or implied—the declaration showing that the relation of landlord and tenant could not exist, "that plaintiff had never parted with his right of possession." 2d. That the service is not sufficient. 3d. That the court rendered judgment for the lands and tenements, and at a subsequent term rendered judgment for damages and costs.

GREGG, for appellee.

We submit that the sheriff's return shows a valid service. The defendant in the court below was duly dispossessed and the writ read to him, and he was required to appear at the proper time and place to answer the plaintiff in the premises. The return of the bond was not an act necessary to the jurisdiction over the party. If the sheriff committed a failure in that, it left upon him the responsibility.

We submit also that the judgment rendered at the return term of the writ was strictly in accordance with law. It announced

the defendant's default, the plaintiff's right to recover the property and damages, and that a jury came at the next term to assess damages. *State use, etc. vs. Crow et al.*, 6 *Eng.*, 648; *Gould's Dig.*, *ch.* 133, *secs.* 78, 82.

And we further submit that the declaration in this case does disclose a good cause of action. It avers that the plaintiff was "rightfully in the posession of the premises," and thereafter the defendant came "lawfully and peaceably" into possession, and that long after the determination of any right to the possession, and after demand in writing, defendant refused to quit possession and unlawfully detained, etc.

This action was based upon the latter clause of the 3d section of the act of forcible entry and detainer, and it was not necessary that the plaintiff should have averred that he contracted the premises to the defendant: The case of *Miller vs. Turney*, 13 *Ark.*, 38, and the other decisions of this court were upon the first, not the second clause of the act.

The plaintiff here averred his own right, his actual possession, and then, in the very words of the statute, that the defendant peaceably and lawfully came into posession; and the law implied a contract to pay for use and occupation and to redeliver.

There is a clear distinction between the cases for which the remedies in the first and second clauses of the section were intended, and that distinction must be borne in mind in order to a clear understanding of the pleadings in the case. There is also a clear distinction between possession, and the right of possession, and under the second clause the plaintiff may have always had the right of possession, and he must have had such right when he brought his suit.

Mr. Chief Justice WALKER delivered the opinion of the court.

This is an action of *forcible detainer*, brought under the latter clause of the *3d section, of chap.* 72, *Gould's Digest, page* 542, which gives a right of action against any one who shall lawfully and peaceably obtain possession of the lands, tenements or pos-

sessions of another, and shall hold the same unlawfully and by force after demand. And the question presented by the motion in arrest of judgment is, whether the allegations in the declaration are sufficient to uphold the judgment by default rendered in favor of the plaintiff.

It is alleged in the declaration that on the 2d day of August, 1863, the plaintiff "was entitled thereto and lawfully possessed of certain lands, (describing them,) which possession of right then belonged to the plaintiff, which right plaintiff in no wise alienated, transferred or conveyed away. But that the defendant afterwards lawfully and peaceably obtained possession of the land, and long after the termination of his right of possession thereof has held and detained, and now holds the same unlawfully and by force after demand."

It is to be observed that there is no contract of lease or rent averred, indeed no contract whatever under which the defendant entered, but on the contrary the allegation that the plaintiff had never parted with his right of possession, negatives any conclusion that such was the case, and thus the point in controversy is raised: which is, that inasmuch as the defendant did not enter upon the premises under a contract or agreement with the plaintiff, (who is alleged to have been in possession and never to have conveyed or transferred the same,) the defendant must necessarily have entered unlawfully, and that the plaintiff's right of action should be under the second section for forcible entry and detainer, and not under the third section for forcible detainer.

The proper construction to be given to this statute has, upon several occasions, been considered by this court; but in no instance heretofore has a case been presented where the plaintiff's right to recover has been based upon the latter clause of the 3d section. In the case of *McGuire vs. Cook*, 13 *Ark.*, *page* 448, which was an action for forcible detainer, this court most carefully considered the right to recover under the first clause of the 3d section, and held that the action for an unlawful detainer under that clause is founded upon a breach of contract, but expressly re-

served for future consideration, the proper construction to be given to the latter clause of that section, under which the present action is brought.

The 3d section provides that "when any person shall wilfully and forcibly hold over any lands, tenements or other possessions after the determination of the time for which they were demised or let to him or the person under whom he claims; or shall lawfully and peaceably obtain possession, but shall hold the same unlawfully and by force, and after demand made in writing for possession thereof by the person having a right to such possession, his agent or attorney shall refuse or neglect to quit such possession, such person shall be deemed guilty of an unlawful detainer."

We may safely say, as was said in *McGuire vs. Cook*, that the first clause in the section gives the right of action to those who temporarily part with their right of possession under contract, such as exists between landlord and tenant; whilst the latter clause provides, that if by any other means possession shall lawfully and peacefully be obtained, but held over unlawfully and by force after demand, such person shall be deemed guilty of an unlawful detainer. It will be perceived that much must depend upon the construction to be given to the words, "lawfully and peaceably," taken in connection with the whole section.

If we give to the word "lawfully" its fullest signification, we must thereby exclude the idea of any possession not taken by the consent of the party lawfully entitled to the possession; because, it is unlawful and wrongful for an entry to be made upon such possession without the consent of the owner, either express or implied: and if thus construed, the latter clause of the section would be rendered useless and superfluous, which should not be done, if by any fair mode of construction it can be avoided. By qualifying the meaning of the word, "lawfully," so as to give it the same effect as the word "peaceably" in immediate connection with it, effect can be given to the latter clause, so as to give the right of action for a forcible detainer against all persons who

enter peaceably upon the possessions of another, and unlawfully and by force hold the same after demand.

By thus construing the latter clause of the section, a remedy will be given for all cases in which the entry was peaceable; and when taken in connection with the first clause of the section, affords a remedy in all cases of unlawful detainer where the entry was peaceable, whether under contract to enter or otherwise: whilst the second section gives a right of action in all cases where the entry is forcible; and thus considered, the two sections give redress to all persons aggrieved, whether the entry be forcible or peaceable, to be sought under the one or the other section, according to the facts of the case. We will not attempt to enumerate the cases that might arise under the latter clause of this section, but can well conceive how an entry might be peaceably made, otherwise than under a contract with the owner of the land, or him who was entitled to the immediate possession; as, for instance, if the owner of a tenement should stand by and see one enter upon his possession, and should make no objection to his doing so. By such conduct there might arise such an implied assent to such entry as not only to make it peaceable but lawful: or, in case a tenement should be abandoned by the owner, or one in possession under him, and a third person finding the tenement vacant should enter into it, although in strictness, it could not be said to be lawful for him to do so, still in a more liberal sense, as the entry was unattended with actual force, it might be held to be peaceable. And in support of this construction, we may refer to the case of *Green vs. Wroe and wife*, 1 *Sneed's Rep.*, 246, where an entry was made in a vacant house, the doors being open. Such entry was held to be neither forcible in fact, nor in law And in a later case, *Hopkins vs. Caloway et al.*, 3 *Sneed's Rep.*, 11, the action being for forcible entry and detainer, in which, as appeared from the evidence, the defendant moved his family upon, and took possession of an abandoned farm, the fences being down and the doors open, the entry was held to be quiet and peaceable.

In view of the actual state of case presented for the consideration of the court in the case of *Fowler vs. Knight*, 10 *Ark. Rep.*, 43, it is fully reconcilable with these decisions, and it will be seen that the decision of the court upon this point (as remarked by the chief justice who delivered the opinion in *McGuire vs. Cook*) was correct under the state of case presented. In that case the tenant had locked the door and delivered the key to his landlord, who, under such circumstances, is not to be presumed to have abandoned his possession; and in the absence of proof to the contrary, the presumption was strong, that the defendant broke open the doors and entered by force. Thus considered, the case of *Fowler vs. Knight* will not be understood as giving the right of action under the second section of the act in cases where the entry has been made peaceably and without force. But that in all cases where the entry, whether under contract or otherwise, has been peaceable, that is, without force, the party aggrieved should seek his redress under the third section of the act, by an action for forcible detainer. This construction of the statute is in harmony with our decisions in the case of *McGuire vs. Cook*, and the latter decisions of *Brady vs. Hume*, 18 *Ark.*, 284, and *Frank vs. Hedrick*, *id.* 304.

Turning to the case now under consideration, we find nothing in the declaration from which an inference may be drawn that the defendant entered under a contract, or upon what terms he did enter. It is however alleged that the defendant held over long after the termination of his right of possession which would seem to imply that possession was given for a limited time; but there is no averment that this limitation was by contract; indeed it is expressly averred that the plaintiff had in no manner parted with his right of possession.

In view of the whole declaration, we confess that we are not free from doubt, as to whether the declaration, which contains no allegations disclosing the terms upon which the defendant entered, should be sustained or not. But as this is not a question arising upon demurrer to the declaration, but a motion in arrest of judg-

ment, in determining which the rule is that after verdict and judgment for the plaintiff, the judgment will not be arrested unless the record shows a clearly defective cause of action, and that every intendment is to be made in favor of the declaration, whatever is implied, or is inferable from the state of pleading will be presumed in favor of the pleading and the judgment rendered upon it. The objection to the declaration being for the bad statement of a good cause of action, under the rule above stated, will be held sufficient.

The objections to the sufficiency of the sheriff's return, we think not well taken. There was, as shown by the sheriff's return, personal service upon the defendant, in substantial compliance with the statute; his failure to return a bond, as required in such cases, might have subjected him to liability as an officer, but did not relieve the defendant from his obligation to appear and defend or suffer the consequences incident to his default.

The judgment is, however, fatally defective, and should have been arrested upon the ground that the assessment of damages by the jury, and the judgment rendered thereon are wholly unwarranted by law. The only judgment to which the plaintiff in this action is entitled (as will be seen by reference to the 16th *sec. of ch.* 72, *Gould's Dig., p.* 544,) when the finding is in his favor, is for costs. No judgment for the property was permissible, because the title to the property was not in issue; nor for the possession of the property, because that had already been given him by the writ; nor for damages, because this is not an action for the recovery of damages: no issue of that kind could be presented in this action. Under the 17th section, the defendant could have his writ of inquiry and damages assessed, in case the verdict is for him, for the damages sustained for having been dispossessed of his property; but no such right is given to the plaintiff.

The interlocutory judgment, the judgment of continuance, the writ of inquiry, the verdict and the judgment thereon were all without warrant of law, and for this the judgment must be arrested and set aside, and the cause remanded, that judgment

may be rendered upon the default of the defendant as provided by the 16*th section of chap.* 72 *of the Digest, page* 544.

FRANK VS. GODWIN, AD.

Where issues were made up in the probate court and submitted to the court and verdict for the defendant, and the judgment of the probate court was affirmed in the circuit court, and it appears that the judgment of the probate court was fully warranted by the evidence, the case will not be reversed.

A judgment will not be reversed and a repleader awarded in order to permit the party first in fault to take advantage of the immateriality of an issue, superinduced by his own blunder.

Appeal from Chicot Circuit Court.

Hon. W. M. HARRISON, Circuit Judge.

GARLAND & NASH, for appellant.

Mr. Justice COMPTON delivered the opinion of the court.

This was a proceeding in the probate court of Chicot county for allowance and classification of a claim against the estate of W. T. Ferguson, deceased.

The administrator pleaded that the claim was not presented to him within two years next after the date of the letters of administration; to which the plaintiff replied, first, that there was no sufficient notice to him of the grant of letters of administration; second, that by ordinance of the convention of 1861, the statute of non-claim was suspended, and continued so to be up to and until the time when said claim was presented; and third, that the county of Chicot was, at the time of granting said letters and for more than two years next thereafter, held and occupied by the

enemies of the United States, and that there were no legal courts held in said county in which the plaintiff could assert his claim, or which had the power to grant letters of administration. Upon these replications issues were joined and submitted, on an agreed state of facts, to the court, who found for the defendant, and rendered judgment disallowing the claim. Whereupon the plaintiff appealed to the circuit court, where, on due consideration of the points excepted to, the judgment of the probate court was affirmed, and the case now comes up by appeal to this court.

The finding of the court upon the issue to the first replication was fully warranted by the evidence.

As to the second replication, waiving any expression of opinion as to the power of the convention of 1861, to suspend the statute of limitations and non-claim, in certain cases, it is sufficient to say, that the evidence adduced did not bring the claim in question, within the provisions of the ordinance; and consequently the finding of the court upon the issue to this replication was also correct.

Upon the authority of *Hawkins vs. Filkins* and *Bennett ad. vs. Worthington*, decided at the last term, the third replication was insufficient; and the issue thereto was immaterial. But the immateriality of the issue cannot affect the judgment in this case; because it is a well settled rule of law, that the judgment will not be reversed and a re-pleader awarded, in order to permit the party first in fault to take advantage of the immateriality of an issue superinduced by his own blunder.

Finding no error in the record, the judgment must, in all things be affirmed.

WILSON VS. THE STATE.

The case of Matthews vs. State, *ante*, approved.

Appeal from Ouachita Circuit Court.

Hon. JOHN T. BEARDEN, Circuit Judge.

GALLAGHER & NEWTON, for appellant.

JORDAN, Attorney General, relied upon the cases of *Brittin vs. State*, 5 *Eng.*, 301, and *Matthews vs. State*, decided at December term, 1866.

Mr. Justice COMPTON: The only question presented in this case, is precisely the same as that determined in *Matthews vs. State*, at the last term. The decision in that case is the law of this. Let the judgment be affirmed.

WILSON VS. BROWNLEE, HOMER & CO.

The death of an individual, though disconnected with any question of pedigree, may be proved by hearsay, subject to the same restriction as where matters of pedigree are involved.

Although declarations of members or relatives of the family, are good evidence to establish marriage, death, birth, heirship and the like; and may be proved by others, as well as by surviving members of the family, as held in *Kelly vs. McGuire*, 15 *Ark.*, 605, yet the statement of a witness that he had received information verbally and by letter, as to the death of a party, when it does not appear that the witness was related to the party in question, or how he obtained his information, is not competent evidence of that fact.

Where debt was brought on a written instrument, from which the plaintiff's demand might be ascertained, and the defendant pleaded in abatement; and issue was made up on his plea, and submitted to a jury, and a part of defendant's evidence was excluded as incompetent, whereupon he declined to proceed further in the case, and the plaintiff read the instrument sued on to the jury, and verdict was rendered in his favor: *Held*, That the proceedings were irregular; that the court, after seeing that the issue on the plea in abatement was properly disposed of, should have proceeded under the statute, (*Dig., chap.* 133, *sec.* 81,) to render judgment for the debt, damages and costs; the amount of the demand being evident from inspection of the instrument sued on: but that the judgment, being substantially the same as it would have been, had the proceedings been regular, will not be reversed.

Appeal from Carroll Circuit Court.

Hon. ELIAS HARRELL, Circuit Judge.

GARLAND & NASH, for the appellant.

Hearsay evidence of death seems to be receivable under the same restrictions as that respecting other matters connected with questions of pedigree. To what extent hearsay evidence may be received to prove the death of a person, see *Scott's Lessee vs. Ratcliff*, 5 *Peters*, 81, 86; *Jackson ex. dem. Miner vs. Boreham*, 15 *John. Rep.*, 226; *Jackson ex dem. Woodruff et al, vs. Cady*, 9 *Cowen's Rep.*, 140; 6 *Yerger*, 494; *Kelly's Heirs*, 15 *Ark.*, 604–5, *and authorities cited; Anderson vs. Parker*, 6 *Cal. Rep.*, 197; 2 *Bouvier's Law Dic.* (*Pedigree*) 307, *and cases cited.* The above fully establish the rule that hearsay evidence is admissible to prove the death of a party. It is beyond all doubt *prima facie* evidence; and general rumor is frequently the only means by which the death of an individual can be established.

The only issue submitted to the jury was as to the death of Brownlee; there was no question before them either as to the debt or damages. The issue as to Brownlee's death being found against Wilson, then if he had nothing more to say, the court should have assessed the damages or found the debt with the damages for its detention. *Gould's Dig., p.* 858, *sec.* 81; *Johnson vs. Frank*, 16 *Ark.*, 199.

Mr. Justice COMPTON delivered the opinion of the court.

This was an action of debt by attachment brought by John A. Brownlee, Thomas J. Homer, David Brownlee, John Rix and Charles F. Tracy, partners, under the style of Brownlee, Homer & Co., against James A. Wilson on two promissory notes, the one for $538.74, bearing date the 28th February, 1860, and the other for $110.95, dated the 26th July, 1860, and both payable to Brownlee, Homer & Co., at six months.

The defendant pleaded in abatement, that, after the making of the promissory notes and before the institution of the suit, John A. Brownlee, one of the plaintiffs, had departed this life. Upon this plea an issue was regularly made up and submitted to a jury; and the defendant, to maintain the issue on his part, offered to prove by the witnesses, Peel, Denton and Gaither that, "according to information which they had received, and which they believed to be true," John A. Brownlee was dead prior to the commencement of the suit—which testimony, on motion of the counsel for the plaintiffs, was excluded as incompetent. The defendant then offered to prove, by the witness, Gregg, that he, Gregg, "had received information, verbally and by letter, informing him of the death of Brownlee," at the time above indicated, which was likewise refused.

The question thus raised, is, whether the evidence offered was competent. Although the uniform current of decision is to allow hearsay of facts, under certain restrictions, bearing upon questions of pedigree, yet hearsay of the same kind of facts has, in some cases, been refused when introduced for other purposes, as in *Whittuck vs. Waters*, 4 *Carr. & Payne*, 375, where, in an action for use and occupation, it became necessary to show the determination of a life estate by proving the death of *cestui que vie*, PARK, Justice, refused to allow hearsay, remarking that the question was not one of pedigree, "where hearsay in the family is admissible." It may be laid down, however, as a general rule, sustained by the decided weight of authority, especially in this country, that the death of an individual, though disconnected

with any question of pedigree, and for whatever purpose sought to be established, may be proven by hearsay, subject to the same restrictions that are applicable in cases where matters of pedigree are involved. It is necessary, then, to refer to these restrictions, in order to determine whether the testimony offered, in the case under consideration, is admissible or not. The rule intimated by this court, in *Kelly's heirs vs. McGuire et al.*, 15 *Ark.*, 605, is that "declarations of members, or relatives of the family, or general repute in the family, are good evidence to establish marriage, death, birth, heirship and the like, and may be proved by others as well as surviving members of the family." And while it has been found, upon examination, that some of the American courts have allowed greater latitude than is indicated in *Kelley's heirs vs. McGuire, et al., supra*, we have met with no adjudication which would sanction the admissibility of the evidence in question. Thus, in *Dudley et al. vs. Grayson et al.*, 6 *Monroe*, 259, the court said, the declarations of relatives, and perhaps of neighbors and intimate acquaintances, have been received, but not so of a mere stranger; and the declaration of one in Missouri, as to the death of a resident in that state, was refused, it not appearing that the speaker was even an acquaintance of the deceased. How the witnesses, in the case we are considering, obtained their information, whether from members of the family, or from relatives, or even from the neighbors and acquaintances of the deceased, we are not informed. For any thing that we know they may have derived their information from a solitary stranger, residing at a great distance from the deceased, and who possessed none of the ordinary means of reliable information. Hearsay, from such a source, all must admit, ought not to be received in any case. For these reasons we are clearly of opinion that the testimony of the witnesses Peel, Denton and Gaither was properly refused, and also that of the witness, Gregg, aside from any question growing out of his relation to the plaintiffs as their attorney. We have examined the cases to which we have been referred by the counsel for the appellant, but do not

understand them as warranting a conclusion different from that which we have reached.

After all the evidence offered by the defendant under the issue to the plea in abatement had been excluded, the record entry states that "the defendant said he had nothing further to say, and said plaintiffs might take their course." Whereupon the plaintiffs read the notes, sued on, in evidence to the jury, who returned the following verdict: "We the jury find the issue for the plaintiffs, and find for their debt and damages the sum of seven hundred and sixty-eight dollars and thirty cents"—for which sum with costs of suit, judgment was rendered. This was irregular. When the defendant declined making further defence, the court, after first seeing that the issue to the plea in abatement was properly disposed of, should have proceeded, under the statute, (*Dig.*, *chap.* 133, *sec.* 81,) to render judgment for the debt, damages and costs, the amount of the demand proceeded for, being ascertainable from the instruments sued on. But conceding, as we do, that the reading of the notes in evidence to the jury, under the issue to the plea in abatement, was irregular and erroneous, and that the finding of the jury was, in no wise, responsive to the issue, yet the judgment is, substantially, what it must have been if the proceeding had been regular; and being, therefore, correct upon the whole record, it will not be reversed for the errors indicated, but is, in all things, affirmed.

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STATE VS. GREEN.

If in an indictment for perjury the substance of the offence is charged, by what court the oath was administered, averring that the court had authority to administer the oath with proper averments to falsify the matter whereof the perjury is charged, it is sufficient. (*Sec. 7, art. 2, ch. 51, Gould's Dig.*)

Where an indictment for perjury charges that in the false oath "the defendant was duly sworn" by the foreman of a grand jury, "to speak the truth concerning all such legal questions as might be asked him by the said" foreman, it is sufficient; the foreman of a grand jury having authority to administer such an oath.

Error to Ouachita Circuit Court.

Hon. JOHN T. BEARDEN circuit judge.

JORDAN attorney general, for the state.

The indictment contains all the requisites of a good and sufficient indictment. *Gold's Dig., ch.* 51, *sec.* 7, 361; *Wh. A. Cr. Law*, 2191.

The substance of the oath need only be stated in an indictment for perjury. *Roscoe Cr. Evidence*, 749, 750, 766.

Mr. Justice CLENDENIN delivered the opinion of the court.

Isaac Green was indicted in the circuit court of Ouachita, at the December term, 1866, for the crime of perjury. He was arrested and plead not guilty, and on the trial the jury found him guilty and assessed his punishment; and the defendant then by his counsel moved in arrest of judgment, which motion being sustained the defendant was discharged, and the state sued out her writ of error to this court.

The indictment charges, after a formal and proper caption, that Isaac Green, (a freedman) late of the county of Ouachita aforesaid, was then and there duly subpœnaed to appear and give evidence before the grand jury, which was duly elected, empanneled, sworn and charged to inquire in and for the body of the

county of Ouachita in the state of Arkansas, at the June term of the circuit court, in the year of our Lord one thousand eight hundred and sixty-six, of which said grand jury Joseph M. Graham was duly appointed foreman, and the said Isaac Green (a freedman) was duly sworn to speak the truth concerning all such legal questions as might be asked him by the said Joseph M. Graham, who, by his position as foreman of said grand jury, was authorized to administer oaths to witnesses who were called to give evidence before said grand jury, and he, the said Isaac Green (a freedman,) did then and there swear that he had seen Lewis Word (a freedman) play a game with cards called seven up, and bet money on the game, which evidence was material before said grand jury in finding a bill of indictment for gaming against the said Lewis Word; and afterwards, to wit: at the county of Ouachita, in the state of Arkansas aforesaid, at the December term thereof, in the year 1866, the said Isaac Green aforesaid wickedly and wilfully contriving and intending wrongfully to aggrieve the state of Arkansas by screening from legal and just sentence of the law of the aforesaid state of Arkansas, Lewis Word (a freedman) as aforesaid, on the 18th of December, 1866, at the county of Ouachita aforesaid, in a certain cause then pending and being tried in the circuit court of the county of Ouachita, in the state of Arkansas, between the state of Arkansas as plaintiff, and Lewis Word (a freedman) defendant, the said Isaac Green being duly sworn before said court as a witness on the part of the state of Arkansas, in said cause, to testify the truth, the whole truth and nothing but the truth, concerning the matters in question in said cause, the said court having then and there sufficient and competent power and authority to administer said oath, and certain questions then becoming and being material, that is to say, whether or not the said Isaac Green had seen the aforesaid Lewis Word play a game with cards, called seven up, and bet money on the same, within the last twelve months before the finding of the said indictment, meaning the indictment found at the June term of the circuit court for Ouachita county, in the

state of Arkansas, in the year 1866, against Lewis Word (a freedman) for gaming as aforesaid, the said Isaac Green then and there, before said court, upon his said oath, falsely, maliciously, willfully and corruptly did depose, swear and give evidence in substance and to the following effect, to wit: that he the said Isaac Green had not seen the said Lewis Word play a game with cards called seven up and bet money on the same, and so, then and there, upon his said oath, did falsely, wickedly, willfully and corruptly, commit willful and corrupt perjury." This is the substance of the indictment, with a correct and proper conclusion.

The causes assigned in the court below to arrest the judgment in that court were as follows:

1st. Because said indictment fails to aver that said defendant was sworn before the grand jury in reference to knowing or having seen the said Lewis Word play cards for money.

2d. Because said indictment alleges that said defendant was sworn by the foreman of the grand jury to speak the truth concerning all such legal questions as might be asked him by the foreman of the grand jury, without alleging that he was sworn to answer questions in reference to said Lewis Word, or any other particular case or person, and that the said foreman had no authority to administer such general oath.

3d. Because the matters which are charged in said indictment as perjury, are not shown therein to be material to the issue to be tried, in that the said indictment does not show that he had seen said Lewis Word play the said game of cards for money twelve months next before the June term, 1866, of the Ouachita circuit court, when before the said grand jury; and in that the said indictment fails to show that the defendant, on the trial of Lewis Word in the circuit court aforesaid, swore that he had not seen Lewis Word within twelve months next before the June term, A. D. 1866, of the said circuit court last, at which time a bill of indictment was found against said Word.

4th. Because said bill of indictment fails to allege that the testimony of the defendant, in the circuit court, was given upon

the trial of Lewis Word upon the indictment found against said Word on the testimony of the defendant given before the grand jury at the said June term of this court.

5th. Because said indictment fails to show the nature of the offence for which the said Lewis Word was being tried in the circuit court, upon which trial said indictment alleges that this defendant committed perjury.

6th. Because the allegations in the said indictment fail to make out the crime of perjury against this defendant.

7th. Because said indictment is uncertain and does not describe the oath taken by the defendant, wherein he is charged to have committed perjury with sufficient accuracy, should defendant have been acquitted, to prevent his being put upon his trial a second time for the same offence, and because said indictment is otherwise informal and defective."

Most of the objections thus taken to the indictment might have deserved consideration, if indictments for perjury now required the same details and recitals as the law required for indictments for the same offence at common law; but by our statute, and that of most of the states, that strictness in the details and recitals of an indictment for perjury is not required. If the substance of the offence is charged, by what court the oath is administered (averring that the court had authority to administer the oath) with proper averments to falsify the matter wherein the perjury is charged, it is now sufficient. See *Sec.* 7, *art.* 2, *chap.* 51, *Gould's Digest.*

Yet notwithstanding this statute, the law requires that all indictments preferred against the violators of law should be sufficiently clear and explicit, to enable the person charged with an offence to know with certainty what he is called upon to answer. We have given the indictment shown to us by the transcript in this case a close scrutiny, and testing it by the precedents and authorities and by our own statute, we think it contains all the requisites of a good indictment. It sets out clearly and distinctly what the defendant swore before the grand jury. It charges distinctly and

clearly the false swearing before the circuit court, and the intent with which it was done; that it was done before a competent court, or the trial of a cause before that court, and that the testimony was material to the trial and to the issue before the court. It has a good caption; it avers with certainty time, place and circumstance, and concludes properly, and according to our statute has all the substance of a good indictment. The defendant could see by the indictment what he was called upon to answer.

But the defendant, by his first and second causes in arrest of judgment, objects to the form of oath administered by the foreman of the grand jury. Our statute has not prescribed any particular form of oath to be administered to witnesses testifying before the grand jury. The 68 *section of chapter* 52, *Gould's Digest*, enacts that "the foreman of any grand jury, from the time of his appointment until his discharge, shall have full power and authority to administer any oath in the manner prescribed by law to any witness who shall appear before such grand jury, for the purpose of giving evidence in any matter cognizable by law." The indictment avers the form of oath administered by the foreman: "That the defendant was duly sworn to speak the truth concerning all such legal questions as might be asked him by the said Joseph M. Graham," the foreman of the grand jury. This form of oath we think was sufficient, and that the foreman had authority to administer it.

The 3d, 4th, 5th, 6th and 7th causes assigned in arrest of judgment, we do not think are sustained by the indictment, as we have copied it from the transcript, and by the view we have already taken of the sufficiency of the indictment; and the circuit court therefore erred in sustaining the motion and arresting the judgment in this case; and for that error this case must be reversed and remanded to the circuit court with directions to proceed with said case.

HAWLEY EX PARTE.

An appeal will not lie on a dissolution of an injunction, before the hearing of the cause, there being no final decree.

Motion for an Appeal.

GARLAND & NASH, for the motion.

Mr. Chief Justice WALKER delivered the opinion of the court

We have given to the voluminous record in this case as careful a consideration as our engagements in other duties would permit, and the state of the record may require; and although much inclined to the opinion that no substantial injustice has been done in the proceedings of the court below, we would not refuse to grant the appeal, and upon argument and authority more thoroughly investigate the case, if there had been any final decree from which an appeal could be taken. But upon looking into the record, we find that the party seeks his appeal upon the order dissolving his injunction, leaving the merits of the controversy undetermined. This is not such final decree from which an appeal would lie, as held by this court in *Moss vs. Ashbrooks*, 13 *Ark.*, 176.

JOHNSON VS. HODGES.

Where a party in chancery prays an appeal, and files an affidavit for appeal and it is "ordered that he have leave to perfect his appeal by giving bond as required by law, with sufficient security, to be approved by the judge," in a certain sum and by a certain time; and after the expiration of that time, he presents a bond to the clerk, in the sum required, with an indorsement on it by the judge referring it to the clerk for approval, and the clerk approves the bond, and files it, the appeal must be dismissed, as there is no showing that it was ever granted.

Although an appeal may be taken without recognizance, yet in this case there is no order for an appeal.

The judge cannot delegate the power to approve the recognizance, to the clerk.

Quere: Can the judge himself approve such recognizance in vacation?

Decree in Crittenden Circuit Court in Chancery.

Hon. JAMES M. HANKS, Circuit Judge.

B. C. BROWN and WATKINS & ROSE, for Hodges et al., filed a motion to dismiss this case, submitting that no sufficient recognizance had been given, that no appeal has in fact been taken from the said decree of Crittenden circuit court, and that there is no case before this court for adjudication. *Gould's Digest, secs.* 146, 147, 149; *Moss vs. Ashbrooks*, 15 *Ark.*, 169.

Mr. Chief Justice WALKER, delivered the opinion of the court.

The appellees have filed their motion to dismiss this case upon the ground that, although there was a conditional order for an appeal entered, in fact the terms were not complied with, and in fact no appeal was granted.

By referring to the record we find the following entry: "And thereupon came the said complainant, and prayed an appeal to the supreme court of the state from so much of this decree as dis-

solves the said injunction and dismisses his said bill of complaint, and authorizes said Asa Hodges and said trustee to execute said deed of trust; and files his affidavit for such appeal in due form of law, and on his motion it is ordered that he have leave to perfect his said appeal by giving bond as required by law with sufficient security to be approved of by the judge of this court in the sum of fifteen thousand dollars by the 24th day of this month."

On the 29th day of November, five days after the time fixed by the court for entering into bond, the complainant presented to the clerk of the court a bond, in the usual form, and for the sum required, with securities to the same, with an indorsement upon it, made by the judge, referring the bond to the clerk for his approval, if the same and the securities thereon should be good and sufficient; whereupon the clerk approved and filed the bond on that day.

By statute, any person who shall deem himself aggrieved by any final order, decision or decree of a court exercising chancery jurisdiction is entitled to an appeal, which, if granted by the court, must be at the same term the decree is rendered, and the only condition precedent to the granting of the appeal is, that the party or his agent shall file an affidavit as therein prescribed. When this is done, the appeal should be granted, no matter whether recognizance or bond, such as is provided for in the 148 *section Gould's Dig., p.* 237, is entered into or not. The bond or recognizance is given to stay further proceedings on the decree until final hearing, without which such proceedings are not stayed, except in cases where the appeal is prayed by executors, administrators or guardians.

The bond in this case was not properly approved. The judge of the circuit court had no power to delegate to the clerk the power to approve the bond and security. It was a power to be exercised by the circuit judge in person, if indeed such approval could be made by him out of term time.

But in this case, although the subsequent orders in regard to the entering into recognizance would seem to imply that the

court itnended to grant an appeal, yet there is no record entry that an appeal was in fact granted. The case stands in several respects like that of *Moss vs. Ashbrooks*, 15 *Ark.*, 170. In that case, as in this, day was given to enter into recognizance, and like that case there is no express order granting an appeal. Adhering to our decision in that case, the case must be dismissed.

WILDE & CO. vs. HART.

Where the plaintiff declines to reply to pleas in bar, or to proceed any further in the case, the suit may be dismissed.

A motion for a continuance is addressed to the sound discretion of the court; and this court will not attempt to control that discretion unless it has been grossly abused.

Where the plaintiff moves for a continuance, after pleas in bar have been filed, and his motion is overruled, if he wishes to take the opinion of this court upon that point, he should take issue to the pleas, go to trial, and appeal on the final decision.

Where he declines to take issue to such pleas, and the cause is dismissed, the judgment, if not rendered at his instance, is superinduced by his acts, and no appeal will lie.

Appeal from Pulaski Circuit Court.

Hon. JOHN J. CLENDENIN, Circuit Judge.

P. JORDAN, for appellants, who argued this case at the December term, 1862, contended that the court was bound by the ordinances of the convention to continue this cause.

WATKINS & ROSE for appellee.

In the court below, the defendant Hart, filed pleas of *nil debet*,

payment and alien enemy, and also exceptions to the affidavit on which the attachment issued—the same being fatally defective according to *Hillman & Co. vs. Fowler & Co.*, decided at the present term.

If the plea of alien enemy was bad, the application of the plaintiff for continuance, based on the ordinance of the convention was equally insufficient. That ordinance was a war measure, and there was no power in the convention to pass it.

The plaintiff refusing to reply or take issue to any of the pleas of defendant, the court below had no alternative but to enter judgment of dismissal, and the most favorable aspect of the case for plaintiffs below, is that they elected to take a voluntary nonsuit, to which error will not lie. A case cannot be brought to this court by piecemeal. See *Yell Governor vs. Outlaw et al.*, 14 *Ark.*, 621, citing *Woodruff vs. The State*, 2 *Eng.*, 333. All the pleas should have been disposed of. *Mandel vs. Peet Sims & Co.*, 18 *Ark.*, 248, and cases cited.

Mr. Chief Justice WALKER delivered the opinion of the court.

This was an action of debt brought by the plaintiffs in the Pulaski circuit court by attachment; goods were attached, and third parties garnisheed.

The defendant appeared and filed pleas of *nil debet* and *payment*, and, at a subsequent term, his plea of *alien enemy*; whereupon the plaintiffs moved the court to continue the case, because they (the plaintiffs) were alien enemies, which motion the court overruled. The plaintiffs excepted to the opinion of the court, and the record entry then says "that the plaintiffs declined to reply to the defendant's pleas, or to proceed any further in the case, on consideration whereof and on motion of the defendant, it is considered, ordered and adjudged by the court here, that said suit be, and the same is hereby dismissed, and that defendant go hence and recover his costs" etc.

From this judgment the plaintiffs appealed.

Upon a careful examination of the record, we find that the

only questions remaining open for consideration are, the correctness of the decision of the court in overruling the plaintiffs' motion to continue the case, and the final judgment rendered thereafter.

A motion for a continuance is addressed to the sound discretion of the court, and unless in cases where that discretion is grossly abused, this court will not attempt to control such discretion. *Hunter vs. Gaines et al.*, 18 *Ark.*, 92. Whatever consideration might, at the time the plea of alien enemy was interposed, have been given to it, under the assumption that the Confederate States was an independent and foreign government to the United States, there can be no question, at this time, but that the defence was wholly worthless, and the assumed right to continue the case wholly insufficient. The circuit court, therefore, did not err in refusing to grant a continuance of the cause.

The defendant, by peremptorily refusing to take issue upon the pleas of *nil debet* and payment, left those pleas confessed. The circuit court might well, under the state of case presented, have rendered judgment *nil dicit* for the defendant, or if the plaintiffs had desired to take the opinion of this court, upon the decision of the circuit court in refusing to continue the cause upon their motion, they should have taken issue upon the pleas, and proceeded to trial, and upon the final decision of the case have appealed. That the milder judgment was rendered dismissing the suit, is a matter of which the plaintiffs cannot complain. It was, in effect, such judgment as is provided for under the *79th section*, *Gould's Dig.*, *p.* 857: "That if the plaintiff shall fail to file his replication within the time prescribed, judgment of *non pros.* shall be rendered against him."

Under this view of the case, the court below did not err in refusing to continue the cause, and on the refusal of the plaintiffs to respond to the defendant's pleas, in rendering judgment dismissing the suit.

The plaintiff, by refusing to respond to the defendant's pleas, in effect abandoned the prosecution of his suit, and forced upon the

court the necessity of rendering such judgment against him, and then appealed from the judgment, which, if not rendered at his instance, was superinduced by his acts. When such is the case, no appeal lies from the judgment, as held by this court in the case of *Yell, Gov. vs. Outlaw*, 14 *Ark. R.*, 624.

Let the appeal be dismissed.

Mr. Justice CLENDENIN did not sit in this case.

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KNIGHT VS. SHARP.

Where the defendant charged the plaintiff with having "sworn a lie," these words are not actionable in themselves, and do not, *per se*, impute a charge of perjury.

To make them actionable it is necessary to state in the introductory part of the declaration, the special circumstances in reference to which they were spoken, and in connection with which they impute the crime of perjury.

In framing a second or subsequent count in slander, for the same cause of action, unnecessary repetition of the same matter should be avoided; and it is sufficient to refer concisely to the inducement in the first count. But unless such second or subsequent count expressly refers to the first count, no defect therein will be aided by the precedent count.

A distinct cause of action in this case, consists not alone in the words spoken; but it is also necessary to connect them with some judicial or other legal proceeding, in which a valid oath was administered to the plaintiff; which, if false, would subject him to punishment for perjury.

Where the declaration alleges that the defendant said, "he" (meaning the plaintiff,) "swore a lie in that case," (meaning the said trial at law, and meaning that the said plaintiff had been and was guilty of perjury in giving false evidence upon his oath in said trial at law, before said justice of the peace,) this is no averment that there was a trial had before a justice of the peace, or that the plaintiff had been sworn as a witness on such trial.

It is not the office of an innuendo to supply the place of an averment: but it is simply explanatory of an averment previously made.

The defects in the count in this case, being in the cause of action, and not in the manner of stating it, are not cured by verdict.

But where the defendant filed a special plea of justification, in which he sets forth all the material facts omitted in the declaration, and issue was made up, the defects in the declaration were supplied, and verdict for the plaintiff will not be set aside.

Where the evidence is not brought to the knowledge of this court, the court will presume in favor of the verdict, that there was testimony to authorize it.

In such case every presumption is to be indulged in favor of the decision of the circuit court, and of its instructions to the jury.

Appeal from Cross Circuit Court.

Hon. JAMES M. HANKS, Circuit Judge.

PIKE & ADAMS, and ALBERT PIKE & SON, for plaintiff in error.

The plaintiff insists that there is error in the proceedings and judgment in this cause, in these:

1st. That the third count in the declaration upon which the verdict was rendered, is not sufficient to support the verdict, as it is manifest from that count that it was intended to urge that the slanderous words charged, if spoken at all, were spoken with reference to some judicial proceeding; yet that proceeding is not set forth in the count, nor is it therein stated that the case was before any court, or judicial officer having jurisdiction of the case spoken of, or that the defendant in error was sworn as a witness in the case, or that he testified, or that his testimony was material to the issue; and as to these, it is not helped by any former count, there being therein no proper reference to such, unless it shall be holden that the words, in said third count, "in the trial at law aforesaid" and "before said justice of the peace," do help it.

2d. That the instructions given by the court, in said cause for the plaintiff, no matter what may have been the testimony, were calculated to mislead the jury; and especially the first and seventh instructions, which, as applicable to said third count, are positively in contravention of the law, the words as laid in said third count, not being actionable *per se.*

The innuendoes in a declaration in slander should be warranted by the *previous* allegations. *Stucker vs. Davis*, 8 *Bl'ckfd.*, 414.

The words "she swore falsely," do not of themselves impute a charge of perjury. The words, in order to make them actionable, must be *averred* to have been spoken with reference to a judicial oath, and to have been meant as a charge of perjury; and the colloquium which sets forth the oath to which the conversation relates, must be proved before the plaintiff can show a right to recover. *Burger vs. Barger*, 18 *Penn. State R.*, (6 *Harris*) 489. How can it be proved, if not averred? See also *Robertson vs. Lea*, 1 *Stew.*, 141; *Piner vs. Miller*, 2 *McCord*, 220; *Stafford vs. Green*, 1 *J. R.*. 505; *Ward vs, Clark*, 2 *J. R.*, 10; *Packer vs. Spangler*, 2 *Binn.*, 60; *Sheeley vs. Biggs*, 2 *H. & J.*, 363; *Martin vs. Milton*, 4 *Bibb*, 99; *Bliss vs. Toby*, 2 *Pick.*, 320; *Carter vs. Andrews*, 16 *Pick.*, 1; *Hopkins vs. Beedle*, 1 *Cains R.*, 348 and *note a; Phindle vs. Vaughn*, 12 *Barbour*, 216; *Edgerley vs. Swan.* 32 *N. H.*, 478; *Holton vs. Muzzy*, 30 *Vermont*, (1 *Shaw*) 365; *Cumonius vs. Butler*, 3 *Blackford*, 190; and see *McGough vs. Rhodes*, 7 *Eng.*, 629.

If the words themselves are set out, and are only actionable by relation to some extrinsic matter, or fact, it is *necessary* to state that fact by way of inducement, and then aver distinctly, that the discourse was of and concerning *that fact*. *Foule vs. Robins*, 16 *Mass.*, 487; *Bliss vs. Toby*, 2 *Pick.*, 320; *Carter vs. Anderson*, 16 *Pick.*, 1; *Commonwealth vs. Snelling*, 15 *Pick.*, 321. Nor will the want of such averment be aided by verdict. 16 *Pick.*, 1.

The count should have averred that the justice had jurisdiction of the case, yet neither the third nor any other count in the declaration does this, or that the testimony given, if any, was material to the issue, both these facts being necessary parts of perjury, without either, no perjury could have been committed. Perjury cannot be committed in a case of which the court had not jurisdiction. *State vs. Alexander*, 4 *Hawks*, 182; *State vs. Hayward*, 1 *N. & M.*, 546; *State vs. McCaoskey*, 3 *McCord*, 308; *State vs. Hyatt*, 2 *Hay'w.*, 56; *State vs. White*, 8 *Pick.*, 453. Nor can

perjury be assigned upon an extra-judicial oath. *Pegram vs. Stysor*, 1 *Bailey*, 595; *The State vs. Furlong*, 13 *Shepley*, (26 *Maine*) 69; *Miner vs. The State*, 8 *Black'fd.*, 154; *Ward vs. Clark*, 2 *J. R.*, 10; *Jones vs. Moses*, 11 *Humph.*, 608; *Sanford vs. Gaddis*, 13 *Ill.*, 320; *Gibbs vs. Tucker*, 2 *A. K. Marsh.*, 219; *Vaughn vs. Havens*, 8 *J. R.*, 109; *Watson vs. Hampton*, 21 *Bibb*, 319; *Shaffer vs. Kitzen*, 11 *Binn.*, 537. The statements that the trial "was taken and had in due form of law," and that the justice then and there had sufficient and competent power and authority to administer the oath, do not show that the justice had jurisdiction of the case.

Where a declaration for slander contains several counts, each setting forth distinct and separate slander, each count must be perfect in itself, and the omission of a material statement in one count cannot be supplied by reference therein to another. *Holten vs. Muzzy*, 30 *Vermont*, (*Shaw*,) 365.

As before stated, the general tendency of the instructions given by the court was, to mislead the jury, assuming as they do, material and necessary facts, which are not averred, and could not have been proven, without permitting an error equally grave; and which, as there was no motion for new trial upon the ground of the admission of improper testimony, it is fair to presume were in fact not proven.

It will at once be perceived that the instructions of the court, especially the first and seventh, directly tend to exclude from the consideration of the jury, qualifying expressions used by the defendant in connection with the words charged, and

Actionable words, used with qualifying expressions, so as not to impute a charge of felony, will not support an action for slander. *Shecut vs. McDonnel*, *Const. Reps.*, 25.

Instructions calculated to mislead, or that do not present the case fairly in all respects should not be given. *Relf vs. Rapp*, 3 *Watts & Serg.*, 21; *Baxter vs. The People*, 3 *Gilman*, 368; 6 *Watts & Serg.*. 132; *Reed vs. Graham*, 7 *Mon.*, 558; *Hickman*

vs. Griffin, 6 *Miss.*, 37; *Brown vs. Clark*, 14 *Penn.*, (2 *Harris*,) 469; *Virginia R. R. Co., vs. Sanger*, 15 *Gratt.*, 230.

If a fact material to the plaintiff's right of action is neither *expressly* stated, nor *necessarily* implied from facts which are stated, a verdict will not cure the defect, and judgment will be arrested. *Welch vs. Bryan*, 28 *Miss.*, (7 *Jones*) 30; see also 16 *Pick.*, 1.

WATKINS & ROSE for defendant.

There was no motion for a new trial in this case, only a motion in arrest of judgment. Under motion to arrest no questions can be raised here on the instructions to jury. *Stephens on Pl.*, 94—97; 2 *N. & M.*, 312.

By electing to rely alone on motion in arrest, the plaintiff in error abandoned any exceptions which might have been properly made the ground for a motion for a new trial. The motion for arrest may have contained matter which would have been good on motion for a new trial, but if it was not good in arrest the court did not err in overruling the motion. If otherwise, there is no use in any case for a motion for a new trial, and a motion in arrest will cover every conceivable ground of error. 12 *Vermt.* 619; *R. M. Charlt.*, 518, (1 *Ga.*;) 4 *Leigh*, 672; *id.* 679; 2 *Scam.* 511.

If there was any defect in the declaration it should have been met by demurrer. 2 *Ark.*, 513; 5 *id.*, 73.

All exceptions not incorporated in a motion for new trial are waived. 4 *Ark.*, 87; 20 *id.*, 36; 22 *id.*, 19.

By motion in arrest it is admitted that there is a verdict to which no objection can be made. *Philpot vs. Page*, 4 *Barn. & Cres.*, 160.

Judgment will not be arrested in an action of slander when there is a general verdict for the plaintiff and entire damages, because some of the counts are insufficient. 1 *Root*, 433.

Under our statute of jeofails the judgment cannot be stayed or arrested because the declaration omitted "*any* allegation or aver-

ment," without which the jury ought not to have given a verdict. *Gould's Digest, ch.* 133, *sec.* 19.

The bill of exceptions in this case does not set out the evidence or any part of it, nor the instructions given on the part of the defendant, nor on the motion of the court. If this case were here for error in overruling a motion for a new trial, doubtless the court would presume every thing in favor of the court below and affirm. *Bach vs. Cook*, 21 *Ark.*, 571; 8 *Ark.*, 430; 12 *id.* 638; 17 *id.*, 530.

The 3d count was good, even on demurrer, under *sec.* 2, *chap.* 161, *Dig.* The reasoning of the chief justice in *McGough vs. Rhodes*, 7 *Eng.*, 629, merely means a judicial repeal of a very plain legislative act.

The following authorities are referred to as to the sufficiency of the declaration: 3 *Wend.*, 205; 4 *Stew., & P.*, 224; 13 *Johns.*, 48; 2 *Eng.*, 125.

The words charged were actionable, *Dig., chap.* 161; 3 *Harrington*, 77; 5 *Johns.*, 188; 3 *Hill*, 572; 1 *Humph.*, 506.

A declaration in slander is good which sets out the substance of the words spoken merely. 17 *Pick.*, 369; *id.*, 269; 21 *Pick.*, 51; 1 *Port.*, 377; 8 *Mass.*, 122; 2 *McCord*, 305; 1 *Binn.*, 393.

The objections raised to the declaration in this case come too late after verdict. 19 *Wend.*, 296; 4 *Iredell*, 461; 2 *Blackford*, 241; 1 *Doug.*, 67; 2 *Humph.*, 434; 8 *Missouri*, 512.

The instructions on the part of plaintiff below were properly given. See 13 *Verm.*, 42; 14, *id.*, 462; 1 *Mis.* 197; 7 *Black.*, 83; 15 *Mass.*, 48; 3 *Dana*, 138; 4 *Scam.*, 30; 8 *Humph.*, 34; 1 *Pick.*, 1; 15 *Mass.*, 48; 2 *S. & R.*, 469; 3 *Mass.*, 546; 18 *Conn.*, 464; 2 *Greenl. on Ev.*, 426; 7 *Eng.*, 627; 3 *Barb. Sup. Ct. R.*, 599; 3 *Wend.*, 205; 4 *Stew. & Port.*, 224; 13 *Pick.*, 364; 13 *Wend.*, 9; 1 *Blackf.* 330; 4 *Port.*, 17; 8 *Port.*, 486; 12 *Ark.*, 629; 7 *B. Mon.*, 475; 7 *Ark.*, 12.

If the words in the case at bar are not actionable *per se*, according to the decision in *Sanderson vs. Hubbard*, 14 *Verm.*, 462, the declaration should have contained the averments that false

swearing was in a judicial proceeding, etc. But if the defendant justify and in his plea allege (as was done in this case) that the plaintiff was examined on oath, and in his testimony did knowingly and corruptly swear falsely, and a verdict pass for the plaintiff, the want of an innuendo and an averment that the plaintiff was sworn, is thereby cured and judgment will not be arrested. *Sanderson vs. Hubbard*, 14 *Verm.*, 462; see also *Wood vs. Scott*, 13 *ib.*, 42.

Mr. Chief Justice WALKER delivered the opinion of the court.

Sharp, the defendant in error, brought his action of slander in the Cross circuit court. The defendant in the court below, the plaintiff in error, appeared and filed a plea of not guilty, and a special plea of justification; upon which issues were taken and the cause submitted to a jury, who having heard the evidence and instructions of the court rendered a verdict in favor of the plaintiff below, upon the 3d count in the declaration, and for the defendant upon the other counts, upon which final judgment was rendered in favor of the plaintiff for the sum of $1,500, the damages assessed by the jury.

The defendant filed his motion in arrest of judgment, which was by the court overruled, and has brought the case into this court by writ of error.

Two distinct grounds of error are presented:

First—That the circuit court erred in the instructions given to the jury.

Second—That the third count, upon which the judgment was rendered, is fatally defective.

The most important question to be determined is as to the sufficiency of the 3d count in the declaration. The plaintiff was charged with having "sworn a lie." These words are not actionable *per se*; and do not in themselves import a charge of perjury; and when such is the case, it is necessary to state in the introductory part of the declaration the special circumstances in reference to which the slanderous words were spoken, and in

connection with which they impute the crime of perjury. 1 *Starkie on Slander, page* 391. This the pleader attempted to do in the first count of the declaration in this case, but whether sufficiently or not, from the view which we take of the 3d count, it is not necessary for us to determine.

In the 3d count no attempt was made to set out the circumstances in reference to which the slanderous words were spoken; nor indeed is it usual to do so. Mr. *Chitty* says: "In framing a second or subsequent count for the same cause of action, unnecessary repetition of the same matter should be avoided, and that it is sufficient to refer concisely to the inducement in the first count. But unless the second count expressly refers to the first count, no defect therein will be aided by the precedent count. 1 *Chit. Pl.*, 413.

It is a rule that each count must be perfect in itself, and set forth a distinct cause of action. A distinct cause of action for such slanderous words as are in this count averred, consists not alone in the words spoken, but it is also necessary to connect them with some judicial or other legal proceeding, in which a valid oath was administered to the plaintiff—an oath which, if false, would subject him to punishment for perjury. By referring in the second count to the inducement set forth in the first, it is considered as fully as part of that count as if incorporated in it. But unless so referred to, it becomes no part of the second count, and in an action, such as this, the count is fatally defective. The brief sentence found in the form books, and used for this purpose, is wanting in the 3d count. It is not averred that the words spoken were "of and concerning said trial," alluding to the trial set forth fully in the first count. The only reference, any where in the 3d count to a trial or a judicial proceeding, is an innuendo found in the following terms and connection: "He (meaning the plaintiff) swore a lie in that case (meaning the said trial at law, and meaning that the said plaintiff had been and was guilty of perjury in giving false evidence upon his oath in said trial at law, before said justice of the peace.") This is no

averment that there was a trial had before a justice of the peace, or that the plaintiff had been sworn as a witness in such trial. It is not the office of an innuendo to supply the place of an averment, to state the existence of a fact, but simply explanatory of an averment previously made. Mr. *Chitty* says: "It serves to point out where there is precedent matter, but never for a new charge." 1 *Chitty Pl.*, *page* 407. The 3d count is, therefore, fatally defective in this respect. It simply charges the defendant with having spoken words which are not in themselves actionable.

Fully recognizing the rule that, after a trial and verdict for the plaintiff, every intendment will be made in favor of the declaration upon the state of facts pleaded, we feel confident that the defect in this instance is not embraced within such rule, but is of that class of defects which affect the cause of action itself, not the manner of stating the cause of action. Lord MANSFIELD says: "That a verdict cures a title defectively stated, but not a defective title." Chancellor KENT, in 17 *John. R.*, 448, says: "If any thing essential to the plaintiff's action be not set forth, though the verdict be for him, he cannot have judgment, because if the essential parts of the declaration be not put in issue, the verdict can have no relation to it."

The presumptions in favor of the declaration must arise upon that which is stated in it, as, for instance, in the case before us, it was necessary to aver that in some legal proceeding the plaintiff had been sworn and given evidence. This was a necessary averment to fix liability upon the defendant. No presumptions could be indulged in support of the judgment, that there was proof before the jury that such legal proceedings were had. But if they had been stated, but the manner of swearing the plaintiff, who was called as a witness in the case, had been omitted, after verdict, the presumption that sufficient proof upon that point had been given, might well be indulged.

The question as to what defects in pleading are cured, and what are not cured by verdict, was considered at great length in the case of *Sevier vs. Holliday*, 2 *Ark. Rep.*, and fully sustains

the conclusion at which we have arrived in this case, which is, that the defect in the 3d count is not such as is cured by verdict.

It is insisted by counsel that, admitting the 3d count to be defective, such defect is cured by the defendant's special plea of justification, in which he has set forth fully all the material facts omitted in the 3d count, and that the defects being thus supplied, the verdict and judgment should not be set aside.

As this question has not, heretofore, been presented for our consideration, we have given it a careful consideration. The American decisions, which hold that the defects in the declaration are aided after verdict by the averment in the special plea, seem to have been made upon the authority of an early English decision, reported: *Drake vs. Corderoy*, *Croke Cas.* 288. In that case, the slanderous words charged were: "He (innuendo, plaintiff,) is foresworn," without referring to any judicial proceeding, or oath administered. The defendant justified, showing the oath which he made in the open sessions, and that it was false, upon which justification issue was taken, which was found and judgment for plaintiff.

"It was assigned for error that the words were not actionable, "because he doth not say in the declaration that he was foresworn "by his oath taken in any court. And to say, generally, that "the plaintiff is foresworn, an action does not lie, but to say he is "perjured an action lies.

"But all the court held that if there was any doubt, it was "upon the declaration, which was uncertain because he doth not "show that the words included a false oath in a court of record. "Yet when the defendant by his plea confesseth that he spoke "those words by reason of his oath taken at the sessions, that "clears the question whereof he intended to speak. Wherefore "the judgment was affirmed."

In the case of *Vaughan vs. Havens*, 8 *Johns.*, *R.* 109, SPENCER J., who delivered the opinion of the court, referred to *Drake vs. Corderoy*, and approved the decision in that case. In *Wood vs. Scott*, 13 *Verm. R.*, 42, REDFIELD J., upon the authority of the

above cases, said: "But when a case, where on exceptions the entire case is before the court, and it is our duty to look into the record, we there find that the defendant pleaded in bar the truth of the words spoken, and therein defined the sense in which he used them. He says, that the plaintiff, in his testimony, on the occasion set forth in the declaration, had knowingly and willfully sworn false, thereby committing willful and corrupt perjury, and therefore he spoke the words, as well he might," and held the defect in the declaration cured by the plea.

It may be well to remark that in the case of *Wood vs. Scott*, the omission in the declaration held to be cured by the plea, was not for want of an averment of the circumstances under which the alleged false swearing took place, but for the want of a proper innuendo. But we apprehend that it is not the less an authority in point, upon principle; and particularly as *Drake vs. Corderoy* and *Vaughan vs. Havens* are cited as authority.

In the case of *Smith vs. The Eastern Rail Road*, 35 *N. Hamp. Rep.*, 356, it was held that "if the facts stated in the plea be such as necessarily to imply, and the issue joined be such as necessarily to require on the trial, proof of the facts imperfectly stated, or omitted in the declaration, and without which it is not to be presumed that the jury would have found the verdict rendered, the judgment will not be arrested on account of such omission."

In the case now under consideration, the special plea of the defendant in the court below, contains all of the facts in reference to which the words were spoken, and which should have been averred in the declaration, and in reference to which the colloquium was had. They were all put in issue by the replication to the plea, and it became necessary and proper to introduce evidence under such issue. We have not the evidence before us, and therefore cannot say what the proof was; but in the absence of it, we must presume, in favor of the verdict, that such evidence was before the jury, and when taken in connection with the other evidence in the case, sustained the verdict rendered.

We must therefore hold that, notwithstanding the declaration was so defective as to present no issue under which competent evidence might have been introduced, yet inasmuch as the defendant, by his special plea of justification, supplied such omission, in so far that under it competent evidence could legally have been introduced, the verdict of the jury may have been, and as we must presume in favor of the verdict, was found upon sufficient evidence to warrant the verdict and the judgment thereon.

The remaining ground of objection to the verdict and judgment is, that the circuit court erred in giving instructions to the jury by which they were misled in making their verdict.

The counsel for the plaintiff in error insists that the instructions were calculated to mislead the jury under any conceivable state of evidence, and that when such is the case, even when the evidence is not before us, such erroneous instructions should be looked into and corrected.

We have carefully looked into the instructions, and when taken all together, they are not so palpably defective, that in the absence of the evidence given to the jury, we could undertake to say that they were erroneous. In a case like the present every presumption is to be indulged in favor of the decision of the circuit court, who heard all of the evidence, and whose duty it was to instruct the jury.

In view of the whole case as presented to us, we are of opinion that the circuit did not err in overruling the defendant's motion in arrest of judgment.

Judgment affirmed.

McDonald vs. Smith Adm'r.

Where the plaintiff brings an ordinary action of debt by petition, and has a writ of summons issued against the three defendants, and the writ is returned without service on two of the defendants, he cannot afterwards file an affidavit and bond in the same suit, and sue out an attachment against the two defendants who have not been served.

And where, in such case, the two defendants against whom the attachment was issued, pleaded in abatement of the writ and declaration the above irregularities, and were discharged, the effect of this judgment was to quash, not only the writ of attachment, but the entire proceedings. (*Edmondson vs. Carnall*, 17 *Ark.*, 284,) and all the defendants should have been discharged.

Appeal from Jackson Circuit Court.

Hon. L. L. Mack Circuit Judge.

Watkins & Rose, for appellant.

The judgment on the plea in abatement of Logan and Bell should have quashed the entire suit, and discharged McDonald as well as the other defendants. *Edmondson vs. Carnal*, 17 *Ark.*, 284; 9 *Ark.*, 159.

If not, the summons clause in the attachment was good, (*Hatheway vs. Jones*, 20 *Ark.*, 111.) And a discontinuance as to Bell and Logan was a discontinuance also as to McDonald. *Frazier vs. State Bank*, 4 *Ark.*, 509, 546; 5 *Ark.*, 140; 6 *Ark.*, 92; 8 *Ark.*, 456; 18 *Ark.*, 361.

Stillwell & Wassell, for appellee.

The suit was pending against all three of the makers of the notes, but service had upon one, and surely the unauthorized act of issuing a writ of attachment against the other two, could not affect the proceeding, valid and regular in all respects, already

pending. The writ was utterly void, and its service upon Bell and Logan did not bring them before the court, and it was so adjudged.

Before the judgment, the suit was discontinued as to Bell and Logan, and it is sought to bring their case within the rule, that where there are several defendants served, the plaintiff cannot discontinue as to one without discontinuing as to all. But it is submitted that this cannot be done. The defendants, Bell and Logan, not having been served with the summons, and the writ of attachment being void, they must be considered as never having been before the court, and no matter how erroneous the ruling of the court may have been as respects the pleas of Bell and Logan, McDonald was not prejudiced and could not be heard to complain in this court. He stood just as if no writ of attachment had been issued.

Mr. Chief Justice WALKER delivered the opinion of the court.

On the 21st day of September, 1865, James S. Smith as the administrator of the estate of Pleasant G. Davenport, filed his petition in debt, in the circuit court clerk's office, of Jackson county, against William M. Bell, Alexander H. Logan and Alvin McDonald, upon which a summons was issued returnable to the October term, 1865, of said court, which as appears, was duly served upon the defendant McDonald, and returned not served upon the other defendants. Afterwards, on the 16th day of November, 1865, without filing an additional declaration, the plaintiff filed his affidavit stating therein that all of the defendants were indebted to him as such administrator in the sum of $5,139.-66, and that defendants, Bell and Logan, were non-residents of the state of Arkansas. Afterwards, on the 27th day of November, 1865, an attachment bond in the usual form was filed in said clerk's office, in favor of Bell and Logan, two of the defendants, reciting in the condition that plaintiff had brought his suit by petition in debt against Bell, Logan and McDonald, and that Bell and Logan had not been served with process, and are non-resi-

dents of the state, and that plaintiff was about to sue out a writ of attachment returnable to the April term, 1866, against Bell and Logan.

It further appears from the record that on the 27th day of November, the day on which the bond was so filed, a writ of attachment was issued from said clerk's office, returnable to the April term of said court, which writ was executed by attaching the property of the defendants, and also by personal service upon Bell and Logan.

At the return term Logan appeared and filed four pleas in abatement, in substance: 1st. That no declaration was filed before the filing of the affidavit for an attachment. 2d. That at the time the declaration was filed, there was no bond filed as required by the statute. 3d. That at the time of suing out the writ of attachment, there was then depending and undetermined, a suit against the defendant upon the same cause of action. 4th. That the writ of attachment was sued out without plaintiffs having filed a declaration. Each of these pleas concluded with a prayer of judgment of the writ and declaration and that they be quashed. Replications were filed to each of these pleas, to which demurrers were sustained, and the plaintiff declining to answer further, judgment was rendered by the court upon the defendant's plea, and that the writ be quashed and the defendant go hence, etc. Bell also filed similar pleas, upon which a like judgment was rendered.

The defendant, McDonald, who had been jointly sued with Bell and Logan, and who had interposed several pleas in bar, moved the court to render final judgment upon the writ and declaration, and that he also might go hence with the other defendants, but the court overruled the motion; and the proceedings *in rem* having been disposed of, proceeded to discontinue the action as to Bell and Logan, and upon trial rendered final judgment against McDonald, from which he appealed to this court.

It becomes unnecessary to consider, at length, the manifest error in suing out a writ of attachment against part of the defend-

ants in an action commenced by summons, after the return of the original writ, and after service upon one of the defendants, because the several pleas in abatement were held sufficient and judgment was rendered in favor of the defendants, who interposed such pleas. Each of the pleas concluded with a prayer of judgment upon the writ and declaration, and that the same be quashed. And the question is, whether the judgment of the court should not have conformed to the prayer of the pleas, and have quashed both the writ and the declaration, instead of the writ only. That such should have been the judgment of the court has been settled by this court, first, in *Childers vs. Fowler*, 9 *Ark.*, followed by *Edmonson vs. Carnall*, 17 *Ark.*, and still more recently in *Hillman et al. vs. Fowler*, decided at the last December term of the court.

The defendants, Bell and Logan, do not complain of the decision of the court; they were discharged, and the remaining question is as to whether McDonald, who had filed pleas in bar of the action, and was not a party to the writ, nor to the pleas in abatement, but who was a party to the declaration, can avail himself of the defence set up by his co-defendants.

If the prayer of the pleas had only been that the writ be quashed, there would be much reason to hold that McDonald could not avail himself of the benefit of such judgment; because he was in court upon a valid writ, and had pleaded in bar to the action. We may despair of finding any case decided under proceedings like the present, for it is but barely possible that any case like it ever occurred before.

As a general rule, any defence in bar of the action, successfully made by one of several defendants, enures to the benefit of all of them. And in case one of several defendants should demur to the declaration, if it be adjudged insufficient, all of the defendants are discharged from answering it; and by analogy, it would seem that a plea which questions the sufficiency of the writ and declaration, if sustained, would so effectually defeat the action as to release all of the defendants from answering it. In other

words, it defeats the whole action; a declaration quashed, is no declaration, is not demurrable, and all the parties are discharged from answering it.

The counsel for the appellee contend that the writ of attachment was a mere nullity, absolutely void, and that no decision upon it could affect the liability of McDonald. Although the writ was irregularly issued, and certainly voidable, yet we cannot say that it was absolutely void, The writ was upon its face regular and formal, and was issued upon a proper affidavit. But in order to make the proceeding by attachment valid, the declaration and the bond are both prerequisites to the issuance of the writ, and a lack of either is fatal to the proceeding; yet the proceeding, for lack of any one of these, we have held to be voidable, not absolutely void, as in the case of *Edmonson vs. Carnall*, 17 *Ark.*, 284.

So far as regards the attachment clause of the writ, we must hold it irregular, and perhaps without precedent, but the summons clause in the writ was formal and regular. A writ had been issued, and one only of three defendants had been served with process, the return day had passed, and the plaintiff had a right to an alias summons against the defendants, Bell and Logan. The summons was served upon them and they were required to appear, and thus all three of the defendants were brought before the court. They were required to defend, or judgment by default might have been rendered against them. Because the attachment clause in the writ was irregular, it would not necessarily affect the validity of the summons clause under which the defendants were required to appear. Defendants, Bell and Logan, did appear and defend. Their plea put in issue the legality of the whole proceeding, and asked the judgment of the court upon it, and that the writ and declaration be quashed.

By the judgment rendered the writ was quashed, and the defendants, Bell and Logan, were discharged.

Now if this proceeding *in rem* was a mere "excrescence," as said by the counsel for the appellees, and absolutely void, it was

irregular to render any judgment upon it, and the defendants, Bell and Logan, would not be discharged thereby, but having been served with process and having appeared in court and plead, were parties in court; and when such is the case, a discontinuance as to them, as was subsequently ordered, was a discontinuance of the whole action. But if, on the other hand, the issues upon the pleas in abatement were properly before the court, and proper subjects for its consideration (as we think they were,) then the judgment should have been in accordance with the prayer of the pleas, have been that both the writ and declaration be quashed.

The only question remaining to be considered is, as to whether, when the writ and declaration were so quashed at the instance of part of the defendants, there was anything remaining for the other defendant to answer. We think not. The pleas did not go simply to the personal discharge of two of the defendants, but to the writ and declaration—the foundation. When these were disposed of, as we have seen they should have been by the judgment of the court, there was no foundation left upon which to base the action. McDonald had nothing to answer, and should have been discharged.

The objection was well taken upon the motion in arrest of judgment, which the court below erred in overruling; and for this error the judgment must be reversed, and the cause remanded that final judgment upon the pleas in abatement may be entered, quashing the writ and declaration and discharging all of the defendants.

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Brown vs. State.

The party against whom a witness is called has the right to have him put on his *voire dire* in order to show his incompetency.

But the correct practice is for the party to state the object and ground of the application, so that the court may determine as to the propriety of entering upon the investigation.

Where such grounds are not stated, the presumption in this court must be that the application was not warranted by law.

The fact that the witness is an accomplice of the defendant, does not affect his competency.

The credit of a witness may be impeached by proof that he has made statements out of court, on the same subject, contrary to what he swears on the trial, provided the alleged statements are material to the issue; and provided also that the witness has undergone a previous cross-examination as to such statements, in which, if the statements were verbal, his attention was not only called to the particulars of the conversation, but also to the time, place and person involved in the supposed contradiction.

But where the record fails to show what the statements were which are alleged to be contradictory, the presumption is that they were properly rejected.

One co-defendant in an indictment still pending against him, cannot be a witness for his co-defendant. (*Moss vs. State*, 17 *Ark.*, 327.)

In a prosecution for felony, the record must affirmatively show that the defendant was personally present at each and every time when any step is taken by the court in his cause.

Appeal from Pulaski Circuit Court.

Hon. Liberty Bartlett, Circuit Judge.

Whytock, for the appellant.

I. The record does not show that the prisoner was present in court, personally, at the time the writ of *venire facias* for the trial of this case was issued. *Dig. sec.* 166, *p.* 416; *Sweeden vs. The State*, 19 *Ark.*, 205; 4 *Bl. Com.*, 318; 1 *Ch. Cr. L.*, 337; *Warren vs. The State*, 19 *Ark.*, 214.

II. The court erred in refusing to permit Greer, the accomplice and co-defendant in the indictment, who was discharged therefrom by the entry of *nol. pros.*, to be sworn upon his *voir dire.* The right to swear a witness upon his *voir dire* clearly belongs to the party objecting to his testimony. *Foley vs. Mason*, 6 *Md.*, 37. That an accomplice may be competent as a witness, is not denied; but he should be properly apprised of the condition in which he stands; that the effect of a *nol. pros.* is not to discharge him from liability, but if he spoke fully and truly, to give him an equitable title to a pardon. 1 *Stark. Ev.*, 143; 2 *id.*, *Title, accomplice*; *Dabney's case*, 1 *Robinson*, 696; *People vs. Whipple*, 9 *Cowen*, 707. It is true, as an abstract proposition, that a promise of pardon will not render an accomplice incompetent. But we submit, a witness sought to be introduced by the prosecution to show the guilt of the defendant, by disclosing acts and circumstances and crimes which he avows himself to have committed in concert and connection with the defendant, may have been so worked upon, so influenced, so instructed as to elevate the test from credibility to competency. If he was induced to believe, and did believe that, by giving testimony against his co-defendants, by making or admitting himself to be, an accomplice in the commission of the crime charged, he would be relieved from any liability to answer; if he had been induced to testify upon the assurance of a discharge in case of the conviction of co-defendants. Then we think he was incompetent to testify until apprised of the consequences and condition in which he would be placed.

III. The court erred in refusing to permit the defendant to examine the state's witness, Greer, as to statements made by him voluntarily, after he was arrested, and to examine him as to the manner of his arrest, the manner of his treatment after arrest, and the inducements held out to him to testify, for the purpose of attacking his credibility, by laying a foundation for contradicting him, if he spoke falsely, by showing that he had made different statements as to the circumstances testified to. The

party against whom a witness is produced has a right to show every thing which may in the slightest degree affect his credit. *Cameron vs. Montgomery*, 13 *Serg. & R.*, 132; 1 *Stark. Ev.* 211; 2 *Greenl. Ev., sec.* 449; *The Queen's case*, 2 *B. & B.*, 301. The defendant sought in this cross examination to lay the foundation for impeaching the witness which the law required. The abstract objection that the confessions were made while the prisoner was in jail, or otherwise confined in a legal way, though for the very crime confessed, has never been recognized as an objection, but expressly denied. *Rex vs. Darrington*, 2 *Car. & P.*, 418; 1 *Wheeler Cr. Cas.*, 392; 4 *Barr*, 264; 11 *Ga.*, 225. 22 *Maine*, 171; 20 *Ala.*, 15; 23 *ib.* 38; 1 *Stroth.* (*S. C.*) 378; 9 *Rich.* (*S. C.*) 428; 5 *Halst.*, 163, 184; 14 *Ark.*, 556; *A fortiori*, these statements might be given, where the witness was not on his trial, but was introduced to involve others in the crime.

IV. The court erred in refusing to permit the defendant to introduce Roland for the purpose of contradicting and attacking the credibility of the witness Greer, by showing that he had made different statements as to these transactions and that he was endeavoring to engage persons in a conspiracy to implicate others in the commission of the crime with which he was charged.

V. The court erred in refusing to permit the defendant to introduce the testimony of Adolph Flanagin, included in the indictment, to show that the defendant was not present and had nothing to do with the murder charged. It is with some delicacy that this proposition is submitted to the court; because it involves the necessity of reviewing, to some extent, the decision of the court in *Moss vs. The State*, 17 *Ark.*, 327. But we think that when the trial of several defendants, jointly indicted, has been severed under the statute, (*Dig. Cr. Pro. sec.* 179,) one has no such interest in the result of the trial of the other as would disqualify him from being a witness—the acquittal or conviction of the one cannot affect the trial of the other, except perhaps consequentially. 2 *Hale P. C.*, 280; 1 *Stark. Ev.* 13 *and n.*; *U. S. vs. Henry*, 4 *W. C. C. R.*, 228; *Maffit vs. The State*, 2 *Humph.*, 90; *Marshall*

vs. The State, 8 *Ind.*, 488; *Hunt vs. The State*, 10 *Ind.*, 69; *Garrett vs. The State*, 6 *Mo.*, 1. If a person is made incompetent as a witness for another by being jointly indicted with him, then may the latter, by design, be deprived of his most necessary and important witness.

Mr. Attorney General JORDAN, for the state.

The court below did not err in refusing to permit the defendant to cross-examine Greer, as to his voluntary statements, the manner of his arrest and the inducements held out to him to testify, that the defendant might by such examination attack the credibility of the witness. It was proper for the court to refuse to let the witness be questioned on cross-examination with regard to matters not referred to either in whole or in part in the direct examination. *Green'l. Ev.*, *Vol.* 1, *sec.* 445; *Roscoe's Cr. Evidence*, 130, *note* 1; *United States Digest*, *vol.* 23, 602.

That the witness cannot be cross-examined as to any matter, which (if admitted) would be collateral and wholly irrelevant to the matters at issue for the purpose of contradicting him, see *Greenl. Evidence*, *vol.* 1, *sec.* 449; *Chitty's Practice*, *vol.* 3, 900; *Archbold's Practice & Pleading*, *vol.* 1, 578.

Before witness Riland could be introduced to testify as to the statements of witness Greer, made off the stand, relative to his voluntary statements, manner of arrest, etc., the witness Greer must first have been examined as to such statements. *Wharton's A. Cr. Law*, *vol.*, 1, 819.

The declarations of a witness made on the stand are inadmissible to contradict him unless his attention has been first called to such declarations. See *United States Digest*, *vol.* 23, 603 *and cases there cited.*

That the court did not err in refusing to permit Adolph Flanagin, an accomplice and co-defendant to be introduced as a witness for defendant, see *Wharton's A. Cr. Law*, *vol.* 1, 790; *Green'ls Evidence*, 1*st vol.* 379; *Moss vs. The State*, 17 *Ark.*, 327.

Mr. Justice COMPTON delivered the opinion of the court.

Simpson Brown—a colored person—was convicted, in the Pulaski circuit court, of murder in the first degree, and sentenced to be hanged. He moved for a new trial, which was overruled, aud the case now comes before the court for consideration.

It is insisted by the counsel for the accused, that the court below erred in refusing to permit the witness, Washington Greer, who was an accomplice, to be sworn upon his *voir dire*. That the party against whom a witness is called, is entitled to have him put on his *voir dire*, in order to show his incompetency, is not denied. The correct practice, however, is to state the object and ground of the application, so that the court may determine as to the propriety of entering upon the investigation. The bill of exceptions merely states that it was "asked that the witness be put on his *voir dire*," without showing for what purpose, or why it was proposed so to examine him; and upon this state of case, the presumption must be, that the application was not warranted by law, and that the ruling of the court was correct. The fact that the witness was an accomplice, did not affect his competency; and if, as intimated in the argument, this was one of the grounds upon which an examination on the *voir dire* was sought, it was not a good one, and but serves to illustrate the rule above indicated. It is admitted that if the object was, also, to show incompetency, arising from defects of understanding, or of religious principle, and the court, after having been asked to do so, upon that ground, had refused to examine the witness, in the mode prescribed by law, touching the matter affecting his competency, such ruling would have been erroneous. But the bill of exceptions presents no such case; on the contrary, it contains no facts upon which we can decide whether or not there was error.

The next point relied on relates to the admissibility of evidence offered by the accused. The bill of exceptions, after showing that the witness, Greer, was interrogated as to what he had said on different occasions in regard to matters connected with the offence charged in the indictment, states as follows: "Defendant

then asked witness, on his cross-examination, as to further statements and admissions he had made after he was arrested, and to whom he had made them for the purpose of laying a foundation for contradicting him by other witnesses—which was objected to, and the objection sustained by the court." It is, undoubtedly, true that the credit of a witness may be impeached by proof that he has made statements out of court on the same subject, contrary to what he swears at the trial, provided the alleged statements are material to the issue; and provided, also, that the witness has undergone a previous cross-examition as to such statements, in which, if the statements are verbal, his attention was not only called to the particulars of the conversation, but, in which, he was also asked as to the time, place and person involved in the supposed contradiction. But whether, in the case before us, "the statements and admissions" of the witness were admissible as laying a foundation to contradict him, or for any other purpose, we have no means of ascertaining, since the bill of exceptions does not show, as it should, what those "statements and admissions' were; and the presumption, therefore, is, that they were properly rejected. In *Whitesides vs. Twitty*, 8 *Ired.*, 431, where the bill of exceptions stated that "the declarations" of a party were offered in evidence, "to show the consideration" of a note, it was held that no question was presented for the consideration of the court, as it did not appear what the declarations of the party were. RUFFIN, C. J., in delivering the opinion of the court, lays down the law so clearly and concisely that we quote his remarks as applicable to this case. He says: "From the nature of a bill of exceptions, as has been frequently declared by this court, it is incumbent on the party excepting, when the error alleged consists in rejecting evidence, to show distinctly in it, what the evidence was, in order that its relevancy may appear, and that it may be seen, that a prejudice has arisen to him from the rejection. In like manner, when the alleged error consists in admitting evidence, the exception must set forth the evidence actually given, as it is the only means whereby the court can ascertain whether

or not the admission did, or might have done, the party a harm. For verdicts and judgments are presumed to be right, and according to law and justice, until the contrary be shown; as the bill of exceptions is required to state all the facts necessary to show the error clearly, since the party excepting is presumed to state the case as strongly against the other party and for himself, as he can, consistently with the truth." In *Styles vs. Gray*, 10 *Texas*, 503, the bill of exceptions showed "that the defendant offered evidence to attack the correctness of the surveyor's record, and to show fraud in the dates of the location and survey of Ann Gray, which was ruled out by the court," and it was held that the bill of exceptions was too vague and uncertain, as to the character of the evidence by which the defendant sought to establish the fraud, to enable the court to say whether or not there was error in ruling it out. To the same effect are the cases of *Carnal vs. The People*, 1 *Parker's Crim. Rep.*, 272; *Fowler vs. Lee*, 4 *Munf.*, 373; and *Gatewood vs. Burrus*, 3 *Call's Rep.*, 194.

The bill of exceptions also states that the counsel for the accused offered to examine the same witness "as to the manner of his arrest, and the places in which, and the persons by whom he was held in custody after his arrest"—which the court refused to permit. What the facts connected with the arrest and imprisonment of the witness were, we are not informed; and consequently, the objections we have just discussed, applies to the bill of exceptions in this particular.

There was no error in excluding the testimony of the witness, Ryland. He was introduced to prove that the witness, Greer, had made statements at the jail, contrary to what he had sworn on the trial, without any foundation for the introduction of such testimony having been first laid, by an appropriate cross-examination of the witness sought to be impeached. Nor was there error in refusing to permit Adolph Flanagin to testify in behalf of the accused. He was a co-defendant in the indictment which

was still pending against him, and for that reason was incompetent, according to the decision of this court in *Moss vs. The State*, 17 *Ark.*, 327.

Without entering into a critical discussion of the charge given the jury by the court below, it is sufficient to remark, that, in view of the evidence adduced at the trial, and especially when taken in connection with the instructions given at the instance of the accused, it had no tendency, we think, in misleading the jury.

The remaining ground relied on for a reversal, is well taken. Upon examination, we find that the record does not show that the accused was personally present in court, at the time the *venire facias* for the trial of this case was ordered; and it has been repeatedly decided by this court that, in prosecutions for felony, the defendant must be personally present at each and every time when any step is taken by the court in his cause, and that the record must affirmatively show the fact. (*Sweeden vs. The State*, 19 *Ark.*, 209; *Sneed vs. The State*, 5 *Ark.*, 431; *Cole vs. The State*, 5 *Eng.*, 518.) For this error the judgment must be reversed, and the cause remanded with instructions to the court below to grant the accused a new trial.

HICKS VS. WILSON.

Where there is no exception to the decision of the court overruling a motion for new trial, the party making the motion will be regarded as acquiescing in the decision.

Writ of Error to Marion Circuit Court.

Hon. ELIAS HARRELL, Circuit Judge.

GARLAND & NASH, for plaintiff.

Mr. Justice CLENDENIN delivered the opinion of the court.

This is a writ of error to the circuit court of Marion county. The defendant in error, Wilson, brought his suit against the plaintiff in error before a justice of the peace. At the appearance of the parties, on motion of the defendant before the justice, the suit was dismissed, and Wilson appealed to the circuit court. In the circuit court, the case was submitted to the court sitting as a jury and judgment was given for the plaintiff, (Wilson.) The defendant moved for a new trial, which was overruled; and the defendant did not except to the ruling of the court.

The uniform doctrine of this court has been that where there has been no exception taken to a refusal of the court to granta new trial, the supreme court cannot revise the decision on the motion, and the party making the motion will be regarded as acquiescing. See *Moss adm'r. vs. Smith*, 19 *Ark.*, 683.

The judgment of the circuit court is affirmed.

OSBORN VS. STATE.

The 134th *sec., chap.* 52, *Gould's Dig.*, providing that the judge of the circuit court may remove a criminal cause to another county, is in violation of sec. 11, art. 2, of the constitution, which declares that in prosecutions by indictment or presentment, the accused has a right to a speedy public trial by an impartial jury of the county or district in which the crime may have been committed, and is therefore void.

The counsel of a defendant indicted for a capital offence cannot, in the absence of the defendant, waive further time as to notice of copy of the indictment, or waive the presence of the accused when the venire is ordered. The counsel of the defendant cannot, in his absence, waive any of his legal and constitutional rights.

Appeal from Pulaski Circuit Court.

Hon. LIBERTY BARTLETT, Circuit Judge.

SMITH and GALLAGHER & NEWTON, for appellant.

The first point we submit to the court is whether or not, in view of section 11, of the bill of rights, a change of venue in a felony case *can* be ordered on the motion of the court, without the application or consent of the accused; and we submit the point for the consideration of the court. The right provided for in the section of the bill of rights above referred to has been considered of sufficient importance to be guaranteed to the citizen by both the constitution of the United States and that of the state. Is the showing made by the record in this case sufficient to deprive the prisoner of this right even though purporting to be for his benefit?

The record shows that the accused was arraigned without being served with a copy of the indictment for the time prescribed by law. The waiver by defendant's counsel, without the personal presence of the accused, was certianly not sufficient, nor was the

error cured by the counsel's waiver of the prisoner's presence. That the appellant ought to have been personally present during these proceedings cannot be doubted. *Sweeden vs. The State*, 19 *Ark.*, 209, abundantly settles that point; and if his counsel could waive his presence then, he could also waive it at final trial.

[Argued at length on the instructions.]

Mr. Attorney General JORDAN for the state.

That the court below had the right to change the venue in this case. See *sec.* 134, *chap.* 52, *Gould's Dig.*, 412. As to the sufficiency of the order, *Pleasant vs. The State*, 16 *Ark.*, 624.

Mr. Justice CLENDENIN delivered the opinion of the court.

George Osborn, the appellant, was indicted at the March term, 1856, of the circuit court of Saline county for the crime of murder. At the September term of the same court, he was arraigned, and standing mute a plea of not guilty was directed to be entered for him. He was tried at that term, and found guilty of murder in the second degree, and his punishment assessed by the jury at five years in the penitentiary. His counsel moved for a new trial, which was granted, and thereupon the court, of its own motion changed the venue of said trial from the county of Saline to the county of Pulaski. At the adjourned September term of Pulaski circuit court, the defendant was again put upon his trial, and the jury again found him guilty of murder in the second degree, and assessed his punishment at five years in the penitentiary, and thereupon his counsel moved for a new trial, and in arrest of judgment, which motion being overruled, the defendant excepted and having filed his bill of exceptions, prayed an appeal to this court, which was granted, and the record of this case from its inception in Saline county is thus before us.

The first three assignments of error are general. The fourth is that "the circuit court erred in changing the venue from Saline county when the appellant was not personally present;" and the

fifth is that "the said record and proceedings are in other respects erroneous and defective."

These assignments bring the case before us, and we propose disposing of the points as they are presented to us by the record, and by the argument of counsel.

The first point then made is, as to the action of the circuit court in changing the venue of this trial from the county of Saline to the county of Pulaski. It is insisted by the counsel of the appellant that the circuit court was not authorized by law to change the venue unless upon the application of the defendant.

To explain and decide the point thus made, it will be necessary for us to give the action of the circuit court, as shown by the record, the section of the statutes of this state under which the court acted, and the provision of the constitution in which the rights of the defendant in this respect are asserted.

Immediately following the order made in Saline county granting a new trial, (and in which orderthe defendant is not shown to be present,) and as part of that order, we find the following entry: "Whereupon the court being satisfied from facts within the knowledge of his honor, the judge here presiding, that another trial of this cause could not be had within the county of Saline, with justice to the said defendant, it is ordered by the court that this trial cause be removed to the circuit court of Pulaski county in this circuit, for trial, and that the clerk of this court do, accordingly, transmit to the clerk of said circuit court of Pulaski county a full transcript duly certified of the record and proceedings of this court in this cause, and it is further ordered by the court that the sheriff of Saline county do remove the body of the said George Osborn to the jail of the county of Pulaski, to which said county this cause is removed on change of venue as aforesaid, and there deliver him to the keeper of said jail, together with the warrant or process, or other authority, by virtue of which the said defendant is imprisoned and held."

The provisions of the statute of this state, under which change

of venue is granted in criminal cases, are as follows: (*Digest, chapter* 152.)

"Sec. 132. Any criminal cause pending in any circuit court, may be removed by the order of such court, or by the judge thereof in vacation, to the circuit court of another county, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending, are so prejudiced against the defendant that a fair and impartial trial cannot be had therein.

"Sec. 133. Such order of removal shall be made on the application of the defendant, by petition setting forth the facts, verified by affidavit, if reasonable notice of the application be given to the attorney for the state, and the truth of the allegations in such petition be supported by the affidavit of some credible person.

"Sec. 134. Whenever it shall be within the knowlegde of the court or judge, that facts exist which would entitle the defendant to the removal of any criminal cause on his application, such court or judge may make an order for such removal, without any application by the party for that purpose."

In the 11th section of the 2d article of the constitution of this state, under the title "declaration of rights," it is declared: "That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial by an impartial jury of the county or district in which the crime may have been committed; and shall not be compelled to give evidence against himself."

We have thus before us the order of the court, the law of the state, by virtue of which the order was made, and the section of the constitution as to the rights of the defendant; and the question is presented whether the 134th section gave to the circuit court authority to change the place of trial in this case.

We find by reference to the 6th article of the amendments to the constitution of the United States, substantially, the same declaration that we find in the section of our constitution, which we have copied. By the history of the constitution of the United States we are informed that the bill of rights was not made a part of that great instrument, by the wise and good men who perfected it, because, as they asserted, the constitution itself was a declaration of the rights of freemen; but many objections being made, the declaration of rights was made part of the constitution by the amendment; and it is now substantially a part of the constitutions of most if not all the states of the union. In some of the states (New York and California—which we have examined,) the clause under consideration—the right to be "tried in the county or district"—is not enumerated. It was that jealous spirit in behalf of the liberty and the rights of the people, that induced the early framers of our government to make that plain and explicit in the organic law, which otherwise might be doubtful, or left to different or adverse construction, and therefore they declared that a person charged with crime shall have, among other rights, the right to "a speedy public trial by an impartial jury of the county or district in which the crime may have been committed." This was a constitutional right of this defendant. Has it been granted to him? We think not. He is charged with the commission of a crime in the county of Saline, and without waiving his right by applying to the court for a change of venue, without being even in court when the order is made, we find by the record the case transferred for trial to the county of Pulaski, and the defendant there tried and convicted. This proceeding is, we believe, without precedent, and in our opinion without authority of law, and that the circuit court had no legal authority to change the place of trial of the defendant from the county of Saline to the county of Pulaski, and that therefore all the proceedings in this case in the county of Pulaski are void.

In this connection, and as showing the views heretofore held by this court, in regard to the efficacy of the bill of rights, we

refer to the case of *Eason vs. The State*, 11 *Ark.*, 482, and to the able opinion of Mr. Justice SCOTT, in which he gives the following definition of the bill of rights. After reviewing the bill of rights, its office and its history, he says: "Hence the correct definition of a bill of rights would seem to be, an instrument, which fixes limitations, as well upon the powers of the civil magistrate as upon the legislative department of the government, while at the same time it secures the civil and political rights and liberty of the citizen."

It is further objected by the counsel of the appellant, that previous to his trial in Saline county, he was arraigned without having been served with a copy of the indictment for the time prescribed by law. The record entry in respect to this point is as follows: "And on this day comes R. H. Deadman, who prosecutes for the state, and on his motion, it is ordered that a venire issue for thirty-eight good and lawful men of the county of Saline, returnable at 9 o'clock, A. M., Thursday next; and said defendant's counsel waiving further time as to notice or copy of indictment, and also waived the presence of the defendant in court when said venire is ordered; and on the further motion of the prosecuting attorney, the defendant is brought into court and arraigned by having the indictment read to him, and said defendant stands mute, and by order of the court a plea of not guilty is entered herein." By *section* 122, *chap.* 52, *Digest*, it is prescribed that, "It shall be the duty of the clerk of the court, in which an indictment against any person, for a capital offence, may be pending, whenever the defendant shall be in custody, to make out a copy of such indictment and cause the same to be delivered to the defendant or his counsel, at least forty-eight hours before he shall be arraigned on such indictment, but the defendant may, at his request, be arraigned and tried at any time after the service of such copy." It appears affirmatively, by the record, that the defendant was not in court when his counsel waived "further time as to notice and copy of the indictment, and also waived the presence of defendant in court when the

venire was ordered." The counsel of the defendant cannot, in his absence, waive any of his legal and constitutional rights.

Our statute provides as follows: "No indictment for a felony shall be tried, unless the defendant be personally present during the trial; nor shall any person indicted for an offence less than felony, be tried, unless he be present at the trial either personally or by his counsel." *Digest, sec.* 164, *chap.* 52. And this court, in construing this statute, on a point similar to the one we are now considering, say: "We have said that it was absolutely necessary that the defendant should have been present "during the trial" in the court below. The phrase, "during the trial," used in the section of the law we have quoted, means that it is necessary that the defendant should be present in court, at each and every time, and on all occasions, at which, and when any substantive step is taken by the court in his cause, after the indictment is presented by the grand jury to the court, up to, and until final judgment (including that also,) is pronounced in his cause by the court, and even afterwards, if any subsequent step should be taken by his counsel." *Sweeden vs. The State*, 19 *Ark.*, 209: and see also *Sneed vs. The State*, 5 *Ark.*, 431, and *Cole vs. The State*, 10 *Ark.*, (5 *English*,) 318.

Referring to the transcript, we find that the defendant was not present when the time for the service of a copy of the indictment was waived, nor was he present when the order for a venire was granted on the motion of the attorney for the state; and therefore he was not legally put upon his arraignment, and that it was error in the court to proceed with the trial, until he was so legally arraigned.

This error we find, by inspection of the record, continues not only in the trial of this cause in Saline county, but also in the trial in Pulaski county, and even if the case had been legally transferred to Pulaski, it would be a fatal defect and error there.

These two objections thus taken (and which occurred while the case was in Saline circuit court) being sustained, we deem it improper to review the case upon its merits, and decide upon the

other points assigned for error, as we cannot do so without reviewing the testimony and instructions; and as this case will have to be tried again, we might possibly in some way influence that trial, and we therefore refrain from doing so.

For the reasons given in this opinion, and in the record there referred to, this case must be reversed with directions to the circuit court to remand the appellant, George Osborn, to Saline county, and there to cause him to be legally arraigned, and then to proceed with the case in accordance with law and this opinion.

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McKENZIE VS. 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. (*Moss vs. State*, 17 *Ark.*, 327; *Brown vs. State, ante.*) But if a *nolle prosequi* has been entered as to him, his competency is restored; and the fact that he has been afterwards separately indicted for the same offence, will not render him incompetent.

An accomplice who is not indicted is not a competent witness for the defendant (*Brown vs. State, ante.*)

Where there is no evidence in the transcript, either by entry of record or by endorsement upon the indictment, that the grand jury returned the indictment into court, the judgment against the defendant will be reversed. The endorsement, "filed in open court," does not show that it was returned into the court by the grand jury, and is not sufficient.

Appeal from Randolph Circuit Court.

Hon. L. L. MACK, Circuit Judge.

WATKINS & ROSE for appellant.

A *particeps criminis* is not an incompetent witness so long as he remains not convicted and sentenced for an infamous crime, if he has not been put on his trial at the same time with his companions in crime. 1 *Greenl. on Ev.*, § 379.

The entry of the *nol. pros.* as to Bremage dischargad him from the record, and after that he was a competent witness. *Id.*, § 363.

Winters was not indicted, and though it might be true that he was one of the party that rode up to Poston's house and fired on him, yet the court erred in refusing to allow him to testify. *Id.*, 379.

There is no evidence in the transcript that the indictment was returned into court, as the statute requires. *Gould's Dig.*, *p.* 405, *sec.* 87; *Whart. Crim. Law*, 181, and cases cited in notes *q. r.* *Green vs. State*, 19 *Ark.*, 178; 7 *Eng.*, 62; 7 *Humph.* 155; 8 *Humph.*, 118; 3 *Gilman*, 71.

Mr. Attorney General JORDAN for the state.

Mr. Justice COMPTON delivered the opinion of the court.

The appellant was convicted in the circuit court of Randolph county of murder in the first degree, and was sentenced to be hanged. The motion of the appellant for a new trial was overruled, and he appealed to this court.

The record presents several questions for our consideration, which we will proceed to determine in the order in which they have been argued in this court.

1. The bill of exceptions shows that the accused offered to introduce Jahu Bremage as a witness in his behalf, which the court refused to permit upon the ground that he was the identical person who, by the name of John Bremage, was jointly indicted with the accused, and as to whom a *nolle prosequi* was entered and against whom a separate indictment, for the same offence, was subsequently preferred, which then remained undetermined.

This was error. It is true that it was decided by this court, in *Moss vs. The State*, 17 *Ark.*, 327, and again, at the present term, in *Brown vs. The State*, that one of several defendants in an indictment, still pending against him for the same offence, is not a competent witness for his co-defendants, but such is not the question here presented. Bremage, as we have seen, had been discharged from the joint indictment, was no longer a party to the record in that case, and the fact that he stood indicted separately for the same offence, did not disqualify him as a witness for the accused. *Whar. Crim. Law*, *p.* 303; *United States vs. Henry*, 4 *Wash. Cir. Ct. Rep.* 428; 1 *Hale*, *p.* 305, (*in Marg.;*) 1 *Chit. Crim. Law*, *p.* 603, (*in Marg.*)

2. The bill of exceptions also shows that the accused offered to introduce James C. Winters as a witness, which the court refused to permit, because it was made to appear that he was an accomplice. In this the court also erred. This witness was not indicted at all, and his being an accomplice did not make him incompetent. *Brown vs. The State* decided at the present term See also authorities above cited.

3. There is no evidence in the transcript, either by an entry of record or by endorsement upon the indictment, thatthe grand jury returned the indictment into court. This was held to be a good ground for reversal in *Green vs. The State*, 19 *Ark.*, 178, and in *Milan vs. The State* at the last term. In the case now before us, the endorsement upon the indictment by the clerk, "filed in open court, November 30, 1866," does not show that the indictment was returned into court by the grand jury, or how it got there—it is evidence of the filing only—and in such case we are not allowed, as held in *Green vs. The State*, *supra*, to indulge the presumption that it was returned by the grand jury.

For the errors indicated, the judgment must be reversed, and the cause remanded with instructions to the court below to grant the accused a new trial, if the record can be perfected—which may be done by making a *nunc pro tunc* entry, showing that the grand jury did in point of fact return the indictment into court

as required by law, if such was the fact. But if the court below shall determine that the indictment was not returned into court by the grand jury, the accused will then be subject to indictment *de novo*, and may be held in custody for that purpose.

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ACCESSORIES.

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See *Evidence*, 16; *Criminal Law*, 19, 20.

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ACTION, COMMENCEMENT OF

1. Under *sec.* 1, *ch.* 133, *Gould's Digest*, which provides that suits at law may be commenced by filing in the clerk's office "a note, or writing obligatory, or due bill, or other evidence of debt," on which a summons or capias may issue, a plaintiff cannot commence an action by filing an open account. *Gaines vs. Craig*, 477.
2. Nor could the plaintiff commence an action by filing a sealed agreement which on its face shows no cause of action, and upon which a right of action could only be shown by auxiliary evidence. *Ib.*
3. Nor was it the intention of the statute that actions of debt or assumpsit should be joined with covenant in one suit. *Ib.*

ADMINISTRATION.

1. The failure of an executor or administrator to present his account, annually, for settlement in the probate court, as prescribed by the statute, is a breach of the condition of his bond, for which any person interested in the estate may maintain an action: but by no rule of construction can it be held, that the statute fixes the measure of damages at the entire value of the estate in the hands of the executor or administrator. *Scarborough vs. State use, etc.*, 20.

ADMINISTRATION—CONTINUED.

2. A person interested in the estate may recover such damages as he has sustained by the failure of the administrator to make his settlement. If no special damage is alleged and proven, he can then recover only nominal damages. *Ib.*
3. Crosby died leaving a will whereby he devised his whole estate to Finn, who was made sole executor thereof; Finn having qualified as such executor, the will was set aside by a proceeding at law, and the administrator and heirs of Crosby filed a bill against the administrator, widow and heirs of Finn, he having died, to compel them to account for the estate of Crosby: *Held*, that the widow was not responsible for *waste* committed by her husband as executor of Crosby. *Finn ad. vs. Hempstead ad. et al.*, 111.
4. She was only answerable for such of the assets of Crosby's estate as remained unadministered by her husband, and came into her possession after his death. *Ib.*
5. And for them, she was properly responsible to the administrator of Crosby, and not to his heirs, *Ib.*
6. Finn having died before the institution of the proceeding to test the validity of the will, while an appeal in that cause was pending in this court, the probate court granted letters of administration *de bonis non* on Crosby's estate: *Held*, that while it would have been more regular for the probate court to have deferred granting letters *de bonis non* until the appeal was determined, yet the executor of Crosby being dead, and the action of the probate court coming before us collaterally, there was no such want of jurisdiction as to render the grant of letters null and void. (*State vs. Richards*, 21 *Ark.*, 515; *Rogers vs. Duval*, 23 *ib.* 79.) *Ib.*
7. The extent of the power and authority of an administrator *de bonis non*, is simply to collect and administer such property and effects of the deceased unadministered by the former representative, as remain in specie and are capable of being ascertained and identified as the specific property or estate represented by him. *Ib.*
8. An administrator *de bonis non* cannot maintain a suit against a former executor or administrator, or his representatives, for effects of the estate wasted or converted by him; though such suit may be brought by creditors, distributees, or legatees. *Ib.*
9. By statute an administrator *de bonis non* may invoke the aid of the probate court against his predecessor or his legal representatives, to obtain possession of effects unadministered, or he may bring suit on the bond of the delinquent predecessor. *Ib.*
10. But he cannot compel the representatives of such delinquent to account in equity for effects wasted or converted. *Ib.*
11. A slave, the property of Crosby, having come into possession of the widow of Finn, as guardian of her children, upon the affirmance by this court of the judgment of the circuit court in the case contesting the validity of Crosby's will,

ADMINISTRATION—CONTINUED.

whereby the same was pronounced invalid, she should have surrendered him to the administrator *de bonis non* of Crosby, and paid to him a reasonable hire for his services from the time he came into her possession. *Ib.*

12. Certain assets, rents, hires, etc., of Crosby's estate having been administered into the estate of Finn, it is proper that his administrator should account therefor to the administrator *de bonis non* of Crosby. *Ib.*

13. But the administrator of Finn having distributed nearly all the estate in his hands, it is but just to charge the estate in the hands of the distributees with the payment of the value of the assets of Crosby, that were administered into Finn s estate. *Ib.*

14. Until the will of Crosby was finally adjudged to be invalid, no cause of action accrued to his administrator *de bonis non*, to recover the goods of Crosby that remained unadministered by Finn, and the statute of limitation would not begin to run until that time. *Ib.*

15. A claim against the estate of a deceased person cannot be verified by the affidavit of an agent. *Marshall vs, Green, exr.* 410.

16. Although the probate court may fail to make an order vesting the entire estate of a deceased husband in the widow, when it does not exceed three hundred dollars, she may, in a proceeding against her to account for the estate, show that it did not exceed that sum, and thus avail herself of the benefit of the statute. *Hampton et al. vs. Physick ad.* 561,

ADMINISTRATOR, AD LITEM.

1. The 10th section, chap. 1 *Gould's Digest*, authorizing the appointment, by the courts, of *administrators ad litem*, is not in violation of the constitution. *Wade vs. Bridges ad.*, 569.

ADMISSIONS.

See *Evidence*, 10.

ADVERSE POSSESSION.

See *Limitation*, 18, 19.

AMENDMENTS.

1. Whether an officer will be permitted, in all cases, to amend his return on a writ of execution, after proceedings against him for false return or negligence, it is unnecessary to decide in this case: because the proceedings had been quashed before the motion to amend was filed: and the attitude of the parties, then, was as though none had been commenced. *Clayton vs. State, use etc.*, 16.

AMENDMENTS—CONTINUED.

2. No very definite rule can be laid down as governing amendments, in all cases; but an officer should always be permitted, in furtherance of justice, to amend his return on an execution, according to the facts, unless, by the allowance of the amendment, manifest injustice would be done. *Ib.*
3. Where the return upon a writ of execution showed a levy upon slaves, and a delivery bond taken and forfeited, the sheriff is permitted to amend by striking out the return and inserting *nulla bona*. *Ib.*

See, also, *Practice in Circuit Court*, 2; *Practice in Supreme Court*, 8; *Execution*, 2.

AFFIRMANCE OF SALES.

See *Vendor and Vendee*. 3.

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See *Marriage and Divorce*.

APPEALS.

See *Chancery*, 18, 59, 60; *Jurisdiction*; *Practice in Circuit Court*, 9, 10.

ARSON.

See *Criminal Law*, 1, 2, 3.

ATTACHMENT.

1. The statute (*Gould's Dig., ch.* 17, *sec.* 3,) provides that the affidavit in a proceeding by attachment shall be positive: an affidavit, therefore, that the affiant *verily believes* that the defendant is about to remove, etc., is insufficient. *Hellman et al. vs. Fowler et al.*, 235.
2. On sustaining a plea in abatement of the writ and declaration in a proceeding by attachment, for insufficiency of the affidavit, the proper judgment is to abate the suit. *Ib.*

See, also, *Practice in Supreme Court*, 9; *Practice in Circuit Court*, 11, 42.

ATTORNEY.

1. Although an attorney is bound to withhold, and will never be compelled to disclose any information which he knows only through professional relations to his client, he may be compelled to testify against his client as to other matters. *Milan vs. State*, 346.

BAIL.

See *Criminal Law*, 4.

BILLS AND NOTES.

1. A note payable to A. B. or Bearer, and indorsed in writing by the payee to a third person, may pass by delivery, and the holder may sue the maker in his own name as such. *Cowser vs. Tatum*, 13.
2. A written acknowledgment of indebtedness to the plaintiff, without containing a promise to pay, or time of payment, may well be described in the declaration as a promissory note and due immediately. *Huyck vs. Meador*, 191.
3. In an action against the maker of a note payable at a particular place, it is not necessary to aver or prove a demand at that place. *Rust vs. Reives*, 359.
4. Where a third party indorses a note, in blank, at the time it is executed, he is bound as security as fully as if he had written his name on the face, under that of the maker. But if such indorsement be made at a subsequent time, it is, in effect, a new contract—a guaranty, and to be valid, must be made upon a sufficient considration. *Killian vs. Ashley et al.*, 511.
5. An indorsement in blank by a third party gives to the payee or indorsee an implied power to write above it, the most absolute terms of guaranty, and is a promise in writing to answer for the debt of another as contemplated by the statute of frauds. *Ib.*
6. A valid contract of guaranty indorsed upon an instrument of writing, passes by assignment, to the assignee, and vests in him a right of action in his own name against the guarantor. *Ib.*
7. The release of a substantial security for the payment of a debt, in consideration of the guaranty of a third person, is a sufficient consideration to support the contract of guaranty. *Ib.*
8. Where a guaranty is absolute and unqualified—as a guaranty in blank may be considered to be—and for the payment of a debt fixed and definite in terms, demand and notice are unnecessary. *Ib.*
9. The liability of an indorser and guarantor is several—upon separate contracts; and a joint action will not lie against them. *Ib.*
10. Where the blank indorsement of a third party is alleged to have been made at the time of the execution of the bond he may be sued as maker jointly with the payee as assignor. *Ib.*

BILL OF SALE.

1. A bill of sale being an executed contract, the sufficiency of the consideration could not be inquired into by those who claim to stand in the place of the vendor, except for the purpose of conducing to show that it was procured by coercion and fraud. *Finn et al. vs. Hempstead ad. et al.*, 111.

BOND FOR COST.

See *Pleas and Pleading.* 6.

CANCELLATION OF DEEDS.

See *Chancery,* 13.

CHALLENGES.

See *Criminal Law,* 7, 8.

CHANCERY.

1. The state issued her bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof: the agents of the bank hypothecated or pledged them to the North American Trust and Banking Company for less than their par value, and the money advanced upon them was appropriated by the bank: the company transferred them, for an advance upon the amount for which they were pledged, to Holford & Co.: afterwards, in a proceeding against the company for insolvency, the debt due from the bank to the company for the money advanced on the bonds, was sold, by the receiver in chancery, under the direction of the court, to the complainant: the bonds were in the possession of Holford & Co., under the transfer to them, and they were charged with their estimated value in the settlement of their claims against the company. *Held:*

1st. That, under adjudications entitled to respect, the disposition of the bonds at less than their par value, might be declared illegal and void; but as the bank appropriated to its use the money advanced upon them, it is but just to conclude that she in bound in equity and good conscience to repay the money, with interest, upon a re-delivery of the bonds.

2d. *Hypothecation,* which is a term of the civil law, is that kind of pledge in which the possession of the thing pledged remains with the debtor, and in this respect, is distinguished from *pignus,* in which possession is delivered to the creditor or pawnee; and so the contract in this case was a pledge, and if valid in equity the company held the bonds in pledge for the repayment of the money advanced and the bank is entitled to have the bonds re-delivered on payment of the debt.

3d. A pawnee may sell or assign all his interest in the pawn—in which case the pawnee's lien cannot be separated either from the possession of the goods or the debt, and passes with the possession to the assignee; and so when the North American Trust and Banking Company transferred the bonds to Holford & Co., in pledge, the debt due the company from the bank passed by the transfer, and could not be sold as the debt of the company. *Whitney vs. Peay, Rec'r et al.* 22.

2. C sold to P one half of a parcel of land and mill, for a certain amoumt, part in

CHANCERY—CONTINUED.

cash and part on credit, and executed a bond for title on payment of the residue; afterward P agreed to re-convey his interest to C on certain terms, a part of which was performed; and C remained in possession of the property as sole owner: subsequently P conveyed all his interest in the property to the complainant, who filed a bill for specific performance of the first contract; and the heirs of C, who had died, filed a cross bill for specific performance of the second contract.

Held: 1st. That the circuit court erred in vesting title to one half of the land and mill in the complainant, under the first contract, regardless of the second and its part performance.

2d. That the complainants had no right to a decree cancelling the bond for title without showing a full performance of the second contract. *Clark vs. Barnett*, 30.

3. The rule established in England is, that if the complainant means to rely on the admissions, conversations, or confessions, of the defendant, whether oral or written, as evidence of facts charged in the bill, the bill must also specifically charge what those admissions, etc. are and to whom made; but, under the practice in this state, it is not necessary that the bill should contain any specific charge as to such admissions or in any way indicate that they will be relied on as evidence. *Bailey vs. Wright ad.*, 73.

4. The notice to take depositions, to a party non-resident of the state, may, under the statute, be served on his attorney of record, and the fact, that it is inconvenient to the attorney to attend, cannot affect the sufficiency of the notice, or furnish any ground for suppressing the depositions. *Ib.*

5. Where a debtor had conveyed his property to a trustee for the benefit of his creditors, giving a preference to certain of them, and a portion of the creditors file a bill in chancery to have the deed of trust declared fraudulent and void, all the creditors whose interests are sought to be affected by the decree are necessary parties. So, also, all purchasers, from the trustee, of trust property, unless, perhaps, it is clearly shown that the sales of the trustee would not be disturbed, and that the plaintiffs elect that the proceeds of the sales should go into the fund instead of the property sold. *Thornberry et al. vs. Baxter et al.*, 76.

6. The defendant in chancery must prove all new matter set up in his answer which is not responsive to the bill.

7. Pike and Underhill entered into a contract by which they agreed to jointly enter swamp lands, Pike making the selections and Underhill furnishing the scrip, and charging Pike with one-half its value, to be paid whenever the lands were sold. Various entries having been made under this contract, Underhill died, and Pike brought a bill for specific performance against his administrator, widow and heirs and Burgett. The latter answered that one-half of a certain portion of the scrip furnished by Underhill belonged to himself, and therefore claimed to be the equitable owner of one-half of the lands so entered, or to have a lien

CHANCERY—CONTINUED.

on the lands for the value of so much of his scrip as was used by Underhill in making the entries: *Held,* that the burden of proof was upon Burgett.

Held, further, that in order to make good his claim, Burgett should have set it up in a cross-bill;

And that the allegations of the answer could not bar Pike's claim, because he was not charged with notice of Burgett's interest in the scrip used by Underhill. *Pike et at. vs. Underhill's ad. et al.,* 124.

8. The plaintiff must recover on the strength of his own case, and not on the weakness of that of the defendant. *Schaer vs. Gliston,* 137.

9. Where the equity is doubtful the legal title must prevail. (*Paty vs. Harrell, ante; Woodruff vs. Core,* 23 *Ark.*) *Ib.*

10. Where a defence, legally cognizable at law has been unsuccessfully interposed in a suit at law, the defendant will not be allowed to avail himself of it in a court of equity; but where the defence is altogether equitable, though unsuccessfully attempted at law, it may afterwards be interposed in equity, (14 *Ark.*, 363; 22 *Ark.* 282.) *Hodges, ex parte,* 197.

11. Where a defendant in a suit at law comes into a court of chancery to injoin the proceeding, he must, as a general rule, submit to judgment; and the offer in his bill to make his defense only in equity and abide the decision of that court, is a substantial compliance with the rule. *Ib.*

12. A vendor who comes into a court of equity to enforce the execution of a contract for the sale of lands, should tender a perfect and unencumbered title; at all events, such a title as he contracted to make. *Ib.*

13. After the adoption of the constitution of 1864, by which slavery was abolished in Arkansas, S. sold and conveyed to R. a tract of land for the expressed consideration of ten thousand dollars, but, in reality, for a number of negroes, valued at that sum, which R. warranted to be slaves for life: *Held,* on a bill in equity to cancel the deed for the land: 1st That the facts in this case bring it within the exception to the rule, *ignorantia juris non excusat*: 2d. That the sale was entirely without consideration: 3d. That nothing of any value whatever having been paid for the land, the negroes being free, there was no necessity to offer to return them: 4th. That R. may have a remedy on the warranty, but as a court of law could not place him in possession of his land, equity would relieve him, and cancel the deed. *Steele vs. Richardson,* 365.

14. Where two persons bring a bill in chancery, the one claiming to be executrix and the other to be sole heir of a deceased person, asserting a right to certain lands purchased at execution sale by the testator, and the will of the deceased and the letters testamentary thereon are neither pleaded nor exhibited, and the judgment and execution under which the testator purchased are not exhibited, the bill is fatally defective. *Trapnall et al. vs. Burton et al.,* 371.

15. Infant defendants must have the benefit of any defence in this court which could have been interposed for them before the chancellor. *Ib.*

CHANCERY—CONTINUED.

16. They are deemed as having set up and relied upon the want of equity in the bill, limitation, non-claim, fraud as to subsequent purchasers, and any special defence interposed by a co-defendant not peculiar to himself, but of which each defendant was equally at liberty to avail himself. *Ib.*

17. One of the defendants having disclosed no title or interest in himself, but having confined himself to impeaching the plaintiff's title, and issue having been taken on his answer, the plaintiff waived objection to his failure to show title or interest. *Ib.*

18. Where there are infant defendants in chancery duly served with process, an affidavit for an appeal cannot be waived. *Ib.*

19. A cross-bill is required to be as perfect and complete as any other bill; and it or the answer to it might as well and legitimately refer to papers in any other suit in the court as in the original suit, and so endeavor, with statement of their contents or exhibition of copies, to make them part of the pleadings on record; the two suits are distinct from and independent of each other; they merely proceed side by side, the hearing of one being delayed until the hearing of the other. *Ib.*

20. It is a fundamental maxim, as well in courts of chancery as in courts of law, that no proof can be admitted of any matter which is not noticed in the pleadings. *Brodie vs. Skelton*, 11 *Ark.*, 134. *Ib.*

21. Defendants having referred to proceedings in another suit by way of showing an equitable estoppel against the plaintiff, the plaintiff cannot use them to avoid the effect of the statute of limitation, not having pleaded them in the bill. *Ib.*

22. Where process is not sued out against several parties, who have an existing legal interest in the lands whereof partition is asked, the bill must be dismissed at the hearing. *Ib.*

23. The case stood precisely as if the bill had not sought to make them parties. One of the plaintiff's having sued as executrix and the other as sole heir of the testator, for the defendants to admit this relationship between the plaintiffs and the testator, was not to admit that the latter, being sole *heir*, had any rights in the lands in question under the will. *Ib.*

24. When a fact is charged in the bill inferentially, and not directly, although on demurrer filed in proper time, the court might have sustained the demurrer, and ordered the bill to be amended, yet it would be unjust to dismiss the bill at the hearing for the want of such direct allegation. *Rice vs. Harrell*, 402.

25. So far as the answer of the defendants is responsive to the bill, replying to it in the negative and positively, and not admitting it and seeking to avoid the effect of the allegations and admissions by counter allegations, it is the *testimony* of the defendants in their own behalf, and must prevail unless overweighed by other testimony. *Marshall vs. Green exr.*, 410.

26. Two witnesses, or one whose testimony is well corroborated by circumstances,

CHANCERY—CONTINUED.

are necessary to overweigh the direct testimony of a respondent so given. At the same time the answer is no more sacred than the testimony of a disinterested witness. *Ib.*

27. And its credit may be wholly destroyed by equivocations, evasions, concealments evident on its face, contradictions, improbabilities, or any other of the many defects and vices in evidence which often make the most positive statement of a witness weigh little or nothing. *Ib.*

28. Green's executor having filed a cross-bill to subject certain lands to execution at law, the defendants being father and son, answered that after the bond for title had been made, whereby the father acquired a right to the land, he made a transfer of the bond and delivery of possession of the land to the son: *Held,* that this was matter in avoidance which the defendants must prove. *Ib.*

29. The father having denied that he purchased the land for himself, states in his answer that "he may or may not have told his vendor that he was purchasing for himself;" this being in regard to a matter within his own knowledge, and not being a denial, is in law equivalent to an admission that he did so state. *Ib.*

30. The answer of one of the defendants being evidently untrue as to a certain statement of a fact within his own knowledge; the maxim *falsus in uno falsus in omnibus* applies, and his testimony ceases to be entitled to any credit whatever. *Ib.*

31. The defendant must take the privilege of being a witness for himself *cum onere,* subject to all the rules and principles of the law of evidence by which the law strives to guard against the dangers of perjury. *Ib.*

32. He must be careful to testify fairly, frankly, ingenuously, fully, and it is the duty of his solicitor to see that he does it. *Ib.*

33. Execution having been levied on certain lands as the property of the defendant in the judgment at law, the son of the defendant filed a bill in chancery, to injoin the sale, claiming the lands as his own, asserting that they had been conveyed to him by his father. Many circumstances combining to show that this alleged conveyance was merely colorable and intended to hinder and delay the creditors of the father, the same is held to be void. *Ib.*

34. The creditor having filed a cross-bill to subject the lands to the payment of his debt, the court below, in decreeing the sale from the father to the son to be fraudulent and void, should have further decreed that unless by a day fixed, the defendants in the cross-bill should pay the plaintiff the amount of the debt, damages, interest and costs adjudged at law, and also costs on the original and cross-bill, the lands, or so much thereof as as should be necessary, should be sold by a commissioner. *Ib.*

35. The proceeds of such sale should first be applied to payment of the costs on the original and cross bill and the expense of executing the decree, and the residue

CHANCERY—CONTINUED.

should be applied to the payment of the judgments at law, and the surplus, if any, should be brought into court. *Ib.*

36. Should the proceeds of such sale fail to produce satisfaction of the costs and judgments at law, the creditor should be remitted to his proceedings at law for the collection of the residue by execution or garnishment. *Ib.*

37. Damages on the dissolution of an injunction can only be awarded by the court where money is injoined, and then "on the amount released by the injunction." *Ib.*

38. The suit on the original bill in the case not being to enjoin the collection of a debt generally, but only to prevent the sale of particular property for payment of it, damages should not have been awarded by the court below on dissolving the injunction. *Ib.*

39. And the court below having erred in this respect to the injury of the appellant, the appellee must pay all the costs accruing in this court, although in other respects the decree entered in this court be in his favor. *Ib.*

40. Depositions read before the register and receiver of the United States land office could not be read in this suit in chancery, unless it were shown that the witnesses were dead or beyond the reach of the process of the court. *Branch vs. Mitchell*, 431.

41. A person conveying lands by a deed containing the words "grant, bargain, sell and convey," is not a competent witness for his grantee in a suit between such grantee and a third person concerning the title to the lands. *Ib.*

42. When on an appeal from a decree in chancery the question presented to this court is one simply of fact, it is precisely as it would be if the parties had had it tried before a jury on an issue out of chancery, and the verdict being against the appellants, their motion for a new trial had been overruled. *Ib.*

43. Even if we thought the weight of the testimony was against the finding, we should not disturb it, unless it was palpably and glaringly wrong. *Ib.*

44. If there is merely a doubt, or a preponderance of testimony one way or the other, the finding below must remain conclusive. *Ib.*

45. When any of the defendants in a chancery suit are minors, the court is the guardian of their rights, and must give them here as well as below, the benefit of every ground of defence of which they might have availed themselves by demurrer or by general and particular denial of the allegations of the bill. *Ib.*

46. Nor would they, not demurring, nor even if the objection were not made at the hearing, lose the benefit of an objection to the jurisdiction of the court that would have been valid on demurrer. *Ib.*

47. Where a party has the only or better *legal* title to land, he may obtain or regain possession by an action of ejectment if he is out of possession; and it is reasonable that equity should decline to interfere where he may obtain all the relief he needs at law. (*Apperson vs. Ford*, 23 *Ark.*, 746.) *Ib.*

48. If he be *in* possession, then, as he can bring no action at law, it has been held

CHANCERY—CONTINUED.

that he may ask a court of equity to remove a cloud upon his title which makes it less valuable, or may prevent his disposing of it to others. *Ib.*

49. But where one holding an equitable title only to lands, or a junior legal title with prior or superior equities, comes into a court of equity to impeach or cancel, or compel a conveyance of, the senior or better *legal* title, the jurisdiction of the court in no wise depends on the question of possession. *Ib.*

50. And in each case the court of chancery will have jurisdiction though no fraud is charged in the bill. *Ib.*

51. Where a purchaser has been let into possession, and continues without interruption, under paramount title, he is not, in the absence of fraud, entitled to equitable relief from payment of the purchase money upon the ground of defect of title. (*Hoppes vs. Cheek*, 21 *Ark.*, 588; *Worthington vs. Curd*, 22 *ib.*, 284; *Bolton vs. Branch, ib.*, 435.) *Busby vs. Treadwell*, 456.

52. A knowledge of incumbrances or defects of title, is no objection to recovery upon the covenants of the deed in a court of law; but it is a ground for equity to refuse relief out of the unpaid consideration; because it supposes that, with such knowledge, the vendee chose to rely upon the covenants; and to their legal effect he will be remitted. (*Worthington vs. Curd, ubi sup.*) *Ib.*

53. A sheriff having sold certain lands for taxes, and having afterwards taken an assignment of one half of the lands so sold from the purchaser to himself, the sheriff was properly made a party to a bill filed by the original owner of the land to set aside the tax sale. *Twombly vs. Kimbrough*, 459.

54. The answer of the purchaser at the tax sale having set up that the transfer from himself to the sheriff was rescinded soon after it was made; this was matter in avoidance which the defendant must prove. *Ib.*

55. But it could not be proved by the sheriff, he being a necessary and proper party, and interested. *Ib.*

56. The bill having charged that the sheriff and the purchaser were parties in the purchase, and jointly interested therein, and the answer stating that there was no partnership at the time of the sale, but that the assignment to the sheriff was made afterwards, and not in pursuance of any previous understanding, the answer herein was directly responsive to the bill, and being uncontradicted by testimony, stands as if proved. *Ib.*

57. General averments of fraud amount to nothing unless the facts constituting the charge are distinctly and specifically averred; and unless also those facts do in law and fact constitute fraud. *Ib.*

58. Though any sheriff who is concerned in the purchase of any lands at a tax sale, is liable to a penalty of five thousand dollars, to be recovered by indictment, yet when the bill merely charges that the sheriff was interested in the purchase of certain lands, without any allegation that by the combination between the sheriff and the purchaser, it was intended to prevent competition in

CHANCERY—CONTINUED.

bidding, or that such was the effect, or that any other person did bid, or desired to bid for themselves, this does not amount to a charge of fraud. *Ib.*

59. Plaintiff filing a bill to set aside a tax sale, offered therein to pay whatever amount of taxes the defendants might have paid on the lands, with proper interest and other dues; the court below, in granting the relief sought by the bill, should have ordered that these sums and the value of any improvements made on the lands by the defendants should be brought into court by the plaintiff. *Ib.*

60. An appeal will not lie on a dissolution of an injunction, before the hearing of the cause, there being no final decree. *Hawley, ex parte*, 596.

61. Where a party in chancery prays an appeal, and files an affidavit for appeal and it is "ordered that he have leave to perfect his appeal by giving bond as required by law, with sufficient security, to be approved by the judge," in a certain sum and by a certain time; and after the expiration of that time, he presents a bond to the clerk, in the sum required, with an indorsement on it by the judge referring it to the clerk for approval, and the clerk approves the bond, and files it, the appeal must be dismissed, as there is no showing that it was ever granted. *Johnson vs. Hodges*, 597.

62. Although an appeal may be taken without recognizance, yet in this case there is no order for an appeal. *Ib.*

63. The judge cannot delegate the power to approve the recognizance, to the clerk *Ib.*

Quere: Can the judge himself approve such recognizance in vacation? *Ib.*

See, also, *Limitation*, 10.

CITIZEN.

See *Homestead*, 2.

CLAIMS AGAINST ESTATES.

See *Administration*, 15.

CLERICAL ERRORS AND MISTAKES.

See *Execution*, 2.

COLLECTORS.

1. A collector is entitled to commissions only when he collects the taxes; and if he fails to take the tax book, and it is delivered to his successor, he has no claim for commission on the taxes collected by his successor. *Union Co.. vs. Cowser*, 51.

2. No notice to the delinquent collector of the preliminary adjustment of his

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COLLECTORS—CONTINUED.

accounts is necessary, but he must have notice before final judgment. (*Trice vs. Crittenden county*, 2 *Eng.*, 162; *Carnall vs. Crawford county*, 6 *ib.*, 623.) *Christian et al. vs. Ashley County*, 143.

3. A *scire facias* issued against the collector and his sureties, after a preliminary adjustment of his accounts, commanding them to appear and show cause why judgment should not be rendered against them for the moneys due the county, etc., and duly served before final judgment, is a sufficient notice. *Ib.*
4. The securities in a collector's bond are liable for the amonnt of the penalties imposed upon him for his delinquencies. *Ib.*
5. The county court properly imposed the penalty of twenty-five per centum upon the amount of revenue found to be due, and fifty per centum per annum thereon. (*Carnall vs. Crawford county*, 6 *Eng.*, 625.) *Ib.*
6. The funds arising from county licenses, fines and forfeitures, constitute a part of the revenue of the county; the collector is required to settle with the county court therefor; and on his failure to do so, his securities are liable for the same. (*Lawson vs. Pulaski county, ubi sup.*) *Ib.*
7. The sureties in a collector's bond given for the year 1859, are not liable for moneys collected for 1860. *Ib.*
8. It appearing in this case that a part of the moneys had been collected for 1859 and and a part for 1860, and that the collector had paid over an amount exceeding the sum collected for the latter year, which amount was duly credited to him in rendering the judgment: it does not affirmatively appear that the collector and his sureties were charged in the final judgment, with any revenues collected after the year 1859, which was the period of responsibility of the sureties. *Ib.*
9. There being no evidence as to whether the sums paid by the collector were appropriated in the adjustment of the accounts, to the payment of the amount due for the year 1860, the court must presume in favor of the correctness of the judgment of the county court. (*Lawson, ex parte, ubi, sup.*) *Ib.*
10. In entering the final judgment, the county court did not credit the collector with the last two payments, but directed them to be credited on the execution. *Held*, That it would have been proper to have given credit for them in entering the judgment; but the direction that they should be credited on the execution was in effect the same, the penalty only being upon the remainder of the judgment after the deduction of these payments. *Ib.*
11. The sureties were not released by the failure of the county court to compel the collector to settle at the time required by statute. (*Christian, ex parte*, 23 *Ark.*, 641.) *Ib.*
12. The collector for a particular year is the only officer authorized to collect the taxes for that year; and although his term of office expires before the day fixed for the sale of lands for such taxes, he alone can make such sales. He may do this himself or by his deputy. *Twombly vs. Kimbrough*, 459.
13. It is only when the collector has *died* or been *removed* from office, or is other-

COLLECTORS—CONTINUED.

wise *disqualified* to act, that the actual collector can sell in such case. *Ib.*

14. Any judicial sale made by any person or officer other than the one authorized by law to make it, is void. *Ib.*
15. Lands having been assessed for taxes for 1856, and the tax book for that year given to one collector; and the lands sold by another collector in 1857, the former collector being alive and not disqualified from selling at the time of such sale, the sale was void. *Ib.*
16. In this case the collector who made the sale had been the deputy of the former collector to whom the tax book had been delivered, but as the sale was not made by him as such deputy, but as collector of 1857, the sale was void. *Ib.*

See, also, *County Court*, 2.

CONDEMNATION.

See *Military Seizures*, 2.

CONFIRMATION OF TAX TITLES.

See *Limitation*, 22.

CONSIDERATION.

See *Chancery*, 13; *Bill of Sale*, 1; *Bills and Notes*, 7.

CONSTITUTIONAL LAW.

1. Upon the adoption and ratification of a constitution by the people of a territory, or of a new constitution by the people of a state, as the fundamental law, no person can exercise any official function in the executive, legislative or judicial departments, otherwise than is provided for by such constitution: and if no provision is made therein for the continuance of existing officers, they cease to be such. *Danley & Johnson, ex parte*, 1.
2. It is not a question for judicial determination, or for that peculiarly, to hold that a proposed constitution has been ratified or adopted as the fundamental law—that being the exercise of a political power, which the judicial department alone is not competent to declare other than as a matter of political history or cognizance: but as a matter of political cognizanee this court knows that it exists by virtue of the constitution adopted by the convention of the people of this state, on the 1st June, 1861, and must take notice that all the departments of the government are acting solely under the authority of this constitution. *Ib.*
3. The constitution adopted on the 1st June, 1861, being, then, the constitution of this state, and the governor, at that time, being continued as governor, by force of the constitution, only until the next general election, to be held on the first

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CONSTITUTIONAL LAW—CONTINUED.

Monday of October next, it is the duty of the sheriff to advertise an election for governor according to law; and the mandamus should have been granted. *Ib.*

4. It was within the power of the convention of 1861, to continue in office any or all of the officers deriving their authority from the old constitution until their terms expired, or for any shorter period; or to permit their tenures to expire with the existence of the instrument under which they held them, and to have appointed persons to fill the offices provisionally, until elections could be had and appointments made under the provisions of the new constitution. *State vs. Clendenin, judge,* 78.

5. Under the present constitution, the state senators in office at the time of its adoption, were to continue to hold their offices until their successors should be elected. *Ib.*

6. The constitution of 1861 provides for the election of successors of the senators of the first class, on the first Monday of October, 1862, and for the election of the successors of senators of the second class, on the first Monday in October, 1864. *Ib.*

7. It was an error to elect all the senators at the general election in 1862, when only the successors of the first class should have been elected and vacancies in the second class, if any existed, filled. *Ib.*

8. Oates belonged to the second class of senators, and his term expired by law in 1864: after the adoption of the present constitution he was not ineligible to the office of secretary of state, by reason of being a state senator. *Ib.*

9. So much of the act, approved 1st December, 1862, as provides "that all suits at law or equity now pending, or hereafter to be commenced in any of the courts of this state, shall be continued until after the ratification of peace between the United States and the Confederate States," is unconstitutional—the continuance of criminal suits, directed by the act, being in violation of the constitutional right of the accused to a speedy trial, (*Cons. art. II, sec.* 11.) and the continuance of all civil suits being in violation of the constitution (*Ib. sec.* 18.) prohibiting the passage of any law impairing the obligation of contracts. *Burt vs Williams,* 91.

10. Granting a continuance is exclusively a judicial act, and is not a proper subject or legitimate use of legislative authority. *Ib.*

11. Legislation is the exercise of sovereign power; but that power is defined to a certainty by the written constitutions of the several states, which determine the extent and limit of the powers delegated to the government and retained by the people. *Rison et al. vs. Farr,* 161.

12. The constitution of this state is the supreme law of the land, under the constitution of the United States; and is of binding force and obligation upon all departments of the government, and assigns the sphere within which each must act, and establishes bounds beyond which neither can go. *Ib.*

13. The courts of justice have the right, and are in duty bound, to test every law by

CONSTITUTIONAL LAW—CONTINUED.

the constitution as the fundamental and paramount law of the land, and to declare every act of the legislature contrary to the true intent and meaning of the constitution null and void, and of no effect whatever. *Ib.*

14. *Section* 2, *Article* 4, of the constitution of this state, fixes the qualifications and determines who shall be deemed qualified voters in this state, in direct, positive and affirmative terms, and these qualifications cannot be added to by legislative enactment. *Ib.*

15. A law requiring that the voter shall swear to support the constitution of the United States, does not restrict the right to vote, adds nothing to the qualifications required by the constitution, requires nothing more than the voter is required by law to do, and is free from the objections of unconstitutionality, and is a valid law. *Ib.*

16. But to add to the qualifications prescribed by the constitution—to require that the citizen shall swear that he has not done a specified act—that he shall purge himself by oath of all crimes, or any particular crime; otherwise, to deprive him of the elective franchise, is not within the powers delegated to the legislature; and therefore, so much of the 6th section of the act approved May 31st, 1864, entitled "An Act to provide for the manner of holding elections," as prescribes such oath as a pre-requisite to voting, is directly in conflict with section 2, article 4, of the constitution, and void. *Ib.*

17. The rights and privileges of the citizen cannot be taken away by legislative enactment, directly or indirectly, or otherwise than by due process of law, that is by the judgment of a court of competent jurisdiction. *Ib.*

18. The 5th section of the act approved 31st May, 1864, providing that certain classes of persons therein described, shall be barred from the collection of their debts in this state, is in violation of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. *Vernon vs. Henson*, 242.

19. The thirteen colonies, although dependencies of the British government, were entirely independent of each other; and separately and severally constituted the government of the United States; and it may be safely assumed that the people of the several states, in whom the sovereign power rests, had conferred upon their state governments sovereign and independent powers as such, limited only by the extent to which power was afterwards conferred by the constitution upon the federal government, or limited by it to the states. *Hawkins vs. Filkins*, 286.

20. But whether the constitution was made and adopted by the states, or by the people of the states, as a political question, is of no importance for any purpose of judicial investigation. *Ib.*

21. There can be no question but that the federal government derived its entire power and authority from the constitution; and is limited in the exercise of its

CONSTITUTIONAL LAW—CONTINUED.

powers to the specific grants of power therein contained, and to such implied powers as are necessary to give effect to the expressly delegated powers. *Ib.*

22. The powers granted to the federal government were for national purposes only: and the constitution and the laws made in pursuance thereof are the supreme law: and as the expressly delegated powers did not embrace any of the local municipal powers of the state government, they necessarily belong exclusively to the states and to the people; in respect to which the states are independent and sovereign; and to that extent the allegiance of the people is due to their state government. *Ib.*

23. The convention of this state, which framed the constitution of 1861, was called according to the provisions of the then existing constitution; and no acts of that convention can be void except such as were contrary to the allegiance of the people to the federal government, viz: that which attempted to dissolve the connection of the state with the federal government, and those that were auxiliary to that purpose. *Ib.*

24. Admitting that the state had no power to withdraw from the compact she had entered into with the United States, and that the act by which she attempted to do this was void; that void act could not affect the validity of the constitution and government of the state in other respects: nor was it intended by that convention to destroy the state government, whose existence as such did not depend upon its connection with the United States. *Ib.*

25. The position of Arkansas in the national government was equal to that of any other state, her rights and responsibilities the same; and her people owed allegiance to the United States to the extent of the powers delegated for national purposes; but the moment the laws which protected the citizen, were suspended by force of the civil war, that allegiance ceased. *Ib.*

26. If the state of Arkansas was conquered territory, the laws and government in force at the time of the conquest, remained in force until altered by the conqueror. *Ib.*

27. If the government of Arkansas was entirely revolutionized, and all of its departments usurped by force, without law or protection, and consequently owing no allegiance to any power, the people of the state as of necessity had a right to establish *de facto* a government for themselves. *Ib.*

28. The late war between the United States government and that attempted to be established as the Confederate States was a civil war, and the rights of belligerents apply and govern the conduct and rights of both parties; but the rules of conquest over foreign territory do not apply to their full extent; nor were the civil governments of the states overturned by the result. *Ib.*

29. The only principle settled by the late civil war, is, that no state has the power to dissolve its connection with the federal government—the powers of the two governments, state and federal, remaining the same—the rights of the people the same. *Ib.*

CONSTITUTIONAL LAW—CONTINUED.

30. The state courts derive no power or authority to adjudicate from the United States, but from the constitution and laws of the state government, whose power as to its municipal affairs is independent of any other government. *Ib.*
31. The state of Arkansas did not, either by the passage of the ordinance of secession, by which she unsuccessfully attempted to dissolve her connection with the United States government, or by any subsequent act of hers, suspend or destroy the existence of her state government. *Ib.*
32. The government of the state continued to exist *de jure*, from the time she attempted to secede, until suspended by the action of the convention of 1864; and the acts of the state government during that period, were valid and binding as though no attempt had been made to secede. *Ib.*
33. No state convention has the power to declare the existing constitution and government void *ab initio*; and thereby render invalid the executive, legislative and judicial acts. *Ib.*
34. The rule of construction, applicable as well to constitutions as acts of the legislature, is, that such construction, if possible, shall be given, that no clause, sentence or word shall be void, superfluous or insignificant; but if, from a view of the whole act, the intention is different from the literal import of its terms, then the intention shall prevail: construing the ordinance of the convention of 1864, by this rule, it is apparent that the intention was to make void the acts of the convention of 1861, only so far as the same were in conflict with the constitution and laws of the United States. *Ib.*

See, also, *Criminal Law*, 17.

CONTINUANCES.

See *Practice in Circuit Court*, 8.

CONTRACTS AND AGREEMENTS.

1. The defendant, assisted by the plaintiff and others, apprehended runaway slaves, and the defendant afterwards received the reward for their capture: the plaintiff sued for a proportionate part of the reward: *Held*, that the plaintiff was not entitled to recover, as there was no fact in the case from which it might be, inferred that the defendant ever promised to share the reward with the plaintiff. *Stroud vs. Garrison*, 53.
2. On a contract for the sale of lands for the price of $30,000, one third to be paid at a short day, the balance in five years with interest, the vendors executed their covenant to the vendee, reciting the contract and binding themselves to make a good title to the lands on payment of the balance of the purchase money, unless the vendee shall then prefer to resell to the vendors; in such case they agree to pay him for the land $50,000, and if they fail or refuse to pay

CONTRACTS AND AGREEMENTS—CONTINUED.

that sum for the land, at the times stipulated in the original sale, then to forfeit and release to the vendee one half of the balance of the purchase money on their sale to him: *Held*, that the latter portion of the contract, as recited in the covenant, was not an independent and separate contract, but that all its provisions should be taken and held as one contract, made upon sufficient consideration and binding upon the parties. *Hodges ex parte*, 197.

3. When a contract is reduced to writing in plain, definite and unambiguous terms, and accepted by the parties as the sole evidence of the contract, neither party will be permitted to introduce parol evidence to alter, or vary its terms or meaning; nor will any conversations, or declarations, either before, at the time, or after the contract is reduced to writing, be admitted to modify or contradict its plain import. (13 *Ark.*, 449–598; 15 *ib.*, 543.) *Roane vs. Greene & Wilson*, 210.
4. And so, in a suit upon a note given for the payment of so many "dollars," a plea setting up that the consideration of the note was property to be paid for in Confederate States money, and that when the note was given it was understood and agreed between the parties that the word "dollars" therein should be understood to mean "Confederate States money," held bad on demurrer. *Ib.*
5. A plea setting up a parol contract different, in terms and legal effect, from the written contract declared upon, is no defence to the suit. (*Roane vs. Green & Wilson*;) and though issue be taken to such plea, there is no issue in fact to try, and the declaration stands confessed. *Hastings vs. White et al.*, 269.
6. Where the payee in a note agrees with the surety and principal debtor to accept a third person as surety in his place and discharge him, and the agreement is executed, it operates as a discharge of the original surety and may be shown by parol. *Reid vs. Nunnelly*, 356.
7. A sale of a certain quantity of lint cotton—part of an unginned crop—neither delivered, separated from the bulk, marked or otherwise identified, is but an agreement to sell and deliver that quantity; and the vendee acquires no title to the property under such contract. (*Beller vs. Block*, 19 *Ark.*, 567.) *Upham vs. Dodd*, 545.

See, also, *Chancery*, 12; *Bills and Notes*, 6, 7.

CONVERSION.

See *Trespass*, 4.

CORPORATION.

1. The act of January 14, 1857, amending the charter of the Mississippi, Ouachita and Red River Rail Road Company, sanctioning a material and unwarrantable departure from the route of the road as designated in the original charter, hav-

CORPORATION—CONTINUED.

ing been accepted by the president and directors of the corporation, acting by authority of a *majority of the stockholders*, was binding on such of the stockholders as solicited or assented to the passage of the act; but such stockholders as did not assent to it were released from their contracts of subscription. (*Witter vs. M., O. & R. R. R. R. Co.*, 20 *Ark.*, 490.) *M. O. & R. R. R. Co. vs. Gaster*, 96.

2. An act of the general assembly altering the charter, to be binding on all the stockholders, must be accepted by a vote of the *majority of the stock*, exclusive of that taken by the state, at a meeting of the stockholders regularly convened for that purpose, as provided by the 21st section of the original charter of the company. *Ib.*
3. The charter of a private corporation is an executed contract between the government and the corporators, and the legislature cannot repeal, impair or alter it in a matter materially affecting the interest of the corporators against their consent, or without the default of the corporation judicially ascertained. *Ib.*
4. The board of directors may act for and represent the stockholders in matters within the scope of the powers conferred upon them by the charter; but when they undertake to accept a legislative amendment of the charter, they act beyond the scope of their authority, and their act is not obligatory upon the corporation. *Ib.*
5. The plea, failing to show that the act of 14th January, 1857, changing the provisions of the charter, as to the location of the road, was so accepted as to make it valid and binding on the corporation, held bad on demurrer. *Ib.*
6. If the directors were proceding to apply the funds of the company in building the road on a line materially variant from that designated in the charter, the defendant had his remedy by injunction. (*M., O. & R. R. R. R. vs. Cross*, 20 *Ark.*, 443.) *Ib.*

COUNTY COURT.

1. The county court acts judicially in adjusting the accounts of an internal improvement commissioner, and has no power to set aside its judgment after the lapse of the term. *Brandenburg vs. State use etc.*, 50.
2. The county court has jurisdiction to render judgment against a delinquent collector or his sureties, for the county revenue which he has collected and failed to pay over as required by law. (*Gould's Dig., ch.* 147, *secs.* 37–45; *Lawson vs. Pulaski County*, 3 *Ark.; Goree vs. State*, 22 *ib.*, 235; *Jones vs. State*, 14 *ib.*, 172.) *Christian et al. vs. Ashley County*, 143.
3. The transcript showing that the proceedings were had "in the county court of the county of Ashley, the Hon. R. T. Harris, judge, etc., presiding, assisted by Esq's. John Hill and Samuel H. Moore," it will be presumed that the two last named persons were the associate justices. *Ib.*

COUNTY REVENUE.

See *Collectors*, 5.

COUNTY TREASURER.

See *Pleas and Pleading*, 7.

CRIMINAL LAW.

1. The burning necessary to constitute arson of a house at common law, must be an actual burning of the whole or some part of the house; but it is not necessary that any part of the house should be wholly consumed; and our statute (*Gould's Dig.*, *p.* 338,) does not materially change the common law definition of the offence: And so, an indictment merely charging that the defendant set fire to the house is fatally defective as an indictment for arson. *Mary vs. The State*, 44.
2. An indictment charging that the defendant set fire to the house, with intent *to injure the owner*, is defective under *section* 7, *p.* 339, *Gould's Dig.* It should charge that the defendant set fire to the house with intent to burn it. *Ib.*
3. Where a person attempts to burn a house by setting fire to it, but fails to accomplish such a burning as constitutes arson, he is guilty of a misdemeanor. *Ib.*
4. On an application for bail in a criminal case, the court will give the prisoner the benefit of any reasonable doubts that may arise in considering the testimony. *Bird & Bailey, ex parte*, 275.
5. An assault with intent to kill, as created by our statute, (*Gould's Dig.*, *ch.* 51, *part* 3, *art.*, 5, *sec.* 1; *part* 10, *sec.* 5,) is a felony; and an indictment for such offence must charge that the assault was made feloniously, etc., and also that the intent was felonious, etc. *Milan vs. State*, 346.
6. The record should always show the empanneling of the grand jury that found the indictment; and that the indictment had been returned into court by the grand jury. (13 *Ark.*, 720; 19 *Ark.*, 178.) *Ib.*
7. By the common law, challenges to the polls for cause, are for principal cause, or to the favor. If for principal cause—as where the matter imports absolute bias or favor—it is tried by the court on the testimony of the juror to the exclusion of other evidence, and if found true, the law *per se* pronounces the juror incompetent. If to the favor,—as where it is supposed the juror is under undue influence or prejudice—it is tried, under the direction of the court, by triers, on other testimony to the exclusion of the oath of the juror; and the finding is conclusive unless the triers are improperly directed. *Ib.*
8. The practice, as modified by our statute is, that challenges to the polls, whether for principal cause or to the favor may be tried by the court, or by triers at the election of the party challenging: if tried by the court, then on the oath of the person challenged; if by triers, then on other testimony; and if the challenge be

CRIMINAL LAW—CONTINUED.

for favor, then the finding of the court is as conclusive as if it had been determined by triers. (13 *Ark.*, 720.) *Ib.*

9. In view of the constitutional provision which guarantees to the accused a trial by an impartial jury, and of that purity and sense of justice which should characterize the administration of the law, a person who states that he would convict a colored man on less evidence than he would a white man for the same offence, should be rejected as a juror on an indictment against a colored man. *Ib.*

10. A witness who had given evidence before the examining court in a criminal case, may be interrogated on the trial in relation to such evidence, for the purpose of laying a foundation to contradict him. *Ib.*

11. The testimony of a witness given before the examining court, which was reduced to writing, is competent evidence on the trial for contradicting him—a foundation having been laid for the introduction of such evidence. *Ib.*

12. Where an offence and an exception to it are contained in the same clause of the statute, an indictment must charge that the defendant is not within the exception; otherwise, where the exception is in a subsequent clause or statute. (5 *Eng.* 301.) *Matthews vs. State*, 484.

13. If in an indictment for perjury the substance of the offence is charged, by what court the oath was administered, averring that the court had authority to administer the oath with proper averments to falsify the matter whereof the perjury is charged, it is sufficient. (*Sec.* 7, *art.* 2, *ch.* 51, *Gould's Dig.*) *State vs. Green*, 591.

14. Where an indictment for perjury charges that in the false oath "the defendant was duly sworn" by the foreman of a grand jury, "to speak the truth concerning all such legal questions as might be asked him by the said" foreman, it is sufficient; the foreman of a grand jury having authority to administer such an oath. *Ib.*

15. One co-defendant in an indictment still pending against him, cannot be a witness for his co-defendant. (*Moss vs. State*, 17 *Ark.*, 327.) *Brown vs. State*, 620.

16. In a prosecution for felony, the record must affirmatively show that the defendant was personally present at each and every time when any step is taken by the court in his cause. *Ib.*

17. The 134th *sec.*, *chap.* 152, *Gould's Dig.*, providing that the judge of the circuit court may remove a criminal cause to another county, is in violation of sec. 11, art. 2, of the constitution, which declares that in prosecutions by indictment or presentment, the accused has a right to a speedy public trial by an impartial jury of the county or district in which the crime may have been committed, and is therefore void. *Osborn vs. State*, 628.

18. The counsel of a defendant indicted for a capital offence cannot, in the absence of the defendant, waive further time as to notice of copy of the indictment, or waive the presence of the accused when the venire is ordered. The counsel of the defendant cannot, in his absence, waive any of his legal and constitutional rights. *Ib*,

CRIMINAL LAW—CONTINUED.

19. 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*, 17 *Ark.*, 327; *Brown vs. State, ante.*) But if a *nolle prosequi* has been entered as to him, his competency is restored; and the fact that he has been afterwards separately indicted for the same offence, will not render him incompetent. *McKenzie vs. State*, 636.
20. An accomplice who is not indicted is a competent witness for the defendant. (*Brown vs. State, ante.*) *Ib.*
21. Where there is no evidence in the transcript, either by entry of record or by indorsement upon the indictment, that the grand jury returned the indictment into court, the judgment against the defendant will be reversed. The indorsement, "filed in open court," does not show that it was returned into the court by the grand jury, and is not sufficient. *Ib.*

COVENANTS.

See *Contracts.*

DAMAGES.

See *Chancery*, 36, 37; *Replevin*, 4.

DEEDS AND CONVEYANCES.

1. Deed of gift of slaves to B, to be held for the use of the grantor during life, then for the support of B and his children during his life, and upon his decease to belong to such child or children as survived him; and if no child or children survived him, then to the plaintiff. B died leaving a child surviving him: *Held*, that the property vested absolutely in such child at the moment of the death of B. *Deloney vs. Deloney et al. ex'rs.*, 7.
2. Deed of gift of slaves and other personal property to M, to be held for the use of the grantor during life, and if at the decease of M, she should have no child or children surviving her, then all the property to belong to the plaintiff. M died without issue surviving her: *Held* that upon the death of M the property vested in the plaintiff, the limitation over not being upon an indefinite failure of issue. *Ib.*
3. The act of signing and sealing a deed gives it no effect without delivery, which is a substantive, specific and independent act: and so where a deed is executed by several, and found among the papers of one of the obligors, after his death, and delivered to the obligee by a stranger, without explanation, or proof of other delivery, there is no such delivery as will bind the obligors. *Miller vs. Physick*, 244.
4. A tax deed is by law evidence of the truth of its own recitals. *Twombly vs. Kimbrough*, 459.

DEFECT OF TITLE.

See *Chancery*, 50, 51.

DELIVERY.

See *Deeds and Conveyances*, 3.

DEMAND AND NOTICE.

1. No demand is necessary before suit, where the defendant has converted the plaintiff's property to his own use. (3 *Eng.*, 510; 6 *Eng.*, 249; 17 *Ark.*, 155.) *Dunnahoe vs. Williams*, 264.

See, also, *Bills and Notes*, 38; *Pleas and Pleading*, 4.

DISCHARGE.

See *Contracts and Agreements*, 6.

DIVORCE.

See *Marriage and Divorce.*

DOWER.

1. A widow is entitled to dower in the undivided estate of her deceased husband, held by him and others as tenants in common—and so, if the estate be a joint tenancy, as held in *Menifee vs. Menifee*, (3 *Eng.*, 50.) *Harvill and wife vs. Holloway, ad.*, 19.
2. It was improper for the court below in assigning the widow her dower to lessen its value by causing it to be scattered in inconsiderable bodies over a great many tracts of wild land. *Pike et al. vs. Underhill's ad. et al.*, 124.
3. Where it would be detrimental to the interest of the parties to assign the widow her dower specifically in certain of her husband's lands, the court will direct them to be sold, and that the interest on one-third of the proceeds of the sale of her husband's interest therein, shall be secured to her for life. *Ib.*
4. But as to other lands where no such inconvenience or difficulty exists, the court will direct that dower be specifically assigned out of the estate. *Ib.*

DUE DILIGENCE.

See *Pleas and Pleading*, 4.

EMANCIPATION.

1. The rights of the owners of slaves, not within the lines of the military occupa-

EMANCIPATION—CONTINUED.

tion of the United States during the late war, were in no wise affected or impaired by the proclamation of the president, of the 1st of September, 1862, commanding that all slaves in the state should be free from and after the first day of January, 1863. *Grace vs. Dorris*, 326.

ENEMY.

See *Military Seizures*, 1.

ESTOPPEL.

1. If a person who has the claim to, or is the owner of property real or personal, stands by and permits it to be sold, without giving notice of or asserting his right, he is estopped from setting up his claim or title against the purchaser. (*Shall vs. Biscoe*, 18 *Ark.*, 142.) *Trapnall et al. vs. Burton et al.*, 371.

EVIDENCE.

1. Where it is shown by competent proof that the attesting witness to an instrument of writing is out of the jurisdiction of the court, or dead, the hand-writing of the maker may be proved—the attesting witness having subscribed his name by making his mark, which it is presumed cannot be proved or identified, like the hand-writing of an attesting witness. But where a witness merely states that he had heard that the attesting witness had gone to another state, and had since heard that he was dead, this is not sufficient to admit secondary evidence of the execution of the instrument. *Delony vs. Delony et al. ex'r.*, 7.
2. The declarations and representations of one person, that another was his partner in the purchase of goods, are not admissible to charge the latter, unless there be a sufficient foundation laid for the admission of such declarations. (*Berry vs. Barnes et al.* 23 *Ark.*, 411.) *Berry vs. Lathrop & Williams*, 12.
3. An admission made by a guardian for infants in one suit cannot be used against them in another. *Finn et al. vs. Hempstead ad. et al.*, 111.
4. The after declarations of a vendor are worthless to invalidate a sale made or a bill of sale executed by him. (*Gullett vs. Lamberton*, 1 *Eng.*, 110.) *Ib.*
5. When men fully acquainted with the qualities of objects for which they search, and with the ground where the search is made, do not find them, their testimony is not subject to the suspicion that attaches to negative testimony concerning facts to which their attention has not been directed. *Schaer vs. Glisten*, 137,
6. A statement made by the clerk, in the transcript sent to this court, that a notice ordered by the court had been issued, but had been mislaid, is no evidence of that fact. *Christian et al. vs. Ashley County*, 143.
7. Witnesses are not, as a general rule, to draw conclusions from a given state of

EVIDENCE—CONTINUED.

facts, and to give such conclusions in evidence—they must state only facts.—*Dickerson vs. Johnson*, 251.

8. St. John's college having been undertaken by the Grand Lodge of Free Masons and the masonic fraternity of Arkansas, a person who was a mason when he testified, and one of the trustees of the college, but without any personal or pecuniary interest in the controversy, is not incompetent as a witness for the college.—*Trapnall et al. vs. Burton et al.*, 371.

9. Where the admission of a party is offered in evidence against him, it is the well settled rule of law that the whole admission is to be taken together—all that he said at the time in connection with his admission should be permitted to be proved. *Trammell et al. vs. Bassett*, 499.

10. The death of an individual, though disconnected with any question of pedigree, may be proved by hearsay, subject to the same restriction as where matters of pedigree are involved. *Wilson vs. Brownlee, Homer & Co.*, 586.

11. Although declarations of members or relatives of the family, are good evidence to establish marriage, death, birth, heirship and the like; and may be proved by others, as well as by surviving members of the family, as held in *Kelly vs. McGuire*, 15 *Ark.*, 605, yet the statement of a witness that he had received information verbally and by letter, as to the death of a party, when it does not appear that the witness was related to the party in question, or how he obtained his information, is not competent evidence of that fact. *Ib.*

12. The party against whom a witness is called has the right to have him put on his *voire dire* in order to show his incompetency. *Brown vs. State*, 620.

13. But the correct practice is for the party to state the object and ground of the application, so that the court may determine as to the propriety of entering upon the investigation. *Ib.*

14. Where such grounds are not stated, the presumption in this court must be that the application was not warranted by law. *Ib.*

15. The fact that the witness is an accomplice of the defendant, does not affect his competency. *Ib.*

16. The credit of a witness may be impeached by proof that he has made statements out of court, on the same subject, contrary to what he swears on the trial, provided the alleged statements are material to the issue; and provided also that the witness has undergone a previous cross-examination as to such statements, in which, if the statements were verbal, his attention was not only called to the particulars of the conversation, but also to the time, place and person involved in the supposed contradiction. *Ib.*

17. But where the record fails to show what the statements were which are alleged to be contradictory, the presumption is that they were properly rejected. *Ib.*

See, also, *Chancery*, 25, 26, 27, 39, 40; *Contracts and Agreements*, 3; *Criminal Law*, 10, 11, 19, 20; *Deeds*, 4; *Trespass*, 1, 2; *Practice in Circuit Court*, 7; *Attorney*.

EXECUTIONS.

1. An execution issued against an administrator on a judgment against the intestate, is irregular and void, whether the judgment be against the intestate alone, or jointly with other defendants. *Blanks vs. Rector et al.*, 496.
2. Executions may be amended, in matters of form; and for clerical errors or omissions before sale; but not in matters of substance. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See *Administration.*

FELONY.

See *Criminal Law*, 5.

FRAUD.

1. Fraud may be shown at law as well as in chancery; and is a mixed question of law and fact; and any evidence tending to show that the title of the plaintiff was acquired by fraud, should go to the jury. *Lindsay vs. Lamb*, 222.

See also, *Swamp Lands*, 1; *Chancery*. 56, 57.

FORCIBLE ENTRY AND DETAINER.

1. A declaration in an action of forcible detainer, under the latter clause of the 3*d section, chap.* 72, *Gould's Dig.*, alleging that the plaintiff "was entitled thereto and lawfully possessed of" certain lands, "which possession of right then belonged to the plaintiff, which right plaintiff in nowise alienated, transferred or conveyed away; but that the defendant afterwards lawfully and peaceably obtained possession of the land, and long after the termination of his right of possession thereof, has held and detained, and now holds the same unlawfully, and by force after demand," will not be held bad on motion in arrest of judgment, though it might be so held on demurrer. *Keller vs. Henry*, 575.
2. The latter clause of the third section of said act was intended to provide for a class of cases where the defendant does not enter by force and violence, and yet does not enter by any agreement with the owner of the land; as where he enters peaceably upon premises which are at the time vacant, without the consent of the owner if absent, or without his objection if present; and holds the same unlawfully and by force, after demand made therefor in writing. *Ib.*
3. In construing the several sections of the said act, so that they may be in harmony with each other, the court considers that the phrase "lawfully and peaceably obtain possession," was not intended to apply alone to cases where the defendant entered under a lease from the owner, or by his express consent; but also

FORCIBLE ENTRY AND DETAINER—CONTINUED.

to cases where the entry is such as to negative the idea of a forcible intrusion in the first instance, though not by express consent. *Ib.*

4. Where the sheriff's return of a writ of forcible detainer shows a personal service on the defendant, in substantial compliance with the statute, his return is not invalid because he fails to return a bond as required in such cases, although such failure may subject him to liability as an officer. *Ib.*
5. In an action of this kind the jury cannot assess damages in favor of the plaintiff. The only judgment which the plaintiff can have, is for costs. (*Gould's Dig., ch.* 72, *sec.* 16.) *Ib.*

GIFTS.

See *Deeds and Conveyances* 1, 2.

GUARANTY.

See *Bills and Notes*, 5, 6, 7, 8.

HIGHWAY.

1. The interest which the public acquires by the dedication of land for a highway or street, is merely an easement or right of passage over the soil, the original owner still retaining the fee, together with all rights of property not inconsistent with the public use. *Taylor et al. vs. Armstrong et al.*, 102.
2. After a person has dedicated land to public use, he has no right to erect a building or other obstruction thereon, or to authorize another to do so. *Ib.*
3. Any person erecting such obstruction upon an easement granted to the public is a trespasser; and the obstruction may be removed at the instance of the public as a nuisance, by indictment or by bill in chancery. *Ib.*
4. The owner of the fee may maintain ejectment against one who obstructs a highway, and recover the land subject to the public easement. *Ib.*
5. The presumption is that the owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. *Ib.*
6. And a grant of land bounded on a public highway carries with it the fee to the centre of the road as part and parcel of the grant. *Ib.*
7. But if a highway be laid off entirely upon the land of a person, running along the margin of his tract, and he afterwards conveys the land, the fee in the whole of the soil of the highway vests in his grantee. *Ib.*
8. The same rules are applicable to streets in towns and cities. *Ib.*

HOMESTEAD.

1. An alien domiciled in this state, being a householder or head of a family, is entitled to the exemption of his homestead from sale on execution. *McKenzie vs. Murphy*, 155.
2. The word citizen is often used as meaning only an inhabitant, a resident of a town, state or county, without any implication of political or civil privileges: and such is the meaning of the word in the homestead law. *Ib.*

HUSBAND AND WIFE.

1. The wife has no legal authority to dispose of the husband's property by sale or otherwise, and to bind him by a contract without a power from him, or his subsequent approval or ratification. *Dunnahoe vs. Williams*, 264.

HYPOTHECATION.

See *Chancery*, 1.

IMPROVEMENTS.

1. In a suit for title to land, the party in possession failing to make good his title cannot be allowed for improvements more than the value of the rents. *Marlow vs. Adams*, 109.

INCUMBRANCE.

See *Chancery*, 51.

INDICTMENT.

See *Criminal Law*, 5, 6, 12, 21.

INDORSEMENT.

See *Bills and Notes.*

INFANTS.

See *Chancery*, 15, 16, 44, 45; *Evidence*, 4.

INSTRUCTIONS.

1. Instructions should never be given unless there is evidence to support them—nor upon trifling and indefinite statements irrelevant to the question at issue. *Dickerson vs. Johnson*, 251.

INSTRUCTIONS—CONTINUED.

2. Though one of several instructions be too limited, yet if taken in connection with the others they express the law, the party is not injured. *Dunnahoe vs. Williams*, 264.
3. It is error to assume, in the instructions to the jury, the existence of the facts in issue. (See 14 *Ark.*, 29, 550; 16 *id.* 593.) *Montgomery ad. vs. Erwin*, 540.
4. Where the infancy of a party is pleaded to avoid his act, and the infancy is denied and his affirmance of the act after arriving at mature age is averred, the court, in instructing the jury that the act was binding upon the party, should add, if the jury find from the evidence that he was of age when the act was done, or affirmed it after he became of age. *Ib.*

JOINT ACTION.

See *Bills and Notes*, 9, 10.

JUDGMENTS.

1. The judgments of a circuit court held, at a time other than that prescribed by law, are void, as held in *Brumley vs. The State*, (20 *Ark.*, 77.) *Osborn ex parte*, 479.

JUDICIAL ACTS.

See *Constitutional Law*, 10.

JUDICIAL SALE.

See *Collectors*, 13.

JURISDICTION.

1. Several notes or obligations, each within the jurisdiction of a justice of the peace, are several demands, and cannot be united so as to confer jurisdiction upon the circuit court, as held in *Berry vs. Linton*, 1 *Ark.*, 252; but if the indebtedness is an open account, though composed of several items, of different dates, and arising out of different dealings and transactions between the parties, the aggregate amount constitutes the demand, and if that is within the jurisdiction of the circuit court, the items cannot be separated so as to bring several suits before a justice of the peace. *Gregory vs. Williams*, 177.
2. It may be more regular, where a demand above the jurisdiction of a justice, has been divided and several suits brought, to consolidate the suits, on appeal, in the circuit court, and dismiss for want of jurisdiction; but if the cases be severally dismissed, such practice is not cause of error. *Ib.*
3. Where a justice of the peace has no jurisdiction, none is conferred on the circuit

JURISDICTION—CONTINUED.

court by appeal; and it is error in dismissing the case, to render judgment against the appellant for costs. *Ib.*

4. This court has no jurisdiction by appeal, unless the prescribed affidavit is filed, or waived of record. *Crow ad. vs. Hardage*, 282.

See, also, *Chancery*, 48, 49; *Marriage and Divorce*, 1, 2.

JURISDICTION OF PROBATE COURT.

See *Administration*, 6.

JURORS AND JURY.

See *Criminal Law*, 6, 7, 9.

JUSTICES OF THE PEACE.

1. Judgment by default having been rendered by a justice of the peace, and it appearing that on the day of trial, the plaintiffs as well as the defendant, failed to appear: *Held*, that the plaintiffs should have been non-suited; and that this error might have been corrected by appeal. *Shaver and Son vs. Shell*, 122.
2. But the justice having jurisdiction of the subject matter and of the person of the defendant, the judgment could not be regarded as null when presented collaterally in a case of garnishment founded thereupon. (*Hill vs. Steele*, 17 *Ark.*, 440; *Alston ex parte, ib.* 580.) *Ib.*

See, also, *Jurisdiction.*

JUSTIFICATION.

See *Officers and Soldiers*, 1, 3; *Slander*, 8.

LAND AGENT.

See *Swamp Lands.*

LANDLORD AND TENANT.

1. A landlord, under sec. 14, ch. 100, *Dig., p.* 685, has a lien upon the crop grown upon his land, which he may enforce in the mode pointed out by the statute in preference to all other claims against the tenant; but he has no title to such crop or any part of it by virtue of such lien. *Upham vs. Dodd*, 545.

LIEN.

See *Landlord and Tenant.*

LIMITATION.

1. The bill in this case charges that the defendant reduced the plaintiff to slavery, and that she was compelled to bring a suit whereby, after a protracted litigation, she regained her freedom; that when the defendant reduced the plaintiff to servitude he took from her certain personal property; that she brought an action of trover therefor, soon after the judgment was rendered whereby she was finally liberated from slavery: that the defendant offers to plead the statute of limitation at law, from which she prays that he may be injoined: *Held*, that it appearing that the plaintiff recovered her liberty on the ground that she belonged to the white race, the claim of the defendant to hold her in servitude is no excuse to the plaintiff for not bringing her suit at law within the period of limitation. *Daniel vs. Roper*, 131.

2. The judgment in the suit for freedom having decided the fact that the plaintiff is a white woman, it follows that she was never under any disability to sue by reason of the claim preferred by defendant that she was his slave. *Ib.*

3. Neither her bondage before the institution of the action of trover, nor the restraint by being hired out under the direction of the court pending her suit for freedom, prevented her from bringing her actiou of trover for damages sustained by reason of the unlawful conversion of her property. *Ib.*

4. Nor is the alleged fact that she was advised by her counsel not to bring the action of trover until her suit for freedom should be decided, such an excuse for her failure to sue as will displace the statute bar. *Ib.*

5. When the maker of a note affixes to it a seal after the statute bar has matured, no question as to validity of the act arises on the plea of the statute of limitations—a special plea of *non est factum* would have been the proper defence. *Hanger & Ayliff vs. Dodge*, 205.

6. When one of several makers of a promissory note affixes a seal to it, with the assent of the payee, such instrument of writing will, on the plea of limitation, be held to be his deed, and will be governed by the statute applicable to sealed instruments; but if such sealing was done without any authority on the part of the other maker and he neither recognizes nor affirms such act, he will not be bound by it. *Ib.*

7. Where the transcript of a judgment of a justice of the peace is filed in the circuit court and entered in the judgment docket, the statute of limitations commences to run from the time of such filing and entry, and not from the date of the justice's judgment. *Burr vs Engles*, 283.

8. More than a year having elapsed after the dismissal of one suit, before the beginning of another by the same parties, the former suit cannot be urged to

LIMITATION—CONTINUED.

remove the bar of the statute of limitations. *Trapnall et al. vs. Burton et al.*, 371.

9. When a new statute of limitations is enacted, it will be taken to be prospective in its operation, and to apply not to causes of action which had occurred at its passage, but to those occurring thereafter, in the absence of language in the statute compelling a contrary construction; and all causes of action existing at the time of the new act are governed as to the length of time necessary to constitute the bar, by the old law and not by the new. *Couch vs. McKee*, 6 *Ark.*, 484, *and other cases cited. Ib.*

10. When the complainant's remedy is barred by limitation on the face of the bill, and he fails to allege anything in avoidance of the defence, and the answer contains a demurrer, the objection is fatal at the hearing. *Sullivan vs. Hadley*, 15 *Ark.*, 129. *Ib.*

11. The old statute of limitations (*Eng. Dig.*, 695, *sec.* 14,) provides that no action for the recovery or possession of lands should be maintained, unless it appeared that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of them within ten years before the commencement of such suit. *Ib.*

12. To bar the plaintiff's claim *actual* possession must be shown by the defendant; lapse of time and actual possession must unite. *Ib.*

13. The possession must be so open and exclusive as to amount to a disseisin, or an ouster or termination of the plaintiff's possession. *Ib.*

14. The acts of the defendant must be plain and unmistakable and such as prove his intention to use the land as owner. *Ib.*

15. Where A buys B's land under execution, he is barred if he does not gain actual possession within ten years. *Ib.*

16. To recover the possession of land, under our statute of ten years, the plaintiff must have had actual or constructive possession within that time. If the execution purchaser does not obtain actual possession, and the defendant in the execution continues in it without agreement to hold under him, the purchaser has no constructive possession. *Ib.*

17. Constructive possession by the plaintiff is sufficient; and if he proves that, then the defendant must prove by sufficient acts that more than ten years before suit he took actual possession and continued it, adversely, so as to put an end to the constructive possession; and that the latter has not been renewed. *Ib.*

18. Where the defendant in execution conveyed the lands in controversy with covenants which guaranteed, not only the absolute title in fee, but the immediate, continued and exclusive possession against all claims of all persons whatever, this was the clearest possible declaration that he claimed the land, or all the interest he ever had in it, as his own. *Ib.*

19. If this conveyance and these covenants did not fix the character of his possession as adverse from the beginning, they made it, at least, adverse from that time forward. *Ib.*

LIMITATION—CONTINUED.

20. Where no exception is made in a statute of limitations, the courts can make none, whatever may be the hardship in individual cases; and so, the closing of the courts in time of civil war, not being a case excepted from the operation of the act of limitations, that fact is no answer to the plea. *Bennett ad. vs. Worthington*, 487.

21. By virtue of an act of the legislature, approved December 1st, 1862, suspending all acts of limitation and non-claim from the date of its approval, the statute of limitation was suspended until the 16th of March, 1864, when that act was repealed by the adoption of the present constitution—so, the intervening time is not to be computed in determining the period of limitation, when properly pleaded. *Ib.*

22. The decree of confirmation of a tax title can have no effect to preclude a party in possession of the land from the benefit arising from lapse of time prior to the rendition of the decree—the proceeding for confirmation being in nowise a possessory proceeding; and held in this case: that as the full period of limitation had elapsed, whether the cause of action accrued on the day of the tax sale, at the expiration of the time allowed for redemption, or at the date of the collector's deed, it was immaterial to inquire on which day the purchaser's right to sue commenced. *Buckingham vs. Hallett et al.*, 519.

23. There can be no suspension of the statute of limitations under the 3d and 7th sections of the act approved 31st May, 1864, (*Acts of* 1864–5, *p*, 45,) if the act is constitutional, unless it is shown that the party belonged to that class of persons as to whom the collection of debts was suspended. *Denton vs. Brownlee, Homer & Co.*, 556.

The case of *Bennett ad. vs. Worthington, ante,* approved.

24. The provision of the 32d section of the limitation act (*Gould's Dig., ch.*, 106,) does not give the plaintiff the benefit of the exception where the improper act of the defendant is done after the cause of action has accrued—the disability of the plaintiff to sue in consequence of the act of the defendant, must exist at the time the cause of action accrues. *Ib.*

See, also, *Seduction* 3; *Administration* 14.

MARRIAGE AND DIVORCE.

1. Where by statute jurisdiction over particular subjects of equity is conferred, or given to common law courts, the entire body of law administered in the equity courts of this country attaches; but the subject of divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction; and in such cases the courts have no other powers than those expressly conferred by the statute. *Bowman vs. Worthington*, 522.

2. Alimony being an incident to a divorce, the courts of this state, under our statute, can only grant it in connection with the decree of divorce; and have no juris-

MARRIAGE AND DIVORCE—CONTINUED.

diction to entertain an application for alimony where the decree has been granted by another tribunal. *Ib.*

3. Where a divorced wife marries again she has no right to alimony or support from the first husband, either during the life, or after the death of the second husband. *Ib.*

MECHANIC'S LIEN.

1. Where there is no registered contract, the mechanic's lien commences at the time that he files his sworn account in the clerk's office, and causes an abstract thereof to be entered in the judgment docket. (*Gould's Dig., ch.* 112, *secs.* 4–26: *Hicks vs. Branton*, 21 *Ark.*, 188.) *Loring et al. vs. Flora*, 151.
2. If before the lien is thus fixed a third person obtains a valid title to the property, by some legal mode of conveyance, and the mechanic has constructive notice thereof by registration of the conveyance, or actual notice, his lien is defeated, *Ib.*
3. But the pleas failing to state that the defendant had acquired title by any deed or conveyance whatever, they were bad on demurrer. *Ib.*
4. A mechanic's lien is only allowed where the demand exceeds one hundred dollars,
5. A plea alleging that the plaintiff's demand did not exceed one hundred dollars need not be sworn to. *Ib.*
6. And in any case the defect that a plea is not sworn to, should be taken advantage of by motion to strike out, and not by demurrer. *Ib.*
7. One of the defendants in a proceeding to foreclose a mechanic's lien, having been made a party merely because he was alleged to be in possession, claiming by purchase, it was error to enter judgment against him personally for the debt. *Ib.*

MILITARY SEIZURES.

1. Where a citizen, during the late civil war, resided within the lines of the confederate army, he might, *prima facie*, be considered an enemy to the United States, and his property enemy's property, and liable to seizure: and so if the lines be only temporarily extended over him; but if living within the permanently established lines, never thereafter interrupted, he was entitled to the protection of the law, and his property not subject to seizure except in case of military necessity. *Taylor vs. Jenkins*, 337.
2. The mere seizure of the citizen's property by unauthorized military power, and placing it among other property of the United States, without other act of condemnation, or appropriation to military purposes, does not divest the owner of his title. *Ib.*

MISJOINDER OF ACTION.

See *Action*, 3.

NEW TRIAL.

1. A new trial will not be granted on the ground of surprise, unless the party brings himself within the rule established for granting a new trial in such case, and unless the evidence to be produced will avail him on a new trial. *Dunnahoe vs. Williams*, 260.

OFFICERS AND SOLDIERS.

1. It is not necessary for a soldier, justifying, in an action of tresspass, under the commands of his superior officer, to produce the commission of the officer, or account for its absence; it is sufficient to prove that the officer was in command, assumed to act, and was recognized as such. *Hardage vs. Coffman*, 256.
2. Soldiers may justify the taking of property under the orders of their commanding officers; but they, having a discretion, are liable for taking the citizen's property without sufficient warrant. *Taylor vs. Jenkins*, 337.
3. Obedience is the first duty of a soldier; he has no right to require the reasons of orders, or consider the consequences of his acts under them; and may prove that he acted under orders in justification, when sued. But officers have a discretion in effecting that which they are required to perform, and will be held to a more strict account for acts done by them. *Trammel et al. vs. Basset*, 499.

PARDONS.

1. The pardon of the President of the United States relieves the person pardoned from all penalties attached to the specified act, and restores him to his former rights and privileges. *Rison et al. vs. Farr*, 161.

PARTNERSHIP.

1. Though one partner cannot sue his co-partner, at law, in actions *ex contractu*, for matters connected with the partnership, they stand in the same relation to each other as other persons as to all contracts or transactions not connected with the partnership. *Huyck vs, Meador*, 191.

PAWNS AND PLEDGES.

See *Chancery*, 1.

PERFORMANCE OF CONTRACTS.

See *Chancery*, 2.

PERJURY.

See *Criminal Law*, 13, 14; *Slander*.

PETITION IN DEBT.

1. If a petition in debt sets forth two notes of the defendant, each note is, in effect, a separate count for a distinct and independent cause of action; and on issue to a plea answering both counts, the finding may be for the defendant on one count and for the plaintiff on the other, according to the proof. *Hanger & Ayliff vs. Dodge*, 205.
2. Where the plaintiff, in a suit by petition in debt pursues the form prescribed by the statute, and sets out a sealed obligation purporting to be executed by the defendant by his agent, it is sufficient on demurrer without other allegation of the authority of the agent. *Hanger & Ashley vs. Dodge*, 208.
3. The remedy by petition in debt will not lie against the maker and indorser of a note—the contract of the indorser, not being for the direct and absolute payment of money but a conditional one, his liability must be shown by averment, and the statute admits of no averments other than those, in substance, which it prescribes. *Thompson et al. vs. Shreve et. al.*, 261.
4. The suit by petition in debt must be brought by the parties to whom the note was given, not by one of several payees, unless there be an assignment, which must be averred. *Yell vs. Snow*, 554.

PLEAS AND PLEADING.

1. The case of *Matlock vs. Purefoy*, 18 *Ark.*, 492, that the omission of the words "for value received," in describing the note, in the declaration, though contained in the note sued on, is not a variance for which the judgment will be reversed, approved. *Hawkins vs. Dean*, 189.
2. It is not a material variance in declaring upon a note, in which no day of payment is specified, to describe it as payable on request: particularly where the pleader does not prefer to set it out *in hæc verba*. *Dickens vs. Howell*, 230.
3. An informal and defective declaration combining several forms of action, should be met by demurrer, not by plea to the writ. *Jones vs. Johnson*, 260.
4. In a suit against the assignor of a writing obligatory, although the plaintiff must prove that demand was made of the obligor within a reasonable time, and notice of non-payment given, he is not confined to the precise dates alleged in the declaration; and so, the court erred in sustaining a demurrer to the declaration because, the allegations of demand and notice did not show due diligence. *Rozelle vs. Pennington & Jay*, 277.

PLEAS AND PLEADING—CONTINUED.

5. To consider mere *memoranda* indorsed on, or written at the foot of the declaration as a part of it, would be to sanction a practice at variance with the established rules of pleading. *Campbell vs. Garrett & Scudder*, 279.
6. The refusal of the circuit court to permit a bond for costs to be filed by a non-resident plaintiff, after plea, is within the sound discretion of the circuit court, which this court will not control; so, also, the refusal to permit an additional replication after issue to the plea. *Ib.*
7. The declaration, in a suit upon a county treasurer's bond, avering that a specified sum, as appeared by the books, remained in the treasurer's hands; that he had been summoned by the county court to settle his accounts but had failed to do so; that the court struck the balance due by him, and that he is justly indebted to the county as treasurer in such sum, which he had neglected and refused to pay, held sufficient to charge the sureties in the bond, without the averment of a formal judgment being rendered by the county court. *State use etc. vs. Croft*, 550.
8. The issue to a replication setting up matter insufficient to avoid a good plea, is immaterial, and the judgment rendered thereon erroneous. *Denton vs. Brownlee Homer & Co.*, 556.
9. According to the forms and rules of pleading a plea in abatement is defective which does not pray for a particular and proper judgment; and in such case the court will not give the proper judgment on the whole record as on pleas in bar, (18 *Ark.*, 359.) *Wade vs. Bridges, ad.*, 569.
10. A plea which sets up a defective defence, or a defence defectively stated, must be met by demurrer, not by motion to strike out. (6 *Ark.*, 196; 16 *id*, 669.) *Ib.*
11. It is error to adjudicate and render judgment in favor of a plea to which there is no issue. *Ib.*

See, also, *Slander; Contracts and Agreements*, 3, 5; *Mechanics' Lien*, 5, 6; *Petition in Debt.*

POSSESSION.

See *Limitation*, 11 *to* 17.

PRACTICE IN CIRCUIT COURT.

1. It is error to entertain a motion to strike a case from the docket, setting up matter of justification in an action of trespass, which can be availed of, if at all, only by special plea. *Salliers vs. Bevins*, 233.
2. Under *sec.* 113, *ch.* 133, *Gould's Dig.*, the court has a discretion in permitting amendments, before final judgment, and without costs; and that discretion was properly exercised where the damages laid in the declaration, from long delay, were not enough. *Brown vs. Cribbs*, 248.

PRACTICE IN CIRCUIT COURT—CONTINUED.

3. It is a matter within the discretion of the court to permit additional pleas to be filed after issue joined; and if pleas are filed out of time, according to the rules and practice of the court, it is within the proper exercise of the power of the court to order them stricken from the files. *Trammell et al. vs. Bassett*, 499.
4. The reading of the preamble to the constitution to the jury, by the court, or other matter not pertinent or applicable to the issues in the case, is objectionable and should not be encouraged. *Ib.*
5. After verdict and judgment for the plaintiff, the judgment will not be arrested unless the record clearly shows a defective cause of action. Every intendment is to be made in favor of the declaration, and whatever is implied, or is inferable from the state of the pleading will be presumed in favor of the pleading and judgment. *Keller vs. Henry*, 575.
6. Where debt was brought on a written instrument, from which the plaintiff's demand might be ascertained, and the defendant pleaded in abatement; and issue was made up on his plea, and submitted to a jury, and a part of defendant's evidence was excluded as incompetent, whereupon he declined to proceed further in the case, and the plaintiff read the instrument sued on to the jury, and verdict was rendered in his favor: *Held*, that the proceedings were irregular; that the court, after seeing that the issue on the plea in abatement was properly disposed of, should have proceeded under the statute, (*Dig.*, *chap.* 133, *sec.* 81,) to render judgment for the debt, damages and costs; the amount of the demand being evident from inspection of the instrument sued on: but that the judgment being substantially the same as it would have been, had the proceedings been regular, will not be reversed. *Wilson vs. Brownlee, Homer & Co.*, 586.
7. Where the plaintiff declines to reply to pleas in bar, or to proceed any further in the case, the suit may be dismissed. *Wilde & Co. vs. Hart.*
8. A motion for a continuance is addressed to the sound discretion of the court; and this court will not attempt to control that discretion unless it has been grossly abused. *Ib.*
9. Where the plaintiff moves for a continuance, after pleas in bar have been filed and his motion is overruled, if he wishes to take the opinion of this court upon that point, he should take issue to the pleas, go to trial, and appeal on the final decision. *Ib.*
10. Where he declines to take issue to such pleas, and the cause is dismissed, the judgment, if not rendered at his instance, is superinduced by his acts, and no appeal will lie. *Ib.*
11. Where the plaintiff brings an ordinary action of debt by petition, and has a writ of summons issued against the three defendants, and the writ is returned without service on two of the defendants, he cannot afterwards file an affidavit and bond in the same suit, and sue out an attachment against the two defendants who have not been served. *McDonald vs. Smith*, 614.
12. And where, in such case, the two defendants against whom the attachment was

PRACTICE IN CIRCUIT COURT—CONTINUED.

issued, pleaded in abatement of the writ and declaration the above irregularities, and were discharged, the effect of this judgment was to quash, not only the writ of attachment, but the entire proceedings. (*Edmondson vs. Carnall*, 17 *Ark.*, 284,) and all the defendants should have been discharged. *Ib.*

See, also, *Replevin*, 3; *Attachment*, 2; *Contracts and Agreements*, 3, 5; *Sureties*, 1; *Pleas and Pleading*, 6; *Stamps*, 3; *Evidence*, 14.

PRACTICE IN SUPREME COURT.

1. Where a party has recovered a judgment and received the amount of it from the defendant, he will not be permitted to reverse the judgment on error. *Watkins vs. Martin*, 14.
2. It is the settled practice in this court not to disturb the decree of the court below for errors committed against a party who does not appeal from the decree. (14 *Ark.*, 125; 20, *ib.*, 526.) *Clark vs. Barnett*, 30.
3. The verdict of a jury, when not totally unsupported by the evidence, will not be disturbed by this court, (*Lindsay vs. Wayland*, 17 *Ark.*, 385,) though the weight of evidence be against it. *State vs. Crytes*, 183.
4. Where there does not appear to be manifest error in the circuit court in refusing bail in a criminal case, this court will not grant it. *Osborn ex parte*, 185.
5. According to repeated decisions of this court, a party failing to make an erroneous instruction of the court a ground of his motion for a new trial, will be considered as having waived or abandoned it.

Where the verdict of the jury is without evidence, or directly contrary to the evidence, it will be set aside and a new trial granted. *McCarroll et al. ads. vs. Stafford*, 224.

6. Where there is no total lack of evidence, the verdict, though apparently against the weight of evidence, will not for that reason be set aside. *Dickerson vs. Johnson*, 251.
7. Where testimony is offered, apparently irrelevant to the issue, it may be excluded, unless some proper explanation, or an offer to accompany it with other evidence which would make it applicable to the issue, be made; but no explanation of testimony is required, where its object is apparent from the pleadings. *Hardage vs. Coffman*, 256.
8. Where a case is submitted to a jury, without objection upon no issue, or an informal issue—as where the defendant pleads a good plea in bar, and the plaintiff "puts himself upon the country" instead of answering the plea—and the parties have had a fair trial with the benefit of his evidence applicable to his plea, and the finding is consistent with right and justice, this court will not disturb the judgment, but under the statute consider the pleadings as amended. *Grace vs. Dorris*, 326.

PRACTICE IN SUPREME COURT—CONTINUED.

9. Where the circuit court has ordered an execution, in an attachment case, this court will presume that the law providing that a bond be filed by the plaintiff has been complied with. *Rust vs. Rieves*, 359.
10. Where any of the parties have died after the cause has been submitted in this court, the court will order its decree to relate to the day of submission. *Trapnall et al. vs. Burton, et al.* 371.
11. Where the bill of exceptions states facts different from the record this court must be governed by the record. (17, *Ark.*, 532.) *Trammell et al. vs. Bassett*, 499.
12. Where issues were made up in the probate court and submitted to the court and verdict for the defendant, and the judgment of the probate court was affirmed in the circuit court, and it appears that the judgment of the probate court was fully warranted by the evidence, the case will not be reversed. *Frank vs. Goodwin*, 584.
13. A judgment will not be reversed and a repleader awarded in order to permit the party first in fault to take advantage of the immateriality of an issue, superinduced by his own blunder. *Ib.*
14. Where the evidence is not brought to the knowledge of this court, the court will presume in favor of the verdict, that there was testimony to authorize it. *Knight vs. Sharp*, 602.
15. In such case every presumption is to be indulged in favor of the decision of the circuit court, and of its instructions to the jury. *Ib.*
16. Where there is no exception to the decision of the court overruling a motion for new trial, the party making the motion will be regarded as acquiescing in the decision. *Hicks vs. Wilson*, 628.

See, also, *Chancery*, 41—2—3; *Evidence*, 15.

PRE-EMPTION.

See *Swamp Lands*, 1, 2, 3, 4.

PUBLIC OFFICERS.

See *Swamp Lands*, 11.

RAIL ROADS.

See *Corporation.*

RECOGNIZANCE.

See *Sureties.*

RECORD.

See *Evidence*, 7.

RELEASE.

See *Trespass*, 5.

REPLEVIN.

1. Replevin does not lie for property in the custody of the law, (*Goodrich vs. Fritz*, 4 *Ark.*, 525; *Spring vs. Bourland*, 6 *Eng.*, 658;) nor can cross-replevin be maintained, (*Gould's Dig.*, *ch.* 145, *sec.* 2;) but where property has been replevied and delivered to the plaintiff, a stranger may well issue his writ of replevin for the same property without waiting for the determination of the first suit, to which he is not a party. *Hagan vs. Deuell & Vaughan*, 216.
2. The remedy provided by the statute (*Gould's Dig.*, *ch.* 145, *sec.* 17 *etc.*) for trial of the right of property when it is claimed by any person other than the defendant in replevin, is not exclusive of any other remedies the party may have. *Ib.*
3. A motion to quash a writ of replevin, and particularly before the return day, on the ground that the property was *in custodia legis*, is not the proper practice. Such defence should be by plea in abatement, or in bar. *Ib.*
4. If the use of the plaintiff's property, while in possession of the defendant, is worth any thing, the jury may estimate its value by way of damages to the plaintiff in replevin. *Dunnahoe vs. Williams*, 264.
5. A second suit in replevin, brought by the defendant in the first jointly with his partner, against the bailees of the plaintiff in the first, held to be cross-replevin. *Beers & Co. vs. Wuerpul & Co.*, 272.
6. The defendant in a cross-replevin may plead in abatement or in bar, the pendency of the first suit; and on determination of the plea in his favor, is entitled to judgment awarding a return of the property. *Ib.*

RIGHT OF PROPERTY.

See *Replevin*, 2.

SALES.

See *Contracts and Agreements.*

SATISFACTION OF JUDGMENTS.

See *Practice in Supreme Court*, 1.

SEDUCTION.

1. The right of a parent to maintain an action for the seduction of his daughter, being founded upon loss of service and consequent expense, the action can be maintained only where the daughter, at the time of seduction, is under age and bears to the parent the relation of servant; or, if of age, resides in the parent's family, doing acts of service: and also, where loss of service is sustained or expense incurred by the parent. *Patterson vs. Thompson*, 55.
2. In this case, the daughter being over twenty-one years of age, and not a member of her father's family at the time of seduction, and neither loss of service nor expense proven: *Held*, that he could not maintain the action. *Ib.*
3. The period of limitation in actions for seduction, is one year from the time the cause of action accrued. *Ib.*

Quere. Will a verdict, in a seduction case, be set aside for excessive damages? or should punishment of the defendant enter into the finding?

SHERIFF.

See *Collectors.*

SLANDER.

1. Where the defendant charged the plaintiff with having "sworn a lie," these words are not actionable in themselves, and do not, *per se*, impute a charge of perjury. *Knight vs. Sharp*, 602.
2. To make them actionable it is necessary to state in the introductory part of the declaration, the special circumstances in reference to which they were spoken, and in connection with which they impute the crime of perjury. *Ib.*
3. In framing a second or subsequent count in slander, for the same cause of action, unnecessary repetition of the same matter should be avoided; and it is sufficient to refer concisely to the inducement in the first count. But unless such second or subsequent count expressly refers to the first count, no defect therein will be aided by the precedent count. *Ib.*
4. A distinct cause of action in this case, consists not alone in the words spoken; but it is also necessary to connect them with some judicial or other legal proceeding, in which a valid oath was administered to the plaintiff; which, if false, would subject him to punishment for perjury. *Ib.*
5. Where the declaration alleges that the defendant said, "he" (meaning the plaintiff,) "swore a lie in that case," (meaning the said trial at law, and meaning that the said plaintiff had been and was guilty of perjury in giving false evidence upon his oath in said trial at law, before said justice of the peace,) this is no averment that there was a trial had before a justice of the peace, or that the plaintiff had been sworn as a witness on such trial. *Ib.*
6. It is not the office of an innuendo to supply the place of an averment: but it is simply explanatory of an averment previously made. *Ib.*

SLANDER—CONTINUED.

7. The defects in the count in this case, being in the cause of action, and not in the manner of stating it, are not cured by verdict. *Ib.*
8. But where the defendant filed a special plea of justification, in which he sets forth all the material facts omitted in the declaration, and issue was made up, the defects in the declaration were supplied, and verdict for the plaintiff will not be set aside. *Ib.*

STAMPS.

1. The act of congress of the 3d of March, 1865, does not repeal the act of the 30th of June, 1864, so as to take away the right of the plaintiff, at any time before offering in evidence an unstamped writing obligatory sued on, to affix a revenue stamp to it in the presence of the court, where such stamp has not been omitted with intent to evade the provisions of the act. *Grace vs. Dorris*, 326.
2. A writing obligatory when stamped, as prescribed by the act of congress, in the presence of the court, is valid from its date. *Ib.*
3. A demurrer to a declaration by an administrator, because the letters were unstamped, held bad: it is sufficient to stamp either the letters or the administration bond, if a stamp be required; and the objection, if good, should be made by plea. *Miller ad. vs. Henderson*, 344.

STATUTES, CONSTRUCTION OF.

1. Unless the terms of a statute are entirely free from ambiguity, regard must be had to its known object, to the mischief intended to be provided against, to its general spirit and intent. *McKenzie vs. Murphy*, 155.
2. The correct rule of construction of statutes is, that where the will of the legislature is clearly expressed, the courts should adhere to the literal expression of the enactment, without regard to consequences; and every construction derived from a consideration of its reason and spirit should be discarded. *Bennett ad. vs. Worthington*, 487.

STATUTES, REPEAL OF.

1. The ordinance of the convention of 1864, which ordained that all laws in force in this state on the 4th of March, 1861, are still in force, etc., necessarily repealed, by implication, the act approved November 18th, 1861, which provides for holding the terms of the circuit court of Pulaski county; and revived the act of 21st January, 1861. *Osborn, ex parte*, 479.
2. The rule of repeal of statutes by implication is received with disfavor; but where a statute is revived, which is totally inconsistent with and repugnant to a later statute upon the same subject, as where effect cannot be given to both, the rule must apply. *Ib.*

STREETS.

See *Highways.*

SURETIES.

1. On appeal from the judgment of a justice, the surety is not responsible beyond the penalty of the recognizance, If the finding in the circuit court exceed the penalty, the appellee may elect to release the excess and take judgment against both principal and surety, or take judgment against the principal alone for the amount found, and pursue his remedy on the recognizance against the surety. *Allen & Neely vs. Grider*, 271.

See, also, *Bills and Notes*, 4.

SURPRISE.

See *New Trial.*

SWAMP LANDS.

1. Where there are two pre-emption claimants of the same tract of swamp land, and one of them is allowed a pre-emption right by the land agent and obtains the legal title, no fraudulent or illegal conduct on his part in obtaining the title can prejudice the other unless the right of the latter was prior in time and superior in equity; and so, in deciding upon the rights of parties in such case, it is the province of the court simply to determine whether, on account of fraud in the one obtaining the legal title perpetrated against the other, the latter was prevented from obtaining the title, which was equitably due to him, without regard to the soundness of the pre-emption claim of the successful party. *McIvor vs. Williams*, 33.
2. To entitle a party to a pre-emption of public land, his improvement must exist at the time of the application, under the law, to make the entry—if an improvement once made be destroyed, it cannot be considered as such. *Ib.*
3. It would seem to be a perversion of terms to call land improved so as to entitle a party to a pre-emption, where the whole existing improvement was an acre of ground deadened some four years and so grown up with vines aud bushes that it would be as much trouble to prepare it for cultivation as if it were entirely wild land. *Ib.*
4. Where the owner of land, in making a deadening upon it, to increase its market value and throw it sooner into market, extends the deadening over his line upon the public land, without any design of settlement upon or improvement of it, especially if the improvement is of little amount and value, he is not entitled, under the act of 16th January, 1855, to be a preferred purchaser of the land. *Wright vs. Green*, 38.

SWAMP LANDS—CONTINUED.

5. The court can exercise no jurisdiction in review of the acts of swamp land agents in pre-emption cases: but if a person makes use of an official act to perpetrate a fraud upon another, he shall be deprived of any benefit that has thereby accrued to him to another's prejudice. *Paty vs Harrell*, 40.

6. In order to make an improvement on the lands of the state available, there must have been no prior improvement thereupon. *Schaer vs. Glisten*, 137.

7. It does not belong to the plaintiff to object to the smallness of defendant's improvement when his own does not largely partake of the qualities of a substantial improvement. *Ib.*

8. To disturb a legal title acquired under our swamp land laws, the plaintiff must show a prior right and a superior equity. (*McIvor vs. Williams, and Wright vs. Green, ante,*) *Ib.*

9. If the adverse claims of persons having improvements on the same land were not known to each other, the success of one, whether the most or the least deserving, did not clothe it with a trust for the benefit of the losing claim. (*Paty vs. Harrel*, 23 *Ark.*) *Ib.*

10. The proper construction of *sec.* 10, *art.* 6, *ch.* 101, *Gould's Dig.*, is that as to lands which were subject to entry, at the date of the act, and which the state desired to put upon the market at an early period, persons were allowed to make improvements upon them, and file their declarations and supporting affidavits in the office of the land agent, at any time within sixty days after the passage of the act; and as to the lands unconfirmed at the date of the act, persons were allowed to make improvements upon them, and file their declarations and affidavits at any time within sixty days after such lands were advertised for sale by the land agent. *Rice vs. Harrell*, 402.

11. A state land agent being a public officer acting under his official oath, in the discharge of his official duties, is presumed to have acted in conformity with the law, in the absence of any showing to the contrary. *Ib.*

12. The defendant having filed in the office of the land agent his declaration supported by affidavits, claiming a pre-emption to certain lands not now in controversy, his attorney afterwards, by permission of the land agent, erased the description of the lands in the declaration and affidavits, and inserted in lieu thereof the land in controversy: *Held*, that the affidavits in their altered state could have no legal effect, not having been sworn to; and that the sale made upon them by the land agent was unauthorized by law. *Ib.*

13. The making and filing the proper declaration and affidavits in the office of the land agent within the time limited are legal prerequisites to a valid sale of the land by pre-emption. *Ib.*

14. By the words of the act of congress of September 28, 1850, all the lands in the state which were swamp and overflowed, and thereby unfit for cultivation, immediately passed to and vested in the state. *Branch vs. Mitchell*, 431.

15. The provisions of the 5th section of the act of January 11, 1857, must be con-

SWAMP LANDS—CONTINUED.

strued to be a consent on the part of the state to receive from the United States the purchase money paid to the latter for only such of the swamp lands as the state could rightfully relinquish; and not for any which any person might obtain a right to as against the state before the purchase of the same by another from the United States. *Ib.*

16. Under the act of January 11, 1851, a levee contractor had a preference right of entry to lands in the rear and adjacent to his front lands; and he might make his selections before he had completed his levees. *Ib.*

17. The law of January 6, 1851, did not say that he should not *select* his land until after he had finished his work; but only that when he had done both he should furnish the numbers of the land to the commissioners, and receive from them a certificate. *Ib.*

18. When he had finished the work, if he had selected the lands and furnished the numbers to the commissioner, his right to the land was complete, whether he ever obtained a certificate or not. *Ib.*

19. No matter at what date he selected the lands; if he finished the work, in whole or in part, and the commissioner approved and received it, and the amount due for it was enough to pay for the lands, they became his, and his title, if necessary, as against any intervening purchaser or claimant, would relate to the 11th of January, 1851, on which day the right of preference in building the levees and taking these lands in payment vested. *Ib.*

20. His right of pre-emption was to *all* the lands in rear of and adjacent to the front land by right lines. *Ib.*

21. The selection in this case was made by a letter addressed to the commissioner, which was sufficient. *Ib.*

22. And the entries in the book kept by the commissioner, whether it was a *record* or not, are sufficient to prove the selections and applications noted in it, where the commissioner has sworn that he entered them correctly there. *Ib.*

23. When he filed it in the office of the board, it became sufficient evidence to the board on which to base its confirmations. *Ib.*

24. The entry of the appellee having been confirmed by the commissioners, their decision is conclusive unless properly impeached. *Ib.*

25. The law presumes in favor of the commissioners that they acted on sufficient data and evidence. *Ib.*

26. The commissioners had power to pay for the work as it advanced towards completion. *Ib.*

27. The appellee had a pre-emption right and was only bound to pay for the land in one way, by doing the work undertaken by him to a sufficient amount, by a certain time and in accordance with his contract. *Ib.*

28. Whether he made known his selection of the lands sooner or later, so that he did not permit his right to lapse by abandonment, made no difference. It was

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only material that he should do it when or before his work was finished and received. *Ib.*

TAXES AND TAX SALES.

See *Chancery*, 52, 53, 56, 57.

TAX DEED.

See *Deeds and Conveyances*, 3.

TRESPASS.

1. On issues to the pleas of not guilty and limitations, in an action of trespass, the defendant will not be permitted to introduce in mitigation of damages evidence not applicable to the issues. *Trammell et al vs. Bassett*, 499.
2. Testimony pertinent to the issue, and tending to prove circumstances showing the connection of the defendant with the trespass complained of, cannot be deemed of prejudice to the defendant and illegal. *Ib.*
3. All persons present and participating in a trespass are deemed equally guilty; and if one be accidentally present and not consenting to or participating in the act, it devolves upon him to prove his innocence. *Ib.*
4. The taking and carrying away the property of another without his consent is a conversion. *Ib.*
5. A valid release given to one of several trespassers, enures to the benefit of his co-trespassers as fully as if directly given to them. *Montgomery ad. vs. Erwin*, 540.

See also, *Officers and Soldiers*, 1.

TROVER.

1. On the plea of not guilty in an action of trover, the issue is sustained by proof that the defendant took the plaintiff's property without authority and sold it; evidence tending to show the motives of the act, as that the owner having left the property liable to waste and destruction, he acted for his benefit, is foreign to the issue. *McCarroll et al. ads. vs, Stafford*, 224.

VARIANCE.

See *Pleas and Pleading*, 1, 2.

VENDOR AND VENDEE.

1. Whoever sells personal property in possession is held in law to warrant the title, and is incompetent as a witness for his vendee in an action concerning the title. *Lindsay vs Lamb*, 222.
2. The vendor of personal property, though incompetent as a witness for the vendee, where the title is involved, as held in *Lindsay vs. Lamb*, is a competent witness for a party contesting the title of his vendee. *Dickerson vs. Johnson*, 251.
3. Where a sale of the plaintiff's property has been made by another, without his consent and against his remonstrance, his silence during a subsequent conversation in his presence, in relation to such sale, raised no presumption of an affirmance of the sale by the plaintiff. *Ib.*
4. The vendor is not a competent witness for his vendee. (*Lindsay vs. Lamb, ante.*) *Dunnahoe vs. Williams*, 264.
5. A vendee having given his note for certain lands, to be paid on a day certain, provided that if the lands were involved in suit concerning the title to the same, payment was not to be made until the suit should be decided; there being no suit pending, at the time of the coming to maturity of the note, involving the title to the lands so sold, the vendor's right of action was complete. *Busby vs. Treadwell*, 456.

VENDOR'S LIEN.

1. Where the vendor conveys land by deed, taking the note of the vendee for the purchase money, a mere assignment of the note does not transfer to the assignee the benefit of the vendor's lien upon the land for the payment of the purchase money, (18 *Ark.*, 157)—the lien of the vendor being personal to him, and not assignable unless under some peculiar equitable circumstances. (14 *Ark.*, 634.) But the peculiar equitable circumstances under which the vendor's lien follows the notes in the hands of an assignee do exist, where the assignment is made as collateral security for the notes of the vendor; the assignee, in such case holding the lien as well for the benefit of the assignor as for himself, is subrogated to all his equities. *Crawley vs. Riggs et al.*, 563.

WASTE.

See *Administration*, 3, 8, 10.

WITNESS.

See *Evidence*, 1, 8, 9; *Vendor and Vendee*, 1, 2.

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