REPORTS

OF

CASES AT LAW AND IN CHANCERY,

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ARKANSAS.

By NORVAL W. COX,

OFFICIAL REPORTER.

VOLUME XXVI.

CONTAINING CASES DECIDED AT THE DECEMBER TERM, 1870, AND JUNE TERM, 1871.

LITTLE ROCK, ARK.,
PRICE & McCLURE, PUBLIC PRINTERS.
1872.

Rec. April 19, 1872

OFFICERS OF THE SUPREME COURT.

*Hon. W. W. WILSHIRE, Chief Justice.
†Hon. JOHN McCLURE, Chief Justice.

Hon. LAFAYETTE GREGG,
Hon. WILLIAM M. HARRISON,
‡Hon. THOMAS M. BOWEN,
Hon. JOHN McCLURE,
‖Hon. JOHN E. BENNETT,
††Hon. ELIHANAN J. SEARLE.
} Associate Justices.

JOHN R. MONTGOMERY, Attorney General.
N. W. COX, Clerk and Reporter.
WILLIAM S. OLIVER, Sheriff.

*Resigned, February 16, 1871.

†Appointed to fill vacancy occasioned by resignation of Chief Justice Wilshire.

‡Resigned, January 30, 1871.

‖Appointed to fill vacancy occasioned by resignation of Hon. Thomas M. Bowen.

††Appointed to fill vacancy occasioned by the appointment of Hon. John McClure as Chief Justice.

PULASKI CHANCERY COURT.

HON. T. D. W. YONLEY, CHANCELLOR.
HON. M. W. BENJAMIN, SOLICITOR GENERAL.

JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT.....HON. M. L. STEPHENSON.
SECOND CIRCUIT.....HON. WILLIAM C. HAZLEDINE.
THIRD CIRCUIT.....HON. ELISHA BAXTER.
FOURTH CIRCUIT.....HON. CHAS. B. FITZPATRICK.
FIFTH CIRCUIT.....HON. ELISHA D. HAM.
SIXTH CIRCUIT.....HON. WILLIAM N. MAY.
SEVENTH CIRCUIT.....HON. JOHN WHYTOCK.
EIGHTH CIRCUIT.....HON. T. G. T. STEELE.
NINTH CIRCUIT.....HON. GEORGE W. McCOWN.
TENTH CIRCUIT.....HON. HENRY B. MORSE.

JUDGES OF THE CRIMINAL COURTS.

PULASKI COUNTY.....HON. W. I. WARWICK.
JEFFERSON COUNTY.....HON. IRA L. BARTON.
PHILLIPS COUNTY.....HON. CHAS. B. WATERS.

TRIBUTE OF RESPECT

TO THE MEMORY OF

JOSEPH STILLWELL, Esq.

STATE OF ARKANSAS,
IN THE SUPREME COURT.

MARCH 30, 1871.

Hon. E. H. English announced to the court the death of JOSEPH STILLWELL, Esq., a member of the bar of this court, and after an appropriate address, presented the following resolutions, adopted at a meeting of the members of the bar, and moved that they be spread upon the record:

"WHEREAS, The HON. JOSEPH STILLWELL having departed this life, and in his death society having lost an upright member, the profession of law one of its most devoted and competent followers, and our State a true and honored son:

Resolved, That in deploring the early death of Mr. STILLWELL, we recognize in his life and character all the elements of a kind and affectionate husband and father, an unswerving christian citizen, and an able and faithful lawyer.

Resolved, That we condole with the family and friends of the deceased in the sad event which has deprived them of his protecting care, and noble example.

Resolved, That the Secretary transmit to the family of Mr. STILLWELL a copy of these proceedings, also a copy to each of the papers of this city with a request to publish the same.

Resolved, That the Chairman of this meeting present these proceedings to the Supreme Court, at its present session, and ask that they be spread upon the records of the Court, and that he accompany the request with such remarks as he may deem proper."

The Court, by the HON. WM. M. HARRISON, J., responded to the address, and ordered that the resolutions be spread upon the record.

TRIBUTE OF RESPECT

TO THE MEMORY OF

ROBERT S. GANTT, Esq.

STATE OF ARKANSAS,
IN THE SUPREME COURT.

DECEMBER 4, 1871.

Hon. E. H. English announced to the court the death of ROBERT S. GANTT, ESQ., a member of the bar of this court, and, after an appropriate address, presented the following resolutions, adopted at a meeting of the members of the bar of the city of Little Rock, and moved that they be spread upon the records of this court, which was accordingly ordered:

"ROBERT S. GANTT departed this life, in the city of Little Rock, at half past four o'clock, P. M., on Thursday, the 30th day of November, 1871, aged about thirty-seven years. A native of Alabama, he removed to the State of Arkansas, in 1857, where he resided until his untimely death.

Possessed of but little of this world's goods, he adopted the profession of the law, trusting alone to his energy, uprightness and intellect for success, and most signally and worthily did he win it. Endowed with a strong intellect and will, accompanied with great knowledge of men and the means of bringing their minds in relation with his own, he, at the time of his death, ranked among the first in the land, both as before the jury and as before the court, while his gentleness of heart and bearing and his ready charity and general sympathy with others' woes, caused the news of his untimely decease to fill the minds of all who knew him with the deepest sorrow; one of the few of the men of strong character of whom it can be said that he died without an enemy. Therefore, be it

Resolved, That we have learned with extreme grief and sadness of the death of our late friend and companion, ROBERT S. GANTT, and we deplore his loss as that of one of our ablest and most cherished brethren.

Resolved, That we deeply sympathise with the friends and relatives of the deceased, and especially with his young children, who are now orphans, indeed, their mother having by a few years preceded their father to the tomb.

Resolved, That the members of this bar attend his funeral, in a body, tomorrow morning, at ten o'clock.

Resolved, That the chairman of this meeting present a copy of these resolutions to the Supreme Court with a request that they, at their next regular meeting, be spread upon the records thereof, and that he accompany such resolutions with such remarks as he may think proper to make; and that Mr. Rose present the same to the circuit court of the county; that Mr. Wilshire present the same to the chancery court; Mr. Whipple to the United States Circuit court, and Mr. E. W. Gantt to the criminal court."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

DECEMBER TERM, A. D. 1870.

JORDAN *v.* WALKER.

CONFEDERATE MONEY.—Where consideration of a contract is Confederate money, the contract is void *ab initio.*

Error to Crawford Circuit Court.

HON. THOMAS BOLES, Circuit Judge.

Clark, Williams & Martin, for plaintiff.

Watkins & Rose, for defendant.

WILSHIRE, C. J.

This was an action of debt, brought by Sallie E. Jordan, as administratrix of Pleasant Jordan, deceased, against William Walker, in the Crawford circuit court, at the November term thereof, 1866, on a writing obligatory, bearing date March 4, 1863, for $1,000, with interest at ten per cent.

The defendant interposed one special plea in bar, alleging that the writing obligatory was executed by him to the plaintiff's intestate, in his life time, in consideration of Confederate treasury notes, loaned and advanced by the plaintiff's intestate to the defendant, and for no other consideration.

The plaintiff replied, confessing the allegation of the defendant's plea, that the writing obligatory sued upon was executed by the defendant in consideration of Confederate treasury notes, but sets up, in avoidance of the plea, that, although the consideration of the writing obligatory was Confederate treasury notes, it was not made payable in Confederate treasury notes, but, by the tenor and effect of the writing obligatory, it was payable in lawful currency of the United States, etc.

The cause was submitted to the circuit court, sitting as a jury, upon the issue joined, which found for the defendant and rendered judgment against the plaintiff.

The plaintiff moved for a new trial; the court below overruled the plaintiff's motion, and he brought error.

We deem it unnecessary to notice the motion for a new trial. The question of the illegality of the contract presented by defendant's plea, stands confessed by the plaintiff's replication.

The admission, by the plaintiff's replication, of the illegality of the consideration of the writing obligatory sued upon, brings this case within the ruling of this court in the case of *Latham v. Clark*, decided at the last term; *25 Ark., 574*. The consideration being illegal, the contract was void *ab initio*, and the courts will not aid in its inforcement.

The judgment of the court below is, in all things, affirmed.

HARVEY v. ROSE.

26 3
62 167

FERRYMEN—Ferrymen, like all other common carriers, are regarded in law as insurers of the property committed to their care, and are responsible for all losses or damages to it, which do not come within the excepted cases of the acts of God and the public enemy.

COMMON CARRIER—*Burden of proof.*—As a common carrier, a ferryman is compelled to receive all goods and property offered for transportation, and in such capacity, he is presumed to have charge of it, and the burthen is upon him to show that he had not such control over it as to invest him with that character in respect to it.

RESPONSIBILITY—Where it affirmatively appears that the owner retains the exclusive control of the property, the ferryman is not chargeable if loss occur, as a common carrier or insurer, but is only answerable for *actual* negligence; and if in such case the loss be occasioned by the willful wrong or negligence of the owner, so that but for it, the loss would not have occurred, the owner cannot recover, except where the direct cause of the loss is the omission of the ferryman, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequence of such negligence.

Appeal from Cross Circuit Court.

HON. JAMES M. HANKS, Circuit Judge.

Watkins & Rose, for appellant.

The instructions given by the court on the motion was manifestly wrong; ferrymen are common carriers. *Spring v. Turner, 1 Murphy, 339; Trent v. Cartersville Bridge Co., 11 Leigh, 591; Rutherford v. McGawen, 1 note, 3 McCord, 17; Gardner v. Green, 8 Ala. 96; Cohen v. Hume, 1 McCord, 144; Pomeroy v. Donaldson, 5 Missouri, 30; Smith v. Seward, 3 Barr. 342.*

"The law regards ferrymen as common carriers, and has imposed on them the same duties and liabilities, and as soon as a ferryman signifies his assent or readiness to receive a passenger, he becomes liable for his safe transit and delivery, and is chargeable with any accident occurring except by act of God or the public enemy." *May v. Hanson, 5 Cal. 360; Richards*

v. Fuqua, 28 Miss. 792, and the fact of mutual negligence is no excuse. *Albright v. Perns, 11 Texas, 290; Fisher v. Chisbee, 12 Ill. 344.*

"A common carrier is regarded by law as an insurer of property intrusted to him and is responsible for acts against which he could not provide, from whatever cause arising, the acts of God and the public enemy only excepted." *Angel on Carriers, sec. 67: Story on Bailments, sec. 489.*

HARRISON, J.

This was an action of assumpsit, to recover from the owner of a public ferry, the value of a mule lost in the course of transportation.

The defendant pleaded the general issue, and the verdict was in his favor.

The facts, as set forth in the plaintiff's bill of exceptions are, that the plaintiff applied to cross with his wagon and team, at the defendant's ferry, on the St. Francis river. The wagon was loaded with cotton, and the team, which was driven by a servant, consisted of six mules. Before entering the boat, the person in charge of the ferry directed the two leading, or front span of mules to be detached from the wagon and left on the bank until the next trip of the boat, and he himself unhitched them and fastened them to a stake on the shore, and the wagon was drawn into the boat by the four other mules. As the boat was about leaving the bank, the plaintiff, who was on the boat, spoke to a negro man, the servant of a person crossing at the same time, and requested him to bring the two mules into the after part of the boat, behind the wagon, which he did, and then held them there. The person in charge of the boat made no objection, and gave a direction to separate them from each other, which, however, appears not to have been done. When the boat had proceeded about one third of the distance across the river, one of the mules in the rear of the wagon (proven to have been worth one hundred dollars) fell overboard and was drowned.

At the time of the accident the plaintiff was in the fore part of the boat, assisting in holding the mules, still attached to the wagon. The boat had no railing or balustrades, and was about forty-seven feet in length.

The court, upon request of the plaintiff, instructed the jury that a public ferryman is a common carrier, but refused to give them the following instructions asked by him:

First. That, as a common carrier, a public ferryman is bound to exercise extraordinary diligence in the protection and preservation of all property committed to him, and is responsible for all accidents and damage to the same, except such as happen by such unavoidable casualty as the act of God or the public enemy.

Second. That a public ferryman is bound to provide a boat of suitable capacity and arrangements to transport, with safety, all property intrusted to him for that purpose, and if he failed in any particular to do so, he is liable for all losses sustained by reason of such failure.

Third. That if the plaintiff's mule was lost off the ferry boat whilst crossing at the defendant's ferry, it devolved upon the defendant to prove that it was lost by an accident against which no diligence or foresight on his part could possibly have provided, and without such proof they must find for the plaintiff.

Fourth. That if the defendant chose to receive on his boat, from the plaintiff, more property than it could safely carry, he is responsible for all losses or damages occurring to the same, in the course of transportation, though the same may have been received at the solicitation and request of the plaintiff, unless he has proven a special agreement by the plaintiff to assume the risk, and release defendant from liability on account thereof.

And it gave the following against the objections of the plaintiff: A public ferryman is bound for the exercise of ordinary diligence only, such as a prudent man would exercise in the discharge of the duties of a ferryman, and if the mule,

alleged to have been drowned was taken on board the defendant's ferryboat, at the instance of the plaintiff, by his servant, after the defendant had declined to take said mule on that trip, and expressed his wish and intention to leave it and its fellow behind, to be carried the next trip of the boat, then said mule was taken on by the plaintiff, and at his own risk, and they must find for the defendant.

Ferrymen, like all other common carriers, are regarded in law as insurers of the property committed to their care, and are responsible for all losses or damage to it, which do not come within the excepted cases of the acts of God and the public enemy. As a common carrier a public ferryman is compelled to receive all goods and property offered to him for transportation, and when he has received property for that purpose, the presumption is that it is in his charge as a common carrier, and the burden is upon him of showing that he has not had such control over it as invests him with the character of a common carrier in respect to it. His responsibility is not modified or diminished by the fact that it was accompanied by the owner, unless it affirmatively appear that the owner did not trust the care of the same to him, but retained the exclusive management and control of it himself. When the care and control of the property has not been entrusted to him, but retained by the owner, he is not, if a loss occurs, chargeable as a common carrier or an insurer, but is only answerable for actual negligence; and if in such case the owner, by his own negligence or willful wrong, contributed to the loss so that, but for it, the loss would not have happened, he will not be entitled to recover, except where the direct cause of the loss is the omission of the ferryman, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequences of such negligence: *Shear & Red, on Neg., secs. 25, 26; White v. Winnesimmet co., 7 Cush ; Powell et al v. Mills et al. 37 Miss., 691; Willett's Adm'r. v. The Buffalo and Rochester Railroad Co., 14 Barb., 585; Smith v. Smith, 2 Pick. 621.*

In the case of *White v. Winnesimmet Co., 7 Cush., 154*, the

Supreme court of Massachusetts say: "If the traveler used the ferry boat as he would a toll bridge, personally driving his horse upon the boat, selecting his position on the same, and himself remaining on the boat, neither putting his horse into the care and custody of the ferryman, nor signifying to him or his servants any wish or purpose to do so, and the only possession and custody by the ferryman of the horse and vehicle, to which he is attached, is that which necessarily results from the traveler's driving his horse and wagon, or other vehicle, on board the boat, and paying the ordinary toll for a passage; in such case the ferry company would not be chargeable with the full liabilities of common carriers of merchandise. The liability in this case would be one of a different character; and if the proprietors of the ferry were chargeable for loss or damage, it would be upon a different principle.

"In reference to persons thus using the ferry, the company have responsible duties to perform, the neglect of which may charge them for the loss of goods and property placed on board their boat, when the loss has been occasioned by their default. It is the duty of a ferry company to provide a good and safe boat, suitable for the business in which they are engaged; and they are required to have all suitable requisite accommodations for the entry upon the same, transportation while on board and the departure from the boat, of all horses and vehicles passing over such ferry."

Although there may be some doubt if the ferry company, in the case we have cited, by an acquiesence on their part, in the acts and conduct of the owner, did not acquire such possession and custody of the horse and wagon as made them liable as common carriers, it affords a very good illustration of the doctrine we have stated.

The *prima facie* case—that the defendant accepted the possession and custody of the mule, as a common carrier—established by the fact that he was a public ferryman, and that the mule was put upon his ferry boat for the purpose of being taken across the river, was controverted by other evidence

tending to show that the plaintiff retained possession and control of it, and had not committed it to the care and custody of the defendant.

The first and second instructions, refused by the court, as abstract propositions of law, are undoubtedly correct, but were not, according to the views we have just expressed, a correct declaration of the law in respect to the evidence before the jury, and were therefore properly refused.

The third is also objectionable, because it in effect assumes that the mule was delivered to the defendant as a common carrier, a fact clearly controverted in the evidence, and the truth of which it was the province of the jury to determine. *Floyd et al. v. Ricks, 14 Ark., 295.*

It is evident, also, from what we have above remarked, that a special agreement is not necessary to qualify a ferryman's acceptance of property delivered to him for transportation over his ferry, so as to modify and change his liability in respect to it, and the fact that the care and custody of the property was never surrendered to him by the owner, can be shown by circumstances as well as by direct evidence. The court, therefore, did not err in declining to give the jury the last instruction asked by the plaintiff.

The instruction given by the court, against the objection of the plaintiff, was manifestly erroneous, and the court should for that reason have given the plaintiff a new trial; and for the error in refusing a new trial, the judgment must be reversed and the cause remanded.

ALLEN, *Ex parte.*

JURISDICTION—APPEAL.—Appeals only lie from one court to another, not from an executive officer to a court.

REGISTRARS.—The duties of registrars are executive, and so far as the right of appeal from their decisions to this court, by a party aggrieved, may be inferred from, or may have been intended to be given by the act of July 15, 1868, providing for the appointment of registrars by the Governor, being contrary to the meaning and intent of the Constitution, no appeal will lie.

Appeal from Board of Registration, Independence County.

William Byers, Garland & Nash, English, Gantt & English, for appellant.

Montgomery, Attorney General, for Board of Registrars.

GREGG, J.

In the papers on file in this case, it appears that John F. Allen, a citizen of Ruddle township, in Independence county, on the 16th day of October, 1868, it being a day appointed for registration in said township, applied to John Campbell, who was acting as registrar, to have his name listed as a qualified voter; that he was refused a certificate of registration; he, at the proper time and place, appeared before the board of review; alleged injustice had been done him, and prayed there to be listed as a voter in said township. He there presented proof that he was a "free male citizen" of the township, etc.; facts tending to show that he had not violated his oath of amnesty, and was not disfranchised from other causes, but the board of registrars, upon their own knowledge, declared he was not a competent elector, and refused to register his name as such. Allen excepted to the decision; had his exceptions signed by the registrars, as a board; presented his affidavit and prayed an appeal to this court. The registrars certify that

they rejected Allen's application, and granted him an appeal to this court.

The attorney general moves to dismiss the appeal, for want of jurisdiction.

The Constitution of this State provides that all male citizens of the United States, over twenty-one years of age, and who have resided six months in the State, shall be deemed electors, unless embraced within certain classes enumerated in *section 3, art. 8, State Constitution. Sec. 5*, of the same article, requires a certain oath to be taken before registering; and *sec. 25, of art. 5*, provides that the General Assembly, at its first session, should provide suitable laws for the registration of the qualified electors, and for the prevention of frauds in elections.

Pursuant to these provisions of the Constitution, the General Assembly, by act of July 15, 1868, provided for the Governor to appoint three registrars for each county, and fixed the time within which they should attend the various precincts for registering electors; and, also, a time when the board of registrars should meet, at the court house of each county, to review the lists, and pass upon all claims of persons who consider that injustice has been done them, etc.; and, if such board should be satisfied that any person has been improperly registered, they shall strike his name off, or if any one has been improperly refused, they shall list his name, etc. And the act continues, "any person feeling aggrieved, upon the decision of the board, can, upon application, have the testimony applying to the case, and the decision thereon, certified to the Supreme Court of the State, upon the same terms and conditions as appeals from the circuit court."

This act is not as explicit as it might have been, but, as the Legislature suggested no other mode for a review of the proceedings of the board, we may infer they intended an appeal to this court; and, upon the motion of the attorney, the only question is whether or not such appeal will lie?

Article 4, of our Constitution, declares "the powers of government are divided into three departments—the legislative,

the executive and the judicial. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided for in this Constitution."

Section 1, Article 7, declares that "the judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, circuit courts, and such other courts, inferior to the Supreme Court, as the General Assembly may from time to time establish."

In the creation of our courts, provision is made for certain classes of cases to come before them respectively, and when they pronounce the law, they have executive officers at their command to inforce their judgments and decrees; but in the larger mass of duties required of the state executive, and his assistants, it is not necessary to have the courts expound the law before the executive officers proceed to its execution.

It is presumed, and usually is true, that the Legislature so frame the laws that the executive department, and the citizens of the State know their purport, and understand their respective duties; and it is only in cases of doubt in the act, or a failure of the citizen to obey, or of an executive officer to perform his duty, that the action of a court is invoked.

In the early case of *Hutt vs. The State*, *2 Ark. 258*, our court, we think, very properly held that "a State treasurer, auditor, sheriff, coroner, constable and militia officers are executive officers, and all these officers strictly belong to the executive department; * * * they constitute the agency or means by which the executive will is carried into effect and the laws inforced."

The Supreme Court of Ohio held, in reference to an act providing for the assessing of taxes, etc., which act provided that the auditor of State, with the advice of the attorney general, should decide all questions as to the tax levied, the construction of the act, or any proceeding thereunder, subject to an appeal to the Supreme Court, that no appeal would lie, the act being contrary to the intent and meaning of the Constitution,

being an attempt to grant an appeal from the ruling of an exective officer." *Logan Branch Bank, 1 O. State Rep., 432.*

The chief executive of a State, aided by such inferior officers as may be elected or appointed to assist him, carries out and enforces the general laws of the State—they make valuations of property and collect the revenue; make proclamations; issue notices and hold elections; issue process and enforce the judgments, orders and decrees of courts, and, in general, perform acts necessary to a faithful observance of the public laws. In all of which sound discretion and good judgment is necessary to accomplish the end desired; but this exercise of official discretion and judgment in enforcing laws, under the direction of the Legislature, or the orders of courts, is quite different from the judicial determination of questions of law and fact by a legitimate court, and, under our system of government, is committed to entirely different officials. Our courts consider the laws, determine questions litigated and order suitors quieted in or restored to their rights, while executive officers only enforce or execute the laws as they are directed by the Legislature or the courts.

The duties of registrars are executive; they are a part of the necessary machinery to put in force and carry out a general law. Are there any official duties more purely ministerial than those of going around the county, under the directions of a general law, and making a list of voters and correcting these lists preparatory to holding an election? Are these officers not as clearly in aid of the chief executive, as is the tax assessor, coroner, or sheriff? The assessor goes around and lists the property—they go around and list the voters; and to answer the argument that they judge of a man's right to register and vote, it may be said the assessor adjudges the value of all the property he lists; a coroner and his jury considers of the cause of a death, and assesses a bill of costs, etc. Yet all recognize these as executive duties.

It requires determination of mind and sound discretion to fill an executive office, and justly to enforce a law, and if an

officer, in that department is indiscreet, misjudges and does a man an injury, his redress is not by an appeal.

Should the Legislature commit a mistake and enact that, if aggrieved by an error in the assessment of property, the injured party should appeal from this ministerial official direct to this court, could we entertain such an appeal? certainly not.

We cannot lose sight of the fact that appeals only lie from one court to another—not from an executive officer to a court. There must be a competent judicial tribunal to pass upon a case before an appeal can be taken to a higher court. *Dunn v. State, 2 Ark., 229.*

These officers, whose duty it is to aid in executing a general law of the State, cannot, at the same time, hold a court. The Constitution expressly prohibits any person belonging to one department of the State government from exercising any of the powers properly belonging to another. *Sec. 2, Art. 4 of the Const.*

The departments of the government are kept entirely distinct. The Legislature cannot empower the same man to go out and do ministerial or executive duty, and then come in and sit as a court. It necessarily follows that any law that may attempt to confer judicial powers on an executive officer is unconstitutional; and a law providing that an appeal may be taken to a court from the ruling of an executive officer is equally unauthorized by the Constitution.

It has been argued that this board of registrars has been constituted a court. Neither the Constitution or the law declares it a court. It has neither the organization nor machinery of a court; it has no clerk, no records, it issues no process, has no officer to execute process, it gives no costs to either party, it renders up no judgment, has neither process or officer to enforce a judgment, should it attempt to render one; and can we suppose the law-making power intended or attempted to create that a court, and left it wanting in everything that can give life or force to a court?

From the 24th section of the act referred to, which declares

that circuit courts shall issue no process to compel a registrar to add to or strike names from his list, it is urged that the board is equal in authority to the circuit court, and their action can only be reviewed here, etc. Such provisions in the act, if valid, does not create that board a court, and unwise legislation on the part of the General Assembly, even if it divests the more appropriate tribunal of jurisdiction, and makes the remedy of an injured party difficult and slow to reach, is not a matter under the control of the courts. It may call for legislative action, but cannot affect the jurisdiction of the courts, nor enable them to grant relief in matters not cognizable before them.

As we have no jurisdiction in the case, we cannot discuss the constitutionality of the oath required, or consider the difference between the actual rights of a citizen and his political privileges, nor determine how far either can be affected without an infringement of the Constitution.

The motion is sustained and the appeal dismissed.

HENRY O'BAR, *Ex parte.*

Appeal from Board of Registration of Franklin County.

GREGG, J.

The opinion of the court in the case of *John F. Allen, ex parte*, determines this case.

The appeal is dismissed.

BYERS, *Ex parte.*

Appeal from Board of Registration of Independence County.

GREGG, J.

The opinion in the case of *John F. Allen, ex parte*, settles all the questions before the court in this case.

The appeal is dismissed.

GREEN & WILSON *v.* ROANE & BELL.

EQUITY—*Confederate money act*—The act of March 5th, 1867, known as the Confederate money act, being unconstitutional, no benefit is derived from it, and a court of equity can grant no relief under it.

Appeal from Jefferson Circuit Court.

HON. WM. M. HARRISON, Circuit Judge.

Wassell & Moore, for appellants.

Bell & Carlton, for appellees.

MCCLURE, J

The record in this case shows that Green & Wilson obtained a judgment against Julia Roane, in the Jefferson county circuit court, for nine hundred dollars debt, and three hundred and seven dollars and fifty-one cents damages, and that said judgment was affirmed by this court at the December term, 1866, (*24 Ark. 210.*)

Upon this judgment Green & Wilson sued out an execution and the same was levied on the property of Julia Roane, who, together with one M. L. Bell, gave a delivery bond. After the affirmance of the judgment in the case of Roane v. Green & Wilson, (*24 Ark. 210*,) by this court, the Legislature passed an act entitled "An act for the relief of persons bound by contract for the payment of Confederate money, or other paper currency." The third section of this act provides that the defendants, in cases where judgments have been rendered against them, may tender the proper amount to be paid according to the rule prescribed in the first section of the act, and enjoin as to the excess of said judgments by a bill in equity.

Under the provisions of said act, Roane and Bell filed their bill and made the necessary tender. At the hearing the Jefferson county circuit court decreed a perpetual injunction as to the judgment at law, save as to the sum of $251 16, and decreed costs against Green & Wilson. From this judgment the defendants appealed to this court.

The sole ground for entering a court of equity was to receive the benefit of the act of March 5, 1867. The question presented involves the constitutionality of the act last recited. In the case of *Leach v. Smith*, (*25 Ark. 246*,) that act was held to be unconstitutional. It follows, therefore, that the decree of the court below must be reversed. The cause is remanded with instructions to dissolve the injunction and dismiss the bill.

JUDGE HARRISON being disqualified, did not sit in this case.

HON. JOHN WHYTOCK, special Supreme Judge.

SCOTT *et al.* *v.* EATON, BETTERTON & CO.

RES JUDICATA.—All questions determined when a cause is before this court on an appeal, are *res judicata,* and must be treated as settled.

EVIDENCE—*Appearance by Attorney.*—Where the transcript of a judgment of record of another State, shows that the parties appeared by attorneys, it is *prima facie* evidence that they did so appear; and even though there were testimony to show that the attorneys were not duly authorized to do so, the error could be corrected on motion for a new trial; and if the transcript does not show such motion, the evidence is not properly before this court.

Appeal from the Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Garland & Nash, for appellants.

Watkins & Rose, for appellees.

WILSHIRE, C. J.

This is the second time this cause has been before this court. The suit was brought in the Pulaski circuit court by the appellees against Pennywit, on a transcript of a judgment obtained by them in the fourth district court of the city of New Orleans, Louisiana.

Two pleas were interposed by Pennywit in the court below: 1st. *Nul tiel record;* and the 2d. That Pennywit, when the suit in the fourth district court of New Orleans was commenced, wherein was rendered the judgment upon which this suit was brought, was, and from thenceforth had been, a resident of the State of Arkansas, etc., and was not served with process, and had no notice whatever of the pendency of said suit, and never appeared thereto, either in person or by attorney, and that no one was duly authorized to enter his appearance to such suit, etc.

On the trial, in the court below, the transcript of the judgment rendered in the fourth district court of New Orleans against Pennywit, was excluded from the evidence, and judgment being rendered against Eaton & Betterton, they appealed. On that appeal this court reversed the judgment of the court below, holding that the fourth district court of New Orleans had jurisdiction, and the transcript of the record was properly authenticated, and should have been admitted in evidence, as it raised "a strong *prima facie* presumption that the defendant did appear in that court by attorney," and that the evidence offered by Pennywit in the Pulaski circuit court, as appeared in the transcript then before this court, was not sufficient to rebut that presumption, and the cause was remanded to the court below for further proceedings.

The only questions presented by the transcript that demand our attention, are those raised by the proceedings in the court below, subsequent to the mandate of this court. All questions determined when this cause was here on the appeal of Eaton & Betterton, are *res judicata*, and must be treated by us as settled. *6 Ark., 558; 7 Ark., 542; 10 Ark., 186.*

Taking that view of this case, the only question we find requiring examination is, whether the evidence introduced by the defendant, at the second trial in the court below, was sufficient to rebut the presumption raised by the record of the fourth district court of New Orleans, that Pennywit appeared to the suit of the appellees in that court, by attorney, and defended, etc.

The testimony introduced on the second trial, in the court below, does not seem sufficient to rebut that *prima facie presumption.* It is true two witnesses, Messrs. Durant and Horner, the counsel appearing of record for Pennywit, in the New Orleans court, state that their recollection of that case is not very distinct. Mr. Durant testifies that so long a time has intervened since the pendency of the suit in the New Orleans court, he cannot recollect any such suit, except in a very faint and indistinct manner, not sufficient to enable him to say any-

thing about it. Mr. Horner testifies that it is his impression that his firm, Durant & Horner, were employed by Moses Greenwood, on behalf of the owners of the steamboat "Thirty-fifth Parallel," which was the subject of the suit against Pennywit in the New Orleans court, and the securities on the bond given to release the boat from seizure under the attachment proceedings.

But Moses Greenwood testified that, as the agent and attorney in fact of Pennywit, to look after and protect his interest in the steamboat "Thirty-fifth Parallel," he employed Messrs. Durant & Horner, attorneys, to represent Pennywit, and defend the suit instituted against him in the New Orleans court, which the transcript of the record of that court shows they did.

There appears to be no testimony presented by the transcript to overcome the statement in the record of the New Orleans court, that the defendant there appeared by attorney, etc.; nor does it appear that the defendant, in the court below, produced any testimony to show that the attorneys, appearing of record in the New Orleans court for Pennywit, were not duly authorized to do so.

But, even if there was such testimony, the error could have been corrected in the court below, on a motion for a new trial. There appearing, by the transcript, to have been no motion for a new trial, we think the evidence is not properly before us.

The judgment of the circuit court is, therefore, affirmed.

COX v FRALEY.

FRAUDULENT CONVEYANCE—The fact of a grantor being embarrassed, is no proof that a conveyance is fraudulent.

CREDITORS—*Preference.*—If acting in *good faith*, a debtor may pay or secure one creditor in preference to another.

The mere *allegation* of a general creditor that he owns a valid claim, will not authorize him to go into a court of equity to prevent other creditors, who have been more vigilant than himself, in recovering against a failing firm.

DEMURRER.—Where there is no equity in the bill, a party is not aggrieved by rulings upon minor points.

Appeal from Independence Circuit Court.

HON. ELISHA BAXTER, Circuit Judge.

Byers & Cox, for appellant.

1. The demurrer should have been stricken out. The causes assigned were general in terms and extended *to the whole Bill.* The only causes assigned being *multifariousness* and *want of equity.*

The filing of the plea was a waiver of the demurrer, the demurrer being to the whole bill.

The cross bill was not multifarious.

1 Danl. Ch. Pl. & Pr. 343, 344 and notes; 1 Danl. Ch. Pl. & Pr., 345, 348 and notes; 5 Paige Rep. 77; Adams' Eq. 650 and notes.

A demurrer for multifariousness goes to the whole bill.

1 Danl. Ch. Pl. & Pr., 352, note 2; 5 Paige 79; Adams Eqt. 655 and note.

Allegations of fraud in the bill precludes demurrer.

1 Danl. Ch. Pl. & Pr. 333; Adams Eqt. 696, 7 and notes; Niles et al. v. Anderson et al., 5 How (Miss.) R. 365; Stovall v. Northern Bank Miss., 5 Sneads & M., 17.

A court of equity has the right to declare acts, and every

kind of instruments, void for fraud, even though sanctioned by the most solemn forms of the law. It may, for this cause, avoid legislative acts. *4 Har. & McHenry, 6.*

Judgments of courts of record:

1 John. Ch. Rep. 406; 3 John. Ch. Rep. 280; 3 Des. Rep. 268; 2 Cowen Rep. 139; Cooper's Eqt. 96; 1 Ves. 120; 1 Sch. & Lef. 355; Mitford's Pleading, 84; 1 Monroe, 256; 3 Monroe, 260; 2 J. J. Marshall, 405; 1 Pirtle 460.

Deeds or patents:

White v. Jones, 1 Wash. 47; Jackson v. Lawton, 10 John. R. 23; Polk's lessee v. Wendall, 2 Tenn. 155; Bagnell v. Broderick, 13 Peters, 436. And of bonds, notes and bills of exchange, the cases are innumerable.

The exercise of this power is all that is asked on the present occasion.

A purchaser, *pendente lite*, and while the property is actually in the *custody of the law* (as was the case here by Fraley and wife; the property having been attached and in the possession of the sheriff and custody of the law at the time they purchased) is utterly void, and no title whatever is acquired. *Meux v. Anthony et al., 11 Ark. 411.*

The purchaser, *pendente lite*, takes nothing by his contract, not even in a case where he pays full value and has no actual notice of the pendency of the suit. *Ib.*

An attachment levied upon property constitutes a lien from the time of the seizure, of which all persons are bound to take notice. *Merrick v. Fenno, 15 Ark. 331; Frelison v. Green 19 Ark. 376.*

The purchase of this property, by Fraley and wife, was after the seizure by the sheriff, under the attachment, consequently they were bound to take notice of the attachment lien; and in addition to this the cross bill charges that they had actual notice of the fraud of the makers of the note and mortgage, and of the appellant's lien.

Garland & Nash, for appellees.

We submit that there was no shadow of equity in the cross bill, and not a semblance of defense in the answer of Cox, and that however the conclusion was reached, the decree was correct. See *Civil Code, sec. 370.*

Admitting that the mortgage was fraudulent, Cox had no right to come into a court of chancery to have it set aside, until he had recovered a judgment on his claim. *Mohawk Bank v. Stawler, 2 Page 57; Lawton & Levy, 2 Eden Chy. 12, 199; Hendricks v. Robinson, 2 Johns. Chy. 296; Brinkerhoff v. Brown, 4 Ib. 671; Williams v. Brown, Ib. 682; North American Fire Ins. Co. v. Graham, 3 Sandf. 197; Halbert v. Grant, 4 Monroe 580; Allen v. Camp, 1 Ib. 231; Graser v. Stellwayen, 25 N. Y. 315.*

Cox being a creditor at large of Burns, had no concern with his fraud. *Wiggins v. Armstrong, 2 J. C. 144.* And still less could he here interfere without connecting Fraley and wife with the fraud. *17 Ark. 146.*

Not only should Cox have shown that he had *judgment*, but also that he had *execution* returned *nulla bona. Meux v. Anthony, 11 Ark. 411; Williams v. Bizzell, Ib. 718; Cook v. Cook, 12 Ark. 387; King v. Payan, 18 Ib. 589.*

The writ of attachment was no proof of the debt. *Currier v. Ford, 26 Ill. 488; Hall v. Stryker, 29 Barb. 105.*

The attachment of Cox could hold, subject to this mortgage, but certainly not to delay or interfere with the mortgage at all. The mortgage must be foreclosed, and what is remaining after satisfying that, will go to Cox's debt under the attachment. *Leaman v. Stoughten, 8 Barb. Chy. 344; Dodge v. McClure, 6 Hill (N. Y.) 9.*

GREGG, J.

On the 7th of May, 1868, the appellees brought their suit, in equity, against Benjamin E. Burns, James F. Jordan and

Stephen M. Henley, to foreclose a mortgage executed by them upon a portable steam engine and apparatus, to Jesse H. Henley, and by him assigned to Mrs. Fraley.

Upon petition, the appellant was made a defendant, and for answer to the bill, he alleged that the note, to secure the payment of which the mortgage was given, was executed without consideration; that it and the mortgage were given to delay and defraud creditors, etc., and that the mortgagors were indebted to him, and that his equities were known to Fraley and wife before they purchased the note and mortgage.

On motion of the complainants, the court struck the answer from the files. The appellant excepted, and then filed a cross bill. After several motions and the forming of some immaterial issues, the court sustained a demurrer to the material parts of the cross bill.

Upon the hearing, a final decree was rendered against the original defendants, foreclosing their equity of redemption, etc., and Cox only excepted and appealed to this court.

There is no proof of fraud on the part of B. E. Burns & Co., in executing the note and mortgage. This court has repeatedly held that the fact of grantor being embarrassed is no proof that a conveyance is fraudulent. *Splawn v. Martin, 17 Ark., 146; Dardenne v. Hardwick, 9 Ark., 482; Hempstead v. Johnson, 18 Ark., 124.*

If acting in good faith, a debtor may pay or secure one creditor in preference to another. *Huff v. Roane, 22 Ark., 184; Williams v. Buzzard, 11 Ark., 718; Cook v. Cook, 12 Ark., 387; King v. Payne, 18 Ark., 589.*

But there was no issue in this cause presenting that question, which the appellant seemed to be seeking to raise.

The object of the bill was to foreclose the equity of redemption of Burns & Co, and have the property sold to satisfy a debt against them. The appellant was a general creditor of that firm, and had no interest whatever in the property mortgaged and no more right to inforce his demand against it than any other creditor had. If he attached the property, it was

after the execution and recording of the mortgage, and with a full knowledge of the existing lien. This he had a legal right to do, and if the value of the property was greater than the amount due under the mortgage, he can have the excess applied toward the payment of any judgment he may obtain; but a *mere obligation* that he owned a *valid claim* against Burns & Co., did not authorize him to come into a court of equity and set up fraud to prevent other creditors, who had been more vigilant than himself, from recovering against a failing firm. Appellant showed no interest in the property, and no claim even reduced to judgment; and there was no error in sustaining the demurrer to the material allegations in his cross bill. And if there was no equity in appellant's cross bill, and we are clearly of opinion there was none, he was not aggrieved upon any ruling of minor points in the cause, as the final decree would, of necessity, have been against him. Certainly no small amount of the time of the court below was consumed in motions that did not go to the real merits of the cause.

Finding no error in the final decree of the court below, the same is in all things affirmed, with costs.

KAUFMAN & CO. *v.* BARB.

EMANCIPATION PROCLAMATION.—The emancipation proclamation of January 1, 1863, did not liberate and free the slaves in the insurrectionary States, outside the lines of occupation of the national forces.

PLEADING—*Presumption of facts.*—Pleas are taken most strongly against the party pleading, and a plea, not averring that the sale took place within the Federal lines, or that the negro man had ever been within them after the proclamation of January 1, 1863, the presumption is against such facts.

Appeal from Independence Circuit Court.

HON. ELISHA BAXTER, Circuit Judge.

Watkins & Rose, for appellants.

Byers & Cox, for appellee.

HARRISON, J.

This was a suit on a writing obligatory, executed by the defendant to Hirsch & Adler, and assigned by them to the plaintiffs.

The defendant filed nine pleas. The *first* and *second* were, on the plaintiff's motion, struck out, and they took issue to the *ninth*, and demurred to the others.

The court sustained the demurrers to the *third*, *seventh* and *eighth* pleas, but overruled those to the *fourth*, *fifth* and *sixth*, and, without disposing of the issues taken to the *ninth*, rendered final judgment against the plaintiffs.

The fourth, fifth and sixth pleas, though varying somewhat in language, were, in substance the same, and the defense set up in them was, that the instrument sued on was given for a negro man, purchased by the defendant from Hirsch & Adler, in Independence county, in this State, on the 10th day of July, 1863, that had been emancipated and freed by the proclamation of the President of the United States, of September 1, 1862, and January 1, 1863, and therefore without consideration.

It was not averred, in the pleas, that the county of Independence was within the territorial lines when the sale was made, or that the negro man had ever been within them after the proclamation of January 1, 1863; and as every body is presumed to make the most of his own case, and it is a maxim of construction that every thing shall be taken most strongly against the party pleading, the presumption is against such facts.

In *Dorris v. Grace*, *24 Ark. 326*, it was decided that the

emancipation proclamation did not liberate and free the slaves in the insurrectionary States, outside the lines of occupation of the national forces. Of the correctness of the decision in that case, we think there can be no doubt, and as it is conclusive of the question presented in this, the judgment of the court below is reversed, and this cause remanded to it, with instructions to sustain the demurrers to the fourth, fifth and sixth pleas, and proceed to the trial or disposal of the issue formed on the ninth, and otherwise in accordance with law.

McCLURE, J., dissenting, says:

It seems that Barb, on the 10th day of July, 1863, purchased a negro slave from Hirsch & Adler, for the sum of thirteen hundred and twenty-five dollars, and in payment thereof executed his note for that amount, payable "twelve months after the expiration of the (then) present war." This note was assigned to Kaufman & Co., who brought suit on the same.

Barb, in his fourth plea, alleges "that on the 1st day of September, 1862, Abraham Lincoln, then President of the United States, issued his proclamation, warning the citizens of certain States, then in rebellion against the said United States, including the State of Arkansas, and the county of Independence, aforesaid, to return to their allegiance to said government on pain of forfeiture of all the slaves within said certain States. * * * And the said defendant further avers, that, on the 1st of January, 1863, the said Abraham Lincoln, President as aforesaid, and as commander-in-chief of the army and navy of the United States, issued his second proclamation, emancipating and freeing, absolutely, all slaves within certain States, therein mentioned, as continuing in rebellion, including the said State of Arkansas, and said county of Independence. * * * That on the 3d day of May, 1862, the forces of said United States government, under the command of Major General Samuel Curtis, occupied the county of Independence, aforesaid, and established the head quarters of

the military district, including the said State of Arkansas, at Batesville, in said county; that said head quarters were afterwards removed to Helena, in the county of Phillips, in said State, and remained there until the close of the war; that from and after the first occupation of said county of Independence, and that portion of the said State of Arkansas surrounding said county of Independence, the said United States authority claimed the same was within their military lines and jurisdiction; and, for the greater portion of the time, actually occupied and controlled the said county of Independence; that Hirsch & Adler, at the county of Independence, aforesaid, well knowing (on the 10th of July, 1863) that said negro was, by virtue of said proclamation, of right and by the irresistible power of the said United States forces, in fact free, fraudulently induced the said defendant to purchase from them said negro man; that trusting in the said fraudulent representations and promises of the said Hirsch & Adler, he, in total ignorance of said proclamation, purchased said negro from them, and then and there executed the said writing obligatory, and for no other consideration whatever; that the contract was made in violation of the said proclamation and the law of the land, and that said writing obligatory is null and void, etc.

The majority of the court say that "it is not averred in the pleas that the county of Independence was within the Federal lines when the sale was made." I have quoted at some length from one of the pleas, and am of opinion that the averment is made with sufficient precision and certainty. The fourth plea from which I have quoted, was demurred to, and the demurrer was overruled. The majority now direct that the court below shall sustain the demurrer to this and certain other pleas.

In my opinion, the defense set up by the plea is a good one, for the demurrer admits that the sale of the slave was made to Barb at a time when the Federal forces were in the occupation of the county of Independence, and at a time when the emancipation proclamation had been in effect for more than six months, and that Hirsch & Adler were aware of this fact. The

reason assigned by the court in *Dorris v. Grace*, (*24 Ark. 330*) for sustaining the demurrer to the plea in that case, was, that "the *enemy*," (and, by the use of this word "enemy," I suppose we are to understand the forces of the United States,) "had not extended his lines to Pine Bluff," but in this case the Federal forces are admitted to be in possession of the county of Independence, at the time the sale was made. The majority of the court may endorse an opinion which speaks of the army of the United States as an "*enemy*," as much as they are a mind to, but I shall do no such thing.

I concur with the majority in remanding the cause.

WILSON *v.* STRAYHORN.

MISREPRESENTATION.—Every misrepresentation will not avoid a contract—the fact or thing misrepresented, must be of such a character that the party deceived *had a right to rely upon it.*

Misrepresentations, to be fraudulent, must be *material*, must mislead the party to his damage, and must be *false*.

A party upon whom fraud has been practiced, must be prompt in communicating it when discovered.

WHAT REQUIRED OF CONTRACTING PARTIES.—The law requires contracting parties to be vigilant and to exercise due caution, and if the means of information are alike accessible to both, so that with ordinary prudence and diligence the parties might respectively rely upon their own judgments, they must be presumed to have done so.

MISTAKE.—Where the mistake is *mutual*, courts of equity will *correct*, but *not make* a new contract.

Appeal from Yell Circuit Court.

HON. WILLIAM N. MAY, Circuit Judge.

Clark & Williams, for appellant.

Strayhorn delivered the whole without explanation, and he cannot be heard to say that Wilson did not purchase the whole or contract for it; and he is bound to make good the whole. This act of delivery shifts the whole onus upon Strayhorn. Even where a man stands by and sees another purchase lands which belong to himself and says nothing, he is afterwards estopped from setting up his title. *Shall v. Biscoe, 18 Ark. 142; Trapnall et al. v. Burton et al. 24 Ark. 371.*

The doctrine of *caveat emptor* does not apply here. *Long on Sales, 129-30; Hall v. Gray, 1 Stark 434; Speuglemeyer v. Crawford, 6 Paige, 254; 1 Story Eq. sec. 200-206; 2 Kent, 481, 491.* In such case the seller is required to tell the truth. *Doggett v. Emerson, 3 Story R. 733:* see also, *1 Story Eq. secs. 193, 204, 206-7-8-9-10, 141-2-3 and 144; Richardson v. Blight, 8 B Monroe, 580; Calruly v. Williams, 1 Ves. Jr. 210, 211.*

English, Gantt & English, for appellee.

We submit that, even though Strayhorn did represent to Wilson that he owned all the lands in his enclosure, Wilson would be entitled to no recoupment on account of such misrepresentation, because the streets, alleys, courts, etc., of the town were public matters, open to inspection, observation and inquiry as well to Wilson as to Strayhorn, and not matters within the peculiar knowledge of Strayhorn. See *Smith v. Richards, 13 Peters R. 35; Hill v. Bush, 19 Ark. 529; Yeates v, Pryor, 6 Eng. R. 66*, and cases there cited.

Even if the streets, alleys and courts of the town had been properly dedicated to public use, when the town was laid out, which does not appear in the record, yet part of them being enclosed with lots, purchased and openly held, possessed and used as part of his premises by Strayhorn, for more than the longest period of limitation ever prescribed by any statute of this State, he acquired a perfect legal title to the ground, so

enclosed and held, as against the corporation and all others. *Cunningham v. Brumback, 23 Ark. 336; Hicks v. Fluit, 21 Ark. 463; Walker v. Town, 23 Ark. 147; Bowman v. Wathen, 1 How. U. S. 189; Angel on Limitations, Title, Adverse Possession, and particularly sections 383, 393.*

We respectfully submit that, in any view, the decree of the court below should be affirmed.

McCLURE, J.

Strayhorn sold to Wilson lots 1, 3, 5, 7, 17, 19, 21, 23 and 25, in block eight, in the town of Dardanelle, for $2,200; seven hundred dollars of this amount was paid on the 16th of March, 1867, and the note of Wilson for $1,500, due January 1, 1868, was executed and delivered to Strayhorn, who executed a title bond, binding himself to make a good and sufficient deed, in fee simple for the lots above described, upon the payment of the purchase money.

Wilson went into possession of the property, and has so continued until the present time. Failing to meet the note at maturity, Strayhorn, in September of 1868, filed his bill asking a decree for the purchase money, and a foreclosure of the equity of redemption held by Wilson.

To the bill Wilson filed an answer and cross bill, wherein he sets up that the property purchased from Strayhorn was inclosed by a fence; that he was a stranger in the country and unacquainted with the size of town lots, and was led to believe, from the statements and action of Strayhorn, that the lots described in the title bond, in extent, were equal to the whole amount of ground inclosed by the fence of Strayhorn; that he now finds such is not the fact, and that a portion of the ground within the inclosure is public ground of the town of Dardanelle; that certain repairs Strayhorn had verbally promised to make, have not been made, and concludes with a prayer that he may be allowed a credit on said note for the deficit of land within the inclosure purchased of Strayhorn,

on account of certain alleys and courts that he now finds belong to the town of Dardanelle, and for certain improvements that have not been made.

At the hearing the court below rendered a decree against Wilson for $1,513, foreclosed the equity of redemption, and ordered the property sold in default of payment. From this decree Wilson appealed to this court.

It is a well settled principle of the law that fraud must be charged, and not left to inference. The allegation in the cross bill is "that he (Wilson) was informed by Strayhorn that he owned all the *lots* within his inclosure; that Strayhorn distinctly stated that the whole inclosure belonged to him, and was divided into nine lots; that the courts and alleys within the inclosure, belonging to the town of Dardanelle, constituted about three-twelfths of the property inclosed.

There is no allegation in the cross bill that this statement was falsely or fraudulently made, with an intent to deceive, or that it did deceive the appellant in this case. In order to vitiate a contract for fraud, the representation must have been *material*—not only material, but it must have *misled* the other party to his damage and injury; and, in addition to this, the statement must have been *false*. It is not every misrepresentation that will avoid a contract. The fact or thing misrepresented must be of such a character that the deceived party had a *right to rely upon it*. The law requires each contracting party to be vigilant, and exercise a due degreee of caution.

In *Yeates v. Pryor*, *11 Ark.*, *58*, this court held that if the means of information are alike accessible to both, so that with ordinary prudence or vigilance the parties might respectively rely upon their own judgments, they must be presumed to have done so; or, if they have not so informed themselves, must abide the consequences of their own inattention and carelessness.

Strayhorn, in his answer to the cross bill, denies representing to Wilson that he owned any land within said inclosure, except the said nine lots, as they are represented on the map

of said town, and described in the title bond. There is no allegation in the cross bill that Wilson was misled by the statement of Strayhorn, or that he believed or relied on the same; if he did not, no fraud could have been practiced upon him.

The introductory or prefatory statement in Wilson's bill, that he was a stranger in the country, and had no knowledge of the size of town lots, is not such an averment as would excuse him from seeking such information as was accessible to a man of ordinary prudence and vigilance, nor is it such an averment as would authorize Wilson to rely implicitly upon the statements and representations of Strayhorn.

All towns have streets and alleys. The citizen of one State is as much presumed to know this as the citizen of another, and that the lots are not always uniform in size throughout a State. Strayhorn was not bound to communicate any fact to Wilson that an ordinary man, in the usual course of trade and business, would naturally look to. If a man of ordinary business tact and prudence would have inquired as to the location of streets, courts and alleys in a strange town, before making a purchase, then Wilson would be bound by the rule.

In our opinion, a man of ordinary prudence would feel some interest in knowing something about the streets, courts and alleys contiguous to his property.

There is another matter connected with this question of fraud that it may be well to look to, and that is, that the party on whom a fraud has been practiced must be prompt in communicating it when discovered.

Wilson went into the possession of the property, purchased in March, 1867, and has been continuously in possession since. On the first of April, 1868, more than a year after he went into possession, he paid Strayhorn $117 on the $1,500 note, but said nothing about being misled or deceived as to the quantity of land purchased. Wilson states that at the time Strayhorn came to him for the six or seven hundred dollars, that he knew of the deficit of land for which he now claims a deduction, but that he said nothing about it to Strayhorn. He also

admits that he offered, and was willing to borrow the money and pay the note if Strayhorn could tell him where the money could be borrowed.

Wishard, another witness, states that he had the note for collection, and about one month before the bringing of the suit, he called upon Wilson and wanted him to pay the note; that Wilson did not say anything about a deficit of land on account of the court and alleys, but did say something about troughs not being made as Strayhorn had promised, and offered to pay the note if Wishard could tell him where he could borrow the money.

It strikes us as being somewhat strange that Wilson would mention the fact that the troughs had not been finished as Strayhorn promised, and not say anything about having been misled or deceived as to the quantity purchased, especially at a time when Wishard was urging the payment of the note given for the property, and threatening to sue.

The first notice that Strayhorn received that he had practiced a fraud on Wilson, is found in the answer and cross bill of the appellant. A period of twenty months after the purchase, and during all which time the appellant was in possession of the premises, he says nothing about being defrauded. It seems, too, that he has not shown any promptness in communciating the fraud, if one was perpetrated upon him.

Wilson alleges that within the inclosure made by Strayhorn's fence there are forty-eight thousand and thirty-two square feet, and that twelve thousand three hundred and ninety-two feet of this amount is public ground of the town of Dardanelle, and to this extent there is, not fraud, but a failure, of consideration. For aught that appears in the record, Wilson would have purchased the property if he had known of the existence of the court and alleys within the inclosure.

Strayhorn, in most emphatic terms, denies all fraud, and there is no proof to sustain the charge; he insists that he was only selling the *lots* within the inclosure. On the other hand,

Wilson alleges that he understood he was buying all the ground inclosed by the fence.

Both men might have been honestly mistaken as to the meaning of the other. Such a mistake is no ground for the reformation of this contract. For, while it may be true that Wilson would not have purchased the property if he had known of the existence of the court and alleys within the inclosure; it may be equally true that Strayhorn, knowing of the existence of the streets and alleys, would not have parted with his property for less than twenty-two hundred dollars. Under such circumstances a reformation of this contract or sale would, in reality, be the making of a new contract by the court, to which the minds of neither party ever consented. Such is not the province of a court of equity. In cases where the mistake is mutual, a court has the power to reform a contract, but this is not the fact in this instance.

The attention of neither of the parties, at the time of making the sale, seems to have been called to the question of streets and alleys. It was no more the duty of Strayhorn to mention them than it was of Wilson to inquire after them. The neglect, or rather the result of a neglect, must be borne by the party who had it in his power to have provided against it by the exercise of ordinary diligence.

The judgment of the Yell county circuit court is affirmed.

STATE v. DUNN.

ILLEGAL CO-HABITATION.—An indictment for illegal co-habitation, should charge the parties to be of different sexes, and that they co-habited as husband and wife. The statutes of this State do not prohibit *persons* from co-habiting together, nor is such an offense at common law.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Montgomery, Attorney General, for appellant.

W. J. Warwick, for appellee.

GREGG, J.

The grand jury of Pulaski county, on the 12th of February, 1869, filed an indictment in the circuit court of said county, against the appellee and Jinnie Harrison.

In the second count of the indictment it was charged that said "Ellick Dunn and Jinnie Harrison, on the 25th day of December, 1868, and on divers other days and times, in the year aforesaid, did then and there illegally cohabit together—they, the said Ellick Dunn and Jinnie Harrison, not being then and there husband and wife—to the injury of public morals, contrary to the statute, and against the peace and dignity of the State of Arkansas."

The appellee appeared in court, and demurred to said second count. The court sustained the demurrer. The prosecuting attorney then entered a *nolle prosequi* to the first count in the indictment, and the court rendered judgment that the defendant go hence, without day; and the attorney for the State prayed an appeal to this court.

The second count in the indictment was clearly bad. There is no charge that Dunn was a man, and Harrison a woman, or *vice versa*, or that they co-habited as husband and wife.

There is no statute in this State prohibiting persons from cohabiting together, nor is such an offense at common law.

The judgment of the circuit court is affirmed.

KING v. CARNALL.

CONFEDERATE MONEY.—Contracts based upon Confederate money are *illegal* and *void*.

PLEADING—*Time of filing.*—After issue joined, the filing of a special plea, at subsequent term, is within the discretion of the court.

Appeal from Sebastian Circuit Court.

HON. E. J. SEARLE, Circuit Judge.

Du Vall & King, for appellant.

Watkins & Rose, for appellee.

BOWEN, J.

This is an action of debt brought by appellee against appellant and others, in the circuit court of Sebastian county.

At the October term, 1866, suit was discontinued as to all the defendants except appellant, who filed, during the term, the pleas of *nil debit* and set off.

At the April term, 1867, plaintiff took issue to the first plea, and replied the statute of limitations to the plea of set off.

The defendant filed an additional plea of set off, on a note executed by John Carnall, in March, 1862, for one thousand dollars. To this the plaintiff replied: *First.* The general issue; second, a special replication, setting up that the promissory note executed by Carnall was given for Confederate money, and therefore void, the same being an illegal consideration. To this replication the defendant entered his general demurrer, which was overruled. The cause was submitted to the court, sitting as a jury, who found for the plaintiff and entered judgment accordingly.

It appears from the bill of exceptions that, at the latter term, defendant asked leave to file a special plea, under oath, alleging substantially that the plaintiff, at the time of com-

mencing this suit, had no claim or title to the note sued on, having previously assigned the same to one Sarah Clark. The plaintiff objected to the filing, and was sustained therein by the court. The defendant excepted to such ruling, and to the overruling of his motion for a new trial, and the cause is here on appeal.

The only point involved in the overruling of defendant's demurrer to plaintiff's replication to defendant's second plea of set off is, that of the illegal consideration. We have already settled that question in the case of *Clark v. Latham*, 25 *Ark.*

The refusal of the circuit court to permit defendant to file his special plea just before going to trial, was a matter which addressed itself to the discretion of the court, and is one with which we will not interfere, especially since no good reason appears for asking to file at so late a day.

At the trial, in the circuit court, the note sued on was in evidence. The court having refused leave to defendant to file his special plea, and this court sustaining it therein, renders it unnecessary for us to say any thing further.

Judgment affirmed.

GRANGER AND WIFE *v.* PULASKI COUNTY.

26 37
68 162
26 37
79 561

QUASI CORPORATIONS—*Powers of.*—Counties may be termed *quasi corporations*, the assumption of their corporate powers conferred and duties imposed, are wholly involuntary, they possess no power, incur no obligations, except specially conferred by statute.

LIABILITY.—A private action will not lie, at the suit of a party injured, against a *quasi* corporation, resulting from non-performance by its officers of a corporate duty, unless given by statute.

Appeal from Pulaski County.

HON. JOHN WHYTOCK, Circuit Judge.

Rice & Benjamin, Gallagher & Newton and T. D. W. Yonley, for appellant.

Counties are liable as bodies politic, as also municipal. *Gould's Dig. 287, Sec. 1, Chap. 41*; corporations are liable at common law for trusts and acts of their agents. *Hawkins v. Duchess of Orange; Steamboat Co., 3 Wend. 453; McCready v. Guard. of the Poor, S. & R. 94; Lyman v. White River Bridge Co., 3. Ark. 355, 3. Hill 573, per Harper, C. J.; Goodloe & Smith v. city of Cin., 4. Ham 500 and 514; Cincinnati v. Hamilton Co., Wright 603; Chestnut Hill Turnpike Co. v. Butler, 4. S. & B. 16; Kansas v. Schuylkill Bank, 4. Was. C. C. 106; Riddle v. Proprietors of docks and canals, 7. Mass. 187; Gerch v. Fulton Bank, 7. Can. 485.* The demurer admitted the authority of the corporation. *Lyman v. White River Bridge Co., 2. Ark. 255, 257.* A county is liable to repair a bridge unless they can charge a particular person. *1. Salk R. p. 359,* (*s. 7.*) *1. Vent 61; 6. Mad. 150, 191, 255, 307. Holt 339.* To render corporation liable for negligence, law must impose duty upon it. *Hawkins v. Plattsburg, 15. Bart. 427;* also, *Western College v. Cleveland, 12; Ohio n. s, 375; Perkins v. Newell, 26 Ill. 220; Cates v. Davenport, 9; Iowa 227,* (*Withwell*) *227.* Municipal are equally liable as civil. See *R. v. Bingham & Glancetshen R. Co., 32, 223; R. v. Great N. R. Co., 315; 3 B. & Ala., 290; R. v. Scourbeck 6 A. & E. 513; 2 Black, 418; 1 Black, 39; 17 Haw. 161.* That all the requisites exist to create the liability in regard to Pulaski county, see, *sec. 1. chap. 41, p. 287, Gould's Dig.; Roads and Highways Ib. p. 962; Public Roads declared Highways, sects. 1 and 2; Ib. p. 971, sect. 76, 77; Ib. 966, sec. 29; Acts of Legislature 1860, p. 359; Ib. 371; Acts of 1860, Roads and Highways; Acts of 1854, p. 176.*

Warwick, Watkins & Rose, for appellee.

A county cannot be sued for damages occasioned by a de-

fective bridge or highway; *Hedges v. County, 1. Gilman, Ill. 567; Russell v. Men of Devon, 2 Durnf & East, 667; Ruddle v. Proprietors &c., 7 Mass. 186; Miney v. Police, 12 La. An. 858; Schuyler Co. v. Mercer Co., 4 Gilman, 20; Ward v. County of Hartford, 12 Conn. 404; Commissioners v. Meghels, 7 Ohio State R. 109; Huffman v. San Joaquin, 12 Cal., 426; Harvey v. Town of Newfane, 8 Barb., Sup. Ct. R. 645; Makinnon v. Penson, 18 Eng. L. & Eq., 509.*

BOWEN, J.

Daniel B. Granger and Alice C., his wife, brought an action, in the Pulaski circuit court, against the county of Pulaski, seeking to recover damages for injuries received by said Alice C. Granger, by being thrown from a bridge on a public highway in said county, in consequence of the insecure condition of the bridge, etc.

The appellee demurred to the declaration, which was sustained, from which ruling and judgment of the circuit court Granger appealed.

The principal point raised by the demurrer is, whether any action lies against a county in this State for damages resulting from a defect in a public highway.

Counties are a political division of the State Government, organized as part and parcel of its machinery, like townships, school districts and kindred sub-divisions. They do not derive any of the corporate powers they possess by a special charter. Their functions are wholly of a public nature, and their creation a matter of public convenience and governmental necessity, and in order that they may the better subserve the public interest, certain corporate powers are conferred on them. Whether they will assume their corporate powers and perform the duties and obligations imposed, are questions over which they have no choice, but their assumption is wholly involuntary.

They have been termed *quasi* corporations, possessing no

power, and incurring no obligations save those especially conferred or imposed by statute.

Chief Justice PARKER, of Massachusetts, in speaking of these involuntary corporations, said: "That they are not bodies politic and corporate, with the general powers of corporations, must be admitted;" and the reasoning advanced to show their defect of power is conclusive: "They may be considered, under our institutions, as *quasi* corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from the general use of authority, which belongs to these metaphysical persons."

It is well settled that, at common law, these *quasi* corporations are not liable to a private action at the suit of a party injured, resulting from the non-performance by its officers of a corporate duty, and no such action lies unless given by statute. This doctrine has been repeatedly asserted and applied by the courts of this State, where actions have been brought against counties and townships for injuries received in consequence of defects in the public highway. We know of but one State in which a contrary opinion is held. See *Mower v. Leicester, 9 Mass., 250; Bartlett v. Crozier, 17 Johnson, 439; King v. Police Jury, 12 La., 858; Hedges v. County, 1 Gillam, 567; Moray v. Newfane, 8 Barb., 645; 21 Cal., 426; 2 N. H., 393; 27 Barb., 543; 4 Mich., 557; 11 N. Y., 392.*

In the case of *Humphries v. Armstrong County, 56 Pa. St. R., 204,* cited by appellants, the question here raised does not seem to have been passed upon. It may be observed, however, that the statute of that State makes it an imperative duty for the county to repair all bridges in the county.

Numerous decisions have been cited by appellant's counsel, wherein cities and municipal corporations have been held liable. It must be borne in mind, however, that municipalities are usually created by express charter, in which the State parts with a portion of her sovereignty, and grants them large powers of self-government; larger powers of acquiring and controlling corporate property are conferred than on counties;

special and peculiar priviliges are given them as to streets and public ways, and special authority given for the use of public ways for the convenience of the citizen, unknown elsewhere. The benefits conferred raise an implied promise of the corporation to fulfill every corporate duty and obligation. The assumption of corporate powers by a municipality is voluntary. In this respect they assimilate a private corporation; and, having accepted a valuable franchise on the condition of the performance of certain public duties, are held to contract by the acceptance, for the performance of those duties.

There is no statute in this State rendering counties liable in actions sounding in *tort*, and the circuit court did not, therefore, err in overruling appellants's demurrer.

Judgment affirmed.

BLAIR, *Adm'r.* v. ALSTON.

FRAUDLENT DEED—Fraud may be shown against any deed, and evidence tending to show fraud in the execution of a deed, to hinder or delay creditors, is relevant and should be admitted.

Appeal from Johnson Circuit Court.

HON. WILLIAM N. MAY, Circuit Judge.

Watkins & Rose, for appellants.

Fraud avoids a contract both at law and in equity. *Straybhorn v. Giles, 22 Ark., 521;* and the evidence tending to establish the fraud, should have been allowed to go to the jury; *Mullen v. Wilson, 44 Penn., 413; Millett v. Pottinger, 4 Metc.*

(Ky.), 213; Babcock v. Eckler, 24 N. Y., 623; Porter v. McDonnell, 31 Missouri, 62; Telles v. Register, 4 Min., 391; Chandler v. Roeder, 24 How. U. S., 224; Mitchell v. Berry, 1 Metc., (Ky.) 602; Jones v. Lake, 2 Wis., 210; Burke v. Murphy, 27 Miss., 167. See Gould's Digest, Chap. 74, Sec. 4.

McCLURE, J.

On the 22d of December, 1860, Alston executed and delivered his note, under seal, to one E. T. Blair, for the sum of $820, payable one day after date, with ten per cent. interest until paid.

On the 9th day of August, 1866, Louisa J. Blair, administratrix of E. J. Blair, deceased, brought suit, by attachment, against said Elijah B. Alston, on the ground of being a non-resident of the State, and the sheriff attached eighteen hundred and twelve acres of land, as the property of Elijah B. Alston.

John W. Alston, a nephew of Elijah B. Alston, came into court and filed an interpleader, wherein he states: "That at and before the time of the sueing out and service of said writ of attachment, the property attached was not the property of said Elijah B. Alston, but, on the contrary, the property of the interpleader, John W. Alston.

To the interpleader the appellant filed a general replication, and the interpleader joined issue. The cause was submitted to a jury, and it found for the interpleader.

The appellant made a motion for a new trial, assigning several causes, and, among others, the following, which is the only one we shall notice: "*First.* Because the ruling of the court, in excluding parol testimony, whereby fraud would have been apparent, is contrary to law."

Upon the trial of the cause, the interpleader, to sustain the issue on his part, introduced and read to the jury a deed executed by Elijah B. Alston, on the 20th day of July, 1865, to John W. Alston. The consideration expressed in said deed is

$7,000, and natural love and affection that the grantor bears towards his nephew, the grantee. The interpleader also introduced a quit-claim deed, executed upon the same consideration expressed in the deed of July 20, 1865, by Elijah B. Alston and Hannah, his wife. This last deed bears date June 1, 1866. The deeds mentioned are for the same lands attached by the appellant, and were filed for record on the 9th of November, 1865, and September 8, 1866, respectively. The interpleader also proved that he had managed and controlled the lands described in said deeds since the fall of 1865. This was all the evidence submitted to the jury on the trial of the cause.

The appellant offered to prove that the deeds executed to the interpleader, by Elijah B. Alston and Hannah, his wife, were executed to defraud creditors; that the deed of the 20th of July, 1865, was executed by the said Elijah B. Alston, at a time when John W. Alston was in the State of Texas, and without any consideration; that the said John W. Alston was poor and penniless, and could not and did not pay any thing for said lands, and was a party to said fraudulent conveyance; that said Elijah B. Alston, at the time of making said deeds, was in failing circumstances; that he owed at the time as much as those lands were worth; that said lands were about all the property owned at the time by the said Elijah B. Alston. The appellant further proposed to prove, by exhibiting to the court, the writing obligatory sued on. The court refused to permit the introduction of any testimony tending to establish these facts.

Judge STORY says that fraud avoids a contract *ab initio*, both at law and in equity, whether such fraud was committed by one of the contracting parties upon the other or by both upon persons not parties thereto, for the law will not sanction dishonest views and practices by enabling an individual to acquire any right or interest by means thereof. *Chitty on Contracts, 589.*

We understand that a creditor may show fraud against any deed that defeats the collection of his claim, and that if the

badges, when presented to the court, disclosed that the grantor and grantee have participated in the fraud, to the delay and injury of creditors, that the deed may be set aside.

Evidence tending to show that the appellant was a creditor of Elijah B. Alston, and that the Alstons had acted fraudulently for the purpose of defrauding, delaying or hindering creditors, was relevant, and should have been allowed to go to the jury.

The judgment of the Johnson county circuit court is reversed, and the cause remanded for a new trial, not inconsistent with this opinion.

JOHNSON v. GEISRITER.

BANKRUPT—*Assignment.*—No assignment of property by a bankrupt after the filing of his petition is valid.

Appeal from Jefferson Circuit Court.

HON. H. B. MORSE, Circuit Judge.

B. S. Johnson, for appellant.

Bell & Carlton, for appellees.

MCCLURE, J.

On the third of September, 1867, Geisriter executed and delivered his note to W. W. Johnson, for $600, payable one year after date. W. W. Johnson assigned said note to one Ben. S. Johnson, the plaintiff in this action, who brought suit on the same.

Geisriter answered, setting up that W. W. Johnson had filed his petition in bankruptcy; that, at the time of filing said petition, said Johnson was the owner of the note sued on; that said note was not included in Johnson's schedule of assets, and that he had no right or authority to assign the same; that said W. W. Johnson, long after the filing of said petition in bankruptcy, was the owner of said note; that the assignment to Ben. S. Johnson, the plaintiff, was and is null and void, and that said plaintiff acquired no legal title by reason of said assignment.

To this answer the plaintiff demurred on the ground that "the answer does not state facts sufficient to constitute a defense."

The court overruled the demurrer, the plaintiff rested, and judgment was for the defendant. The plaintiff appealed.

The question presented is whether a bankrupt can assign property that ought to have been scheduled, after having filed a petition.

The demurrer admits the filing of the petition of bankruptcy, by W. W. Johnson, the ownership by him of the note at the time of filing the petition, that it was not included in the schedule of assets of said Johnson, and that long after the filing of the petition in bankruptcy, Johnson was the owner of the note.

The appellant urges that a bankrupt's assets do not pass to the assignee until the assignee has been *appointed and qualified.*

The bankrupt act requires the petitioner to make a schedule of his assets and liabilities. It also declares that, upon the appointment of the assignee and his qualification, the judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the interest, real and personal, of the bankrupt, and that such assignment shall *relate back to the commencement of said proceedings in bankruptcy;* and therefore, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, * * * and shall dis-

solve any attachment made within four months next preceding the commencement of said proceedings. The 11th section of the act declares: "The filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt."

The appellant urges that the answer does not disclose that the petitioner had been adjudged a bankrupt, or that an assignee had been appointed and qualified. The language of the 11th section is, that "*the filing of the petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.*" We construe this language to mean that a petitioner shall be deemed a bankrupt from the day on which he files his petition.

The moment the petition is filed the bankrupt is civilly dead. During the interval existing between the filing of the petition and the appointment of the assignee, a condition of things exist not unlike that in the case of a person dying intestate, and before the appointment of an administrator. On the death of a person intestate, no one is authorized to dispose of or assign his assets. A bankrupt is *civiliter mortuus*, from the day on which he files his petition, and during the interval, between the filing of the petition and the appointment of the assignee, no assignment of his assets can be made. A judgment rendered against a bankrupt, after the filing of the petition, and before the appointment of an assignee, is as much a nullity as a judgment rendered against a deceased person, who has no legal representative. If no valid judgment can be rendered against a bankrupt at such a time, it is not at all probable that the law gives him the power to make a valid assignment of assets that should, and which the appellant admits, ought to have been placed in the schedule.

The judgment of the Jefferson county court is affirmed with costs.

BUCHANAN *as adm'r. etc. v.* NIXON.

Appeal from Franklin Circuit Court.

HON. WILLIAM N. MAY, Circuit Judge.

Garland & Nash, for appellant.

Clark & Williams, for appellees.

GREGG, J.

The appellant presented a claim against the estate of the deceased for $1520, founded upon a promissory note, which claim was allowed, duly classed and ordered to be paid.

The appellant then filed his bill in equity and prayed an injunction against the collection of the claim, and that the order and judgment of the probate court be declared void, upon the ground that the only consideration for the note was certain negro slaves, sold in the year 1859, by the appellee to the deceased, in his life-time.

The appellee answered, made a feeble attempt to show that he had received pay for the slaves and then loaned part of the money.

Upon the hearing in the circuit court, the chancellor dismissed the bill for want of equity, and decreed costs against the appellant, from which decree he appealed to this court.

The only question involved in this case was decided by this court in the case of *Jacoway v. Denton, 25 Ark. 265.* That case determined the validity of the notes given for slave property before the attempted secession of the State.

The decree of the circuit court is in all things affirmed with costs.

McCLURE, J., dissenting, says:

I dissent on the grounds given in Kaufman v. Barb.

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STEPHENS *v* HOLMES, *et al.*

VENDOR'S LIEN—*Tax Title*—Neither the legal or equitable title to lands or town lots, sold for the non-payment of taxes, vests in the purchaser or holder of the certificate of purchase, until the execution and delivery of the collector's deed, and the relation of vendor and vendee does not exist between the purchaser and owner until such execution and delivery.

REDEMPTION.—The owner, in order to redeem, is not required to pay to the purchaser taxes paid by him subsequent to the purchase and before redemption.

Appeal from Pulaski Chancery Court.

HON. T. D. W. YONLEY, Chancellor.

M. L. Rice, for appellant.

J. W. Faust, for appellees.

WILSHIRE, C. J.

This is a bill filed in the Pulaski chancery court by B. M. Stevens, against Rebecca B. Holmes, (formerly Rebecca B. Ryan), Dr. —— Holmes, Henry S. Rymal and Edwin T. Linsley, the object of which was to enforce a vendor's lien.

The facts are briefly these: Stevens, on the 15th day of June, 1866, at a sale of lands, in Pulaski county, belonging to non-residents, for the payment of taxes, purchased certain lands belonging to Mrs. Rebecca B. Ryan, (now Rebecca B. Holmes), for the sum of $255 $\frac{52}{100}$, being the amount of taxes and penalty due on said lands, and the cost of the sale thereof; that he afterwards paid the taxes assessed upon said lands for the year 1866, amounting to $132; that after that, on the 16th day of July, 1867, said Rebecca B. Ryan (now Holmes) paid to Stevens the sum of $255 $\frac{52}{100}$, the amount paid by him at the tax sale for the land, and, also, the sum of $27 for improvements made by him on said lands; and thereupon Stevens

transferred, by assignment in writing, the certificate of purchase of the lands, to said Rebecca B. Ryan, in the following language:

"LITTLE ROCK, JULY 16, 1867.

"I hereby assign and transfer all my right, title, claim and interest to the within described lands to Rebecca B. Ryan, for value received, acquired by tax sale for the year 1865.

"Signed: B. M. STEVENS.

"Attested by B. F. Rice and J. W. Faust."

That the complainant(Stevens) has since demanded of said Rebecca B. Holmes, and her husband, Dr. —— Holmes, as, also, of the two other defendants, who hold under said Rebecca B. Holmes, by purchase and as tenants, the payment to him of the taxes on said lands for the year 1866, amounting to $132, paid by him, together with one hundred per centum thereon, which he alleges they refuse to do; and he prays that the same be declared a lien upon the lands, and the defendants directed to pay him the amount found to be due him, and, in default thereof, the lands be subjected to the payment thereof, etc.

The defendants demurred to the bill for want of equity, the court below sustained the demurrer and dismissed the bill, and the complainant appealed to this court.

The statute under which these sales were made, provides that lands and town lots belonging to non-residents of the county, in which they are situated, when sold for the payment of taxes, the non-resident owners of such lands may, within twelve months from the time of the sale thereof, redeem the same by paying or tendering to the purchaser of such lands, his legal representatives or lawful agents, the amount of taxes and penalty paid thereon, together with the costs of such sale and one hundred per centum on the whole amount paid by such purchaser, and shall also pay, or tender, to the purchaser, or his legal representatives, the true value of any improvements made on such lands, etc. See *Gould's Digest, Sec. 143*

Under that statute, no deed could be executed by the collector of revenue until after the expiration of one year from the date of the sale. Section 126 of the same statute provides that the "certificate of purchase shall be assignable, and an assignment thereof shall vest in the assignee, or his legal representatives, all the right and title of the original purchaser."

By section 129 it is provided that the collector, after the lapse of one year from the time of sale of lands belonging to non-residents, if not redeemed, shall execute to the purchaser, his heirs or assignee, a deed of conveyance. Section 130 provides that, upon the deed being executed, acknowledged and delivered by the collector to the purchaser, the title, both in law and equity, shall vest in the grantee.

It is evident to our minds that it was not the intention of the Legislature enacting the statute, above referred to and quoted, to vest the title, either legal or equitable, in the purchaser or holder of the certificate of purchase of lands or town lots sold for payment of taxes, until after the execution and delivery of a deed by the collector for such lands or town lots. Therefore, the relation of vendor and vendee, necessary to create the vendor's lien, never existed between the complainant and any of the defendants, for it does not appear that the collector of revenue of Pulaski county ever made a deed to Stevens for the lands in question; but, on the contrary, the record of the chancery court shows that the lands, purchased by Stevens, were redeemed by Mrs. Ryan, and the certificates of purchase transferred to her by the written assignment of Stevens.

The statute under which the sale of Mrs. Ryan's lands was made, does not expressly require the owner of lands or town lots sold, to entitle her to redeem the same, to pay to the purchaser any taxes paid by him on such lands subsequent to his purchase, and before the redemption thereof. The purchaser, in such a case, if he has any remedy, is remitted to an action at law against the party for whose use and benefit he may have

paid the taxes, subsequent to the purchase and before the redemption.

We think the chancery court properly dismissed the complainant's bill for want of equity.

The judgment of the court below is, therefore, affirmed.

HANGER & CO. *v.* KEATING, *Adm'r. etc.*

JURISDICTION—*Prohibition.*—Where there is no final judgment, no appeal will lie. Prohibition is the only remedy before determination, where courts are proceeding without jurisdiction.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Garland & Nash, for appellants.

Watkins & Rose, for appellee.

HARRISON, J.

Thomas D. Keating, administrator of Milus Killian, deceased, applied, by petition, in the circuit court of Pulaski county, for an order to sell the lands belonging to his intestate's estate, for the payment of its debts.

Peter Hanger & Co., and Fletcher & Hotze, creditors of the estate, as they alleged, appeared in court and demurred to the petition upon the ground that the subject thereof, and the power to make such order, was not within the jurisdiction of the court. The court overruled the demurrer and made an

order that all persons interested in the estate should be notified to show cause, on the first day of the next term of the court, why the prayer of the petitioner should not be granted. Peter Hanger & Co. and Fletcher & Hotze excepted to the rulings of the court, and without further proceedings being had, prayed an appeal to this court.

It is manifest that there was no final judgment, or order, in the proceeding from which an appeal might be taken. If the court was proceeding in a matter not within its jurisdiction, a prohibition was the only remedy which could be resorted to, before the determination of such proceeding. The case must therefore be stricken from the docket.

CITY OF LITTLE ROCK, *ex parte*.

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JURISDICTION—*Prohibition.*—Prohibition will not lie to an inferior court, in a cause arising out of its jurisdiction, until that matter has been pleaded in the original court and the plea refused.

The circuit court will not be presumed to take cognizance of matters not within its jurisdiction.

Petition for Prohibition.

T. D. W. Yonley, Montgomery & Warwick, for petitioner.

The power of amotion is incident to every corporation, *2 Kent. Com. 348-9; Angell & Ames on Corp. sec. 408-9, 27, 32; 5 Ind. 77; Grant on Corp. p. 240*, and is conferred by statute in this State. *See page 273, New Digest, sec. 67, Law of Mun. Corp.* The city council is not a court and the provisions of the Code (*sec. 521*,) do not apply to it.

WILSHIRE, C. J.

On a former day of the present term the city council of the city of Little Rock presented to this court their petition, suggesting and informing us that one H. H. Pugh had applied to the Pulaski circuit court for a writ of mandamus, commanding the members of the said city council to refrain from further proceeding in the cause of impeachment instituted in said council for the removal of said H. H. Pugh, as the solicitor of said city, upon charges preferred against him, and also commanding said city council to dismiss said proceedings against said Pugh.

This court, in a very early case, announced the doctrine that at common law the rule was that no prohibition lay to an inferior court, in a cause arising out of its jurisdiction, until that matter had been pleaded in the original court, and the plea refused. *Williams, ex parte, 4 Ark., 540; Blackburn, ex parte 5 Ark., 22.*

The same doctrine was reiterated and re-affirmed in the case of *McMeechen et al., ex parte, 12 Ark., 73.* The suggestion in this cause fails to show that the petitioners have made any effort to defeat the issuance of the mandamus by the circuit court, by plea to the jurisdiction of that court, or otherwise.

This court will not presume that the circuit court will take cognizance of matters not within its jurisdiction.

There being no allegation in the suggestion that the petitioners have sought, by plea or otherwise, to object to the jurisdiction of the circuit court, and prevent the issuance of the mandamus; that the plea or objection was overruled and refused, the application here for a rule to show cause why the writ of prohibition should not issue must be refused.

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TRULOCK *et al.* v. TAYLOR, *Adm'r.*

EJECTMENT—*Swamp and overflowed lands.*—An entry of lands with the register of the United States land office, in accordance with the law authorizing him to act, and the receipt of the purchase money by the proper officer, although no patent be issued, *vests* such title and legal interest, as enables the purchaser to maintain ejectment; and a subsequent grant by the United States, of such land, under an act entitled "An act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits, approved September 28, A. D. 1850, conveys no right or title, as against the original purchaser, from the United States to the State, or its vendees, further than a naked legal title in trust for the party holding the prior and more equitable title.

PLEADING—*Practice.*—Where, under the Code of Practice, an equitable defense may be made to a suit at law, and the case is not transferred to the equitable side of the docket, the issue made on such defense is not to be disregarded, and such issue must be disposed of by the court according to the principles involved, either of law or equity.

EQUITABLE TITLE—*When pleaded*—An equitable title, in an action on a United States land patent, can be pleaded in a State court, when permitted by the law of the State.

PLEAS—*Election of*—Parties can only be required to elect between pleas presenting the same issue *and both well pleaded.*

Appeal from Jefferson Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Watkins & Rose, for appellants.

We submit:

1. Action is barred by Statute of Limitation. *Gould's Dig. p. 462, sec. 22. Ib. p. 739, sec. 2.*

2. Suit of 1862 is a nullity. *Const. 1868, art. 1, sec. 25.*

3. Refusal to allow first plea reinstated, was error.

4. Refusal to declare law propositions of appellants, was error.

As to third proposition, see *Cowper, 473.*

There was nothing *dubious* in appellant's *equity. 2 Johnson's*

cases, *321.* See also, *3 Wheat. 221; 2 Wend. 109; Angel on Lim. sec. 327; 7 Wallace, 386.*

5. The second suit was not a continuation of the former one. *8 Cranch, 84; 22 Texas, 93.*

Bell & Carlton, for appellee.

The ruling of the court requiring appellant to elect between 1, 3 and 4 pleas, was right. *Davis v. Calvert, 17 Ark. 85; Spencer v. McDonald, 22 Ark. 466; Sumpter v. Tucker, 14 Ark. 186.* Plaintiff had a right to demur after motion to elect was disposed of. *Davis v. Calvert, 17 Ark. 85.*

The propositions of law asked by defendants, were clearly erroneous. As to the first, see *Thorington v. Smith & Harly 8 Wallace; Hawkins v. Filkins, 24 Ark. 288.* The *second* was based upon the idea that time runs against the government.

The *third* proposition is, that defendant's equitable title, based upon a pre-emption float, that had never been confirmed by the United States, will prevail in this action of ejectment over the plaintiff's legal title. See *Campbell v. Garvin, 5 Ark; Hooper v. Scheimer, 23 Howard, 249.* We submit there was no error in the ruling of the court below.

WARWICK, Special J.

At the May term, 1862, of the circuit court of Jefferson county, Creed Taylor, administrator of the estate of Solon B. Jones, deceased, brought action of ejectment against Amanda Trulock, *et al.*, to recover possession of eighty acres of land in Jefferson county. Summons was issued and the defendants served, but no other proceedings appear to have been had in this case.

At the May term, 1866, said Creed Taylor, administrator, etc., instituted a new suit, to recover possession of said land, against Amanda Trulock, *et al.*, alleging in the declaration that Solon B. Jones, his intestate, was, on the first day of Jan-

uary, 1861, *in possession* of the lands sought to be recovered, and that, by *virtue of such possession*, he, Creed Taylor, as administrator, became entitled to the possession of said premises on the first day of January, 1866, and that *afterwards*, to wit: on the first day of February, 1866, Amanda Trulock, *et al.*, entered, etc.

At the fall term, 1866, on motion of Taylor, the first suit was dismissed. At the fall term, 1867, the appellants filed four pleas: *First.* Not guilty. *Second.* Statute of limitations. *Third.* Possession since the 27th April 1836, under right and title derived from the United States, by virtue of an entry and purchase thereof, on that day made, of the register and receiver of the United States district land office, located at Little Rock, Arkansas, and authorized by law so to sell the same, and so continuously have been in such actual, peaceable, uninterrupted, adverse possession and occupation to the present time. *Fourth.* Possession under Barraque, (who entered) and assignees, as in third plea. That appellee claims title thereto, and right of possession, by virtue of a purchase made by his intestate, Solon B. Jones, in the year 1856, of the State of Arkansas, claiming the same under an "Act (of Congress) to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits;" approved September 28, A. D. 1850; that the land in controversy was not, at the time of the passage of the act of Congress, and has not been since, swamp or overflowed land, and that the selection and confirmation thereof, as a part of the grant inuring to the State of Arkansas, was and is a mistake, and a fraud upon said act.

On motion of the appellee, the appellants were required, by the court, to elect between their first and fourth pleas, and they elected to stand upon the fourth.

The appellee then demurred to the fourth plea, which demurrer was sustained by the court. Whereupon the appellants moved the court for leave to reinstate their first plea, which motion was overruled by the court.

At the May term, 1869, this cause was submitted to the

court, sitting as a jury, on the following written agreed statement:

"For the trial and determination of the issues joined in this cause, and now submitted to the court as a jury, and for the purpose of such trial, the said parties, by their respective attorneys, agree that the facts are as follows: The tract of land described in the delaration was located with an eighty acre pre-emption float, under the act of Congress of 29th of May, 1830, by Antoine Barraque, at the United States land office, at Little Rock, on the 27th of April, 1836, *and the purchase money thereof* ($100) *paid by him* to the receiver of said land office, but no patent has ever been issued on said entry.

"On the 12th day of December, 1843, said Barraque and wife made a deed of trust, of and upon said land, to Frederick Notrebe and William B. Wait, to secure the payment of certain debts owing by him.

"On the 21st day of February, 1845, said trustees, Notrebe and Wait, sold said land, under and in pursuance of said deed of trust, when the same was purchased by James H. Trulock, the husband of said Amanda, father of said other defendants, and conveyed to him, by deed of said trustees, and he entered into possession thereupon, and cleared the same, and it has ever since then been in cultivation; and under and by virtue of such purchase, at said trustees' sale, said tract of land has been in possession of the said James H. Trulock, and of the said defendants, succeeding and claiming under him, ever since the 21st day of February, 1845, and down to the present time; and this paragraph includes the fact that said defendants were in possession of said land at the time of the institution of this suit, and of any former suit for said land. So far, such fact may be relied on by said plaintiff.

"Said Antoine Barraque and James H. Trulock are both dead, and both died in or prior to the year 1848.

"Ever since said James H. Trulock purchased said land at said trustees' sale, he and said defendants, claiming under him, have been in the actual possession of said land, openly and no-

toriously claiming the same as owners, and using and cultivating the same.

"Said tract of land has never been overflowed, so far as known to any person now living, and was not at the time of the passage of the act of Congress of the United States entitled 'An act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits,' approved September 28, 1850, and has not since been swamp or overflowed land, or in any way made unfit thereby for cultivation.

"Said tract of land was selected, by the agents of the State of Arkansas, as part of the swamp lands in said State, under and by virtue of said act of Congress, and on the 9th day of August, 1855, the intestate, Solon B. Jones, entered and purchased the same at the State swamp land office, at Pine Bluff.

"Such selection was confirmed by the commissioner of the general land office, at Washington City, and the same, along with other lands so selected, were patented to said State; and said tract of land was conveyed by the Governor of said State, pursuant to such entry, to Solon B. Jones, by deed, on and bearing date January 14, 1858.

"On the 10th day of February, 1862, said plaintiff instituted an action of ejectment for said lands against the defendants thereto. The declaration and writ in that suit, on file in the office of the clerk of this court, and indorsements thereon, as the same appears of record, are here referred to and made part hereof, the same as if here inserted at full length.

"On the 19th of March, 1866, said plaintiff, on account of the supposed loss of said papers, instituted this suit, and on the 3d day of December, 1866, dismissed the said former suit.

"And upon the foregoing facts this case is submitted to the court, sitting as a jury, upon the issues joined herein, with leave to either party to except to any rulings of the court, upon any propositions of law that may be moved by either as applicable to this case, and take a bill of exceptions in respect thereof." Signed by attorneys for both parties.

The court below gave judgment of possession to the appellee, Creed Taylor, administrator, etc., and damages against the appellants, Amanda Trulock, *et al.*, in the sum of $2, 690, from which they appeal.

The Code of Practice for this State went into and took effect on the first day of January, 1869, by its own provisions, and has been in full force and effect from that date, so far as it gave or created any new or substantial right. The act of the Legislature, approved April 12, 1869, entitled, "An act to legalize the practice and proceedings of the courts of this State from January 1, to June 1, 1869," in no manner postponed the time of its taking effect, but merely extended to the pleader the privilege or option to plead under the former practice, or under the Code, until the first of June, 1869, after which time all pleadings were required to conform to the Code.

Under the Code of Practice, a defendant may, in his answer, in action to recover the possession of land, set up and rely upon an equitable defense. See *section 116, Code of Civil Practice.* This was a substantial right enjoyed by the defendants in the court below, at the time of the trial of this cause, viz: at the May term, 1869, of the Jefferson circuit court. Where an equitable defense is set up to a proceeding at law, either party may have the case transferred to the equity side of the docket; but if this be not done, the issue made on such defense is not to be disregarded, and such issue must be disposed of by the court according to the principles involved, either of law or equity. *Pitty v. Maher, et al., 15 B. Mon 604.* The right of a defendant to plead an equitable title, in an action on a United States land patent, in a State court, when permitted by the law of the State, was definitely settled in the Supreme Court of the United States, in the case of *O'Brien v. Perry, 1 Black, (U. S.,) 132.* This was a case similar to the one now under consideration, in which the right was maintained by the Supreme Court of Missouri, and an appeal was affirmed.

In this case the appellee claims title and possession through

a purchase from the State of Arkansas, she acquiring title by a grant from the United States, as swamp and overflowed lands, and received a patent from the general government for the same. The appellant claims under and by virtue of an entry made with a pre-emption float, at the United States land office, on the 27th of April, 1836, and for which the United States, or her representatives received the purchase money, for which a certificate of entry was given, but no patent has been issued thereon.

Various questions of pleading, practice and limitations are presented to the court, none of which, however, with our views, being necessary to the determination of this cause, we pass them, and proceed to the main inquiry, viz: Does the third plea of the appellant, taken in connection with the agreed state of facts, present a sufficient legal or equitable defense to defeat the appellee's claim? For, as we have before stated, the appellant could rely on an equitable as well as legal defense, under the Code of procedure of this State.

It is admitted by counsel for the appellee, that all the facts set forth in the agreed statement could be given in evidence, under the first and third pleas of the appellant, and upon this statement the case was presented to the court below, and upon it do we form our opinion.

At the time Barraque, the first purchaser, entered upon the land in controversy, it was the subject of sale and entry under the laws of the United States. Barraque did all that the law required of him to entitle him to a patent, in the selection of the land and payment of the money to the receiver of the land office at Little Rock, and he, and those claiming under him, cannot be affected by the negligence or want of fidelity of the officers of the government. It was held, in *Moyer v. McCullough, 1 Ind., 343*, that when "the Register of the land office, in accordance with the law authorizing him to act in the premises, admitted the location to be made, and granted a certificate of the location, his authority for disposing of the land, thus legally located, was at an end. The land was no

longer in the market and the Register's subsequent sale of it, though to a person without notice, is not sustainable in a court of equity against the location."

So, also, in *Astrom et al., v. Hammond, 3 McLean's Reports, 107*, Justice McLean said, in regard to land thus situated: "Until the patent is issued the purchaser has not the legal title, but having made the entry of the land, and paid for it, the government can no more dispose of the land to another person than if the patent had been issued." An entry or survey for lands is an inchoate legal title, incomplete it may be; they will descend, may be devised, or aliened, and, as has been held by this court, vests such legal interest as enabled the purchaser to maintain ejectment.

In the United States courts it has been held that, where land has been bought and paid for, a certificate to that effect makes it as much the land of the purchaser as the patent itself. "Lands which have been sold by the United States can, in no sense, be called the property of the United States. They are no more the lands of the United States than lands patented."

In the case of *Reichart v. Phelps, 6 Wallace, 160*, the Supreme Court of the United States held that "patents by the United States for land, which it has previously granted, reserved from sale, or appropriated, are void." It is certain that in this case Barraque, having entered the land with a preemption warrant of the government, and the money paid to an agent of the government, duly authorized to receive it, the United States no longer held any right or title to grant to the State of Arkansas.

So, also, in *Stark v. Starrs, 6 Wallace, 402*, held that "the right to a patent once vested, is treated by the government, when dealing with the public lands, as equivalent to a patent issued." Can there be a doubt as to the lands in controversy, that a right to a patent vested in Barraque, when he located the land, and paid the government the full price she demanded in money? We think not.

It is insisted by the appellee that the patent is conclusive.

This is true, so far as it appropriates the land called for, and against rights subsequently acquired; but it has been judicially determined, in many cases, that when an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined. *Bush v. Ware et al., 15 Peters 93*, and cases there cited.

The most that can be claimed for the title of the appellee is, that he holds the naked legal title in trust for the appellants; and it would be manifestly inequitable to oust the beneficiary holding a prior and more equitable title.

We cannot but conclude that the selection of the land by the State, and the issuance of a patent by the United States, was the result of a mistake, but from which the State of Arkansas, and the appellee claiming under her, take nothing—for, from the great length of time these lands were occupied notoriously by Barraque, and appellants under him, taxes must have been paid thereon, to the State, raises a very strong presumption, if not conclusive, that the State, as well as the appellee, had actual notice of the prior equities of the appellants.

There is one question of practice presented by the record, that we cannot pass without allusion. At the fall term, 1868, the appellee filed a motion to require the appellants to elect between their first plea (not guilty), and their fourth plea, being a special plea for possession, under color of title, etc., which was sustained by the court, and the appellants elected to stand on their fourth plea; whereupon the appellee demurred to the fourth plea, assigning that it was defective, double, etc., which was sustained by the court.

At the next term the appellants prayed to have their first plea reinstated, which was refused.

Without passing on the merits of the fourth plea, but conceding that, under the practice before the adoption of the Code, (whatever it may be now) the demurrer was rightly sustained, the court below erred in sustaining the motion requiring the appellants to elect between the first and fourth pleas. For it

is a well established rule that parties can only be required to elect between pleas presenting the same issues, *and both well plead.*

The judgment of the court below is reversed, and the cause remanded with instructions to permit the parties to further plead.

HARRISON, J., being disqualified, did not preside in this case.

HON. W. I. WARWICK, Special Judge.

LESTER *v.* HOSKINS, HEISKELL & CO.

JUDGMENTS—*When enjoined.*—Equity will not relieve against a judgment at law when the defense could be made at law, unless it is clearly shown that the defense set up is meritorious, and the party was prevented from making it, by unavoidable circumstances, or without any default or laches on his part.

Appeal from the Lawrence Circuit Court.

HON. L. L. MACK, Circuit Judge.

English, Gantt & English, for appellant.

Watkins & Rose, for appellee.

MCCLURE, C. J.

It appears from the record in this case, that Glasscock & Co. were indebted, by note, to Hoskins, Heiskell & Co., in the sum of $2,597 03; that in order to secure the payment of this and

other indebtedness, Glasscock & Co. assigned to Lester their partnership book accounts. At the time of this assignment, Lester held the note of Glasscock & Co., due Hoskins, Heiskell & Co., for $2,597 03, for collection, upon which was a credit of $1,816 49.

Hoskins, Heiskell & Co. brought suit against Lester, on the law side of the Lawrence county circuit court, alleging that said Lester was indebted to them, in the sum of two thousand dollars, for moneys collected from the books of Glasscock & Co. Of the pendency of this suit Lester had notice.

At the November term of said court, 1866, Hoskins, Heiskell & Co. obtained a judgment against Lester for $1,294 58, and an execution was issued and levied upon his property.

In April of 1870, Lester filed his bill, setting up the above, and other facts, and prayed for an injunction, based upon the ground, that at the time said judgment was obtained, he was "too sick and wholly unable to ride to said court," and that he conceived his most appropriate remedy was in a court of equity.

Hoskins, Heiskell & Co. filed their answer, wherein they allege that they are unable to admit or deny that said Lester was sick and wholly unable to ride to said court, and ask that he be required to make strict proof to said allegation; that said Lester is an attorney, practicing in the Lawrence circuit court, and that in other cases in which said Lester was a litigant, at said November term, he was represented by Paschal L. Liggan, Esq., a practicing attorney in said court.

At the filing of the bill a temporary injunction was granted, and at the hearing, the injunction was dissolved and the bill dismissed. From the decree Lester appealed to this court.

The appellant sets up no defense in equity, that he could not have availed himself of in a court of law. He simply states the payment of certain sums that he was entitled to receive as credits on the note; the defendants admit the right to these credits, and allege that Lester received credit therefor in the suit at law. The only ground set up in the bill that would

authorize the interposition of a court of equity on the facts stated is, that the appellant was too sick to appear and defend in the court at law.

The defendants, as has been stated, required strict proof upon this point, and none is given; in fact the appellant makes no proof of any controverted allegation in the bill.

Green P. Nunn, it seems, held the receipt of Lester for the note, and was the attorney for Hoskins, Heiskell & Co.; he died. His executor delivered it to James C. Marain, who called on Lester for the money. Marain testifies that Lester offered to pay the sum due on the note to him in July of 1860, but that he would not agree to pay the interest, and that he, Marain, would not receive the principal without the interest. Marain also states, that he contracted with a partner of Lester's for some land, and that it was agreed that $100 00 should be credited on the note; that Lester was informed of this fact, and refused to do it on the ground that the defendants were residents of the State of Pennsylvania and that the debt was confiscated to the Confederate States.

No claim seems to have been set up by Lester, at the time alluded to, that he had not realized the money out of the assets of Glasscock & Co., and he presents no evidence in support of that position. The offer to pay the note, less the interest, can hardly fail to carry conviction to the mind that Lester must have realized, at least, the amount he offered to pay, out of the assets of Glasscock & Co. He at no time, before the beginning of the suit, placed his refusal to pay the note on the ground that he had not realized the money out of the assets in his hands.

The judgment of the circuit court of Lawrence county is affirmed with costs, and ten per centum damages.

McCLURE v. McDEARMON.

EQUITY—*Liens.*—A sale or lease by one joint-stock owner of his joint interest to the other for a valuable consideration, reserving, by trust deed, a lien on the joint stock interest and the increase thereof in the line of business, is a continuing security, enforcible in equity, between the parties and their privies, with knowledge of the prior incumbrance.

Appeal from Independence Circuit Court.

HON. ELISHA BAXTER, Circuit Judge.

Watkins & Rose, for appellant.

A mortgage will not pass chattels *not in existence at the time it was made, or not in the ownership of the mortgagor at the time. 1 Hilliard on Mortgages, p. 6; 2 Ib., ch. 42, sec. 4, p. 479,* and cases cited, particularly *Moody v. Wright, 13,* (*Mass.*) *20, 39; Winslow v. Merchants, etc., 4, 2d, 306; Bernard v. Eaton, 2 Cush., 294; Codman v. Freeman, 3d Ga., 306; Otis v. Sill, 8 Barb., 102; Gardner & McEwen, 19 N. Y., 123; Chapin v. Cram, 40 Maine 561; Cudworth v. Scott, 41 N. H., 476; Rose v. Bevan, 10 Md., 466.*

The mortgage, in this case, did not even bind the forty logs and the fifteen cords of wood on hand, at the time Ingram sold to McClure, because it is no where shown or even claimed in the bill, or elsewhere, that Ingram had them at the time he made the mortgage, which was six months before the sale by Ingram to McClure. See *Hamilton v. Rogers, 8 Md., 301; 2 Hill on Mort., ch. 42, sec. 22, p. 398.*

The notion on which the decree is based, that A. may pledge, by mortgage, the after-acquired property of B., seems never to have been thought of before—certainly it has never been put in print.

We submit, then:

1st. That the injunction should have been dissolved, except as to the forty logs and the fifteen cords of wood.

2d. That the injunction ought to have been dissolved altogether, there being no evidence that the logs and wood belonged to Ingram, when the mortgage was made, or that they were at the mill when the suit was brought.

Byers & Cox, for appellee.

If the mill and lease were real property, a covenant to pay rent would run with the realty. *4 Kent, 473, and n. b.*

But we will treat the lease, in this case, as being upon personal property. The lease by McDearmon to Ingram being but for one year, was a personal chattel. *2 Kent, 342 and n. b.*

1st. It is a principle of universal application in equity, that all kinds of property, whether real or personal, capable of being sold, may be mortgaged in conformity to the maxim of the civil law, "Whatever may receive purchase and sale, may also receive hypothecation." Rents, franchises, *choses in action, possibilities*, coupled with an interest, etc., may be mortgaged. *2 Story Eqt., sec. 1021.*

Things having a *potential* existence, and contingencies and possibilities coupled with an interest, a single hope or expectation of means, founded on a right *in esse*, are capable of sale (and, consequently, of mortgage) at law. *1 Bouv. Inst. Nos. 599 to 603; 2 Kent, 468 and n. g.; 2 Kent, 401 and n. b.; 1 Parsons on Con., 523.*

And we refer specially to the case of *Hibblewhite v. McMorine, 5 M. and W., 462*, cited at length in the last named note, overruling the doctrine that the sale of property, to which the vendor has no title, and which he intends, at the time of sale, to go into the market and buy, is void and cannot be enforced.

The doctrine at law requiring the existence, actual or potential, of the thing sold or assigned, falls far short of that now entertained by the courts of equity, for they will support the assignments of contingencies and possibilities having no potential existence, but resting in mere possibility; not as a transfer to operate *in presenti*, but to take effect and attach as

soon as the thing comes *in esse. 2 Story Eqt., sec. 1040*, and the authorities cited in the notes to that selection; also, *Secs. 1040, c. and notes; 1040, d. and notes; 1055, and notes; 2 Story Eqt, sec 1021; 1 Mad., ch. 54; Adam's Eqt., 54; Kent's Com., 468, and n. g.*

In the case now before the court, the mortgage or deed of trust given by Ingram, gave the appellee the right and power to seize the property mortgaged, as soon as it come *in esse*, and there was a default in payment by Ingram. Ingram made default; the property mortgaged come into being and the appellee *executed* the power vested in him as mortgagee and trustee, by seizing the property, and the mortgagor, and his privies in estate, are estopped from now questioning the mortgagee's lien thereunder. *Moody v. Wright, 13 Met. 17; 2 Story Eq. sec. 1040 and n. 3, 6 and 7; 2 Story Eq. sec. 1040 and n. 8; Holroyd v. Marshall, 6 Jurist, N. S. 931; Hose v. Haly, 5 El. and Bl. 845; 2 Jurist, N. S. 486; 1 Parsons on Contracts, 570, 1 and N. S. and T; Congress v. Evetts, 26 E. L. and Eq. 493; Wood v. Luster, 29 Barb. 145; VanHosyer v. Cory, 34 Barb. (N. Y.) 10; Cudworth v. Scott, 41 N. Hamp. 456; Beaumont v. Crane, 14 Mass. 400.* All of which authorities are cited in *2 Kent (11th Ed.) 616, n. 5.*

GREGG, J.

On the 27th of August, 1868, the appellee presented his bill of complaint to the chancellor of Independence county, and prayed an injunction against the appellant, which was awarded and the bill filed in the office of the clerk of that county.

The complainant alleged that on the third of May, 1867, he and William Ingram, jointly owned a saw mill, machinery, etc., for running the mill and manufacturing lumber, and also a lease for four years, from November, 1866, of the ground on which the mill stood; that he owned one-third and Ingram two-thirds; and that they could not agree in jointly running the mill, and by arbitration, it was agreed that Ingram should

run the mill from August 1, 1867, to August 1, 1868, for the use of which he was to pay the appellant $600, and certain expenses to be incurred. And the appellee was to have a lien upon the stocks and on the lumber cut, within the year, to secure quarterly payments. The award was signed and recorded, and on the third of August, 1867, Ingram executed four writings obligatory, and a deed of trust on the stocks and lumber to be cut, to secure the payment. The deed was recorded; at maturity the first obligation was paid off.

On the first of November, 1867, Ingram delivered the mill, etc., to the appellant, and by deed of January 16, 1868, conveyed to him all his interest in the mill and apparatus connected therewith.

He also alleged that appellant had seen the deed from Ingram to him, and was notified that he would hold appellant for the payment of the writings obligatory, not satisfied; that appellant received from Ingram sixty logs, worth $150, and used the same; and that on the 31st of July 1868, the appellant had forty-seven thousand feet of lumber that had been cut on the mill, within the preceding year, on which appellee claimed a lien for the payment of the obligations; that Ingram was insolvent, and that appellant would sell the lumber if not restrained; that appellant held the same, and would not return it or pay the rents due.

The prayer of the bill was, that an account be taken between the three; that whatever might be found due to appellee be declared in his favor, on said lumber; that appellant be restrained, etc.

The bill was taken *pro confesso*, as to Ingram.

McClure, by answer, admitted the original ownership of the mill, lease, etc., as charged; admitted that he knew of the writing from Ingram to McDearmon, "called a deed of trust," at the date of his purchase, but denies that Ingram had any logs or lumber at that time; alleges that he held, as Ingram's agent, from November, 1867, to 16th January, 1868, at which time he assumed the balance Ingram owed Ramsey for In-

gram's two-third interest, in the lease, mill, etc. Alleges he was no party to Ingram's renting, and that he informed appellee that he would assume none of Ingram's responsibilities, but he was ready to run the mill upon any satisfactory agreement, made with himself, but in no other way. He admits that the mill cut lumber of much more than the value of the writings obligatory, within the time of such renting, but that he could not distinguish any part of that from other lumber. He fails to respond to the allegations of Ingram's insolvency, or his intention to sell the lumber.

Much more testimony was taken than seems to have been necessary—there being but little contradiction in the material allegations in the pleadings.

The substance of the testimony satisfactorily shows that the parties respectively owned the shares stated; that the contract between Ingram and McDearmon was made, as alleged, and that McClure, at and before his purchase, knew of the terms of that agreement; that he took possession of the mill and refused to pay the rents; that the mill cut a large amount of lumber, and that there was of the lumber cut, between the first of August, 1867, and first of August, 1868, on the yard, at the date of the injunction, much more than sufficient to pay off the rents claimed by the appellee.

The court found for appellee; decreed that the amount of the remaining writings obligatory be paid, and that he have a lien upon the lumber enjoined, and that, if payment be not made, that it be sold, etc.

Upon the hearing, the appellant objected to the reading of the trust deed, made by Ingram to McDearmon, because it was not sufficiently stamped—there being but a fifty cent internal revenue stamp on it. On motion of the appellee, the court allowed the clerk, in open court, to affix another similar stamp, and then held the deed sufficiently stamped, to which the appellant excepted.

He, also, objected to the reading of the deed, as evidence, because it was made in the name of Wilson W. McDearmon

whose full and proper name was William Wilson McDearmon. The name in the writing obligatory was the same as in the deed.

McDearmon set out his full name in his bill, and alleged that these writings obligatory were made to him, and set them out in full, which sufficiently showed how and to whom they were executed; and this was in no way questioned by the appellant, in his answer; and such objections, at the hearing, were technical and frivolous.

There is but one question of doubt or importance in this cause, and that is, whether or not the stocks obtained and the lumber cut after the execution of the trust deed, could have been so conveyed by that deed as to be binding on the parties and their privies?

The appellant denies that he is bound by the contract with Ingram, or that the court below could properly decree a lien upon the lumber, cut by the mill, during the time of the renting.

The peculiar circumstances and inherent equities of each cause, may influence the chancellor to make the most liberal application of the established rules of equity to the facts appearing before him; the rigid rules of law should never defeat the ends of substantial justice, where the more liberal doctrines of equity jurisprudence reach the merits of the case.

We understand the rule of law to be, that a mortgagor cannot convey chattels not then in existence, and to which he has no present title. But in equity, incumbrances, not enforcible at law, are sometimes held valid.

Courts of law and courts of equity, upon imperfect titles, do not always take the same view of the conveyances. A mortgagor of land, at law, has a mere tenancy, and the mortgagee has the title and the right to take possession at any time, unless restrained by positive agreement to the contrary. But in equity the mortgagor is regarded as the real owner, the mortgage a mere security, a mere chattel interest, until after foreclosure.

A legal mortgage is the conveyance of the property intended, as a security for the performance of some prescribed act; but there are equitable mortgages, wherein the mortgagor does not actually convey the property, but does some act manifesting his intention to bind the same as a security; and courts of equity have frequently sustained claims of lien upon property that would not have been recogized by courts of law. Unreserved vendor's liens are not recognized by courts having no equitable jurisdiction; but before a chancellor it is unconscionable to hold lands under any conveyance without first paying the purchase price; and other just liens, not created as such, according to the rules governing purely law courts, are enforced in equity, where no intervening rights have accrued.

In the case of *Smithurst v. Edmunds, et al.*, *1 McCarter*, (*N. J.*,) *408*, where, after acquired hotel furniture was embraced in a mortgage, the Supreme Court of New Jersey held that that which was purchased, subsequent to the execution of the mortgage, was embraced within its provisions—that it was not a mortgage in law, for want of title in the mortgagor at the time of executing the mortgage, but it was an equitable mortgage.

The Supreme Court of Illinois held that a chattel mortgage might cover after-acquired property if taken into possession before other liens attached. *Gregg v. Sanford*, *24 Ill.*, *17*.

In the case of Walker v. Vaughan, the Supreme Court of Connecticut say: "a mortgage upon property not yet acquired will be good between parties and others, * * * upon the chattels being acquired by the mortgagor, no intervening rights having accrued." *33 Conn.*, *583;* and see *29 Conn.*, *282*.

It has been said, where a mortgage was to operate as a continuing security, it will be so applied to property afterwards acquired. *Carr v. Alott*, *Hurl & Nor.*, *964; C. B.*, (*N. S.*) *471; Langdon v. Horton*, *23 Eng. Com.*, (*or 1 Hair.*) *549*.

Where a cutler mortgaged his stock and tools, etc., and all stock and tools to be purchased, and all goods manufactured, and to be manufactured, and all machinery to be added, it was held a valid mortgage. *Mitchell v. Winslow*, *2 Story*, *630*.

In the case of Johnson v. Curtis, the Supreme Court of New York decided that a mortgage on logs, and lumber to be cut out of them, was not fraudulent—the transaction being attacked for fraud. *42 Barb., 585.*

Judge STORY, in his *Equity Jurisprudence, Vol. 2, Sec. 1040*, lays down the rule equally as broad as in most of the cases above referred to.

But the now leading case of *Pencock et al. v. Col., 23 How., 117*, by the Supreme Court of the United States, fully establishes the doctrine that liens may be created upon chattels not in being, to take effect upon the acquisition of such property by the mortgagor, where such property comes to him in the ordinary course of his business, or is otherwise sufficiently identified, and that such liens will be enforced in equity.

In the case under consideration, it is clear that the appellee owned a one-third interest in the mill, machinery, etc., and Ingram the other two-thirds, and by just and fair means, satisfactory to both, it was found that the one-third of the rent of the mill, etc., for the time stated, was worth $600. Ingram preferred to pay that sum and have the entire mill, etc., for that time, rather than to continue the co-partnership, and McDearmon preferred to accept that sum, if the payments were secured, and to that end the deed exhibited was executed, conveying to him the stocks and lumber on hand, and the further material that might result from carrying on that business. For this consideration he turned over his property and gave the entire mill, etc., into the possession and control of Ingram for the year. Ingram then owned absolutely two-thirds, and for one year he owned the other third, with an incumbrance upon or claim against it of $600.

It certainly would have been unjust and inequitable for Ingram to have used this mill and machinery, and had the entire profits thereof, without paying a share to the appellee; and appellant, being cognizant of all the facts, purchased no better title than Ingram had; and for him to have received the entire

profits of the mill and machinery, and to pay nothing, would be no less unjust to the appellee.

And the appellant being well aware that the appellee relied upon the products of the mill for his fair share of the profits, and not upon any other credit given Ingram, and that the parties, by deed, had endeavored to create a lien upon such effects to secure such sum, and having the sole use of the mill, and all profits arising therefrom, for so long a time, we deem it unjust that he should refuse to pay the sum which he knew had been fairly settled upon as appellee's share of rents and profits, and it seems to us that this is one of those continuing securities, an equitable lien, that may well be enforced in a court of equity.

The decree of the court below is in all things affirmed with costs.

THE STATE v. NICHOLS.

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PARDON AND AMNESTY—The pardoning power is not naturally or necessarily an executive function, and where the Constitution is silent, vests no more in one branch of the government than the other.

The power to pardon, *after conviction*, vested in the Governor, by the Constitution of 1864, is not prohibitory of the exercise of that power, by the Legislature, *before conviction*, nor is it inhibited by the powers delegated to the federal government.

Where there is no express or implied limitation in the exercise of the pardoning power, granted to the executive, it operates as an inhibition against the legislative branch interfering with it.

Plea of tender and acceptance of pardon, before indictment found, is good and is not an interference with the administration of justice by the courts.

After tender and acceptance of pardon, no subsequent action of the executive or Legislature can revoke it.

The Act of March 1, 1867, entitled, "An act of pardon and amnesty," is not in conflict with the present Constitution.

Appeal from Pulaski Circuit Court.

HON. WM. STORY, Judge 2d Judicial Circuit, presiding.

Montgomery, Attorney General, for appellant.

Parr & Fletcher, *Garland & Nash*, *Gallagher & Newton*, for appellee.

McCLURE, J.

At the March term of the Pulaski circuit court, for the year 1869, the grand jury found a true bill of indictment against Nichols, for the murder of one Charles Wood, on the 10th of July, 1864.

At the May term, 1869, Nichols filed a plea, wherein he sets up "that the killing, for which he is indicted, occurred between the 6th of May, 1861, and the 4th day of July, 1865, and that he was fully and freely pardoned of said supposed offense by an act of the General Assembly of the State of Arkansas, entitled "An act of pardon and amnesty," passed March 1, 1867," etc.

To this plea the State filed a demurrer, which was overruled by the court, and, the State declining to proceed further with the prosecution, the defendant was discharged. From this judgment the State appealed.

The only question presented by the record is, whether the act of pardon and amnesty, passed March 1, 1867, is, in fact, a pardon and amnesty. In other words, had the Legislature of 1867, assembled under the Constitution of 1864, power to pardon and amnesty citizens of the State who were liable to be charged with crime?

"Our government," says Judge PARSONS, "is founded on principles not known to the laws of any other country. The sovereignty of the commonwealth remains in the people. The several departments of the government--the legislative, execu-

tive, and the judicial—are the agents of the people in their respective spheres."

The language quoted above, from Judge PARSONS, no doubt, was used for the purpose of directing the mind of counsel to the fact that our form of government, so far as the exercise of certain powers is concerned, is not analagous or similar to any monarchial form of government, and that a power exercised by a monarch does not necessarily prove that such powers belong to the Executive of a State.

In a republican form of government the people select delegates to form a fundamental law for the government and control of such persons as may be called to exercise the duties prescribed. To use the expression of another, they build a capitol, erect its pillars and its walls, surround it with bulwarks, and assign to each department its various duties. This done, the members of a constitutional convention disperse; the people send the officers who are to take charge of the various departments, and the three branches represent the sovereignty of the State.

The theory of all monarchial forms of government is, that the monarch, or reigning sovereign, rules by "divine right," and that he is the depository of all supreme power—that whatever of liberty the people possess or enjoy, is a gracious grant on the part of the sovereign. Under such a form of government, the power to pardon and remit fines and forfeitures is a *dispensing* power of the sovereign; a crime in such a country is not against the *government*, but against the *king*. With us, the theory of government is different. If a man commits a crime in this State he is indicted for having offended, not against the executive, the legislative or judicial branches of the government, but for having offended "against the peace and dignity of the State of Arkansas."

In a republican form of government, such as exists in this country, what belonged to *one* branch of government under a monarchial form, is lodged in *three* different departments. Lieber, in his second volume, 147 on "civil liberty and self-

government," says: "The executive stands, if any one visibly does, in the place of the monarchs of other nations, and that we *forget* the monarch had the pardoning power, *not because he is the chief executive*, but because he was considered the sovereign; while, with us, the Governor or President has but a delegated power and limited sphere of action, which by no means implies that we must *necessarily* or *naturally* delegate, along with *the executive* power, also the pardoning power."

From this it would seem that the pardoning power is not naturally or necessarily an executive function. The Constitution of the United States places but few prohibitions upon the States, as to what the Constitution of the State shall contain. The Constitution of a State must be republican in form. It must not provide for titles of nobility, nor violate the obligation of contracts, nor attaint persons of crime, nor provide *ex post facto* laws for the punishment of acts which were innocent when committed, nor contain any other provisions which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the United States. So long as the people do not infringe upon the power already delegated to the general government, they are fully authorized to deposit power in such branches as to them may seem best. To illustrate: They had the right to withhold all pardoning power from any one of the three branches; or, on the other hand, they had the right to vest the pardoning power in either the legislative or judicial branches of the government. The Executive no more represents the sovereignty of the State than either one of the other branches of the State government. The pardoning power no more vests in the Governor, by virtue of his position, than it does in the judicial branch of the government, when the Constitution is silent.

The Constitution of 1864, on the subject of the pardoning power of the Governor, says: "In all criminal and penal cases, except those of treason and impeachment, he shall have power to grant pardons *after conviction*, and remit fines and forfeitures," etc. It is urged, on behalf of the State, that this lan-

guage is an inhibition against the Legislature exercising the pardoning and amnesty powers attempted to be exercised by the Legislature, in the act of March 1, 1867, and, therefore, unconstitutional.

There is a plain rule of construction running through all the books, and is as familiar to the profession as the common law itself, that declares where the language employed is inhibitory, it is a denial of power to the extent of the inhibition. To illustrate: The Constitution of this State declares: "In criminal cases the jurisdiction of justices of the peace shall extend to all matters less than felony for final determintion and judgment." It was insisted, in this court, that this language conferred *exclusive* jurisdiction on the courts of justices of the peace; but, in Tucker, *ex parte*, we held this language was no inhibition on the Legislature from conferring a concurrent jurisdiction over the same subject matter to the circuit court.

The inhibition in the Constitution of 1864 limits the right of pardon, in the Governor, to cases in which there has been a conviction at law. Now, the question arises, does this limitation of the exercise of the pardoning power to cases *after conviction*, inhibit the Legislature from passing an act of pardon and amnesty, as to such persons who have not suffered conviction? The counsel for the State insist that the power of pardon and amnesty, *before conviction*, is not vested in any one of the branches of government, and that convictions must follow before the pardoning power can be exercised at all.

There is a broad difference as to the rule of construction applicable to the Constitution of the United States and that of a State. The government of the United States is one of enumerated and limited powers, while the government of the State is possessed of all the general powers of legislation. In construing a law of the United States, we look to the Constitution to see if the power is *granted;* but, in construing the Constitution of the State, we look whether the Legislature is *prohibited* by express words, or by implication. Congress can

pass no laws save such as the Constitution authorizes in express terms, or necessary implication, while the Legislature is constrained by no bounds, save such as the Constitution of the State and United States have thrown around it.

While it may be conceded that the pardoning, *after conviction*, is, by the Constitution, declared to be one of the duties of the executive, yet the exercise of the same power by the Legislature, *before conviction*, cannot be construed, in our opinion, to be an invasion of the executive department. We have already intimated that the executive of a State did not inure to any of the powers exercised by a monarch, by "divine right," and that his power and authority was measured by the Constitution alone. It is not urged that the executive has any pardoning power *before conviction*, and if he has not, we are unable to see wherein his province has been invaded.

It is urged, however, that the pardoning power is peculiarly an *executive function*, and that any exercise of such power by the Legislature is impliedly prohibited. The power to pardon partakes more of the nature of a *dispensing* than an executive power. The chief duty of the executive is to see that the laws are *executed*, and, where the power to *dispense* with the execution of the law is given him, it should not be extended by implication. The power of dispensing with the law and its penalties, partakes more of a legislative than of an executive character.

The President of the United States exercises the pardoning power, both before and after conviction; but this is not by reason of it being peculiarly an executive function, but because the Constitution of the United States, in plain and unqualified language, has conferred the sole power of pardoning on him. In a question involving the discussion of the pardoning power of the President, Chief Justice CHASE says that the President had the pardoning power without any act of Congress, but that if he did not, the act of Congress would have been sufficient to have given him the power—thus conveying the impression that if the pardoning power was not vested in the

President by the Constitution, that Congress had the power to confer it on him. The federal government is composed of three branches, just like the State governments. No one of these branches of government are permitted to exercise the powers belonging to another, any more than they are in a State government; and if the pardoning power is peculiarly an executive function, it is not at all probable that Chief Justice CHASE would have made the remark he did, in the *United States v. Paddleford, 9 Wall., 542.*

So far as our knowledge and research extends, the question as to whether the Legislature has the power of pardon or amnesty before conviction, has never been submitted to any court acting under a similar constitutional provision to that of this State, save in the State of Tennessee. The Constitution of Tennessee, on the pardoning power, declares that, "He (the Governor) shall have the power to grant reprieves and pardons, *after conviction*, except in cases of impeachment." Andrew Fleming was indicted for retailing liquors in violation of the act of 1838; pending the prosecution, and before conviction, the Legislature passed an act by which, under certain restrictions, it became lawful to retail spirituous liquors, and at the same session, and subsequent to the passage of the act legalizing the sale of spirituous liquors, it was *resolved* by the Legislature that "no fine, forfeiture or imprisonment should be imposed or recovered for the offense of tippling, and that all causes pending in the courts should be dismissed, wherein such an offense was charged." The defendant (Fleming) had no knowledge of the passage of the resolution, and was tried and convicted of the offense charged, and fined. Before the fine was collected, the passage of the resolution became known to him, and he asked that the judgment against him might be vacated. It will be borne in mind, that the defendant, in the case just cited, had suffered a conviction, and had not plead the act of remission. This being true, he stood before the court in the light of one who had waived his pardon, and asked a judgment at the hands of his peers. The Constitution of

Tennessee places the power of pardon, after conviction, in the hands of the Governor. Fleming had been convicted, it follows, therefore, the action of the court in extending to Fleming the benefit of the resolution, *after conviction*, was an invasion of the executive duties.

If Nichols had waived the provisions of the act of March 1, 1867, as he had a right to do, for a pardon need not be relied on unless the defendant so elects, and had suffered a conviction, he would not then be allowed to go back and plead an act of pardon or amnesty for the purpose of vacating the judgment. To tolerate such a practice, even if an act of the Legislature authorized it, would be an invasion not only of the executive functions, but those of the judiciary.

Our attention has been directed to certain rulings in the States of Alabama and Missouri, in which it is strongly intimated that the pardoning power is an executive function. In order to show that the opinions of the Supreme Courts of those States are not applicable to a Constitution like ours, it is only necessary to state that there is no similarity between them. The Constitution of Arkansas is as follows:

"In all criminal and penal cases, except those of treason and impeachment, he (the Governor) shall have power to grant reprieves and pardons, and remit fines and forfeitures, under such rules and regulations as may be prescribed by law."

The Constitution of Missouri, on the subject of pardons, reads as follows:

"The Governor shall have power to remit fines and forfeitures, and except in cases of impeachment, to grant reprieves and pardons."

It will be observed, there is no limitation in the Constitutions of Alabama or Missouri, to the exercise of the pardoning power to cases, *after conviction*. The language used amounts to an absolute grant of *all* the pardoning power of the State to the executive, and therefore is an inhibition against the legislative branch interfering with it. The Governor of Alabama

exercises the power of pardon *before conviction*, and where his pardons have been pleaded, the prisoner has invariably been discharged.

No Governor of the State of Arkansas ever attempted to exercise the power of pardon *before conviction*, and if he had, no court of the State would have recognized it. The idea advanced by the Supreme Court of Tennessee, that the courts and prosecuting attorney have a *vested right* to a conviction, under a criminal statute that may have been violated, is not founded in law or reason, because the Legislature is the branch of government that declares what acts shall be criminal and what penalty shall be inflicted. While it is true that the Legislature cannot affix a *greater* penalty to crime than was affixed thereto at the time of its commission, no one has ever seriously doubted the right or power of the Legislature to *lessen* the punishment or remit it altogether, when such remission did not infringe upon the exercise of some right conferred on some other department of the government by the terms of the Constitution.

This act of pardon and amnesty was passed in March, of 1867, and related to offenses committed between the 6th of May, 1861, and July 4, 1865, and no indictment was found against Nichols until March, of 1869. The question presented in this case is not like the cases presented in either Tennessee, Alabama or Missouri. In the cases passed upon by the Supreme Courts of those States, the action of the Legislature was directed toward the *control of cases pending in the courts* at the time of the passage of the law. At the time of the passage of the law, there was no case pending in the courts of this State against Nichols, nor was there until two years afterwards. If Nichols had been indicted *before* the passage of the act of March, 1867, and had pleaded the act, and the question had come here upon such a state of facts, a very different question would have been presented to this court than the one now before it. Such a case would have presented the questions discussed in Missouri and Tennessee; but in the case at bar, the action of

the Legislature in no manner undertook to control or dismiss a case in court. The plea of interfering with the administration of justice in the courts, cannot be set up in this case, because the interference, it interference it is, took place *before* the jurisdiction of the court attached. The plea of Nichols shows that he accepted the pardon tendered him by the Legislature, and the rule is that, where the pardon has been accepted, no subsequent action of the executive or Legislature can revoke it.

The disposition of this question does not necessarily involve a discussion of the second section of the act of March 1, 1867, or cases arising thereunder. It will be time to discuss the constitutionality or unconstitutionality of that section when a case is presented, and until that time we refrain from any expression of opinion.

Section 16, of article 15, of the Constitution of 1868, declares that "all laws in this State, not in conflict with this Constitution, shall remain in full force until otherwise provided by the General Assembly," etc. The act of March 1, 1867, is not in conflict with the present Constitution.

We are therefore of opinion that the circuit court of Pulaski county did not err in overruling the demurrer and discharging the appellee.

Judgment affirmed.

GREGG, J., dissenting says:

Upon a most careful consideration of this case, I have failed to agree in opinion with the majority of the court.

The Legislature of this State, on the first of March, 1867, passed a pardon and amnesty act, in which it is provided, "That full and free pardon and amnesty be, and the same are hereby granted to all persons who at any time, after the sixth day of May, A. D. 1861, and before the fourth day of July, A. D. 1865, may have committed any crime or misdemeanor against the

State of Arkansas—rape only excepted—and shall not have been convicted thereof before the passage of this act."

It is not merely the purport or effect of this act that makes it a legislative act of pardon, but the title and the body of the act declare that it is an act of pardon, no pretense that it is a repeal of the criminal law or the jurisdiction of the courts.

We have, then, but one question: Is the pardoning power, under our form of government, committed to legislative action? We think not.

We lay down, as one of the fundamental principles of our government, that the powers of the three departments are to be exercised by different and distinct classes of persons. Our present, as well as former Constitutions, ordains that the powers of government are divided into three departments—the legislative, executive and judicial—and that no person, nor collection of persons, belonging to one department, shall exercise any of the powers belonging to another, except in the cases expressly provided in the Constitution.

The majority of the court, in argument, assume that there is a sovereignty attached to the legislative department that does not belong to the executive or judicial.

We admit its wider range and greater diversity of power, but not its claim to sovereignty. The sovereignty of the State is in the people They have assembled in convention and distributed the sovereignty between three departments of government—legislative, executive and judicial—conferring upon each all the powers necessary to the full execution and maintenance of its respective department, and to maintain this independence and distinctiveness, have declared that "no person or collection of persons, belonging to one department, shall exercise any of the powers belonging to either of the others."

Then, we hold that each of these departments received from the people that portion of sovereignty necessary to the discharge of all the functions of its respective department, and no more; and, consequently, each is sovereign within its own sphere—the equal, but not the superior, of the other co-ordi-

nate powers of the State; and, as quoted by the majority, from Mr. Parsons, "Each is the agent of the people, in their respective spheres."

And, to use a further quotation of theirs: "The people in convention, assign to each department its various duties; this done, the members of a convention disperse, and the people send the officers who are to take charge of the various departments, and the three branches represent the sovereignty of the State."

The legislative department has more extended jurisdiction, and greater diversity of action; its province is to enact rules, or laws, for the government and well-being of society, in its varied wants, innumerable changes, pursuits and improvements, the right to make laws upon all subjects, and to any purport and effect, not restricted by constitutional limitations; but this is not a grant of sovereignty to that department, except over the wide field assigned to it.

We do not concur in the opinion that the pardoning power is more legislative than executive, and the weight of authority, hereinafter referred to, if not for other reasons, would incline us to a contrary conclusion.

The majority say that the Constitution of the United States has, in plain and unqualified language, conferred upon the President the sole power of pardoning. This is the ground we assume, and we propose to show that such has been the ruling of the Supreme Court of the United States, and other high authority. Yet the language in the United States Constitution is, that "he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." No exclusive words are used to confer "*the sole power*" on him alone; and there is one limit to his power—that is, in case of impeachment. The State Constitution has three limitations instead of one—the pardon shall not be before conviction, nor in impeachment or treason. The language of our Constitution is, that "in all criminal and penal cases, except in those of treason and impeachment, he shall

have power to grant pardons, after conviction, and remit fines and forfeitures, under such rules and regulations as shall be prescribed by law"—*Article 6, section 11, Constitution of 1864*—words no less definite and exclusive than the former, in the United States Constitution, as to the power conferred.

The majority of the court say if Nichols had been indicted before the passage of the act of March, 1867, and had then pleaded the act, and brought his case here, a very different question would have been presented to this court, and that such were the cases in Missouri and Tennessee. In our view, the main question is the same. It is not whether legislative action interferes with causes in court, but whether the Legislature can pardon offenders, and discharge whole classes of individuals who have violated the criminal laws of the State. To attempt to shift the argument upon technicalties of pleading on time, etc., is but playing with the shadow rather than grappling with the reality before the court.

The question is the power of the Legislature to pardon a criminal after he has violated the penal statutes of the State, and became liable to be convicted and executed for such violation of law.

I submit, as my opinion, that the Constitutions of Missouri and Alabama, omitting the words, "after conviction," in the clause conferring the pardoning power upon the executive, in no way affect the question at issue. The Constitution of Tennessee is conceded to be precisely like ours.

In all these Constitutions there is a pardoning power conferred upon the executive, and there is also a clause that no two departments shall exercise the same power. Does this not make it an exclusive power, as so often held in the Supreme Court of the United States? Can the Legislature exercise a power that the Constitution has made executive, even if not declared exclusively so in the particular clause conferring the power?

Before reciting the authorities relied on, I will allude to one point not noticed by the court. This pardon act, of March 1,

1867, was repealed by act of July 23, 1868. If the Legislature of 1867 had power to pass a law of pardon, had not the Legislature of 1868 power to repeal that pardon act? And, when that law was repealed, did not the law remain as if the law of 1867 had never passed? as the pardon law did not attempt to repeal any former law.

Bishop, in his American Criminal law, vol. 1, 216, says: "Where the old law having been repealed, and the Legislature, by subsequent act, authorize proceedings, as by repealing the repealing statute, in every such case, though the right to prosecute should have once lapsed, a conviction may be had."

If this is stronger than the rule with us, may it not apply when the act of 1867 was a mere tender of pardon that had to be accepted, and which could not have been accepted until its repeal?

An offense was committed in Pennsylvania. Under an act of 1827, the Supreme Court of that State said: "In this case the offense was committed before the act of 1832, and the conviction thereon was had after the act of 1833, and so the offense was not committed, nor was the conviction had, whilst the act of 1832 was in force. The court are all of opinion that the prisoner is liable to an additional punishment under the statute of 1827," etc. *Commonwealth v. Scott, 21 Pick. 492; and Com. v. Gitchell, 16 Pick. 352.*

If the pardon act was a valid law in 1867, as such law it was repealed in 1868. When Nichols was indicted, in 1869, there was no law of pardon to plead. The act charged was murder, when committed, and murder when the indictment was found; and if the act of 1867 did suspend prosecutions, the case is stronger against the accused than those above referred to. If that act was not an ordinary law, it is an argument against legislative power, and tends to show that that power is exclusively in the executive, where Chief Justice MARSHALL says it has been, time immemorial. But we pass on to elucidate the main question; and our views not being indorsed by the majority of the court, I may be allowed to quote

at some length from the decisions of courts whose judges were abler than myself, and who maturely considered this grave question.

In the case of the *State v. Gloss, 25 Mo. 293*, the Supreme Court of that State say: "The powers of the General Assembly are not unlimited. All the departments of our government are confined in their operations; they have prescribed limits which they cannot transcend. The union of the legislative, executive and judicial functions of government in the same body, as shown by experience, had been productive of such injustice, cruelty and oppression, that the framers of our Constitution, as a safe-guard against those evils, ordained that the powers of government should be divided into three distinct departments, and that no person charged with the exercise of powers, properly belonging to one of these departments, should exercise any of the powers properly belonging to either of the others."

They say, of the pardoning power: "All unite in pronouncing it an executive function. So the framers of our Constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the State." They continue, in speaking of the act, making it the duty of the circuit court judge to dismiss prosecutions commenced under a former law, (the operation of the act is confined to the release of individuals from prosecution,) who stand indicted for offenses: "The justice or propriety of the act has nothing to do with its constitutionality. We are not to presume that the Governor, under suitable circumstances, will not exercise the power with which he has been clothed by the Constitution. He is the sole judge of the propriety of granting a pardon." See, also, *State v. Maberry, 29 Mo. 301.*

In the case of *Haley v. Clark, 26 Ala. 442;* the Supreme Court of Alabama say: "The appellants claim under acts of 1849 and 1850, p. 452, by the first section of which it is enacted that the treasurer of Marion county be, and he is hereby, directed to pay Allen Haley, John M. Frederick, John T. San-

ders and William Warren, the securities of John Douglass, late clerk of the circuit court of Marion county, the sum of five hundred dollars, that being the amount of a fine they have paid for said Douglass, in consequence of said Douglass having failed to comply with the requisitions of the second section of the act of 1854," etc.

"The principal question is, whether this act is unconstitutional. By article 4, section 11, of the Constitution of Alabama, the power to remit fines and forfeitures is given to the Governor; and by the second article, the powers of the government are divided into three distinct departments—the legislative, executive and judicial—and no one of these departments, or person belonging thereto, can exercise any power properly belonging to either of the others, unless expressly directed or permitted by the Constitution. To sustain this position would be to allow one department of the government to trench upon the powers of another, and to defeat the purpose which the Constitution contemplated in confining the pardoning power to one branch of the government, by permitting it to be indirectly exercised by another; the act was void and the judgment correct."

It is urged, as legislative authority, that the Parliament of Great Britain grants pardons. That is true, but that government differs widely from ours. There is no Constitution above Parliament, no power restricting it. Parliament can make laws, determine of their violation, and order them carried into effect. She is not limited to any one function or class of functions of government; and so far as the subjects of that realm are concerned, she does what she wills to do, and she is amenable to no superior; and, unlike a Congress or State Legislature, in this government, who dare not pass constitutional limits.

The Supreme Court of the United States, through Chief Justice MARSHALL, in the case of the *United States v. Wilson*, *7 Pet., 159*, says: "The Constitution gives to the President, in general terms, the power to grant reprieves and pardons for offenses against the United States. As this power had been

exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance. * * * A pardon is an act of grace, *proceeding from the power entrusted with the execution of the laws*, which exempts the individual from the punishment the law inflicts for a crime he has committed."

"It is the private, though official act of the *executive magistrate*, delivered to the individual for whose benefit it is intended," etc.

Judge TANEY, who was then acting as Attorney General, said: "The pardoning power, under the Constitution, is the executive power." See also, *Opinions of United States Attorney Generals, vol. 6, pp. 20, 39 and 488, and vol. 10, p. 455.*

In the case of Garland, *ex parte*, *4 Wal.*, *380*, the Supreme Court say: "The pardoning power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders," etc.

Thus, under the clause of the Federal Constitution merely granting the executive the right to pardon, the Supreme Court held that the pardoning power is vested in him, and cannot be limited or controled by Congress.

We are aware that it is urged that Congress has only delegated powers, and is therefore limited strictly to the grant. On the other hand, State Legislatures are limited by their Constitutions providing that they shall not exercise any of the powers belonging to the executive or judicial departments of the government: "No person or collection of persons, being of one department, shall exercise any power belonging to either of the others," and the source is immaterial, so there is a limitation upon legislative action.

Our own Supreme Court, in the case of *Baldwin v. Scoggin*, *15 Ark.*, *432*, through Chief Justice ENGLISH, said: "The framers of our Constitution have intrusted the pardoning power to the Governor," etc. This court did not then seem to think the Legislature shared in that power.

We hold the Legislature can pass rules regulating executive action, just as they regulate proceedings in court, but the power to pardon is in the executive, and in the other case the power of rendering judgments and ordering executions is in the courts, and therefore excluded from the Legislature.

As stated by a majority of the court, the Legislature of Tennessee passed a law, subjecting persons to indictment and fine for retailing liquors. In 1846 the Legislature passed another act allowing persons, upon certain conditions, to retail liquors, and subsequently passed a resolution declaring that no fine or forfeiture or imprisonment should be imposed or recovered, for the offense of retailing under the former act of 1837, and that all causes pending in any of the courts for such offense should be dismissed. The circuit court vacated a judgment that had been published, and the Attorney General appealed, and the Supreme Court of that State said: "The question presented for our consideration is, whether the resolution of the Legislature, passed in 1846, is a constitutional exercise of power, and we think it is not. * * * The question reduced to simplicity is this: Can the Legislature, by resolution, direct that an individual who stands charged with crime in a court of justice, be discharged therefrom? The mere statement of the question, it seems to us, answers it, necessarily, in the negative. The powers of the State of Tennessee are vested in legislative, executive and judicial departments, each separate and distinct from the other, with their power and duties well defined by the Constitution, and by which each is kept within its appropriate sphere of action.

"The Legislature can make the law, but the courts must expound it, and execute it, with the aid of the executive, when his action may become necessary for that purpose.

"The Legislature has no power to interfere with the administration of justice, either civil or criminal, in the courts. A resolution that a criminal or class of criminals shall be discharged by the courts is then necessarily, an assumption of power not warranted. After conviction the Governor may

pardon, but before conviction, the Attorney General and the court are the only power that can discharge without acquittal, and this by *nolle prosequi.* We are, therefore, constrained to hold that the resolution under which these defendants claimed their discharge is void, for want of power in the Legislature to pass it."

These courts give reasons why this legislative power is inhibited, but in each one the judgment goes to the vital question and decides that a Legislature has no power to pass an act of pardon.

A constitution or a law must be construed as a whole, and not by separate clauses, and when the constitution said the executive shall exercise a pardoning power, if it had there stopped we could have agreed, but it further says, in effect, no other department of the State government shall exercise any of the powers exercised by the executive. Then we say the others are excluded. So, in the case of Tucker, *ex parte*, if the Constitution that said justices of the peace shall have jurisdiction in cases of misdemeanors, had in some other clause said, where justices have jurisdiction no other court shall take jurisdiction, then we would have held quite differently.

But it is said, the Legislature here pardoned before conviction and the Governor pardons after conviction. This does not change the proposition. Both are pardoning powers—the Legislature is using a pardoning power, and the Governor a pardoning power—when the Constitution declares, that the same power shall not be exercised by persons belonging to different departments of government, meaning, beyond question, that the powers of the different departments shall not be blended.

Now, it will be seen by an examination of the various cases in Missouri, Tennessee and Alabama, that those courts did not base their decisions upon the question of time, as to when the offense was committed, or whether an indictment or conviction had been had. Some of the circumstances in each case are alluded to in the arguments of the judges, but upon the

main question they move up like men conscious that they are armed with the right, and declare that the Legislature has no power to pass acts of pardon, because, so far as the people have granted that power, it has been conferred upon the executive, and the same function cannot be exercised by two departments of the State government.

It seems to me that these cases are entitled to great weight, especially so, when not a single case has been cited to the contrary. I have carefully searched our voluminous library, to say nothing of the more diligent and efficient examination of the majority of the court, and not one case can be found where any Supreme Court has sustained a law granting pardons by legislative action.

Now, I repeat, if two branches of the State government cannot exercise the same functions, and the Constitution says they shall not, and the pardoning power is a function of government, I cannot see how the executive and Legislature can both pardon; and if the Constitution, in the clause referred to, had said the different departments of the government shall not at the same time exercise the same power, I could see some force of argument in the position of the majority; but it does not so ordain; and, with good authority to the contrary, and none to support what seems to me a misinterpretation of our Constitution, I cannot agree.

HARDY'S *Exr's. Ex parte.*

PRACTICE—*Remittitur.*—The rule adopted in *Fowler v. Johnson, 11 Ark. 280,* affirmed.

Remittitur must be entered before cause disposed of, on appeal or writ of error, by this court.

The judgments of a court, after its adjournment, pass from under its control.

Motion to enter Remittitur.

J. L. Witherspoon, for petitioners.

WILSHIRE, C. J.

At the present term of this court the appellees in the cause of *Ayliff v. Hardy's Executors*, decided the judgment reversed and the cause remanded at the December term of this court, 1867, moved for leave to enter a remittitur for the excess of damages found by the jury in the Clark county circuit court, which was the sole error for which the judgment was reversed, and the cause remanded.

The rule was adopted by this court in the case of *Fowler v. Johnson, 11 Ark. 380*, that "where a remittitur will cure the only error complained of, it shall be allowed to be entered upon the terms of paying costs, as usual, and also of an abandonment of record of all right to proceed on the recognizance, whereupon the judgment will be immediately *affirmed.*" This rule has been adhered to by this court in all cases since its adoption.

It must be observed that the remittitur must be entered before the cause is disposed of, upon the appeal or writ of error by this court. No other conclusion than this can be drawn from the language of the rule. The language of the rule is substantially that, upon the remittitur being entered, the right to proceed upon the recognizance, abandoned of record by the appellee, the judgment will be immediately affirmed. Then,

by the rule itself, the remittitur must be entered before the final disposition of the case in this court.

If there was any doubt in the language of the rule, it is quite clear to our minds that the motion could not be sustained at this late day. The judgment of the Clark circuit court, in the case of *Ayliff v. Hardy's Executors*, was brought here by appeal, and decided at the December term, 1867. Three years since this cause was disposed of by this court has elapsed. It is now too late for the appellees in that cause to avail themselves of the rule; indeed, it was too late after the adjournment of the term of this court, at which the judgment was reversed, etc. It is a rule too well established, to require discussion here, that the judgments of a court, after the adjournment of the term, pass from under its control. See *10 Ark. 186; 13 Ark. 104; 11 Ark. 151*, and authorities therein cited.

The motion is overruled.

FOLEY, *et al.*, *v.* WHITAKER, *ex'r.*

MORTGAGE.—*Specific Liens, Etc.*—General creditors, in the absence of any fraud of their rights by complainant, will not be allowed, on petition, to be made parties defendants to a bill to enforce a specific lien, created by mortgage, prior to their rights.

APPEALS—*What necessary for.*—To entitle a party to an appeal to this court, there must have been a final decree rendered for or against him in the circuit court.

Appeal from Chicot Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Garland & Nash, for appellants.

The decree in this case is most clearly erroneous, as it was given upon the pleadings, answer replied to, and no proof whatever outside of the pleadings and exhibits. The answer responded directly to the bill, and denied some material averments in the bill, and most assuredly the bill should have been supported by proof. *8 Ark., 290; Sneed v. Town, Ark., 535; 24 Ark., 410; 19 Ib., 166; 13 Ib., 592; 20 Ib., 309.*

Not only this, the answer was made a cross bill, and certain questions propounded to complainant, and new parties made; but all this, it seems, drops out of the case, but at what place is not seen. The decree is, therefore, incomplete in failing to dispose of the whole case, and in not disposing of all the issues upon the pleadings themselves. In truth, there is no decree at all, to the extent of settling the rights of parties, and an order appointing commissioners to sell, etc., was a nullity. *8 Ark., 56; 70 Ib., 333; 17 Ib., 58; 3 Dan'l Chy., p. 1192, 1209–12, (notes); Dubes Eq. Pls., 141, 123.*

Again, Foley, *et al.*, (appellants), asked leave, at April term, 1869, to be made parties to the suit, as creditors, and exhibited their claim in due form by petition, but the court refused this, which was certainly wrong, for, as creditors, they were not only *proper*, but *necessary* parties. *Porter v. Clements, 3 Ark., 364; Barney v. Baltimore City, 6 Wallace, 283, et seq.*

The court erred in refusing these parties an appeal from the decree. *12 Ark., 101.* And this is so under the Code. See *Code, p. 23, sec. 15, 16 et seq.* The decree was final so far as the purposes of an appeal was concerned. *Rose Digest (Title Decree), p. 250–1 (4)*, and the decision of this court in *Hyde, et al., v. William Prinkard, Sur.*, (from Desha) rendered February 11, 1868.

Bell & Carlton, for appellee.

The court below properly refused the appellants to be made

parties, and not being parties, they had no right to appeal. See *Code of Practice, sec. 859.*

WILSHIRE, C. J.

This case is presented on a motion to dismiss the appeal.

It appears by the record that this was a proceeding in chancery, in the Chicot circuit court, instituted by the executor of Horace F. Walworth, deceased, against Aaron Goza, Edward P. Johnson, as administrator of Francis Griffin, and also in his own right, and Isabella Johnson and John Griffin, the object of which, it appears, was to foreclose a mortgage executed by Aaron Goza and Francis Griffin, in his life time, to Horace F. Walworth, in his life time, on certain lands, situated in Chicot county, known as the Point Chicot plantation, and certain personal property, to secure the payment of the balance of the purchase money for the mortgaged property, sold by Walworth to Goza and Griffin.

It also appears that the appellant (Foley) was occupying the lands sought to be subjected to the payment of the debt secured by the mortgage, and was made defendant in the suit of foreclosure.

During the pendency of the cause in the court below, as appears by the transcript, B. F. Foley, and the Canal and Banking Company of New Orleans, for themselves and the other creditors of the estate of Francis Griffin, deceased, presented their petition to the court, praying to be made defendants in the cause, with leave to defend the same, as if they had been made defendants in the original bill of complaint, and asked to be allowed to adopt the answer of the administrator, Edward P. Johnson.

The grounds of their petition were substantially as follows: That they were creditors of the deceased, Francis Griffin, owning and representing large claims duly allowed against his estate: that they have no means of realizing their claims un

less the claim of the complainant in this suit is defeated; that the administrator is a non-resident, liable to be removed as such, and the cause left wholly undefended; and that, without his removal, petitioners insisted that they should be parties to the cause and allowed to defend; and that the administrator of Francis Griffin "had made such defense as they should have made had they been parties."

It does not appear, by the transcript, that the creditors were made parties defendants in the court below, as prayed by them. The petition seems to be copied into the transcript without any authority for it. They should not have been parties defendant. The executor of Walworth was, by his bill, attempting to force a specific lien, created by mortgage, and prior to the rights of general creditors; and they should not be allowed, in the absence of any fraud of their rights by the complainant, to hinder, delay or obstruct his right to enforce such lien.

The answer of the administrator of Francis Griffin, deceased, and of Isabella Johnson, John Griffin and Aaron Goza, defendants, admit the execution of the notes and mortgage by Francis Griffin and Aaron Goza to Walworth, but set up several matters in bar of the right of Walworth's executor to collect the note, or enforce the lien upon the property created by the mortgage.

It was the duty of the administrator of Francis Griffin to protect the rights of the creditors of his estate by diligently making all legal and valid defense to the suit of foreclosure, existing. If, as was contended here by the counsel for the appellants, the administrator of Francis Griffin was a non-resident of this State, and unfriendly to the rights and interests of the creditors of his intestate, and would not prosecute an appeal from the decree rendered against him, when there were grounds to believe such an appeal ought to have been prosecuted to protect the interest of the creditors, it was the right of such creditors to apply to the probate court for his removal, and the appointment of a competent and more faithful administrator; and, upon a satisfactory showing of such

neglect of duty, by the administrator, it would be the duty of the probate court to make such removal and appointment.

But it is contended, by counsel for the appellants, that Foley was one of the defendants to the original bill of complaint, and, though the creditors were not entitled to be made defendants to the suit of foreclosure, he can prosecute the appeal from the decree rendered below. To entitle either party to a suit to appeal from the circuit court to this court, there must be a final judgment or decree rendered for or against such party.

There appears to be no decree rendered against B. S. Foley, by the court below. The decree is against F. H. B. Lawrence, assignee of Aaron Goza, in bankruptcy, and Edward P. Johnson, as the administrator of Francis Griffin, deceased, to pay to the complainant a stipulated sum, there found to be due and unpaid, and secured by the mortgage; and a further decree, in default of such payment, that the mortgaged lands be sold at public sale, by commissioners appointed by the court below for that purpose, and named in the decree. There appears, from the transcript, to be no decree or judgment rendered for or against the defendant, Foley, for any amount, not even for costs; and, we think, he made no answer to the bill of complaint. It is true that he asked, in his joint petition with the Canal and Banking Company of New Orleans, to adopt the answer of Edward P. Johnson, as administrator of Griffin, but that was coupled with the proposed admission of new parties defendants, who, we think, from the petition presented by them, should not have been made parties. There being no order of the court allowing the prayer of that petition, appearing in the transcript, it must be treated as being no part of the record.

There appearing to be no decree against Foley, and the other appellants not having been parties in the court below, the motion is sustained and the appeal dismissed.

Judges GREGG and BOWEN, dissenting.

HOWARD *et al.* v. MCDIARMID.

MANDAMUS—*When will lie.*—It is a general rule that where a person has a legal right to insist that a certain act shall be done, the performance of which is, by law, made the duty of a public officer, mandamus will lie.

ELECTION RETURNS—*Duty of County Clerk.*—It is the duty of the county clerk to make out and return to the office of secretary of State, an abstract, of the whole number of votes cast at an election, according to the returns on file, in the clerk's office, for each candidate.

The clerk cannot decide the legality, nor can he question the validity of the appointment of judges.

Regularity is to be presumed in favor of the returns of elections by judges appointed in the manner prescribed by law, and if there be a question respecting the regularity, the clerk has no authority to decide it.

SENATORIAL AND REPRESENTATIVE DISTRICTS.—The provisions of the Constitution, regulating the apportionment of Representative and Senatorial districts, does not inhibit the Legislature from passing an act, changing county boundaries.

Petition for Mandamus.

Garland & Nash, *English*, *Gantt & English*, *Watkins & Rose* and *Warwick*, for petitioners.

Rice & Benjamin, *Yonley*, *Gantt* and *Montgomery*, for respondent.

MCCLURE, J.

The plaintiffs filed their petition, praying for a *mandamus*, against McDiarmid, the county clerk of Pulaski county, to compel him to certify certain election returns, to the secretary of State.

The petition, in substance, recites that the petitioners were candidates for election to the House of Representatives, and that an election was held in said county, for that purpose, on the eighth of November, 1870; that the board of registration, immediately before said election, appointed judges of election, in the manner prescribed by law; that a copy of the appoint-

ments, thus made, was filed in the office of the county clerk of said county, and became a record in that office; that in the townships of Ashley, Eastman, Campbell, Gray and Badgett, armed mobs seized and usurped the places, designated as voting places, and prevented the judges, regularly appointed, from holding the election, and appointed others in their stead, and held a pretended election, the returns of which were forwarded to said McDiarmid; that in the township of Eagle, and the first and third wards of the city of Little Rock, the judges appointed as aforesaid, by the board of registration, held an election and duly certified the returns of the same to said McDiarmid, county clerk, who has utterly disregarded his duty and refuses to certify the same to the secretary of State, as by law he is required to do.

The relief asked for, is that this writ, by *mandamus*, compel the said McDiarmid, county clerk, etc., to certify to the secretary of State, abstracts and statements of the votes, cast at said election, for representatives to the House of Representatives of the General Assembly, from the township of Eagle and the first and third wards of the city of Little Rock, by the judges of election constituted and appointed by the board of registration as aforesaid, as well as other returns, or pretended returns, of such election presented to him, or on file in his office.

McDiarmid filed a response to the petition, in which he declares that he, before the filing of the petition, did make out abstracts and statements of the votes cast at said election to the House of Representatives, etc., held on the 8th day of November, from the township of Eagle, and the first and third wards of the city of Little Rock, held by the persons appointed judges of election by the board of registration, to the secretary of the State of Arkansas, and that before the filing of the petition against him, he had made abstracts and statements of all returns, or pretended returns, of such election, presented to or filed in his office, and returned and certified the same to the secretary of State, and asks that he may be dismissed.

Thereupon the plaintiffs filed a supplemental petition, wherein it is set up that said McDiarmid, in the pretended returns made by him, as charged in his answer, did not in any manner comply with the law, but on the contrary violated the same in many respects.

First. That said returns, so made by said McDiarmid to the secretary of State, show that in the first and third wards of the city of Little Rock, and in the township of Eagle, in said county, there were double elections, or elections by two sets of judges, or persons claiming to be judges, and that said returns fail to show which were the regular and legal elections in said wards and township, etc.

Second. That said returns make no showing at all as to the *persons* claiming to have held elections being the regular and legal judges, when said clerk knew who, in fact, were such legal and regular judges, and this was and is an important matter to be placed before the secretary of State, etc.

Third. That said returns inform the secretary of State that the townships of Caroline, Clear Lake, Richwoods and Prairie are, and were at the time of the election aforesaid, a portion of the twelfth Senatorial and Representative district, and not a portion of the tenth district, and therefore failed to show that the elections held in said townships were estimated and counted in the elections of said tenth district; when, in fact, the elections held in said townships should be counted and estimated in the returns of the said tenth district.

Fourth. That if said McDiarmid will make out and certify the returns of such election *as he should do*, and in conformity with the specifications contained in said original petition, and this amendment, and in accordance with the law, that it will furnish the petitioners with the means of securing the places to which they have been legally elected, without which they will be deprived of their places as aforesaid, and the secretary of State will not be able to issue certificates of election to the proper persons.

The amended petition concludes with a prayer, asking that

"the said McDiarmid be ordered and directed to make out and certify said election returns as hereinbefore indicated, and that, to that end, a writ of *mandamus* issue from this court, etc.

To the amended petition, McDiarmid filed a response to the original and amended petition, and says that the same is not sufficient in law, and he demurs to the same: *First.* Because the court has no jurisdiction to hear and determine the matters therein complained of and set forth. *Second.* Because the petition does not set forth facts sufficient to entitle petitioners to the relief asked, or to any other relief.

The demurrer raises no question as to the jurisdiction of this court in cases of *mandamus* generally, but that, in this particular case, it has no jurisdiction. If this be true, the application for *mandamus* will be dismissed. It is laid down as a general rule, by all text writers, that *mandamus* will lie "where a person has a legal right to insist that a certain act shall be done, the performance of which is, by law, made the duty of a public officer." *Moses on Mandamus, 16.*

The first question to determine is, whether the petitioners "have a legal right to insist" that the election returns shall be certified to the secretary of State.

The second question is, whether that act, insisted on, is one, the performance of which is required by law."

And the third is, whether McDiarmid is a "public officer."

We will take up the propositions in just the reverse order of their statement. We will assume that the county clerk is a "public officer," and this assumption disposes of any argument on the third point, and turn our attention to the second proposition, which is, "Is it the duty of the clerk to make out and certify to the secretary of State, an abstract of the votes cast, for candidates voted for, at the general election, in November last, for members of the House of Representatives of the General Assembly of the State of Arkansas?" The answer to this question must be determined by the provisions of the law alone.

Section 39 of the election law says: "On the fifth day after the

election, if all the returns have been received, the clerk of the county court shall proceed to open and compare the several election returns which have been made to his office, and make abstracts of the votes given for the several candidates for each office, on separate sheets of paper; and such abstracts, being signed by the clerk, shall be deposited in the office of the clerk of the county court, there to remain." This section requires an abstract to be made out.

The 42d section of the same act says: "Each clerk of the county court shall, within two days after the comparison and examination of the returns of any election, deposit in the nearest post office, on the most direct route to the seat of government, certified copies of the abstracts, filed in his office, of the returns of the election of all executive, judicial and legislative officers," etc.

These sections clearly make it the duty of the county clerk to make out and return to the office of the secretary of State certified copies of the returns of the election of all executive, judicial and legislative officers, and from this it may be inferred that it *is* a duty "enjoined by law."

This, now, brings us back to the first proposition, and that is, have the petitioners a "legal right," to insist that these returns shall be certified to the secretary of State?

As an evidence of their right to have this done, the petitioners aver that they were candidates for election as members of the House of Representatives of the General Assembly of the State of Arkansas, and that, if a proper return is made by the clerk of the county of Pulaski, it will appear to the secretary of State that they are entitled to seats in the House of Representatives.

The 34th section of the election law says: "It shall be the duty of the secretary of State, on the first day of each regular session of the General Assembly, to lay before each house a list of the members elected, agreeable to the returns in his office."

It seems to us that these facts, undenied as they are, give

the petitioners a "legal right," to insist that the clerk shall forward proper returns to the office of the secretary of State.

These things having been determined, it follows that this court has jurisdiction "to hear and determine the matters complained of."

The counsel for the respondent urge that the determination of these facts is an interference with the legislative branch of the government, who are alone authorized to determine the election returns and qualification of its own members.

We are determining no such thing. We are simply determining that the petitioners have made such a showing of a "legal right," as would authorize them to come into this court and ask it to compel the clerk of the Pulaski county court to send up proper returns to the secretary of State. If the Legislature had no power to go behind the list of members furnished by the secretary of State to each house, it might with some propriety be asserted that this court would be determining the election of members of the General Assembly; but in this proceeding this court does not, nor is it asked to, say who are members of the House of Representatives, or who are not.

If the proper returns in the office of the clerk of the county show that the petitioners are elected, they have a right to have the returns forwarded to the secretary of State, that shows such fact to exist, no matter whether it may be true in point of fact or not.

There is a vast difference between saying that returns showing an election of certain persons shall be forwarded to the secretary of State, and saying that such persons are elected.

We will now turn to the second cause of demurrer, which is, that "the petition does not set forth facts sufficient to entitle the petitioners to the relief asked, or any other relief."

The relief asked, to bring it down to a single proposition, is to compel McDiarmid to send an abstract to the secretary of State, showing the vote cast for the different candidates as members to the House of Representatives of the General As-

sembly, in the different townships and wards within the county of Pulaski.

The response of McDiarmid says he has done this.

The petitioners file a supplemental answer, in which they say that it is true he has forwarded a return of all the votes cast in said county for members of the General Assembly, but that the return of the votes cast in the townships of Caroline, Clear Lake, Prairie and Richwoods, are certified as "votes cast for representatives in the lower house of the Arkansas State Legislature, in the territory belonging to the county of Prairie, in the twelfth district," instead of votes cast in the territory of Pulaski county, in the tenth district.

They further state that in the township of Eagle, and in the first and second wards of the city of Little Rock, in said county, the returns filed in the secretary of State's office, by the said county clerk, show that two elections were held on the same day within said township of Eagle, and said first and third wards of the city of Little Rock; and that instead of certifying the election returns of the election held by the judges of election appointed by the board of registration, that said McDiarmid has also forwarded the returns of other pretended elections, held in said township, and that by reason of doing so, the secretary of State is unable to tell who was elected according to the returns.

The demurrer of the respondent admits these things to be true, and this brings us to consider what was the duty of the clerk, under the law, in making out the returns.

It appears that double elections were not held in any of the townships of the county, save Eagle, and that double elections were only held in the first and third wards in the city of Little Rock. Under such circumstances, what was the duty of the clerk?

The 39th section of the election law is, "that on the fifth day after the election, if all the returns have been received, the county clerk shall proceed to open and compare the several

election returns which have been made to his office, and make abstracts of the votes given for the several candidates," etc.

As to all the other townships, save Caroline, Richwoods, Clear Lake, Prairie and Eagle, and the first and third wards of the city of Little Rock, his duty was clear and plain; for it was no part of his business to determine whether the election held in Ashley, Eastman, Campbell, Gray and Badgett precincts was regular or not. There was but one set of returns before him, and he was bound to forward an abstract, to the secretary of State, of those townships.

Now, let us see what his duty was, as to the township of Eagle, and the first and third wards of the city of Little Rock.

There were two sets of returns filed in his office, and counsel ask how was the clerk to determine which was the legitimate return?

The third section of the election act requires the county court to revise the formation of election precincts in each county, and fix a place in each precinct or ward, where the election shall be held. The county clerk is the custodian of the records of the county court, and it will be presumed that he knew the action of the county court in this respect.

The fourth section of said act requires the board of registration, for each county, immediately before the election, to appoint three discreet persons, having the qualification of electors, in each election district, to act as judges of election. The petition alleges, and the demurrer admits, that a list of the judges, appointed by the board of registration, was filed in the office of the county clerk, and that he knew who the regular judges were.

Knowing that the law authorized the appointment of judges of election by the board of registration, and being furnished with the evidence of such appointment, now what was the duty of the county clerk?

The counsel for the respondent, at this point, direct our attention to the seventh section of the election law, which provides that, "If the county court shall fail to fix a place at

which elections are to be held in any election district, *or the board of registration fails to appoint judges of election*, or those appointed *fail to act*, it shall be the duty of the sheriff to fix a place for holding the election, and the voters, when assembled, may appoint the judges." After directing our attention to this section, it is asked how the clerk is to know whether the return made by persons as judges elected by the voters, is the regular return of the election held, or whether that held by the regularly appointed judges should prevail?

The answer is, that it appears that '*the board of registration did not fail to appoint*," and the evidence that the regular judges did not "*fail to act*," is furnished by the returns filed in the office of the county clerk, and that the law does not recognize the right of the voters to select judges, except in the two cases provided.

But it is urged that the returns from the township of Eagle, and the first and third wards of the city of Little Rock are sworn to, and that it appears therefrom, that the regular judges did "*fail to act*," and it is asked what the clerk is to do under such circumstances?

We have already stated that return of the regularly appointed judges was made to the clerk; it was to be presumed that they had acted, if they so returned; and as to whether what is termed the "irregular polls," were so sworn to, all that we have to say is, that no such fact appears by the response or demurrer, and such statements must be treated *de hors* the record.

Then, we say, that the returns made by the judges appointed by the board of registration, and of which the clerk admits he was fully advised, ought to have been certified as the true returns, and the other should have been excluded from the abstract to the secretary of State.

The counsel for respondent direct our attention to the 41st section of the election law, to show that, if the clerk should reject or refuse to count the vote on *any* poll-book, of any election held by the people, the clerk is liable to indictment for a

high misdemeanor, etc., and that it was his duty to certify, to the secretary of State, all the returns that might be returned to his office, whether legal or illegal.

It will be a sufficient response to this to say, that the law does not contemplate any such thing as an "illegal poll;" and when the law speaks of "*any poll-book*," it has reference to the poll-book of a legal election, and not to the poll-book of an election that the *record*, in the office of the clerk of the county, advised him were *prima facie* void.

The records in the clerk's office, as the respondent admits, contained the names of the judges of election, appointed by the board of registration, and the return of the judges, that they held an election under and by virtue of that appointment, became another record, showing that they had *acted*, and under such circumstances the clerk had no right to assume that they had "*failed* to act," no matter who or how many had sworn they had not.

Having disposed of the township of Eagle and the first and third wards of the city of Little Rock, we will now proceed to inquire, the clerk's duty, as to the townships of Caroline, Clear Lake, Richwoods and Prairie.

The counsel for McDiarmid urge, that the electors residing in the territory acquired from Prairie county, although electors of Pulaski county for the purpose of electing members of Congress, State and county officers, are not electors of the tenth senatorial district, and have no right to vote therein, they having been electors of the twelfth senatorial district at the adoption of the present Constitution.

In assuming this position, they urge that they are sustained therein by the plain provisions of the Constitution of this State.

The provision of the Constitution alluded to reads as follows: "Until after the apportionment, as herein provided for, the senatorial and representative districts shall be composed of the following counties, to-wit: * * * Tenth district, of

Pulaski and White; twelfth district, of Prairie and Arkansas."

Here we have an apportionment of the *counties* into senatorial and representative districts.

The concluding portion of the section declares that, "the senators and representatives shall be apportioned among the several senatorial and representative districts as follows, to wit: Tenth district, two senators and six representatives; twelfth district, one senator and four representatives."

Here we have an apportionment of the number of senators and representatives to the different districts.

The 8th section, of article 5 of the Constitution, then declares that "there shall be no apportionment, other than that made in this Constitution, until after the enumeration to be made in the year one thousand eight hundred and seventy-five."

Here we have a declaration that the apportionment made by section 2, of article 15, shall remain as it now is until after the year 1875.

The inquiry now arises, does the act, entitled "An act to be entitled an act to change the boundary lines of Prairie and Monroe counties, and for other purposes," change any one of the senatorial or representative districts, or the basis of representation or apportionment therein?

The Constitution declares that the tenth district shall be composed of the counties of White and Pulaski, and that the district shall have two senators and six representatives.

The counsel for the respondent urge that these provisions of the Constitution evidence an intention on the part of the framers of the Constitution, and the people who adopted it, to prevent the transfer of electors, by change of county lines, from one senatorial and representative district to another. We do not assent to any such interpretation of the Constitution.

Section 12, of article 50, declares that "no county now established by law shall ever be reduced, by the establishment of any new county or counties, to less than six hundred square miles."

The rule of construction is, that the Legislature may pass all such laws as to them may seem just, so long as they do not *trench* on the other departments of government, or the Constitution of the State. The inhibition in the section just quoted is, that counties shall not be reduced below six hundred square miles. This does not prevent the Legislature from adding territory to another county, so long as it does not reduce a county below the number of square miles mentioned in the Constitution.

This general proposition is conceded by counsel for respondents, but they insist that, while it is true the Legislature may change the boundaries of counties, it cannot change the boundary of a senatorial or representative district.

We concede that the Legislature had no power to attach a portion of Prairie county to the tenth district for the sole purpose of allowing the electors of the twelfth district to vote in the tenth, without a change of county boundary. This would be a mere change of voters. But, in this instance, the county line is changed and the citizens are, by operation of law, moved from one county to the other for *all* purposes, as fully as though they had abandoned their former homes and moved voluntarily within the county of Pulaski. They then as much become electors of the tenth district as they were of the twelfth.

The boundary line of the tenth district is fixed by the boundary lines of White and Pulaski counties, and not by what was the boundary of those counties at the adoption of the Constitution. To say that the electors of Prairie county may be transferred, by a change of county boundary, into Pulaski county, for the purpose of suing and being sued, for the purpose of voting for all State and county officers and members of Congress, and that they cannot vote for senators and representatives to be elected to represent the county in which they live and are interested, but that they must vote for men to represent them in the Legislature that do not live in their

counties, is a proposition that, when once stated, shows the fallacy of the reasoning.

The tenth senatorial district is yet composed of the counties of White and Pulaski, and no other. The officers of Prairie county have no jurisdiction over a single foot of the territory added to Pulaski county. In making the apportionment the framers of the Constitution evidently intended that the boundary lines of the different counties, and not the boundary lines of the different townships of a county, should constitute the boundary lines of the senatorial and representative districts. The inhibition in the Constitution, in relation to apportionment, was to prevent the Legislature from changing the *counties* in the district—that is, from taking one *county* out of a district and placing another therein. If the Legislature should put White county into some other district, and Prairie into the tenth district, this would be such a change of apportionment of the district as the Constitution inhibits; or if the Legislature attempted to say that the tenth district should have one senator and four representatives, instead of two senators and six representatives, as now fixed by the Constitution, this would be such a change in the apportionment as the provision was intended to inhibit.

These things being true, the clerk of the county court ought to have returned the abstract of votes cast in these townships, as votes cast in Pulaski county, instead of votes cast in the county of Prairie, in the twelfth senatorial district. Whether the electors of those townships had a right to vote in Pulaski county for senators and representatives to represent the tenth district, was a question that the law does not authorize a county clerk to decide. His duty is simply ministerial, and it was for him to certify the returns, and let the proper tribunal pass on the question of legality or illegality.

It is urged that *mandamus* is not the proper remedy, if the party can obtain justice by any other proceeding, and the case of "*The People v. The Supervisors of Greene, 12 Barb. 222*, is cited as an authority in point, in which case the writ was re-

fused on the ground that it would be "inappropriate and ineffectual." There is no analogy between that case and the one now before the court. In the case cited the *mandamus* was prayed for the purpose of convening a board of supervisors to meet and re-count certain votes, and the court refused the *mandamus* on the ground that the board was *functus officio*, and if convened, would have no legal authority to do the act prayed by the petitioner.

The county clerk is not *functus officio*, and, being a "public officer," can be compelled to perform any duty which, by law, he is required to do, if the person asking it shows any legal right to have it done.

Other authorities have been cited to show that the sending of the abstracts forward, as prayed by the petitioners, would not establish them in their rights; and from this it is urged that the remedy is not efficacious, but on the contrary fruitless, and for this reason ought to be dismissed.

It appears to us counsel for respondent have mistaken the object of this proceeding. Its object is not to determine that the petitioners are entitled to seats in the House of Representatives, but to compel the county clerk to send such abstracts of the election to the secretary of State, as will enable him to put the persons names on the list to be made out by him, and furnished to the different houses, as appear to be elected by the returns properly certified to his office.

The amended petition sets up that the returns certified to the secretary of State are not returns responsive to the prayer of the petitioners. The prayer is that McDiarmid be compelled to send an abstract of the votes cast in the township of Eagle and in the first and third wards of the city of Little Rock, of the election held by the judges appointed by the board of registration, and an abstract of all other returns or pretended returns of said election presented to him, or on file in his office.

In order to have complied with this prayer of the original

petition, and that of the amended or supplemental petition, he must have sent to the secretary of State an abstsact, "on a separate sheet of paper," showing the number of votes each candidate received in the townships of Gray, Maumelle, Owen, Fourche, Big Rock, Campbell, Union, Badgett, Eastman, Clear Lake, Richwoods, Ashley, Prairie, Caroline, Peyatte, Plant, Cypress, Bayou Meto, Mineral, Eagle and of the first, second, third and fourth wards of the city of Little Rock. An abstract had been sent to the secretary of State, it is true, showing a portion of the returns required by the abstract asked by the petitioners, but as to the township of Eagle, and the first and third wards of the city of Little Rock, it showed the votes cast at an illegal, instead of the legal poll. As to the townships of Prairie, Richwoods, Clear Lake and Caroline, the abstract sent to the secretary of State showed that the votes of those townships belonged to the twelfth, instead of the tenth district.

The response does not show the sending forward of the abstract asked by the petitioners, and which we think they are entitled to upon the showing made to the court.

The demurrer is overruled, and the writ prayed for will be awarded, unless the clerk can make a response that is responsive to the prayer of the petition.

[The demurrer to the petition being overruled, and the respondent having filed an amended response, the court delivered the following opinion thereon.]

McCLURE, J.

The response admits the appointment of the judges of election, as alleged by the petitioners, save as to the township of Eastman, and denies that the judges, so appointed by the board of registration, were legal judges, on the ground that a list of the judges, so appointed as aforesaid, was not filed in his office until three o'clock, P. M., on Saturday preceding the election.

It is a sufficient answer to this to say, that the law does not

fix the precise length of time the list shall be filed in the clerk's office before the election. The response shows it to have been filed on the Saturday before the election, which evidences the fact that, so far as the clerk is concerned, he knew who the judges of election, appointed by the board of registration, were. Whether the judges thus appointed were legal judges, is a question the clerk had no power to decide, nor can *he* question the validity of their appointment in this proceeding.

The response states, that the clerk had no information as to armed mobs seizing and usurping the polls, and preventing the judges appointed by the board of registration from acting. This denial, it is presumed, is intended to refer to the poll-books of the townships of Ashley, Campbell, Gray, Badgett and Eastman.

In the opinion delivered on yesterday, we said, that inasmuch as but one set of poll-books came up from those townships, the clerk was bound to presume in favor of their correctness, and certify them to the secretary of State.

As to the township of Eagle, and the first and third wards of Little Rock, the response says but *one* set of poll-books were returned into his office, and that said returns show that the judges appointed by the board of registration had failed to open the polls in the time prescribed by law; all of which the clerk says will appear by reference to exhibits.

By reference to these exhibits we find what purports to be a copy of a letter written, which is not even certified to as being a correct copy of a letter on file in the clerk's office, by persons who sign themselves as deputy sheriffs, wherein the clerk is informed that at the hour of eight o'clock, the time fixed by law for opening the polls, there being no judges of election present, certain persons therein named were selected as judges of election.

The response admits the return of the election returns held by the judges of election, appointed by the board of registration, in the township of Eagle, and the first and

third wards of the city of Little Rock, but says on account of "official information and satisfactory indubitable testimony," he certified the election returns of the election held by the judges elected by the people, to the secretary of State.

The only information the clerk seems to have had, as to the failure of the regular judges to act, was the letter purporting to have been received from some person signing himself deputy sheriff, and this constituted the "official information and indubitable testimony" on which he based his action.

In our opinion, this is not sufficient to overturn the returns of the regular judges, who made a return, showing they had acted. And, even if it did raise a question in the mind of the clerk, he has no authority or power to decide it. His duty was to presume in favor of the regularity of the action of the persons who were appointed, in the manner prescribed by law, to perform the act of holding the election. The law makes it no part of the duty of deputy sheriffs to write such letters, and, in the absence of such a provision of the law, the deputy sheriff's letters are entitled to no more credence than those of any other citizen of the State.

Judges of election, by the provisions of the sixth section of the election law, continue to be judges of election until the next general election; and in every case where an election is held by persons other than the regular judges, *the poll-book itself* ought to show the absence of the regular judges, or some reason why the regular judges did not act. In cases where a special judge is elected, the record always shows that the election was made because the regular judge did not appear, or that he was in some manner disqualified by some provision of the law, and there is no good reason why persons not known to the law, as judges of election, should be excused from showing by what authority they have assumed to discharge duties enjoined upon another. A *letter* from a deputy sheriff, directed to this court, informing it that the regular judge failed to appear, as the law provides, and that the bar elected a judge,

would hardly supply the deficit in a record, nor would it show any authority in the judge to hear and determine cases.

The object of this *mandamus*, and its prayer is, that the clerk of Pulaski county make out an abstract showing the number of votes cast at the election, held on the 8th day of November, 1870, for persons voted for for representatives in the General Assembly of the State of Arkansas, whereon will be shown the whole number of votes cast, according to the returns on file in the county clerk's office, for each candidate in the townships of Eastman, Clear Lake, Richwoods, Ashley, Gray, Prairie, Caroline, Peyatte, Plant, Cypress, Bayou Meto, Mineral, Maumelle, Owen, Fourche, Big Rock, Union, Campbell, Badgett, and the second and fourth wards of the city of Little Rock, and whereon will be shown the vote cast at the election held by the judges of election, *appointed by the board of registration*, in the township of Eagle, and the first and third wards of the city of Little Rock.

It is no response to say, that the clerk has certified certain townships already. What the petitioners want, is an *abstract* showing the information prayed for, and, to use the exact expression of the law, "on a separate sheet of paper."

The peremptory writ is awarded, and the clerk of this court will issue it forthwith.

GREGG, J., dissenting, says:

The plaintiffs bring their original petition, in this court, praying for a *mandamus* against the defendant, as clerk of Pulaski county, to compel him to certify what they allege to be the proper abstracts of election returns of said county, of the election held the 8th of November, 1870, and to file the returns, so certified, with the secretary of State.

The defendant responds that, before the filing of this petition against him, he did make and file abstracts and statements of all the votes cast at said election, etc., and of all returns, or pretended returns of said election, presented or filed in his

office, and returned and certified the same, and filed them with the secretary of State; and by a demurrer clause in his response, he submitted that this court had no jurisdiction in this suit, and that we should not take jurisdiction of the matter.

Upon the latter proposition, we have been unable to find any sufficient reason to change our views from the opinion expressed by the minority of the court, in the case of Price & Barton against Page, as treasurer. Our understanding of the Constitution of our State, and the whole theory of our judicial system, convinces us that the Supreme Court of the State was, and is, intended as a tribunal of last resort; that its leading object and intent was, and is, the hearing of appeals and the correction of errors; the holding of general supervision and control over inferior tribunals, and that it is not the intent and spirit of the Constitution, and was not the design of its framers, that this should be a court of first impression; that writs of this and a similar character should not be originally issued, and heard, and determined in this court; that, if so, no revisory power anywhere exists to correct the errors likely to be often intermixed in the haste of original trials. But, in this case, we will content ourself with these few general remarks on this subject, without quoting the various provisions in our Constitution that have led us to this conclusion, and giving, at length, the cogent reasons why the people, in convention, should have intended, and did intend, that the Constitution be interpreted as we understand it.

The other question raised by the demurrer is, whether the case presented here, is a proper subject for judicial investigation in this court. We also assume the negative of this position. Our State Constitution, in reference to the Legislature, *Sec. 4, Art. 5*, declares that: "each house shall choose its own officers, determine the rules of its proceedings, judge of the qualifications, election and return of its members," etc.

To our mind, it is clear that the object intended to be accomplished by this clause was, to commit the whole subject of the election and qualification of members to that house, in

which membership is claimed, for consideration and determination; and that no co-ordinate department of government was expected to influence or control them in their action.

The majority of the court admit that the legislative branch of the government alone is authorized to judge of the election, return and qualification of its members; but, they say, we are only asked, herein, to compel the clerk of Pulaski county court to send up to the secretary of State proper returns. Now if we can, under this Constitution, judge as to what are proper returns, and compel the clerk to make out such returns, can we not judge, also, as to the election or qualification of the members? The Constitution declares each house shall judge of the qualification, election and *return* of its members. Now, if we can disregard that clause in this Constitution, that declares that the house shall judge of *the return*, can we not, also, disregard that, which says it shall judge of the election and qualification of its members? Wherein is the difference? If we assume one function belonging to another department, can we not assume others? And, if we do this, are we not assuming a power that is given to a co-ordinate department, and not granted to us?

In *section 556*, "*Law and Practice of Legislative Assemblies*," *by Cushing*, *p. 225*, the law is stated as follows: "It being a principle of parliamentary law that a legislative assembly is the sole and exclusive judge of the *returns* and elections of its own members, it follows that the validity of an election, or return, cannot be drawn into question, on a claim of privilege, for, otherwise, the independence of the Assembly would be placed completely at the discretion and in the power of other co-ordinate branches of the government," etc. The law here declares that the *return* and *election* of members is within the sole and exclusive control of the Assembly. No distinction is here made by which a court can judge of the returns, and leave the house to judge of the elections alone. This writer declares that the election, *or return*, cannot be drawn in question, etc. Not election *and return*, but *or return*, etc.; other-

wise the independence of the Assembly would be placed completely at the discretion of other co-ordinate branches of the government, etc. It is to maintain this distinctiveness, and keep the one department of government free from the interference and control of the others, that our Constitution has so expressly and carefully conferred these powers upon the respective houses of the General Assembly; and, as Mr. Cushing says, "given them the sole and exclusive control over the election and return of its members."

In England the returns were made and returned into chancery (while here they are made to the secretary of State,) and there recorded, and this return and record was the evidence of a member's right to his seat, and in the work referred to, *sec. 1050*, this author says: "But as this record is made up from the returns in the first instance, and as they are received, which cannot be altered *but by the authority of the house*, and as the house, which is the sole judge of the returns and election of its members, may, afterwards, upon investigation, find that a particular return is wrong, and that some other person should have been returned: it then becomes necessary, by analogy, to legal proceedings in certain cases, that the record should be made to conform to the facts. Inasmuch, however, as the record is in the chancery, and the power to rectify it exists only in the house, the method of proceeding is for the house to direct the returning officers, if necessary, and the clerk of the crown, in chancery, to attend in the house and there, in its presence, to make the requisite alterations." *Sec. 1051.*

"These officers may, also, be directed to perform other official acts connected with the election and return of members, and are subject to the censure and punishment of the house for any neglect of duty," etc. Nothing is here said of the returning officers being amenable to the courts, but it is said *the house* may punish, and it is here said, as to this return and record made in the crown office in chancery (with us in the office of the secretary of State,) "*The power to rectify it exists only in the house,*" etc., while, in the matter before the court we are urged

to have the returns corrected, that the secretary may correct his records or lists and certify accordingly. But again, in *sec. 140*, this author says: "As to the general duty of returning officers, it has been a point much agitated in England, whether it is wholly ministerial, or whether it is in any degree judicial." In reference to this question, the writer already referred to, remarks: "There can be no doubt that in those branches of their duty, wherein the law has marked out a definite line, it is ministerial, etc., * * * In the judicial decisions of this country, where this point is adverted to, it seems to be considered that the returning officers are chiefly judicial in their character," etc. *Sec. 141.*

"It remains to be observed, in conclusion, that the proceedings of these officers, from the necessity of the case, are, in the first instance, uncontrollable by any other authority whatever; so that if, on the one hand, notwithstanding an election has been effected, the returning officers refuse or neglect to make the proper return, the party thereby injured is without remedy or redress until the assembly, to which he is chosen, has examined his case and adjudged him to be duly elected; and, on the other hand, if the returning officers make a return when no election has, in fact, taken place, or if not eligible, the person returned, will not only be entitled, but it is his duty to assume and discharge the functions of a member until return and election are adjudged void."

I have thus quoted at some length from this standard author, to show that the return, as well as the election of members, is solely under the control of the legislative department, and, as stated, the Constitution contemplates that it shall be entirely free from the influence or control of the judiciary and executive departments of the government, and that this may be placed beyond all question, the returning officers of elections are, by this law, declared to be beyond their control; and if, through the misconduct of such officer, a person is injured, as stated in the last paragraph quoted, he is, from the very necessity of the case, without remedy until the assembly meets.

That is the court provided by the Constitution to try such case, and he must wait until it convenes, and therein have his rights determined. Yet it is assumed here that we will control the returning officer and cause him to make a return different from what, in his judgment, he should make, and thereby change the rights of contestants, while the authority referred to is, that these officers are uncontrollable by the courts. This is a special matter, by the Constitution made triable by the legislative department, and intended and provided for the maintenance of the rights, dignity and independence of that department. And, in our opinion, the writ prayed for should be denied and the petition dismissed.

HARRISON, J., dissenting, says:

Adhering to the opinion I expressed in the case of *Price & Barton v. Page, Treasurer*, that this court has no original jurisdiction except in the exercise of its superintending control over inferior tribunals, I think we should not take cognizance of this case. I concur, however, with the majority of the court, in the conclusions at which they have arrived, in respect to the other questions involved in the case.

PAGE, *Adm'r etc. v.* COOK, *Adm'x etc.*

ADMINISTRATION—*Letters, when not evidence.*—Letters of administration issued by a clerk of the probate court, acting under authority of the Confederate State Constitution of 1861, *after* the inauguration of the State provisional government of 1864, are void, being issued without legal authority, and are not admissible in evidence.

Appeal from Columbia Circuit Court.

HON. JOHN T. BEARDEN, Circuit Judge.

James R. Page, and *E. W. Gantt*, for appellant.

Watkins & Rose, for appellee.

GREGG, J.,

This is an appeal prosecuted from a judgment of the probate court of Columbia county.

On the 20th of April, 1867, the appellant presented to the appellee for allowance, a claim founded upon two judgments, rendered in 1859, against her intestate. She rejected the claims, and the cause was submitted to the probate court on pleas of limitation, non-claim and payment. The court found for the appellee, and rendered judgment against the appellant for costs, from which he appealed to the circuit court. The judgment was there affirmed, and he appealed to this court.

Upon the trial in the probate court, the transcripts of the judgments rendered against the deceased, in his lifetime, were admitted to be properly certified, etc.

After introducing the transcripts, the claimant read in evidence, the letters of administration granted appellee, on said estate, in September, 1865.

The appellee, over the appellant's objection, was then allowed to read in evidence, letters of administration issued to her, on the 31st day of March, 1864, by one Daniel Dixon, as clerk of said county, who testified that he was not then acting as clerk under the Constitution and laws of 1864, but under the Confederate Constitution of 1861, and a commission issued by Harris Flanagan, as Governor of Arkansas.

There was no proof of payment, and it is not insisted that the claim was barred by the statute of limitations, but it is here insisted, as was held by the courts below, that the statute of non-claim cut off the demand, because it was not presented

to such administratrix within two years from the 31st day of March, 1864.

At that time, a new Constitution had been adopted and ratified, and a valid provisional government inaugurated and put in force, and Dixon, who issued these pretended letters of administration, of March 31, 1864, was not then an officer of the government of the State of Arkansas, and consequently had no lawful authority to issue letters of administration.

These pretended letters were void, and should not have been admitted in evidence. The probate court, therefore, erred in admitting them, and in finding that issue in favor of the appellee.

This error appeared upon the face of the record, and the circuit court should, therefore, have granted a trial *de novo*, and for the error in refusing so to do, the judgment of that court is reversed, and this cause is remanded, to be proceeded in according to law.

HARRISON, J., dissenting.

PARSONS *v.* PAINE.

ATTACHMENT—*Publication.*—Publications in suits by attachment, made in conformity to the law in force at the time of the institution of the suit, will not be affected by a subsequent statute changing the manner of giving notice.

LIENS.—A judgment in attachment, though, in form, *in personam*, under the statute, is a lien on no other property than that attached.

Appeal from Johnson Circuit Court.

HON. THOMAS BOLES, Circuit Judge.

Clark & Williams, for appellant.

T. D. W. Yonley, for appellee.

WILSHIRE, C. J.

At the April term, 1867, of the Johnson circuit court, Thomas B. Paine, as common school commissioner of Johnson county, brought an action of debt, by attachment, against Hiram Parsons, on a writing obligatory, bearing date February 5, 1861, and due six months after date, for $200, with interest at eight per centum.

A writ of attachment was issued; certain lands were attached as the property of Parsons, and the writ of attachment returned on the 16th day of February, 1867. The court, at the term to which the suit was brought, made an order of publication, as to Parsons.

At the succeeding term, in October, 1867, proof of publication of notice was made, and the defendant failing to appear, as required by the notice, or order of publication, the circuit court rendered judgment against him for the sum of $200 debt, and $105 $\frac{48}{100}$ damages, etc.

The cause was brought here upon an appeal, granted by the clerk of this court, on the 17th of May, 1870.

The principal errors complained of, and for which this court is asked to review and reverse the judgment below, are: 1st. That the order of publication was made by the court below, when it should have been done by the sheriff, as prescribed by section 8, of the act of the General Assembly, approved March 7, 1867.

This suit was commenced, by the plaintiff suing out a writ of attachment, on the 14th day of February, 1867. It appears, by the return of the sheriff, contained in the transcript of the record, that the writ of attachment was executed by attaching certain lands, as the property of Parsons, and was returned on the 16th day of February, 1870.

The law regulating proceedings by attachment, in the circuit court, in force when this suit was commenced, provides that "if the defendant shall not, on or before the third day of the term, * * * appear and plead, or otherwise answer the plaintiff's action, the court shall order that a publication be made, containing a statement of the nature and amount of the plaintiff's demand, and notifying the defendant that an attachment has been issued against his estate, and that, unless he shall appear by himself, or his attorney, on or before the third day of the next term, (stating the time the court will meet), judgment will be entered against him, and his estate sold to satisfy the same." It is insisted by counsel for the appellant that this mode of giving notice to the defendant, in attachment proceedings, was changed by section 8, of the act approved March 7, 1867, and that the provisions of the latter act should have been observed in this case.

In this position of the learned counsel, we cannot agree. The right of the appellee to proceed under the law regulating the proceedings in attachment suits, in force prior to the passage of the act of March 7, 1867, had attached before the passage of that act. The appellee had, before that time, commenced his suit, the writ of attachment had been issued and executed, by a levy upon the lands of the appellant, and returned by the sheriff so executed. The only thing remaining to be done, was for the court to make the order of publication, which could not be done until the time arrived for the court to be held, which was subsequent to the passage of the act of March 7, 1867.

It is clear, from the language of the act of March 7, 1867, that the Legislature intended that it should be prospective in its operation; that it was intended to apply to actions of attachment thereafter to be commenced, and not to those commenced under the law prior to the passage of the act. The language of the 8th section of the act is: "When any writ of attachment shall come into the hands of any sheriff, or other officer, and the defendant named in such writ cannot be found

in his county, it shall be the duty of such *officer to make publication*," etc. There are no words in that act that can be construed into giving it a retroactive effect.

This court has repeatedly held, that a statute will not have a retrospective operation, unless there are words contained in the act clearly showing that to be the intention of the Legislature. *Couch v. McKee, 1 Eng. (Ark.), 493*, and the authorities there cited.

The second, and only remaining question raised by counsel for the appellant, that appears in the record, is: That the judgment against the appellant is *in personam.*

The learned counsel seem to insist that the judgment, in the form it was rendered against the appellant, is a lien upon his property, other than that seized, by virtue of the writ of attachment.

This objection is not good. By the transcript of the record before us, we find that the judgment rendered by the court below is in the usual form in such proceedings, and in conformity to the statute; *sections 24 and 31, chapter 17, Gould's Digest.*

It is true that the judgment is, in form, *in personam*, under the statute; but the only writ the appellee was entitled to, for the execution of his judgment, in this case, was a *venditioni exponas*, or special execution, commanding the sheriff to sell the property formerly seized under and by virtue of the writ of attachment. The judgment against the appellant was a lien on no other property of his than that attached.

The counsel for the appellant state that an execution was issued upon the judgment, and the property sold, etc., without a bond being executed by the appellee, as required by law in attachment proceedings. There is no such question presented by the transcript before us. It does not appear by the record that any proceedings have ever been had to execute the judgment.

Finding no error in the proceedings of the court below, in this cause, the judgment is, in all things, affirmed.

TUBBS *et al. v.* GATEWOOD *et al.*

DEEDS—*Construction of.*—Where two clauses in a deed are so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected.

In the common understanding and acceptation of their meaning, the words "signed and sealed," in the certificate of acknowledgment, is an equivalent expression for "signed, sealed and delivered," or "executed."

The words "without undue influence or compulsion of her husband," in the certificate of acknowledgment of a married woman, in their common acceptation, are equivalent to the expression of her "own free will, without undue influence or compulsion of her husband."

ACKNOWLEDGMENT.—A substantial compliance with its requirements, in the acknowledgment of a deed, will dispense with a literal conformity with the statute.

Appeal from Prairie Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Watkins & Rose, for appellant.

The statute prescribes one form of acknowledgment, where the wife owns the land, and a different form where she merely has a dower interest. *Gould's Dig. ch. 37, sec. 21, and forms 29 and 30, in the appendix.*

In the case of *Lane v. Dollick, 6 McLean, 200*, on a like statute, and the cases there cited, are, to our minds, conclusive of this case.

Clark & Williams, and *English, Gantt & English*, for appellees.

The deed to A. J. Ellis is a valid deed between Sheppard and wife—signed and acknowledged by both of them, and by Sarah Sheppard, separate and apart. The validity of the deed under the provisions of *sections 10, 11 and 21, chap. 37, Gould's Dig.* (the title being shown to have been in the wife), depends

upon the acknowledgment coming within the provisions of section 21.

Slight verbal variation or surplusage in the form of acknowledgment, if a substantial compliance, does not vitiate a deed. *Dex v. Hamilton, 7 Halstead Rep. 109; Jackson v. Inman, 2 Cowen 552.*

In the acknowledgment of a wife's conveyance, the form of the certificate is immaterial, provided the directions of law are substantially complied with. *Talbot v. Simpson, Peters C. C. Rep. 188; Watson v. Mercer, 6 S. & R. 49; 6 Binney, 437; Lee v. Hall, 2 Har. & McHer. 19 Dex v. Guger, 4 Halstead, 225.*

After great lapse of time, courts will presume that the deed was properly acknowledged, even if defective. *Jackson v. Gilchrist, 15 Johnson Rep. 91.*

HARRISON, J.

This was an action of ejectment, by William Tubbs and his wife, Priscilla M. Tubbs, and George W. Sheppard, against James E. Gatewood, James S. Thomas, Nathaniel H. Burk, Nicholas Burnett, Mack Banks, Jonas McKindree and Stephen Forehand, for a block of ground, in the town of Des Arc. The defendants, except McKindree, who was not served with process, pleaded the general issue, and the verdict and judgment were in their favor.

The block in controversy, was conveyed by George C. Watkins to Sarah Sheppard, wife of Christopher Sheppard, on the 21st day of May, 1850, and she and her husband were in possession in that, and several years thereafter. On the 23d day of October, 1854, Christopher Sheppard, and his wife, conveyed lots three, four, five, eight, nine and ten, in said block, to Albert G. Ellis, under and from whom the defendants claim title.

The deed to Ellis, which was read to the jury against the

plaintiff's objection, purported to grant, bargain, sell, alien and convey the lots to him in fee simple; and, except that it contained, after the grant or conveyance of the property, a clause of relinquishment of dower by Mrs. Sheppard, was in every respect in the usual form of a deed of conveyance, of a married woman's real estate, but the certificate of her acknowledgment attached to the deed was as follows: "I further certify that on this day, voluntarily appeared before me, Sarah Sheppard, wife of the said C. Sheppard, to me well known as the person whose name appears upon the within and foregoing deed of conveyance, and, in the absence of her husband, declared that she had *signed and sealed the relinquishment of dower, and the foregoing deed of conveyance,* therein expressed, for the purposes therein contained and set forth, *without compulsion or influence of her husband.* In testimony whereof," etc.

Sarah Sheppard died in 1859, and her husband in 1861, and her heirs-at-law were her children, the plaintiffs, Priscilla M. Tubbs and George W. Sheppard, Salina Sheppard and Frederick Sheppard. Salina Sheppard died, without issue, in 1863. Frederick Sheppard, on the 24th day of December, 1867, conveyed all his right and interest in lots one, two, three, four, five, eight, nine, ten, eleven and twelve, in the block in controversy, to Priscilla M. Tubbs.

Evidence was adduced to prove that the defendants were in possession of the property at the time of the commencement of the suit.

The two following instructions, asked by the plaintiffs, were refused by the court:

1. "If the jury believe the evidence before them, the plaintiffs are, upon the construction and legal effect of the deed from Christopher Sheppard and wife to Albert G. Ellis, entitled to recover the property therein described."

2. "If they believe the evidence, the plaintiffs are, upon the construction and legal effect of the deed read in evidence, entitled to recover an undivided half of the property described in the deed from Christopher Sheppard and wife to said Ellis."

The main question for our decision, and upon which all others depend, is as to the sufficiency of Sarah Sheppard's acknowledgment of the deed to Ellis. If properly acknowledged, no serious doubt can exist that it conveyed the fee in the lots described in it, which was in her, to Ellis; for it is a familiar and well settled rule in the construction of deeds, that where there are two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected. Besides, being herself the owner of the property, she had no right of dower to relinquish, and we cannot presume that she intended a nullity.

Section 21, chapter 57, Digest, prescribes the manner of authenticating conveyances of real estate by married women, as follows:

"The conveyance of any real estate by any married woman, or the relinquishment of dower in any of her husband's real estate, shall be authenticated and the title passed by such married woman voluntarily appearing before the proper court or officer, and, in the absence of her husband, declaring that she had, of her own free will, executed the deed or instrument in question, or that she had signed and sealed the relinquishment of dower for the purposes therein contained and set forth, without compulsion or undue influence of her husband."

In taking the acknowledgment of a deed, as well as that of a married woman as any one else, a literal conformity with the statute will be dispensed with, when there is a substantial compliance with its requirements. *Trammell v. Thurmond 17 Ark., 216; Jacoway v. Gantt, adm'r., 20 Ib., 190; Alexander & Belt v. Merry, 9 Mo., 510; Webster's Lessee v. Hall, 2 Har. & McH., 19; Dex v. Geiger, 4 Halst., 225, Nantz v. Bailey, 3 Dana, 111.*

Though signing and sealing, without delivery, is not a complete execution of an instrument, the phrase "signed and sealed," in the certificate, was obviously used agreeably to the common understanding and acceptation of its meaning, as an

equivalent expression for "signed, sealed and delivered," or "executed."

Mrs. Sheppard's object and purpose was, as stated in her acknowledgment, to make a conveyance of the lots described in the deed, and the officer, by whom it was taken, must have understood her as declaring that she had executed it, for we cannot conceive that he intended to certify to so nugatory an act, as that she acknowledged the signing and sealing only of the instrument.

It is further contended that if an execution of the deed is shown by the certificate of acknowledgment, she did not declare it to be of her "own free will." The certificate does not so state, in those words, but she declared that it was "without compulsion or undue influence of her husband." The wife is under subjection to no one except her husband, and her freedom from the constraint and control of all other persons is presumed, and need not be shown, and the free will with which she is required to act in the disposal of her real estate is, freedom from the constraint and undue influence of her husband. That appearing by the certificate, we are clearly of the opinion that her voluntary execution of the deed is sufficiently stated therein.

Holding, then, that the provisions of the statute were substantially complied with, and that the deed conveyed Mrs. Sheppard's interest in the lots described in it, there could be no valid objection to its being read to the jury, and it must, for the same reason, likewise follow, that the court did not err in refusing to give the jury the instructions asked by the plaintiffs.

The judgment of the court below is affirmed.

SEVIER *adm'r. et al. v.* HASKELL, *adm'r.*

CONSTITUTIONAL LAW—*Contracts for sale of slaves.*—Section 14, article 15, of the present Constitution, relating to contracts for the sale or purchase of slaves, is repugnant to section 10, article 1, of the National Constitution, relating to the obligation of contracts and is therefore *unconstitutional* and *void.*

Appeal from Arkansas Circuit Court.

HON. H. B. MORSE, Circuit Judge.

Watkins & Rose, Garland & Nash, for appellants.

Clark & Williams, Bell & Carlton and *J. W. Martin,* for appellee.

WILSHIRE, C. J.

This suit was originally instituted in the Arkansas county circuit court, sitting in chancery, by L. C. Haskell, as administrator of the estate of Augustus M. Smith, deceased, against Ambrose H. Sevier, as administrator of John A. Jordan, deceased, and the heirs at law of said Jordan, the purpose of which was to foreclose a mortgage executed by Jordan to Smith, in the lifetime of both.

The cause was brought to a hearing in the circuit court; upon consideration of which a decree was rendered dismissing the bill and for costs, from which the complainant appealed.

Upon that appeal, this court reversed the decree of the court below, and remanded the cause with instructions to render a decree in favor of the complainant, in accordance with the prayer of his bill, etc.

At the November term, 1868, of the court below, Haskell filed the mandate of this court. Thereupon the present appellants presented their separate petitions, showing to the circuit court that since the decision in this cause, by this court, upon

the former appeal, the present Constitution of the State had been adopted and ratified, which ordained that "all contracts for the sale or purchase of slaves, are null and void, and no court of this State should take cognizance of any suit founded on such contracts; nor shall any amount ever be collected or recovered on any judgment or decree which shall have been, or which hereafter may be, rendered on account of any such contract or obligation, on any pretext, legal or otherwise." The petitioners prayed that further proceedings in the case be stayed, and perpetually superseded, and that the circuit court take no further cognizance of the suit, etc.

The court below refused to grant the prayer of the petition, and rendered a decree in favor of the complainant against Sevier, as administrator, etc., for the sum of $84,000, and the further decree, that the mortgage be foreclosed against each and all of the defendants, etc.

To the ruling of the circuit court, in the overruling and refusing to grant the prayer of the appellants' petition, they excepted and appealed to this court.

The only error complained of by the appellants, on this appeal, is the ruling of the circuit court, refusing to grant the prayer of their petition. No other question is raised by the proceedings, subsequent to the filing of the mandate of this court. All questions raised prior to that time, were decided when this case was here before, and are, so far as this case is concerned, settled. See *C. G. Scott, executors, v. Eaton & Betterton,* decided at the present term, and cases there cited.

The only question demanding our attention, is that raised by the appellants' petition. This court, in the case of *Jacoway v. Denton, 25 Ark., 625,* held that section 14, article 15, of the present Constitution, relating to contracts for the sale or purchase of slaves, is repugnant to section 10, article 1, of the national Constitution, relating to the obligation of contracts, and is, therefore, unconstitutional and void.

That provision of our present State Constitution, being the only ground relied on by the appellants for the granting of the

stay of further proceedings, and a perpetual *supersedeas* in the court below, we think, under the ruling in *Jacoway v. Denton*, the circuit court did not err in refusing to grant the prayer of the appellants' petition.

The judgment and decree of the court below is, in all things, affirmed with costs.

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ADAMS, *Ex'r.*, *v.* WARD & CO.

PARTNERS—*Survivors.*—Surviving partners have the exclusive possession and management of the business of a firm, dissolved by the death of one of the partners, but only for the purpose of settling and closing the same, and are tenants in common with the representatives of the deceased partner.

EVIDENCE—*Partnership transactions.*—Without some evidence to connect it with a transaction with the original firm, a receipt in the hand writing of an agent of the surviving partner, not mentioned therein as such, is irrelevant and inadmissible in evidence, as against a demand in favor of the original firm.

Appeal from Franklin Circuit Court.

HON. THOMAS BOLES, Circuit Judge.

Garland & Nash, for appellants.

The receipts offered in evidence, should have been received as presumptive proof, at least, of payment, to be rebutted by W. & Co. *1 Greenl. Ev., 14, 28 and 45; Ib. 147, note.*

From the proof, every presumption must be indulged that the parties were satisfied that the note was settled. *Greenleaf sup; 8 Ark., 213; 9 Ib., 339; Smith (Tucker, 2, E. D.), (N. Y.) 193; Busbee v. Allen, 31 Vt., (2 Shaw) 631; 1 Wallace, (U. S.),*

627, et seq. The facts, taken together, show the verdict is entirely without evidence to support it, and all the court can do is to set it aside. *14 Ark., 202; Ark., 701; 20 Ib., 444.*

The court erred in refusing to give the second instruction; it was in the very language of the law. *Gould's Dig., p. 121, sec. 102, chap. 4;* and the objection can be had at any time during the trial. *14 Ark., 237.* The third instruction was, in substance, our statute of non-claim, *Gould's Dig., sup., p. 120, sec. 99,* and should have been given. All the courts guard and enforce this statute. *14 Ark., 246–7; 18 Ib., 334.*

Clark & Williams, for appellees.

Did the court err in excluding the receipts, as evidence, from the jury? and, if so, is that error before this court for correction? See *Stillwell v. Young, 17 Ark., 473; Camp v. Gullett, 7 Ark., 514; Carr v. Crain, ib., 241; Lafferty v. Day, ib., 264; Campbell v. Thurston, 6 Ark., 441.*

But the court did not err in excluding those receipts. The evidence of facts, as preliminary to the introduction of evidence, is passed upon by the court, and not the jury, *and a new trial will not be granted,* where there is a fair conflict of such preliminary evidence, although the court may find against such preponderance of evidence. *Seymour v. Beach, 11 Cown, 275, 281; McMunygel v. Ross, 20 Pick., 99, 103; (Donelson v. Taylor, 8 Pick, 290; Coleman v. Woolcott, 4 Day 388, contra).* See, also, *Harris v. Wilson, 7 Wend., 57; Penful v. Carpenter, 13 Johns., 350.*

The statute of non-claim is not available unless specially pleaded. *State Bank v. Wallace, ad., 14 Ark., 236; Walker v. Byers, ib., 259; Biscoe, et al., v. Maden, 17 Ark., 533.* But, any how, the credence went to the jury, and there being no motion for a new trial, their finding is conclusive. *State v. Jennings, 10 Ark., 429; State Bank v. Conway, 13 Ark., 344; Lefils v. Sugg, 15 Ark., 137.*

HARRISON, J.

Augustus L. Ward and Leonard C. Southmayd, surviving partners of —— Wallace, of the firm of Wallace, Ward & Co., presented to the court of probate, of Franklin county, for allowance, a demand against the estate of Abner Adams, deceased, for $481 85, a balance due on the following promissory note, made by Berry & Adams, of which firm the said Abner Adams was a member.

"$500. VAN BUREN, ARKANSAS,
November 21, 1857.

Six months after date we promise to pay to the order of Wallace, Ward & Co., five hundred dollars, with interest, at the rate of — per cent. from date until paid. Value received.

Witness my hand and seal.

BERRY & ADAMS."

The decision in the court of probate being against the validity of the demand, the claimants appealed to the circuit court.

The circuit court reversed the judgment of the court of probate, and upon a trial *de novo*, the claimants recovered judgment for the amount of their claim.

The executor, James H. Adams, appealed to this court.

Upon the trial in the court of probate, after the claimants had read the note in evidence, the executor, having first proven it to be in the hand-writing of John Ingram, and that he was, at the date thereof, the agent of the plaintiffs, who composed the firm of Ward & Southmayd, and authorized to make collections for them, read in evidence to the jury the following receipt:

"Received, Huntsville, Ark., July 13, 1859, of H. C. Berry, five hundred dollars, on note of Berry & Adams.

WARD & SOUTHMAYD,
per John Ingram."

And in the circuit court, upon a like showing, he offered

again to read the same, and also the following receipt to the jury:

"Received, Huntsville, Ark., March 1st, 1860, of H. C. Berry, five hundred dollars, to be credited on note given by Berry & Adams.

WARD & SOUTHMAYD,
per Ingram."

Although the firm of Ward & Southmayd was composed of the surviving members of the firm of Wallace, Ward & Co., there was no identity in respect to the property and business of the two firms. By the death of their partner, they became entitled to the exclusive possession of the property and management of the business of the firm of Wallace, Ward & Co., but only for the purpose of settling and closing the same, and were tenants in common with the representatives of their deceased partner. *Par. on Part. 440.*

Without some evidence to connect the receipts with the note to Wallace, Ward & Co., and none is disclosed by the record, they were wholly irrelevant to the case; and as they were calculated to mislead the jury, the admission in the court of probate of the former, against the objections of the claimants, was an error, and for which we presume the circuit court reversed its judgment; and for the same reason the latter court did not err in excluding both from the jury.

The record presenting no other question, the judgment of the court below is affirmed.

ROBINSON v. WHITE.

CONSTITUTIONAL LAW—*Statutory offices.*—The office of assessor is a statutory office, and the Legislature has absolute control over all statutory offices and may abolish them at pleasure, and in doing so, no vested right is invaded.

The act of July 23, 1868, providing for the appointment of the officers contemplated by section 2, of article 10, and the change thereby made, is not in conflict with that clause of the Constitution that declares that the "*term* of *all officers, elected* or *appointed* under the provisions of this Constitution, shall expire on the first day of January, 1873, unless herein otherwise provided."

Appeal from Phillips Circuit Court.

HON. JOHN E. BENNETT, Circuit Judge.

Palmer & Sanders, for appellant.

Garland & Nash, for appellee.

MCCLURE, J.

There is but one question presented by the record in this case, and that is: Who is the legal and lawful assessor of Phillips county?

Under the provisions of an act, approved January 21, 1861, it is provided that an assessor shall be elected in Phillips county, at the general election, who shall hold his office for two years and until his successor is elected and qualified.

Robinson, in his complaint at law, recites that on the 13th day of March, 1860, he was elected assessor of Phillips county, and commissioned as such by the Governor of Arkansas, and was duly qualified as such assessor, on the 23d of July, 1868. He further states that he made the assessment of Phillips county for the years 1868-9, and was proceeding to make the assessment for the year 1870, when James T. White, on or

about the 10th day of January, 1870, forcibly entered upon and usurped his said office, without warrant or authority of law.

White filed an answer to the complaint, admitting the election of Robinson, and that he was commissioned by the Governor; that Robinson made the assessment for the years 1868-9, and that he filed his bond, etc., but denies that he forcibly entered upon or usurped the office of assessor of said county of Phillips. White asserts that at the time of said election of Robinson there was no such office as assessor under the Constitution of the State of Arkansas; that, by the provisions of an act, approved July 23, 1868, it is made the duty of the Governor to appoint some suitable person in each county as assessor, whose term of office shall continue until the year 1872, unless sooner removed, etc.; that under the provisions of said act he was appointed assessor of Phillips county, and said Robinson removed, etc.

To this answer a demurrer was filed setting up that the answer does not set up facts sufficient to constitute a defense. The court overruled the demurrer, and rendered judgment for the appellee, and Robinson appealed.

It is urged by the appellant that the second declaration of section 16, article xv., which declares that "all laws not in conflict with the Constitution shall continue in force until otherwise provided by the General Assembly," continued the office of assessor of Phillips county provided by the act of January 21, 1861; and from this he proceeds to question the power of the Legislature to oust him of his office by legislative enactment.

The office of assessor to which Robinson was elected, it is admitted, is a statutory office.

The counsel for the appellant seem to be influenced or impressed with the idea, that Robinson had some kind of vested right to the office of assessor, because he was elected by the people. The Legislature has absolute control over all statutory offices, and may abolish them at pleasure; and in doing

so no vested right is being invaded. *9 Ark., 270; 24 Mo., 22; 1 Selden, 285; 7 Hill, 81; 2 Denio, 272.*

The second section of article x, declares that "real estate shall be appraised at least once in every five years, by an appraiser, *to be provided by law*, at its true value in money." The entire basis or system of taxation is changed by the Constitution of 1868; the property is to be appraised, not in the manner *then* provided by law, but by an appraiser "*to be* provided by law." The language of the present Constitution clearly indicates that the assessment, to be made as a basis of taxation, was to be done, not by the assessors then provided by law, but by assessors "*to be provided by law.*"

It is admitted by the demurrer that the Legislature, by the act approved July 23, 1868, did provide for the appointment of the officer contemplated by section 2, of article x, and that White was appointed, as therein provided, and exercised the duties of the office of assessor by virtue of said appointment.

The only question raised by the demurrer is, whether the change made by the act of July 23, 1868, is in conflict with that clause of the Constitution that declares that "the term of all officers elected or appointed under the provisions of this Constitution shall expire on the first day of January, 1873, unless herein otherwise provided." We have already determined that the assessor appointed or elected under the provisions of the act of January 21, 1861, was the appraiser or assessor contemplated by the second section of article x., and it follows from this that neither the election nor commission of Robinson gave him any right to the office, therefore the tenure of his office was not protected by that clause of the Constitution, which declares that the officers elected under the provisions thereof, should hold until January 1, 1873. The office, to which Robinson was elected, was repugnant to the terms of the Constitution itself, and no act of the electors or the commission based on it could cure his title.

Finding no error in the judgment of the Phillips county circuit court, the same is affirmed with costs.

KENT *v.* GRAY, *Adm'r.*

PRACTICE.—A party cannot complain of an error, when error, if any, is in his favor.

Where the record recites, as part of the transcript of the justice, before whom the suit was brought, that a note was filed, this court is forced to take the record as true, the party not having taken the proper steps in the court below to contest it.

Where the record does not show that the court below was asked to rule upon the admissibility of evidence, this court is bound to presume in favor of the decision of the court below, whenever the record fails to clearly and affirmatively show that there was error.

Appeal from Prairie Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

J. W. Martin, for appellant.

The note sued on does not show the amount, or when interest commences, whether from maturity or date, and is not such as is contemplated by *sec. 25, chap. 99, Gould's Dig. p. 657.*

It was wanting in one of the essential elements of a promissory note, which must be for a fixed and certain amount. *Story on Prom. Notes, sec. 19,* and citations.

The plaintiff is not without remedy on a mutilated note. See *Greenleaf Ev., sec. 566, et seq; Gould's Dig., chap, 99, sec. 26.*

Neither the justice's court or the circuit court, have jurisdiction, and the whole proceeding was *coram non judice. Reeves v. Clark, 5 Ark., 27; Anthony, Ex parte, 5 Ark., 358; Pendleton v. Fowler, 6 Ark., 41; Levy v. Shurman, ib., 182; Sutton v. Jones, ib., 271; Everett v. Clements, 9 id., 480; Butler v. Wilson, 10 ib., 316; Collins v. Woodruff, 9 ib., 463.*

The evidence was not sufficient to establish the claim. *Taylor v. Riggs, 1 Pet., 600; 1 Greenl. Ev,, 566, et seq.*

There was no privity between the parties independently of

the special contract, and the common counts will not avail. *1 Chitty Pl'd, 373; Story on Prom. Notes, s. s. 104, 405; Black v. Zadesie, 3 How., 483; Costar v. Davies, 8 Ark., 217.*

English, Gantt & English, for appellee.

The issue was tried by the court, sitting as a jury, and finding for plaintiff, and motion for new trial overruled. No question of law was reserved at the trial, but this court is asked to review the finding of the court below. This court will not, as it has repeatedly held on such appeals, inquire into the weight of evidence, but will affirm the judgment, unless there was a total want of evidence to sustain the verdict. *Mayers v. State, 2 Eng., 174; Drennan v. Brown, 5 ib., 138; Spratt v. Vaughn, ib., 474; Hendrix v. Sharp, 13 Ark., 306; Allen v. Nordhamer, ib,, 339; Moss v. State, 17 Ark., 327.*

Admissions against interest are competent evidence. *1 Greenl. Ev, secs. 180, 191.*

BOWEN, J.

The appellant, the administrator of the estate of M. T. Cooper, deceased, brought suit, before a justice of the peace, upon a mutilated promissory note, executed by T. B. Kent. This note bears date, January 1, 1862, but the amount of the note cannot be be determined, on account of certain portions thereof being destroyed. At the trial before the justice of the peace, the appellant, Kent, moved to dismiss the cause, on the ground that the note, or demand sued on, was not the individual property of the plaintiff, which motion the court, after having heard the evidence, sustained and dismissed the suit. Whereupon the plaintiff appealed to the circuit court.

In the circuit court, the defendant, Kent, plead the general issue; also, plead specially that the note sued on was not the property of the plaintiff, as administrator of M. T. Cooper, de-

ceased, but the property of John Jackson, the surviving partner of the firm of John Jackson & Co., upon which pleas issue was joined.

The cause was submitted to the court, sitting as a jury, which gave judgment for the plaintiff in the sum of $96 debt, and $69 $\frac{84}{100}$ damages, with costs of suit. Defendant moved for a new trial, which was overruled, and the cause is here on appeal of the defendant.

The new trial was moved on the ground that the finding was not supported by the evidence; that the verdict and judgment are not supported by the law of the land, and that the statements of John Jackson were received as testimony, whereas, by the law of the land, it should have been excluded.

The record discloses that the note sued on, was executed to Halsey & Erwin, on the 1st of January, 1861, and was payable to them, or their order; that it was indorsed by them, in blank, and delivered, in payment for goods, to the firm of John Jackson & Co., of which firm Cooper was, in his life time, a partner, and was in Cooper's possession, who had charge of the books and papers; that the note was, with others, buried during the war, and was so defaced that the amount of it could not be determined, only the words, "dred and four and $\frac{93}{100}$ dollars," being discernable. The defendant, Kent, swears that the account with Halsey & Erwin, for which he gave the note, was $97, but presumes that, as the note seems to be for more than $100, there must have been some other transactions included in it, but what the additional amount was, he could not say. Halsey and Erwin both swear that the note was due one day after date; that it was indorsed in blank, and it appears from the note that it bore interest at the rate of ten per cent. per annum.

But was the note the property of the estate of Cooper, or that of John Jackson, surviving partner of the firm of John Jackson & Co., of which Cooper had been a member? The note, as before stated, was indorsed in blank, by Halsey & Erwin, to the firm of John Jackson & Co. Cooper died during

the war and this note, with other papers, were in the possession of his widow, and by her delivered to the administrator, Gray, as part of the estate. The record, however, further discloses that Cooper was the book-keeper, and had charge of the books, notes and accounts—also, that before the death of Cooper, the firm of John Jackson had quit business, as merchants, and were winding up their affairs—also, that at one time John Jackson, as surviving partner, received other claims from Gray, as administrator, but declined to take this note—that at other times he claimed it as firm property.

We will not, of course, express any opinion as to the weight of evidence; it being well settled that this court will not reverse the judgment of the court below on that ground. *Mayers v. State, 2 Eng. 174; Drennan v. Brown, 5 Eng. 138; Spratt v. Vaughan, Ib. 474; Hendry v. Sharp, 13 Ark. 306; Wass v. State, 17 Ark. 327; Ib. 478; McLure v. Hart, 19 Ark. 119; Mason v. Edgington, 23 Ark. 208.*

The note was indorsed in blank, and was transferable by delivery. The evidence conduces to show that it was among Cooper's papers, and it appears that Jackson declined to receive it from Gray, when offered. The court below must have found, on this evidence, that there was a transfer, and having so found, we are inclined not to interfere with the finding, but take it as true. We confess we do not understand exactly why or how the learned judge, sitting as a jury, found the sum of ninety-six dollars, principal, to be due—there being no plea of payment or set off, for, unless his payment was founded upon the note for one hundred and four dollars and ninety-three cents, filed with the justice, the whole matter was "*coram non judice*," and the suit should have been dismissed; but the judgment for ninety-six dollars, principal, being an error in favor of the defendant, he cannot complain. *Reeves v. Clarke, 5 Ark. 27; Pendleton v. Fowler, 6 Ark. 41; Latham v. Jones, Ib. 371; Everett v. Clements, 9 Ark. 480; Collins v. Woodruff, Ib. 463; Butler v. Wilson, 10 Ark. 316.*

It is insisted here that the suit should be dismissed for want of jurisdiction in the court below, because no cause of action was filed with the justice of the peace before the issuance of the summons; but the record recites as part of the transcript of the justice, before whom the suit was brought, that the plaintiff "filed before me, one note against T. Blake Kent, for one hundred and four dollars and ninety-three cents," etc., and the court is forced to take the record as true, the defendant not having taken proper steps in the court below to contest it.

It is also insisted that on the trial of the cause, evidence of the statements of John Jackson were received as testimony, when it should have been excluded. His statements being those of a third person, and not a party to the suit, were simply hearsay, and evidently not admissible. And it was the duty of the judge to disregard them, and, if requested, to declare that they were not admissible. The record does not show that the court paid any attention to these statements, nor that the judge was asked to declare that these statements were not admissible as evidence, and failed to do so, and this court is bound to presume that the decision of the court below was correct, wherever the record fails to clearly and affirmatively show that there was error. *Dyer v. Hatch, 1 Ark. 339.*

It appearing from the whole record that there is no error of which the defendant can complain, the judgment of the court below is affirmed.

[The appellant filed a motion for a re-hearing herein, upon which motion the following opinion was delivered.]

BENNETT, J.

This is a motion for a re-hearing of the case, made by the appellant, Kent. The facts will be found stated in the above opinion, when it was decided by this court, BOWEN, J. writing the opinion.

The motion for a re-hearing is based upon the words of the

opinion, as follows: "We confess we do not exactly understand why or how the learned judge, sitting as a jury, found the sum of ninety-six dollars principal, to be due, there being no plea of payment or set off; for, unless his judgment was founded upon the note for one hundred and four dollars and ninety-three cents, filed with the justice, the whole matter was *coram non judice*, and the suit should have been dismissed;" together with that part of the opinion of the court which relates to the fact as to whether the cause of action was filed with the justice of the peace before summons issued.

The attorney for appellant, Kent, insisting that, even if the note was filed before the justice of the peace, when the case came before the circuit court, it was a trial *de novo*, and the paper writing as attached to the transcript was not a note.

The general rule is, that a re-hearing will not be had, in any case, when substantial justice has been done between the parties, or when the party seeking a re-hearing has not been injured. When the real merits of the controversy has been reached, it would be unjust to reverse it for any merely technical cause. Courts should endeavor to do *substantial* rather than *technical* justice. They aim to take a broad, comprehensive and equitable view of the rights of the litigants, and to guide them to what is, on the whole, best for them, even though, strictly speaking, they may surrender a right.

In *3 Waterman and Graham on New Trials, 1356*, we find the following words: "Notwithstanding, then, a party may solicit the court to exercise its discretionary power in his behalf, under circumstances entitling him to judicial aid, it will not, as a matter of course, grant his petition; but will first inquire whether he would be benefited by such interference. A theoretical or abstract right, merely, will not avail. The time of judges, witnesses and juries, the delay of other important business, and the public as well as private expense, all forbid that courts should be occupied to no tangible purpose. It must see that good will result to the party seeking its aid, or, at least, may result if the prayer be granted."

In the case before us there can be no doubt but that the appellant, Kent, is owing the appellee, in amount, about one hundred dollars. The court below, which rendered the judgment, said it had jurisdiction in the case. This court has also held it had, and now a re-hearing is asked for, simply on the ground that the judgment was not for $104 $\frac{93}{100}$; it, consequently, could not have been under on the note. The judgment rendered was for $96, a difference of only $8 93. By what parity of reasoning the amount was arrived at, by the court, we may be unable to discern, yet the amount is so trifling, and it being in favor of the appellant, were we to grant a re-hearing on these grounds, we should be encouraging, rather than discouraging, petty strifes, which can in no sense be profitable. We think the record sufficiently clear, and explicit enough, to protect the appellant against any other suit that may be brought on the same cause of action. Whether the judgment should have been for a few dollars, more or less, substantial justice has been done.

But the counsel for appellants insists that he was so confident that the court below had erred in its judgment of the case, and was so certain that this judgment would be reversed, that he did not interpose an equitable defense to the claim, which he might have availed himself of. This, of course, cannot govern us here. If an attorney neglects to make a defense upon merits, and relies upon technicalities to gain his suit and protect his client's interest, it is a matter between those parties. The case appears before us on the record. What might have been done and what was done are two different propositions. The presumptions are always in favor of the record. It is upon this we are trying and determining the case at bar. We are unable to find such error, either in the proceedings of the court below, or the judgment of this court, as would warrant us granting a re-hearing in the case.

Motion for a re-hearing is denied with costs.

THE STATE v. SMITH.

JURISDICTION—*Assaults and assaults and battery.*—Under the present Constitution justices of the peace have jurisdiction in all criminal cases below the grade of felony, but that jurisdiction is not exclusively vested in justices of the peace.

WHEN CONCURRENT—Under the provisions of the Code of Criminal Practice, the jurisdiction may be exercised concurrently by the circuit courts, in cases of assaults and assaults and battery.

Appeal from Benton County.

HON. E. D. HAM, Circuit Judge.

Montgomery, Attorney General, for appellant.

WILSHIRE, C. J.

At the September term of the Benton circuit court, 1869, Joshua Smith was tried upon an indictment for an assault, with the intent of a great bodily injury, upon the person of one William Ramsey.

Upon the trial the jury found the defendant not guilty of the assault charged, but found him guilty of a simple assault, and asssessed his fine at the sum of ten dollars; whereupon, the court gave judgment against the defendant for that sum and costs, etc.

The defendant moved in arrest of judgement, upon the ground that the circuit court had no original jurisdiction in cases of simple assault; that exclusive original jurisdiction, in cases of simple assault, was vested, by law, in courts of justices of the peace. The court below sustained the motion, and the State appealed to this court.

The only question presented by the transcript of the record before us is, that of the jurisdiction of courts in offenses of simple assaults. Paragraph five, of section ten, of the Criminal Code of this State, provides that "justices' courts have

concurrent jurisdiction with city and police courts; but exclusive of circuit courts, of prosecutions for offenses where the punishment of a person is limited to a fine not exceeding ten dollars; and concurrent jurisdiction with the circuit courts in prosecutions of offenses where the punishment is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding thirty days, or both."

A simple assault, by our statutes, is punishable by a fine of over ten dollars. *Chapter 51, Gould's Digest, page 336*, provides that a *simple assault*, unattended with any apparent design to commit homicide or felony, shall, upon the conviction of any person thereof, be punished by fine not exceeding one hundred dollars. The punishment of simple assaults, by fine or imprisonment, imposed by the chapter of Gould's Digest referred to, has not been reduced by any subsequent legislative enactment.

In the case of *Tucker, ex parte, 25 Ark., 567*, the court held that the change in the jurisdiction of justices of the peace effected by the present Constitution, considerably enlarges the jurisdiction of justices of the peace, "both in civil and criminal cases, extending it in the latter to all offenses less than felony. No change whatever in the jurisdiction of the circuit court is directly or expressly made, but the exclusive jurisdiction given justices of the peace, in actions of replevin and of contract, where the amount in controversy does not exceed two hundred dollars, does, by necessary implication, so far as the change in the jurisdiction of justices of the peace extends, restrict it. But, as the criminal jurisdiction of justices of the peace is not declared to be exclusive, no implication that that of the circuit court is confined to felonies is necessary to avoid an inconsistency or repugnancy in the two provisions or to prevent a conflict between the jurisdiction of the circuit court and that of justices of the peace."

Prior to the adoption of the present Constitution, justices of the peace had exclusive original jurisdiction in assaults and assaults and batteries; but the present constitution confers up-

on justices of the peace jurisdiction in all criminal cases below felony, but, as was held in Tucker, *ex parte*, that jurisdiction is not exclusively vested in justices of the peace.

Under the provisions of the Code of Criminal Practice, referred to, it may be exercised concurrently by circuit courts, in cases of assaults, or assaults and battery.

The court below erred in arresting the judgment of the circuit court; the judgment is reversed, and the cause remanded, to be proceeded in according to law, and not inconsistent with this opinion.

WILSON *v.* BOWDEN, *et al.*

CHOSES IN ACTION—*Enforcible in Equity.*—A person may be entitled, in equity, to money due upon a bond or chose in action, although the legal title has not been transferred by assignment; and such purchaser of a chose in action, in equity, will have a right of subrogation to the debt and all the securities that attend it, and can enforce its collection in equity.

Appeal from Pope Circuit Court.

HON. WILLIAM N. MAY, Circuit Judge.

Clark & Williams, for appellants.

HARRISON, J.

This was a bill in chancery, exhibited in the Pope circuit court, by Joseph E. Wilson, William J. Ashmead, and Mary Ashmead, his wife, against Elizabeth Bowden, Louisa Burkhead, and the heirs at law and the administrator of John S. Bowden, deceased.

John S. Bowden, on the 22d day of January, 1861, executed to Louisa Burkhead, a writing obligatory for five hundred and sixty-five dollars, payable in seven months after date, with ten per cent. interest from date, and to secure the payment of the same, he and Elizabeth Bowden, his wife, executed to her a mortgage on a tract of land containing about one hundred and twenty acres.

Louisa Burkhead, to use the exact language of the bill, "for value received, sold and delivered" the writing obligatory and mortgage, to Samuel D. Wilson, the guardian of the complainants—Joseph E. Wilson and Mary Ashmead, then Mary Wilson—for their use and benefit.

Elizabeth Bowden, it was alleged, was in possession of the land.

The bill prayed that the complainants might be subrogated to the rights of Louisa Burkhead; that the equity of redemption of Elizabeth Bowden, and the heirs of John S. Bowden, in the mortgaged premises, be foreclosed, and that the same be sold for the payment and satisfaction of the writing obligatory.

Elizabeth Bowden and Jackson J. Bowden, the administrator of John S. Bowden, filed a demurrer to the bill, in which they assigned as grounds therefor, first; that no assignment of the writing obligatory and mortgage to the said Samuel D. Wilson, or to the complainants, was alleged or shown in the bill; and second, that it contained no allegation of an indebtedness of Samuel D. Wilson to the complainants.

The other defendants made no defense, but no decree *pro confesso*, was taken against them.

The court sustained the demurrer and dismissed the bill.

The question raised by the demurrer may be readily disposed of. That a person may be entitled in equity to the money due upon a bond or other chose in action, notwithstanding the legal title has not been transferred to him by assignment, so that he may sue upon it at law, is so plain and familiar a proposition as not to admit of discussion.

The bill alleges that Louisa Burkhead had, for value received

by her, sold and delivered the writing obligatory and mortgage to Samuel D. Wilson, for the use and benefit of the complainants.

Although she had not assigned the writing obligatory, by an indorsement, and the legal title remained in her, she had no beneficial interest in it, and held it only as trustee for the complainants, who alone were, in equity, entitled to the money due upon it; and they sought to be subrogated to her right to enforce its collection.

A chose in action may be the subject of a sale which will entitle the purchaser to all the remedies or securities held by the vendor, and to enforce them by action, in the name of the vendor, but for his own benefit; and in equity will give a right of subrogation to the debt itself, and to all the securities that attend it. *Carter v. Jones, 5 Ired. (Eq.) 196; Matthews v. Aiken, 1 Const. 595; 2 Amer. Lead. cases, 407; 2 Lead. cases in eq. 230.*

The other objection, that the bill contains no allegation of an indebtedness from Samuel D. Wilson to the complainants, is wholly immaterial. Their right to the money due upon the bond was derived from the purchase of it for their use, which their guardian might make, whether indebted to them or not.

The matters set forth in the bill, if true, entitle the complainants to the relief they pray, and the demurrer to it should have been overruled.

The decree of the court below must, therefore, be reversed and the cause remanded for further proceedings.

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CLINE v. WILSON, et al.

PARTNERS—*When rights vest.*—Agreement of partnership to commence *in futuro*, upon the death of one of the parties, before the time fixed for commencement, no estate or interest intended to be contributed by either of the parties, vests in the partnership and the survivor takes nothing as such.

RIGHT OF SURVIVOR.—A surviving partner has a right to the possession and control of the partnership property for the purpose of settling and closing the business, and not for the purpose of carrying it on.

Appeal from Pope Circuit Court.

HON. W. N. MAY, Circuit Judge.

Gallagher & Newton for appellant.

Clark & Williams, for appellees.

HARRISON, J.

This was an action of ejectment by Chesteen Cline against Curtis R. Wilson, Mary A. Dawson, Absalom Adams, Joseph A. Wilson and Jones Hicks.

Absalom Adams, Joseph A. Wilson and Jones Hicks, pleaded the general issue, Curtis R. Wilson and Mary A. Dawson the general issue, and also, specially, that the parcel of land described in the declaration, was the property, in his lifetime, of William H. Dawson, deceased, who died, seized and possessed thereof, on the 11th day of November, 1868; that they were his executors, and that, as such, entered into and took possession of the same.

To this special plea the plaintiff replied that the said William H. Dawson and himself, on the 18th day of September, 1868, formed a partnership for the purpose of carrying on the business of farming in the ensuing year of 1869, and that, by their partnership agreement, the said William H. Dawson was to contribute or furnish the said land for cultivation.

A demurrer was sustained to the replication, and the plaintiff declining to proceed further with his suit, it was dismissed by the court and judgment rendered against him for costs.

The partnership between the plaintiff and William H. Dawson having been dissolved by the death of the latter, before the beginning of the year 1869, or the commencement of the term for which it was to have the land, no estate or interest in it ever vested in the partnership, and the plaintiff, of course, could have none as surviving partner. He was entitled, as such survivor, to the possession of the property belonging to the partnership, if any, only for the purpose of settling and closing the business of the partnership, and not for the purpose of continuing or carrying it on.

The demurrer was properly sustained, and the court did not err in dismissing the plaintiff's suit, upon his refusing to proceed further with it, and rendering judgment against him for costs.

Judgment affirmed.

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HAZARD v. WHITE.

INDORSERS—*Release of.*—To release an indorser on the ground of extension of time given by the indorsee to the maker, or on further security given by the maker to the indorsee, it must be shown that a consideration was paid or promised for the delay or further security.

WAIVER—*How shown.*—It is competent to show by parol, the waiver of demand and notice at the time of the indorsement.

LIABILITY—Demand and notice, within proper time, or a waiver thereof, must be proved, to fix the liability of the indorser.

DEMAND AND NOTICE—*Waiver of.*—An unconditional promise to pay by the indorsee, with a full knowledge of the facts by which he is released at law, is an implied waiver of demand and notice and a promise by indorser of a promissory note to pay *after due*, is *prima facie* evidence of demand and notice.

Appeal from Mississippi Circuit Court.

HON. JOHN E. BENNETT, Circuit Judge.

Palmer & Sanders, for appellant.

This transaction was not the ordinary transfer of commercial paper, in the regular course of business, but it was a sale of the piece of paper for the reason that the maker could not pay it. Plaintiff, defendant and Ward all being present, and being parties to the transaction which culminated in the sale and assignment of the paper, were all equally affected by it. Demand was then and there made, and defendant had notice that Ward could not, would not, and did not pay the paper. The testimony of Hazard, on this point, excluded by the court, should have been received, even under the old practice. But under the Code, with its liberality of amendments, all testimony bearing on the transaction, the *res gestæ* should be received in evidence, because plaintiff had a right to amend his declaration to correspond with the testimony: *Code sec. 155, Hord v. Chandler, 13 B. Mon. 404; Coil v. Howard MS. Ky. opin. Decr. 1863; Kearney v City of Cov., 1 Met. 339; Irwin v. Bank of Bellefontaine, 6 O. St., 81; Hunter v. Hudson River R. R. Co, 20 Barbour, 493; see notes to sec. 161, Ky. Code of Practice; Coleman v. Playstead, 86 Barb. 37.*

Plaintiff should have been allowed to prove that the mortgage was taken only as collateral security—that there was no novation of the old debt. *Story on Bills, sects 427, 430, 436: Byles on Bills, 196; Mohawk Bank v. Van Horne, 7 Wendell 117; King & Houston v. State Bank, 9 Ark., 190; Smith's Mercantile Law, 268; McLemore v. Powell, 12 Wheaton 554.*

If defendant, with full knowledge, afterwards promise to pay, he is liable. *Smith's Mercantile Law, 168*, and authorities there cited, as to the mortgage. As to the demand and notice: *Story on Bills 329, and notes; Thornton v. Wynn, 12 Wheaton, 187; Byles on Bills, 236-7-8 and 9, and notes; Walker v. Walker, 7 Ark., 542; Chitty on Bills, 234-5 and 6.*

H. M. McVeigh, for appellee.

It is an inflexible rule of law that written evidence is of a higher grade than parol testimony. *Trowbridge v. Sawyer, 4 Ark., 454.* And it is a well established rule, applicable to suits in equity, as well as at law, that a parol contemporaneous agreement, contradicting or varying the written contract of the parties, is inadmissible. *See Bordon v. Peay, 20 Ark., 293. Also the cases of Richardson v. Comstock, 21, 67; Henly v. Brodie, 16, 516; Featherston v. Wilson, 4, 154; Bertrand v. Byrd, 5, 672; Scott v. Huey, 13, 525; Jordan v. Fenno, 13, 593; and the case of Anderson v. Yell, 15, 9,* where the court decided that it was error to permit the plaintiff to *change a blank indorsement as given on oyer into one waiving demand and notice.*

A contract cannot rest partly in writing, nor can verbal conditions be annexed to a written contract. *Black v. Bowman, 9 Ark., 501;* and when a contract is once reduced to writing, *it is to the writing alone* that we must look to ascertain what the contract really is. *Scott v. Huey, 13, 125; Jordan v. Fenno,* and cases before cited.

GREGG, J.

The appellant sued appellee as the indorser of a promissory note made by Ward and Edington. Appellee answered that appellant did not make presentment to, and demand of the makers in due time; secondly, that due notice of non-payment was not given him; and thirdly, that appellant took a mortgage of one of the makers, to secure payment, and for that consideration extended the time of payment without his knowledge or consent.

The court overruled a demurrer to the cause of defense set up in the third paragraph of the answer. The cause was then submitted to the court and a finding and judgment for the defendant, the appellant.

The note, given in evidence, was for $1000, with certain

credits thereon, dated March 12, 1866, payable to John W. White, on the 1st of October, 1866, and indorsed by White, November 14th, 1866.

The appellant offered to prove that, at the time of the indorsement, appellee said, in the presence of him and Ward, that appellant had made a good thing of it; that the note had cost him only $800, in cash; that appellant then refused to complete the trade because the note drew but six per cent interest, and Ward then agreed to pay two per cent., and did pay that for one year. Appellant also offered to prove, by parol, that in taking the mortgage, he did not agree to give Ward time on the debt; that the mortgage was only as security and the extension of time only related to the foreclosure, etc. The court sustained the objections to such parol proof. Appellant then read a letter from the appellee, dated October 29th, 1868, in which he stated "you say I have to become paymaster for the balance of the Ward and Edington note; you say you could only collect $400," etc., "having a lien on Ward's old mill." Then speaking of what per cent. Edington's estate could pay, and of a note, held against him for land, which had been transferred and could not be used, he adds: "But I can assure you, Dr., that it shall be paid if takes the last piece of property I own, though it seems hard to lose so much, when I need it so bad. I have other notes, amounting to more than *I owe you*, and if I can collect them, I will pay all indebtedness to you" etc. etc., closing by saying, "at any rate, I think I shall fix up our business satisfactory by Christmas, or before." These, with the mortgage referred to, was the substance of the evidence. The proof does not show that there was any consideration paid, or promised, for delay, or that the plaintiff put himself under any legal obligation, whatever, not to sue the obligor, and hence the defense set up in the third paragraph failed. *McLemore v. Powell 12 Wheat, 557; Byles on Bills, 316 and cases there cited; Creath's adm'r. v. Sims, 5 How. U. S. 192.*

The appellant might have proved, by parol, that the appel-

lee, at the time of the indorsement, waived his right of demand and notice, but the statements attempted to be given in evidence, had no such effect, and were properly ruled out; and the evidence offered to modify the terms of the mortgage was incompetent and properly excluded.

We are of opinion the letter of the appellee admitted his liability upon the note, and, upon this evidence, the appellant asked the court to declare the law. The court first correctly declared that demand and notice within proper time, or a waiver thereof, must be proved, to fix liability upon the appellee.

Secondly, the court declared that "the evidence introduced does not show that such a demand and notice was given, or such a waiver was made as would make the indorser liable."

This declaration of law was not supported by the evidence. If such had been given as an instruction to a jury, it would have been calculated to mislead them, and, therefore, erroneous, and when declared by the court, sitting as a jury, it was likewise erroneous.

If an indorser, with a full knowledge of the facts by which he is released by law, unconditionally promises to pay, it is an implied waiver of demand and notice, and a promise, by the indorser of a promissory note to pay it, after due, is, at least, *prima facie* evidence of demand and notice. *Byles on Bills, 285; Greenway, et al., v. Hindley, 4 Camp., 52; 12 Wheat., 187; Rogers v. Stephens, 2 Tenn., 718; Walker & Faulkner v. Walker, 4 Ark., 542*, and the cases there referred to on this subject.

The judgment herein is reversed, and the cause remanded to be further proceeded in.

George v. Terry.

Confederate money.—In a contract, the consideration of which was Confederate notes, it is immaterial whether the party first agreed to pay money for such notes, or to pay property for them, and then executed a promissory note for the property, the consideration, which was the basis of the promise, being Confederate notes, was illegal, null and void.

Promissory note.—A promissory note given for a supposed liability, which has no foundation in law, is without consideration and void.

Appeal from Ashley Circuit Court.

Hon. Henry B. Morse, Circuit Judge.

G. W. Norman, for appellant.

W. D. More, *English*, *Gantt & English*, for appellee.

Gregg, J.,

The appellee brought his complaint at law upon a note for $1000. The appellant answered the complaint, by admitting the making of the note, and averring that she had sold the appellee one hundred bales of cotton, for two thousand six hundred dollars, in treasury notes of the so-called Confederate States, then in rebellion against the United States government, and she received the two thousand six hundred dollars in such treasury notes, and gave her receipt for the same, and agreed to deliver the cotton, and did deliver sixty-six bales, which were afterwards sold by appellee for $8,717 $\frac{22}{100}$, in United States currency, and the balance of her cotton, without fault of hers, being burned, at the instance of the appellee she executed the note, sued upon, as the balance of the consideration on her part in said agreement, and for no other consideration; that said treasury warrants were utterly valueless and void, etc.

The appellee demurred to the answer. The circuit court sustained the demurrer, and rendered final judgment against the

appellant for the amount of the note and interest, from which judgment she appealed to this court.

The appellee here says: "The only question presented by the transcript is: Was there a consideration for the note sued on?"

There was an agreement by the appellant to transfer a considerable amount of valuable property, and an agreement on the part of the appellee to pay her a certain amount of notes, which this court has repeatedly held to be illegal and void. If the promise was made by the one party, without any consideration on the part of the other, such promise cannot be held binding. If this answer be true, and for the purposes of the demurrer it is taken as true, the appellee paid over Confederate notes; he neither paid, nor promised to pay any thing else, then there was no consideration moving from him but the Confederate notes, and it is not material whether the appellant first agreed to pay money for such notes, or to pay property for them, and then executed the note in lieu of the property; the consideration, which was the basis of the promise, was Confederate notes received. That, and that alone, was all that was given, or to be given, for the cotton or note. Then, if these notes were illegal and valueless, the appellee sustained no injury in passing them to the appellant, nor did he thereby confer any benefit upon her; and it has been holden that such notes, issued in violation of the laws of the State and United States, and to aid in the rebellion against the lawful government, must be so considered.

A promissory note, given for a supposed liability, which has no foundation in law, is without consideration and void. *Haynes v. Thorn, Foster, 386.*

It therefore, follows that the circuit court erred in sustaining the demurrer to the appellant's answer. For that error the judgment is reversed, and the cause remanded, with instructions to overrule the demurrer and to proceed according to law.

PUGH v. HARBISON.

PRACTICE—The several pleas or defenses that may be set up in an answer, under paragraphs *three* and *four*, *section 116*, *Code of Practice*, stand each upon its own merits, and a demurrer may be sustained as to some and overruled as to others.

PLEADING—It is a rule well understood that a litigant is not bound to prove more than he avers, and a plea or defense, not denying title in plaintiff, or averring title in defendant, is bad on demurrer.

Appeal from Ashley Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

J. W. Van Gilder, for appellant.

GREGG, J.

The appellant brought his complaint at law, in the Ashley circuit court, for three bales of cotton; at the March term, 1870, the appellee filed his answer containing four paragraphs.

The first: That martial law had been proclaimed in the county by the Governor; that civil law was suspended, and the government of the county turned over to military officers, J. A. Lockhart was such officer in command of that county, and by his order the appellant was required to turn over the cotton to George W. Norman, as the administrator of Rufus Whitlow.

The second: That Norman, as administrator, under such order, directed appellant to turn over said cotton to the appellee, and it was so delivered for said Norman.

The third: That the appellee, under Norman's order, received the cotton and "turned it and the proceeds of it," over to Norman.

The fourth: That the cotton was the property of Norman, as such administrator, and that appellant had taken the same

without right, and that the cotton was turned over to Norman, who, as administrator, was the owner.

The appellant demurred to the first three paragraphs or causes of defense in the answer; the court overruled the demurrer; the appellant rested, and final judgment went against him for costs, from which he appealed.

The third and fourth paragraphs of section 116, of the Civil Code, relating to what the answer of a defendant shall contain, read as follows:

"*Third.* A statement of any new matter constituting a defense, counter claim or set off, in ordinary and concise language, without repetition."

"*Fourth.* The defendant may set forth in his answer as many grounds of defense, counter-claim, and set off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered. The several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished." Section 121, provides that the plaintiff may demur to the answer, etc.

Thus it is declared that a defendant may set up any number of defenses he may have, but each defense must be separately stated, in a paragraph distinguished by number. Then each of these pleas, or paragraphs of defense, stands upon its own merits. A demurrer may be sustained as to some paragraphs and overruled as to others.

The question then recurs, do the facts set up in the first paragraph constitute a defense? This paragraph does not claim that the cotton belonged to Norman, to the appellee, or Whitlow's estate. It admitted the taking and did not deny ownership in the appellant; it did not aver any public or military necessity for taking the property, and that he was required by military order to take the same. It is a rule, well understood, that a litigant is not bound to prove more than he avers; hence the demurrer should have been sustained to this paragraph.

The second paragraph is equally bad. It does not deny the

appellant's ownership of the cotton. It admits the taking and avers he did it under an order from Norman, without claiming that Norman had any title to the cotton.

The third paragraph, likewise, avers that appellee took the cotton and turned it, and the proceeds of it, over to Norman, without averring title in Norman, or want of title in appellant, or that he was compelled, by military order, to take the cotton, and it was demurrable.

The fourth paragraph is different. It denies appellant's right; sets up title in Norman, as administrator, etc., and, if true, is a good defense to the action.

For the error in not sustaining appellant's demurrer, the judgment is reversed, and the cause remanded with instructions to allow the pleadings amended herein, and for further proceedings to be had according to law.

MASON, *Ad.* *v.* BULL, ELLIS & CO.

ADMINISTRATION—*Authentication of Claims.*—Verification of claims against the estate of a deceased person, by one cognizant of the facts, under act of March 5, 1867, or by agent or attorney, under act of March 13, 1867, is sufficient—and these acts are not in conflict with each other.

RECORDS—*Proof of.*—Parol evidence is admissible to prove the contents of a record, ancient or recent, *after* proof of its loss or destruction, satisfactory to the court.

Appeal from Pope Circuit Court.

HON. WILLIAM N. MAY, Circuit Judge.

Clark & Williams, for appellant.

The claim was not authenticated by affidavit, as required by

law, to authorize a judgment of allowance. *Lafferty Exr. v. Lafferty, 10 Ark. 268; Carnall v. Edmondson, 17 Ark. 284; Bank of the State v. Henchcliffe, 4 Ark. 444; Burns & Burnside v. Imboden et al. 15 Ark. 415; Rogers et al. v. Wilson et al. 13 Ark. 507; See act approved 13th July, 1867, pamphlet acts, page 218; Smith v. Dudley, 3 Ark. 60; McKnight v. Smith, 5 Ark. 409; Sedgwick on Stat. and Const. Laws, 323; Ex parte Bank of Monroe, 7 Hill, 177; Dwarris, p. 477; Sedgwick on Constitutional and Statutory Law, 309–385; Bartlett v. Morris, 9 Porter (Ala.) 268, 269; Agent of State Prison v. Lathrop, 1 Mich. 438.*

The claim was barred by the statute of non-claim, and it was competent for the administrator to show that fact by evidence. *1 Green'l. Ev. sec. 92; McCary v. Curtis, 9 Wend. 17; Commonwealth v. Norcross, 9 Mass. 492; Ellis v. Ellis, 11 Mass. 92; Rex v. Allison R. R. 109.*

English, Gantt & English, for appellees.

We submit that the affidavit authenticating the claim is substantially good. *Beirne et als. v. Imboden et als. ad 14 Ark. 241–2. State, use State Bank, 16 Ark. 32.*

There was no error in the exclusion by the court, of the evidence offered by Y. D. Sheppard, to prove by parol, matters of record. *Williams v. Bramel, 4 Ark. 129,* unless the record has been lost or destroyed. *Davis v. Pettie, 6 Eng. 349; 1 Greenl. Ev. sec. 501–521.*

WILSHIRE, C. J.

On the 16th day of July, 1867, Bull, Ellis & Co., presented to R. C. Mason, as the administrator of S. D. Lewis, deceased, a claim against said estate, based upon a promissory note, bearing date April 4, 1860, for the sum of $371 18, payable twelve months after date, with interest at eight per cent. after maturity. The claim was verified by the affidavit of one W.

D. Jacoway and presented to the administrator for allowance, who rejected the same.

The appellees, on the same day, presented the claim to the probate court of Pope county for allowance and classification. The probate court allowed the claim, and classed it as a fifth class claim against the estate of Lewis, deceased. The administrator appealed to the circuit court of that county, which affirmed the judgment of the probate court, and the administrator appealed to this court.

The first error complained of, is the ruling of the probate court in overruling the motion of the administrator to dismiss the claimant's action, because the claim was not authenticated by affidavit, as required by law. The affidavit is as follows:

"I, W. D. Jacoway, being duly sworn, do depose and say that, to the best of my knowledge and belief, nothing has been paid or delivered towards the satisfaction of the above demand except what is credited thereon, and that the sum of four hundred and forty-four dollars and thirty-one cents, above demanded, is justly due the firm of Bull, Ellis & Co."

The affidavit of Jacoway for the authentication of the claim is substantially that prescribed by section 102, chapter 41, Gould's Digest. That statute required the affidavit to be made by the claimant, but, by an act of the General Assembly, approved March 5, 1867, it is provided, "that the affidavit required in section 102, chapter 4, Gould's Digest, to authenticate demands exhibited for allowance against the estates of deceased persons, may be made by any person other than the claimant, who may be acquainted with the facts sworn to, and who is otherwise competent to give evidence in a court of justice; and such affidavit shall have the same force and effect as if made by the claimant." This statute is manifestly just, as it allows to persons who have claims against the estates of deceased persons, the right to establish their claims by the testimony of witnesses, cognizable of the facts, competent to testify in the courts, as well as the affidavit of the claimant. It is not unfrequently the case that the claimant is not as well ad-

vised of the facts in relation to his claim against the estate of a deceased person, as some person who has no interest in it.

The act of the General Assembly, approved March 13, 1867, authorizes the verification to be made by an agent or attorney of the claimant, and prescribes the requisites of their affidavit. This latter statute does not conflict with the act of March 5, 1867; one applies to cases where the claim is verified by the affidavit of a person cognizable of the facts, and the other to verification by an agent or attorney, as to his belief, after having "made diligent inquiry and examination," etc. Both acts were evidently intended to relax the vigor of the statute formerly existing in relation to the verification of such claims.

The second and only remaining error complained of here, as presented by the record before us, is, that the appellant offered to prove, by one Y. B. Sheppard, that he, the said Sheppard, administered on the estate of S. D. Lewis, in the year 1864, in the county of Sevier, and that he is still administrator of said estate, and that he has not resigned his admistration nor been removed as such; which testimony the probate court excluded.

The position assumed by Mason, the appellant, in the probate court, is remarkable, to say the least of it. It appears, by the transcript of the record, that when the claim was presented to him for allowance, he indorsed his disallowance on it, as the administrator of Lewis; he appeared in the probate court and contested the claim; went into trial, as such administrator, and then attempted to show that he was not the administrator, but that Y. B. Sheppard was.

The appellant made no attempt to show the loss or destruction of the record of the Sevier probate court appointing Sheppard as administrator of Lewis, and the probate court of Pope county very properly refused to allow him to introduce parol testimony to prove a record that this court, from the record before us, presume to be in existence.

This court held, in *Davies v. Pettit*, 11 *Ark.*, *359*, that a party might be allowed to introduce parol evidence to prove the

contents of a record, either ancient or recent, after proof of its loss or destruction satisfactory to the court. But in the case at bar no such proof of loss or destruction was made, or attempted to be made, by the appellant, in the probate or circuit court.

Judgment affirmed.

Judges GREGG and HARRISON, dissenting say:

We concur with the majority upon the ruling of the court below, excluding the parol evidence offered, but we are of opinion that the affidavit of Jacoway, appended to the claim for probate, was not a compliance with the statute, and was not sufficient to entitle the claim to probate.

GAINES *et. al.* *v.* HALE & RECTOR,

AND

RECTOR *v.* HALE, *on cross appeal.*

UNITED STATES—*Title to Indian country.*—The United States holds the fee simple to the lands occupied by the Indian tribes, and may, if it seem fit, disregard their right of occupancy, and, before a cession by the Indians, convey, either an unincumbered title in fee simple, to take effect immediately, or a title subject to their right of possession, and to take effect only, when they, by voluntary cession, shall have yielded their title.

POLICY—*Of government.*—The policy of the government has been to protect the lands occupied by the Indians from settlement, and not to convey the title until the possessory rights of the Indians have been extinguished; therefore, it is not to be presumed that the United States intended that the act of 12th April, 1814, should extend to lands south of the Arkansas river, the title to which was not ceded to the Federal government until August, 1818.

HOT SPRINGS.—The Hot Springs and four sections of land, including the Springs, were reserved from entry and sale, by the act of April 20, 1832.

The effect of the third section of the act of March, 1843, was not put in to extend the act of 1818, to land on the south side of the Arkansas river, as of its time of passage, but simply as of the time of the passage of the act of March 1843, and rights vested under it, as against the government only from and after that date.

CHEROKEE—*Pre-emption claims.*—Cherokee pre-emption claims could not be located on the four sections of land, including the Hot Springs as their center, after the passage of the act of April, 1832.

IMPROVEMENTS ON PUBLIC LANDS—Settlers making valuable improvements on the public lands, reserved for the exclusive use of the government, have not been regarded as trespassers, and such improvements are, by statute, protected as property. The interest which a person has in such improvements, is a possessory right against all the world except the United States or their grantee.

WHO MAY CANCEL CERTIFICATES.—It is well settled that, either the secretary of the Interior or the commissioner of the general land office may cancel a certificate of entry or patent, when erroneously issued.

PROOF OF SETTLEMENT—The act of the 29th May, 1830, required proof of settlement or improvement should be made to the satisfaction of the register and receiver, prior to any entries being made, and in default of such proof of settlement or improvement, no interest vested in the pre-emption claimant.

JUDGMENTS—*When not enforced.*—A judgment based on a certificate of entry, which has been properly cancelled, being inequitable, will not be enforced.

NEW MADRID CERTIFICATES—A location of a certificate under the New Madrid Acts, is, the actual survey of the land, and a return of the plat by the surveyor to the recorder of land titles, and its approval on the part of the government, and until such survey, return and approval, the title remains in the government, nor was this changed by the act of April 29th 1816.

Appeal from Hot Springs Circuit Court.

HON. LIBERTY BARTLETT, Circuit Judge.

Watkins & Rose, for Gaines *et al.*

In all cases of grants, the interpretation should be most favorable to the public and most strongly against the grantee.

Townsend v. Brown 4 Zabr. 80; Mayor, etc. v. Ohio and Penn. R. R. Co. 26 Penn. S. R. 355; Green's Estate, 4 Md. Chy. Decis. 349; McLeed v. Burroughs, 9. Geo. 213; Harrison v. Young, Ib. 359; Hagan v. Campbell, 8 Port., 9.

Continuity of possession is the vital principle of a pre-emption; and a voluntary removal will be deemed an abandonment. *Jacobs v. Figans, 25 Penn. S. R. 45; Watson v. Gilday, 11 Serg. & R. 340; Farmer's Bank v. Woods, 11 Penn. S. R. 113; Goodman v. Losey, 3 Watts and S. 526; Bledsoe v. Cains, 10 Texas, 458; Simpson v McLemore, 8 Ib. 448; Clemens v. Gottshall, 4 Yeates, 330; Byron v. Sarpy, 18 Mo., 460; Page v. Scheibel, 11 Ib. 167.*

No reconveyance by Paxton is anywhere shown. Nothing but a reconveyance could restore the title. *Strawn v. Norris, 21 Ark. 82; Simpson v. McLemore, 8 Tex. 448.*

In *Burgess v. Gray, 16 How. 64*, the Supreme Court held that the courts could not correct mere errors into which an officer of the land office had fallen, in making a decision upon a question of entry. Where any matter is adjudicated by a tribunal of peculiar and exclusive jurisdiction, such adjudication is conclusive upon all other courts, unless impeached upon the ground of fraud. *Wilcox v. Jackson, 13 Pet. 511; Vorhees v. U. S. Bank, 10 Pet., 478; U. S. v. Arredondo, 6 Ib. 729; Foley v. Harrison, 15 How. 448; Bordon v. State, 11 Ark. 547; Nick's heirs v. Rector, 4 Ark. 284; 2 Laws, Instructions and Opinions, (Ed. 1868,) p. 85, No. 57; Gaines v. Hale, 16 Ark. 25; Mithchell v. Cobb, 13 Ala. 139; McGhee v. Wright, 16 Ill. 557; Lewis v. Lewis, 9 Missouri, 186.*

The policy of the government has been to protect the Indians, no less from their own improvidence, than from the oppression so easily exercised over them. So *individals* have not been allowed to acquire titles to land from them even by purchase. *Gaines v. Nicholson, 9 How., 365; Cherokee Nation v. State of Georgia, 5 Pet. 17; People v. Dibble, 16 N. Y. (2 Smith,) 212; Dale v. Irish, 2 Barb. Sup. Ct. R.* 641; *Fellows v. Lee, 5 Denio, 628; Public Lands, Laws, Instructions and Opinions, Pt. II. p.*

29, No 25; Ib. p. 92, No. 59; see, also, ib. No. 54, p. 81; No. 10, p. 10: No. 11, p. 11; No. 12, p. 13*; No. 23, p.* 25*; No. 787, p. 816; Strong v. Waterman*, 11 *Paige, 607.*

But the same territory had been formerly ceded to the government by the treaty with the Osage Indians in 1808. *See 7 U. S. Stat. at Large*, 107. If it had included these lands, we are not able to see how it would effect the question, since the United States afterwards acknowledged the title of the Quapaw Indians by purchase, and so is now estopped from denying it. *Sherwood v. Vanderburg, 2 Hill, 307; Boone v. Porter, 17 Wend., 164; Davis v. Darrow, 12 ib., 67; Hitchcock v. Harrington, 6 Johns., 293; Collins v. Terry, 7 Ib., 279; 2 Ib., 123; 19 Maine, 69; 1 Ib., 183; 12 Wend., 57; 14 Johns., 225; Threadgill, v. Pintard, ubi. sup.*

A conveyance by a pre-emptor, before the issuance of a patent, is absolutely void. *Glenn v. Thistle, 23 Miss., (1 Cush.,) 42; Craig v. Tappin, 2 Sandf, Chy., 78; Moore v. Jordon, 14 La. An., 414; Terison v. Martin, 13 Ala., 29; Forbis v Bowen, 1 A. K. Marsh., 407.*

It becomes plain that if Percifull had no rights to his pre-emption, then he was not injured by the establishment of Belding's pre-emption. *Graham v. Roark, 23 Ark., 19; Cunningham v. Ashley, 12 Ark., 303, 320; Jones v. Reyburn, 11 Ib., 389; 1 Sto. Eq. Jur., sec. 203; Halls v. Thompson, Smedes & M., 489; Young v. Bumpass, Freeman's Chy. R., 250; Juzan v. Toulmine, 9 Ala., 684; Conrod v. Nicholl, 4 Pet, 296, 310; U. S. v. Arredondo, 6 Ib., 716; Meux v. Anthony, 11 Ark. 418; Edmundson v. Hildreth, 16 Ill. 215; Wynn v. Morris, 16 Ark. 434.*

The tenant may deny the landlord's title after the end of the time, and he may show that the landlord's title has expired. *Smith's Landlord and Ten., 81; Co. Litt., 476; 57 Eng. Common Law, 400; 2 Smith's L. C., 660; 1 Vermont, 302.*

The relationship of landlord and tenant cannot affect the question. *Pelham v. Wilson, 4 Ark. 289; McFarland v. Mathis, 10 Ark. 560; Floyd v. Ricks, 14 Ark., 290; Graham v. Roark,*

23 Ark. 23; 2 Land Laws, Instructions and Opin., 367, 542; 3 ib., 129, 182, 188; Jennings v. DeCordova, 20 Texas, 508; Kennedy v. Wiggins, 5 Humph., 127; Reese v. (David) Crockett, 8 Yerg., 133; Loftus v. Mitchell, 3 A. K. Marsh., 594; Davis v. Gray, 3 Littell, 450.

In the case of *Rector v. Ashley, 6 Wallace, 143*, the court held that: "in perfecting a title to land located under the act of February 17, 1815, for the benefit of the inhabitants of New Madrid, no vested interest in the land, nor any appropriation of it binding on the United States, was affected until after the survey was made and returned into the office of the recorder of land titles." *Bagnell v. Broderick, 13 Pet., 436*; *Barry v. Gamble, 3 How., 51; Lessieur v. Price, 12 ib., 60; Rector v. Ashley, 6 Wallace, 142; Rector v. Ashley, 6 Wall., 151*; *Rector v. Gaines, 19 Ark., 84.*

Such claims, by the act of 1815, could only be located on lands which were public, *and the sale of which was authorized by law. Hale v. Gaines, 22 How. 158.*

By an act of April 26, 1822, the time for making locations of New Madrid claims was limited to *one gear from that date*, at which period they were to become *void*, if not before located. And the Supreme Court expressly held that this identical claim of Langlois *did become void on that day*, and that it was not revived by the act of 1843. *Hales v. Gaines, 22 How. 159.*

The land had already been reserved from sale by the act of April 20, 1832.

Because Belding had acquired the land by pre-emption under the act of May 29, 1830, this pre-emption would necessarily prevent the location of a New Madrid certificate on the land, as Rector had acquired no vested interest in the land at that time. *Lytle v. State, 9. How. 334; McAfee v. Keirr, 6 Sm. & M. 789; Taylor v. Brown, 5 Cranch. 234; McArthur v. Browder, 4 Wheat. 488; Fenley v. Williams, 9 Cranch, 164; Isaacs v. Steele, 3 Scam. 79; Benner v. Manlove, Ib. 439; Gaines v. Hale 16 Ark. 9; Winn v. Morris, Ib. 434.*

BELDINGS' CLAIM.—The plaintiffs have asserted the validity

of their titles, and they must sustain them, or their bills must be dismissed. *Rice v. Harrell, 24 Ark. 402.*

The act under which Percifull claimed, of April 12, 1814, required inhabitancy and cultivation, but the act of May 29, 1830, required no more than previous cultivation and settlement, or occupancy. *Wynn v. Morris, 16 Ark. 426; Gaines v. Hale, 16 Ark. 19.*

If Belding was entitled to a pre-emption, his interest vested immediately on the passage of the act. *Brown v. Clements, 3 How. 666.*

No reservation of land can be made after a citizen has acquired a right to it under a pre-emption law. *U. S. v. Fitzgerald, 15 Pet. 407; Brown v. Clements, 3 How. 666, Lytle v. State, 9 How. 333; Marks v. Dickinson, 20 How. 501; Stephens v. McCargo, 9 Wheat, 502; Doe v. Stephenson, 9 Tanner, (Ind.)* 148; *Lytle v. State*, 17 *Ark.* 644; *Wynn v. Morris*, 16 *Ark.* 414; *Rector v. Gaines*, 19 *Ark.* 80; *Lytle v. State*, 9 *How.* 314; *Lytle v. State*, 17 *Ark.* 608.

In *Evans v. St. Louis Public Schools*, 32 *Missouri*, 27, it was properly held that plaintiff's title having been held by the Supreme Court of the United States to be void, he could not file a bill to hold the defendant a trustee for his use.

And these decisions, made on this same subject, are final, conclusive, irrevocable and unimpeachable; so much so, that even if this court should now conclude them to be wrong, it could not change them. They are as matters adjudicated and forever at rest. *Story v. Livingston*, 13 *Pet.* 367; *Nelson v. Hubbard*, 13 *Ark.* 256: *Fortenbury v. Frazier*, 5 *Ib.* 202; *Porter v. Hanley*, 10 *ib.* 191; *Walker v. Walker*, 7 *ib.* 556; *Pulaski county v. Lincoln*, 13 *ib.* 104; *Rector v. Danley*, 14 *ib.* 307; *Story ex parte*, 12 *Pet.* 339; *Sibbald v. United States*, *ib.* 492; *Wirt v. Brasheok*, 14 *ib.* 54; *Boyle v. Grundy*, 8 *ib.* 190.

English, Gantt & English, Clark & Williams and H. Flanagin, for Hale.

The several claims to the tract of land in controversy may be classed and discussed in the following order:

1. THE PERCIFUL PRE-EMPTION CLAIM, represented by John C. Hale, the successful claimant in the court below.

2. THE BELDING PRE-EMPTION CLAIM, represented by William H. Gaines, and others, heirs of Belding.

3. THE NEW MADRID CLAIM, represented by Henry M. Rector, which covers part of the tract and goes over on the adjoining tract.

1. THE PERCIFULL PRE-EMPTION CLAIM.—This claim is founded upon the pre-emption act of 12th of April, 1814, and at the time of the passage of this act, the land on which the Hot Springs are situated, was part of the territory of Missouri. *U. S. St. L. vol.* 3, *pp.* 122–3; *Bright. Dig. p.* 511; 2 *St. L.* 283; 2 *St. L.* 743; *Geyer's Dig.* 30; *Geyer's Dig. Laws of Mo. sec.* 7, *p.* 133; 3 *Stat. L.* 493. The tract in controversy was never surveyed until 1838.

We submit that the evidence clearly shows that Percifull, under whom Hale claims, cultivated and inhabited the land in controversy, prior to the 12th of April, 1814, and continued to occupy and possess the same, either by himself or tenants, from about the year 1809, up to 1836, when he died. That after the land was surveyed, in 1838, and before it was offered at public sale, (and it never was), the proof of the pre-emption right of John Percifull, under act of 12th April, 1814, was filed with the register and receiver of the land office at Washington, Arkansas, by Sarah Percifull, widow, and David Percifull, son and only heir of John Percifull. *See Folio Trans. p.* 61 *to* 71. The application was rejected on *the ground* that part of the land claimed had been previously located by New Madrid certificate, No. 467, in the name of Francis Langlois, or his legal *representatives*—and *not* for the *want of proof of cultivation or inhabitancy* by Percifull. It will be observed that

this attempted location of the New Madrid certificate was made about the year 1820, and long after the pre-emption right of Percifull, under the act of 12th April, 1814, vested. *See Folio Trans. p.* 73. In October, 1843, after Hale became interested in the Percifull pre-emption, the application was renewed, to enter the land, by Sarah Percifull, on the same grounds as before, with additional proof. *See Fol. Trans. pp.* 81–2–3.

As to the inhabitancy, cultivation, etc., by John Percifull, as before stated, the judge, sitting as chancellor, in the court below, found in favor of Percifull—(*See decree, Fol. Tr. p.* 399), and as to the correctness of this finding, *see Branch v. Mitchell*, 24 *Ark.* 443; *also, see note of the Rep. p.* 8, 24 *Ark.*

A cultivation by members of a family, his hired hands, servants, etc., or persons under his direction, is a sufficient cultivation within the meaning of the pre-emption acts. *See Op. Atty. Gen.* 1791 *to* 1838, *pp.* 1087, 1171–2.

That the going to Red river to hunt for a year or two by Percifull, was *not* an *abandonment* of his pre-emption right, acquired by inhabitancy and cultivation, and did not work a forfeiture of it under the terms of the act of 12th April, 1814, which could only be done by removing from the territory (and this the witnesses state he never did.) *See Wynn vs. Morris*, 16 *Ark.* 414; *Wynn v. Garland, ib.* 440.

It is insisted by counsel for Belding's heirs, that the Percifull pre-emption claim was not assignable, and therefore Hale has no valid claim to the land.

It is true, that by the third section of act of 29th May, 1830, assignments and transfers of the right of pre-emption, prior to the issue of patents, were made void. (*Bright. Dig., p. 470, sec. 66.*) But the act of 23d January, 1832, so modified this clause as to permit the transfer of certificates, and patents to issue to assignees. (*Bright. Dig., p.* 470.) But for these statutory restraints, under 29th May, 1830, pre-emption rights would have been transferrable, like all other rights in property. But there is no such restraint in the act of the 12th of April, 1814. On the contrary, by the terms of the act, the right

of pre-emption in the purchase of land is given to every person, *and the legal representatives of every person*, who has inhabited and cultivated, etc. See *Dickson v. Richardson, adm'r.*, 16 *Ark.*, 118; *McDaniel v. Grace, et al.*, 15 *Ark.*, *484*.

It is immaterial whether the government would issue the patent in this case to Percifull and his heirs, or to Hale; if to the former, the patent would enure to the benefit of the latter under the assignment, and equity would protect his rights. These are rights which are recognized as assignable in equity, which are not transferable at law. *Buckner v. Greenwood*, 1, *Eng.* 206, *and cases cited.*

But it is contended that the United States had no title in 1814, and therefore could give no pre-emption; that the title was in the Indians. We submit that neither the United States government, or any European government, ever recognized any right in the Indians, except such as was conceded by treaty, and that the Quapaws never had any such recognized reservation, until the treaty of 24th Aug., 1818, and the Hot Springs were not included in this reservation. (*Sec.* 7, *Statutes at L. p.* 176, *Little, Brown & Co. ed. by Peters.* The territory, including the land in controversy, had been organized into a county in 1813, and was represented in the Missouri Legislature—prior to the treaty with the Quapaws. *See Geyer's Dig. L. Missouri*, *p.* 133, *Sec.* 7. The acceptance of the United States, in the treaties, of cessions of territory by the Indians, was not an acknowledgment of title in them, but as a matter of policy to prevent trouble. This land had been purchased from France by treaty in 1803. (*See* 8 *U. S. Statutes at Large*, *p.* 200.) There was no treaty at that time between Spain and the Indians, much less one conceding these lands. (*See* 2, *Statutes at Large*, 245, 575, 251, 286, *Sec.* 1.) 287, *Sec.* 12, 331: 641. No rights were recognized in the Indian tribes to the land, except such as were given by treaty. *See Johnson & Graham, Lessee vs. McIntosh*, 8 *Wheat*, 543 (*Peters Condensed Rep.*, 515.) There was no reservation of title to the Indians in the treaty with Spain. *See Marsh v. Brooks*, 14 *How. Rep.*, 513. The fact

that no allusion was made to any such treaty in the treaty of 1818, is a strong presumption there was none. An unextinguished Indian title, is not inconsistant with a seizen in fee, by the State. *Fletcher v. Peck, 6 Cranch, 87, Curtis, Dec. 328.* An Indian tribe or nation, within the United States, is not a foreign State within the meaning of the 2d section, 3d article, Constitution of the United States, and cannot sue in the courts. *Cherokee Nation v. State of Geo. 5 Peters 1; 9 Curtis Dec. 178; also as to Indian title, 3 Kent. Com. Marg. p. 379.* In contest between the United States and grantee of lands, title of the Indian is not before the court. *6 Peters, 681; 10 Curtis, Dec. 315, p. 355, particularly.* Where one obtains a grant of land, subject to the Indian possessory right, his title is perfect, when the United States extinguishes that possessory right. *Cornet v. Winston, Lessee, 2, Yerger Rep. 143;* See, also, *14 How., 513, 522; 20 Curtis Dec., 312; Blair, et al., in Pathkiller's Lessee, 2 Yerger Rep., 407; United States, in Fernando, 10 Peters, 303; 12 Curtis Dec., 134; Martin v. Waddel, 16 Peters 367; 24 Curtis Dec., pp. 347-8; George Gamble's case, 2 Tenn. Rep., 170.*

DECISION OF THE REGISTER AND RECEIVER.—It is not true, as insisted by Belding's counsel, that the register and receiver sitting as a court, had decided against the inhabitancy and cultivation of Percifull. On the contrary, there was a division of opinion; see *Fol. Trans., p. 168-9:* see *Fol. Tr., 139-40.* But even if they had so decided, that decision would not have been conclusive, but could be reviewed on a direct proceeding for that purpose. See *Bernard's heirs v. Ashley, 18 How., 43; State of Missouri v. Batcheldor, 1 Wallace, 109; Lyttle v. State, 22 How., 193; O'Brien v. Perry, 1 Black., 139; Lindsey, et al., v. Haines, et al., 2 Black., 554.* See, also, *Wynn v. Gacland, 472.*

BELDING PRE-EMPTION CLAIM.—This claim is founded on the act of Congress, approved 29th May, 1830. See *Bright. Dig., 459, § 64, etc., 4 Stat. L., p. 420.* That whatever possession

or right Belding may have had, or claimed, was not in *his own right*, but as tenant, by virtue of a lease from Percifull; see *Opinions of Register and Receiver*, *Fol. Tr. p. 222-3-4-5.* That the reservation act of April 20, 1832, was fatal to the pre-emption claim of Belding's heirs; see *letter of the Commissioner to the Register and Receiver*, *Fol. Tr.*, *p. 124-5.* The permission given Belding's heirs to make entry, by the opinion of the secretary of the Interior, was for a specific purpose only, it conferred no right or admitted any title, but only, that the parties might be placed in a position to contest the claims of each other in the courts; see *Fol. Tr.*, *p. 126.* That the certificate issued to Belding's heirs was illegal, and afterwards directed to be cancelled; see *Fol. Tr.*, *p. 359*, *101*, *108.* But suppose Belding cultivated and occupied the land within *the letter* of the act 29th May, 1830, and after the expiration of that act, his heirs had the right to make proof of the pre-emption and apply to enter the land under the reviving act, and that the proof, application and entry were *formally* regular, so as to vest in them such title, as a certificate of entry ordinarily passes, we submit that this title in equity and under the facts of the case, would enure to Percifull, the landlord. See *Op. At. Gen. 1791 to 1838*, *p. 722.*

A tenant cannot dispute the title of his landlord; nor set up a title acquired by him, adverse to his landlord. *Taylor on Landlord and Tenant*, § *629*, *p. 450; William v. Watkins*, *3 Peters.*, *43.* A tenant cannot acquire a title adverse to his landlord's. *Wilson v. Smith*, *5 Yerger*, *379; 9 Vermont*, *37; Marley v. Rogers*, *5 Yerger*, *217.* A tenant, who enters under a particular title, though he may acquire a better title, cannot avail himself of it against the title under which he has entered.

Garland & Nash, for Rector.

After arguing the case at length upon all the main points involved, submitted the following:

In the printed argument heretofore submitted by us, in this

cause, in advocacy of Rector's claim, we alluded to a case between *Gaines and wife and others, and Thompson and Wilson, (pp. 52, 53, 54);* commenced in the circuit court of the United States for the District of Columbia. In the printed brief we attempted to show the decision of the circuit court in that case was correct, and since our brief was filed, the Supreme Court of the United States, on an appeal in that case, affirmed the decision of the circuit court, and the decision of the Supreme Court we present with this, and respectfully call the attention of the court to it. *7 Wallace, 347.* This decision, we take it, leaves the order of Secretary Thompson as the law of the case, so far as the Belding certificate is concerned, and this sweeps away all pretense of claim on the part of the misguided heirs of Belding; and we here repeat, that as this officer has directed its cancellation, the Belding certificate stands now as if cancelled; and in addition to the authorities already referred to by us on this, (*2 Danl. Ch. Pr. 1192, 1204, 1209*) we would cite *Hunt v. Lemin, 4 Stew & Port. (Ala., 138; Higeras v. The United States, 5 Wallace (U. S.) 827.*

Then, of course, Rector's possession, even without title, if you please, cannot be interfered with by the Beldings, who have no title and are out of possession, and we here call the attention of the court to the authorities cited by us on pages 54 and 55, of our printed brief. And the rule that Rector's mere possession is good against one who has no title, goes so far, and is so well recognized by the courts that his bill of complaint here would be maintained, and his injunction made perpetual to secure him in his possession, if nothing else. As between the parties having the same rights in law, the courts always quiet possession, and enjoin the other party from interfering with him who is in possession. So that if Rector had, in his bill, conceded his title, as against the United States, to be invalid, but set up his possession, and asked the court to protect him in it as against the Beldings, whose claim in law is no better, the court must grant this relief. This is always done between parties thus situated: *4 Kent's Com., 371; Broom*

v. Max, 638, (3d London Edition); Snower vs. Williams' heirs; 4 Dana (Ky.) 460; Clements vs. Warren, 24 How. (U. S.) 397; Pettijohn v. Akers, 6 Yerger (Tenn.) 448, 451; U. S. v. Stanley, 6 McLean 409; Curtis v. Sutton, 15 Cal. 127; Hire v. Draper, 10 Barbour (N. Y.) 455; Strete et al v. Fish, 2 Minnesota 153; Smith v. Brannon, 13 Cal. 107; 2 Eden on Injunction, 425–4 (Waterman); Williards' Equity, 303, 328.

And this relief to protect the possession, merely, is not inconsistent, at all, with the prayer for special relief, as indeed it is a part of that prayer; and if the court cannot grant all the relief asked, it will grant as much as the facts sustain, and as may not be incongruous with the general object and scope of the bill. *Adams' Equity, p 308–9 and note 1; 13 Arks. Rep's 183; 15 Ib. 555–6; 19 Ib. 62; 20 Ib. 332.*

While it is true that Rector is complainant in the bill, yet this is in no sense an original bill—it is a mere weapon of defense, not of aggression; it is a suit growing out of, and auxillary to the ejectment suit, and is the mode by which Rector defends himself, both as to title and possession against the Belding claim. His defense could not be heard, as we have seen, in the ejectment suit, because it was *equitable* and not *legal;* therefore he had to change his forum to make his defense, and in filing a bill to do so, it is not an original suit, but, in truth, a defense against the Belding suit; and the court will regard all the parties, now, precisely as if Rector were defending in the ejectment suit, on matters that could be heard in that suit, and that Rector is just where he was, as to possession, etc., when the ejectment suit was pending and was tried. This position is recognized by countless decisions of the first courts in the Union. *Williams v. Byrne, Hemp. Reps. 473; Logan v. Patrick, 5 Cranch, 288; Dunlap v. Stitson, 4 Mason, 349; Dunn v. Clark, 8 Peters, 3; Simmons v. Guthrie, 9 Cranch 19;* and especially, *Freeman v. Howe, 24 How. (U. S.) 460.*

This being true, in every sense of the word, and the government not being a party here, and not complaining against Rector, although his title is not good against the government,

yet it is as good as the Belding claim, and is upheld by possession of years standing, acquired and continued with the knowledge and acquiescence of the government. This court will not, we humbly submit, turn him out of possession, and let in the worthless claim of Belding, but will, for the purpose of this suit, hold his claim good, protect him in his possession, and leave him and the government to settle the title hereafter. In other words, if convinced all the claims are no account, yet as the party who holds the title is not before the court, possession must turn the scale on a comparison of the claims asserted. This is right, and is equity. The court would be compelled to do this in this case, particularly, as our law protects Rector in his improvements on the public land, or the government land, if the court should hold this to be the land of the government. The statute giving this protection is broad and comprehensive. *Gould's Dig. chap. 61, p. 439.*

So, in no event, can the Beldings, on their cancelled certificate, which is the foundation of their judgment, disturb Rector in his possession of the premises, even if the court should decree Rector's title is not good as against the government, which we do not think will be held, after a careful and thoughtful review of this record and the points as presented.

STORY, Special C. J.

Gaines, in an action of ejectment, in the Hot Springs circuit court, recovered judgments against Hale and tenants, and Rector and tenants, for the possession of the south-west quarter of section 33, in township 2, south of range 19 west, including the Hot Springs, which judgments were affirmed by the Supreme Court of this State and the United States.

Hale and Rector filed separate bills, each claiming an equitable title to the land in controversy, superior to the legal title of Gaines; prayed that their rights might be declared, their title quieted, and that a perpetual injunction issue restraining the execution of the judgment in ejectment.

An interlocutory injunction was granted.

The chancellor decreed that Hale's claim, to the quarter section in controversy, was good; that his title should be quieted, and that a perpetual injunction should issue restraining the enforcement of the judgment in ejectment against him. The chancellor further decreed that a certain portion of Rector's claim, not in conflict with Hale's, to lands outside of the south-west quarter of section 33, in township 2, south of range 19 west, had been established, and that his title to so much of his New Madrid claim should be quieted. Gaines and Rector both appealed from the decree, so far as it confirmed Hale's title to the quarter section in controversy.

The rights of the claimants are before the court for settlement, and we will dispose of them in their chronological order.

For this purpose, we will first examine the right of John C. Hale, who represents what is proven as the Percifull pre-emption claim.

This claim is founded upon the act of April 12, 1814, section five of which act is in the following words: "That every person, and the legal representatives of every person, who has actually inhabited and cultivated a tract of land lying in that part of the State of Louisiana, which composed the late territory of Orleans, or in the territory of Missouri, which tract is not rightfully claimed by any other person, and who shall not have removed from said State or territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same restrictions, conditions, provisions and regulations, in every respect, as is directed by the act entitled "An act giving the right of pre-emption in the purchase of lands to certain settlers in Illinois territory," passed, February 5, one thousand eight hundred and thirteen, (1813). *U. S. St. L. vol. 3, pp. 122-3.*

Several objections have been raised to the Percifull claim, which we will pass, and proceed at once to consider the question which we believe to be decisive of Hale's right to the land in controversy, viz: Was the south-west quarter of sec-

tion 33, in township 2, south of range 19 west, included in the act of April 12, 1814?

At this time the Indian title to the lands south of the Arkansas river had not been extinguished.

By treaty, made August 24, 1818, between the United States and the Quapaw Indians, approved by the President on the fifth of January, 1819, these lands were formally ceded to the government.

For the purpose of determining this question, it may be well to consider the status or condition of the different Indian tribes in the relation they bear to the United States.

Chief Justice MARSHALL, in the case of the *Cherokee Nation v. The State of Georgia*, *5 Peters*, *17*, says: "Though the Indians are acknowledged to have an unquestionable and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. *They occupy a territory to which we assert a title independent of their will*, which must take effect, in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupilage."

Coinciding with their status, as defined by Chief Justice MARSHALL, is the language in *Gaines et al. v. Nicholson et al. 9 How. 365*, where the court, speaking of the effect of a reservation in an Indian treaty to a specific tract of land, say: "There is no doubt but that all persons in whose behalf reservations were made under the treaty, and who were residents upon any particular tract, and had made improvements thereon at its date, were entitled to the section, including their improvements, in preference to any other right that could have been previously acquired under the government, because the land embraced within the section was so much excepted from the cession. No previous grant of Congress could be paramount,

according to the rights of occupancy which the government has always conceded to the Indian tribes within her jurisdiction."

It appears, then, that the United States holds the fee simple of the land occupied by the Indian tribes; and while it is the *policy* of the government to recognize the right of occupancy until it may be extinguished by voluntary cession, the nation may, if it see fit, disregard this right, and, before a cession by the Indians, convey either an unencumbered title in fee simple, to take effect immediately, or a title subject to the Indians' right of possession, and to take effect only when the Indians, by voluntary cession, shall have yielded their title.

The question before us, however, is not one of power, but of intention. We think the cases of *Fletcher v. Peck, 6 Cranch, 87; Lattimore v. Paleet, 14 Peters, 4: Clark et. al. v. Smith, 13 Peters, 195*, clearly show that the United States may convey the land before the Indian title has been extinguished. The policy of the government, however, and one that is founded in principles of justice and humanity, has been to protect such lands from settlement, and not to convey the title until the possessory right of the Indians has been extinguished.

Such being the policy of the government, it is not to be presumed that the United States intended that the act of April 12, 1814, (in which it expressly provided that the right of preemption should not extend to any tract which is rightfully claimed by any other person,) should extend to lands in the occupancy of the Quapaw Indians.

At the time of the passage of the act, Percifull's settlement was antagonistic to their claim, the justness of which claim the United States, and all persons claiming under them, are estopped, by the treaty of the 24th of Agust, 1818, from denying. We are not without authority to sustain us in the position we have taken.

Thus, in the case of *Danforth v. Wear, 6 Wheat., 675*, the court say: "As to lands surveyed within the Indian boundary,

this court has never hesitated to regard all such surveys and grants as wholly void."

In a late case, *Threadgill v. Pintard, 12 How., 37*, the court, speaking of the same territory acquired from the Quapaw Indians, and of the act of April 12, 1814, say: "It must be conceded that the first settlers upon this land, the Indian title to it not having been extinguished, could claim, under the act of 1814, no pre-emption right. No laws giving to settlers a right to pre-emption, can be so construed as to embrace Indian lands. Such lands have always been protected from settlement and survey by penal enactments." See *Preston v. Browder, 1 Wheat., 115: Danforth v. Thomas, ib. 115.*

We think the authorities cited, clearly show, that the act of 1814, did not apply to the land on which Percifull had "inhabited and cultivated" prior to April 12, 1814, and that, consequently he acquired no rights under the act. On the 20th of April, 1832, Congress passed an act, the third section of which provided, "that the Hot Springs, in said county, together with four sections of land, including said Springs, as near the center thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located or appropriated for any other purpose whatever." *4 Stat. at L., 505.*

Percifull did not claim under any act prior to the act of 1832, reserving the Hot Springs, except the act of April 12, 1814. In fact, neither Percifull nor his representatives made any attempt to pre-empt the land until more than six years after it had been reserved from entry and sale.

In March, 1843, Congress passed an act which provided; "that every settler on land, south of the Arkansas river, should be entitled to the same benefits accruing under the provision of the pre-emption act of 1814, as though they had resided north of said river. *5 St. at L., 603.*

The counsel for Hale do not insist that Congress, by a general law, in 1843, intended to repeal a special one, the reservation act of 1832, but they declare that Percifull had an inchoate right

under the act of 1814, which, by force of the act of 1843, became a vested interest and relates back to the passage of the act of 1814.

We cannot agree with counsel in this respect, for we think we have clearly shown that on the 20th day of April, 1832, Percifull had no right, inchoate or otherwise, to the land in controversy, that could affect the power of Congress to withdraw it from entry and sale. The effect of the third section of the act of 1843, was the same as though an act had been passed, similar in its terms to the act of 1814, authorizing pre-emptions on the south bank of the Arkansas river, and rights vested under it, as against the government, only from and after its passage. The act of April 20, 1832, having reserved the Hot Springs from pre-emption, and it being conceded that this reservation was not repealed by the act of 1843, it is apparent that the act of 1843, did not apply to the four sections of land including the Hot Springs as their center.

If we needed any assurance of the correctness of our conclusion we have it in the case of *Hale v. Gaines, 22 How., 160*, wherein the court, after fully considering the effect of the act of March, 1843, upon Percifull's interest to the land in controversy, say: "A claim is set up in defense, that John Percifull was entitled to a preference of entry, under the act of 1814, which act, it is insisted, was revived by the act of 1843. Suppose that Percifull's right to appropriate the land in dispute was undoubted, and that the register and receiver had allowed the heirs of Belding to enter wrongfully, still the courts of Arkansas, in this action of ejectment, had no right to interfere and set up Percifull's rejected claim. But this is of little consequence, as, when the act of April, 1832, was passed, reserving the Hot Springs from sale, Percifull had no vested interest in the land that a court of justice could recognize."

Hale applied to enter the section in controversy, in October, 1850, under a Cherokee pre-emption claim, founded upon the act of the 26th of May, 1824, concerning pre-emption rights in Arkansas territory, and the supplemental act of March 3, 1843.

The counsel for Hale, very properly, appear to place but little reliance upon this claim, since, more than eighteen years previous to the attempt to locate the Cherokee pre-emption, the land in controversy had been reserved from entry and sale.

The next question that presents itself for our consideration is, what rights has Rector, who claims the equitable title, if any there be, that may have accrued to Langlois, or his representatives, under a New Madrid certificate, No. 467, for two hundred arpents (or 170 $\frac{15}{100}$ acres) of land.

A full history of Rector's claim, and the grounds on which he relies, may be found in *19 Ark., 70.*

His claim is based upon the act of February 7, 1815, (*3 Stat. at Large, 211,*) which provided that any person owning land in New Madrid county, Missouri territory, materially injured by earthquakes, should be authorized to locate the like quantity of land on any of the public lands of that Territory, "the sale of which is authorized by law." The second section of the act provides: "That whenever it shall appear to the recorder of land titles for the Territory of Missouri, by the oath or affirmation of a competent witness or witnesses, that any person or persons, are entitled to a tract or tracts of land under the provisions of this act, it shall be the duty of said recorder to issue a certificate thereof to the claimant or claimants; and upon such certificate being issued, and the location made, on the application of the claimants, by the principal deputy surveyor for said Territory, or under his direction, whose duty it shall be to cause a survey thereof to be made, and to return a plat of each location made to the said recorder, together with a notice in writing, designating the tract or tracts thus located, and the name of the claimant on whose behalf the same shall be made; which notice and plat the said recorder shall cause to be recorded in his office, and shall receive from the claimant, for his services on each claim, the sum of two dollars for receiving the proof, issuing the certificate and recording the notice and plat as aforesaid."

Section 3 provides, "that it shall be the duty of the recor-

der of land titles, to transmit a report of the claims allowed and locations made, under this act, to the commissioner of the general land office, and shall deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract therein designated; which certificate shall be filed with the said recorder, within twelve months after date, and the recorder shall, thereupon, issue a certificate in favor of the party, which certificate being transmitted to the commissioner of the general land office, shall entitle the party to a patent, to be issued in like manner as is provided by law for other public lands of the United States."

Rector prefers his claim under two surveys, one made by J. S. Conway, deputy surveyor, on the 16th of July, 1820, and the other by John C. Hale, deputy surveyor, on the 28th of February, 1838.

The survey of 1820, was not returned to the recorder of land titles, and Rector's claim under this survey, in the language of his counsel, is reduced to a single question: "Was it indisputably necessary that the plat and certificate of survey, made upon this New Madrid warrant and location, should have been returned to the recorder's office, in order to give the applicant an incipient right and inchoate title to the land so located by the actual survey?"

This question has been repeatedly passed upon and settled, in the cases of *Bagnell v. Broderick, 13 Peters, 346*; *Barnes v. Gamble, 3 How., 51*; *Lessieure v. Price, 12 How., 60*; *Hale v. Gaines, 22 How., 146*; *Rector v. Ashley, 6 Wallace, 142*, that claimants, under the act of 1815, acquired no rights whatever, until the plat and certificate of survey were presented to the recorder of land titles and approved by him. The Supreme Court of the United States is the authoritative expounder of the acts of Congress, and these decisions are a sufficient answer to the learned argument, that the survey is the location, and that rights vest as soon as the survey is made, rather than from the time a return of the plat is made to the recorder and approved by him.

Counsel for Rector have filed two briefs, of fifty-eight and sixty-eight pages respectively, in which they have insisted that the Supreme Court of the United States, commencing with the case of *Bagnell v. Broderick*, down to the case of *Rector v. Ashley*, have omitted to notice the act of April 29, 1816, and its effect upon the act of February 7, 1815.

If this were true, it would certainly be a most remarkable case of judicial oversight. A careful examination of the act, however, will show that counsel are mistaken, and that the practical effect of the act of 1816, so far as it changes or modifies the act of 1815, is simply to abolish the office of principal deputy surveyor and all other deputy surveyors' offices that had previously been established under either the Spanish or Federal government, within the limits of the Territories of Missouri and Illinois, and provides for the office of a surveyor of said Territories, to which all the plats and papers of the different surveyors' offices which had been abolished should be sent, and that the surveyor, so provided for, should perform the duties of the principal deputy surveyor.

The practice, after the passage of the act, was not changed. "The warrant or location certificate issued from the recorder's office, and there it was returnable; that the plat and certificate were returned and recorded; that officer issued the patent certificate; in that office the law required all official business to be transacted, and not in the surveyor's office." That the notice of location, and plat and certificate, were recorded in the surveyor's office is true, and it was proper. It was not done, however, to the end of furnishing evidence of title to the claimant, but to have evidence there to show that the land was appropriated according to the New Madrid act, and for the convenience of the surveyor's department. The plain meaning of the law is as above stated, nor can its import be changed by the practice pursued in the surveyor's office.

The mistake made by the counsel for Rector, has arisen from their having construed the words, in the act of 1816, "any office heretofore established or authorized for the purpose of

executing or recording surveys of land, within the limits of the Territories of Missouri and Illinois," to mean all recorder's offices, rather than surveyor's offices, through ignorance of the fact that the notice of location and plat and certificate were *recorded* in the surveyor's office, not to the end of furnishing evidence of title to the claimants, but to have evidence there to show that the land was appropriated according to the New Madrid act, and for the convenience of the surveyor's department. *Lessieure v. Price, 12 How., 71.*

The next question that presents itself is, what right did Rector acquire under this second survey, made by John C. Hale, in February 28, 1838?

In the case of *Hale v. Gaines et al. 22 How. 158*, Hale, who by agreement with Rector, has a two-fifths interest in the New Madrid claim, pressed upon the court all the legal and equitable grounds on which Rector bases his right of relief.

Justice CATRON, who announced the decision of the court, very carefully considered and passed upon the rights that had accrued under the New Madrid certificate. He says: "The defendant (Hale) relied upon a survey made in June, 1838, founded upon a New Madrid certificate for two hundred arpents. To support this survey an application was produced, dated 27th January, 1819, signed by S. Hammond and Elias Rector, addressed to William Rector, surveyor of the public lands, etc., asking to have surveyed and be allowed to enter the recorder's certificate for two hundred arpents, granted by him to Francis Langlois, or his legal representatives, and dated the 26th of November, 1818, (No. 467.) The survey to be made in a square tract, the lines to correspond to the cardinal points, and to include the Hot Springs in the center. In 1818 the springs were in the Indian country, to which, of course, no public surveys extended. And, as the act of 1815, providing for the New Madrid sufferers, only allowed them to enter their warrants on lands, the sale of which "was authorized by law, the unsurveyed lands could not be legally appropriated, and of necessity the surveyor general disregarded the applica-

tion to have a survey made by Langlois, and thus the claim stood from 1818 to 1838."

The act of April 26, 1822, validated locations of New Madrid certificates then existing, and which had been made in advance of the public surveys, but the second section of the act declared that future locations should conform to the public surveys, and that all such warrants should be located within *one year* after the passage of the act. As the public surveys, then existing in Missouri and Arkansas territories, were open to satisfy these claims, there was no difficulty in complying with the act of 1822.

Reliance is placed on the act of Congress of March, 1843, to maintain the survey of 1838, of the New Madrid certificate. That act provides that locations, before that time made on New Madrid warrants, on the south side of Arkansas river, if made in pursuance of the act of 1815, in other respects, shall be perfected into grants in like manner as if the Indian title to the land on the south side of the river had been completely extinguished at the time of the passage of said act of 1815.

The act of 1843 does not apply to the survey and location of Langlois, made in 1838, for several reasons:

First. The sale of the land thus surveyed was not authorized by law—the act of April 20, 1832, having reserved from location or sale the Hot Springs, and four sections of land including them, as their center.

Second. The attempted location was void, because barred by the act of 26th of April, 1822, which act was not repealed or modified by the act of 1843. This act referred to locations made on the south of the river Arkansas, of lands regularly surveyed and subject to sale, and which locations had been made on or before the 26th of April, 1823, when the bar was interposed.

We are of the opinion that the New Madrid survey of 1838 was altogether invalid, and properly rejected by the State courts. *Barry v. Gamble, 3 How. 51*; *Rector v. Ashley, 6 Wallace, 142.*

We have not forgotten that in several of the cases cited, it was the legal title which was decided, and that in the present case, it is the equitable title we are required to pass upon; but, as was remarked in *Rector v. Ashley, 6 Wallace, 151*, the rights of claimants are to be measured by the acts of Congress, and not exclusively by what he may or may not be able to do; and if a sound construction of that act shows that he acquired no vested interest in the land until the officers of the government had surveyed the land, and until that survey is filed in the office of the recorder, and approved by him, then, as claimant's rights are created by that statute, they must be governed by its provisions, whether they be hard or lenient.

If it be possible for any case to come within the rule of *res adjudicata*, this appears to do so.

Hale and Rector allege, in their bills, that they have made valuable improvements on that portion of the land in controversy, now in their possession; that Belding has no rights, legal or equitable, to the land in controversy, and pray the court to grant an injunction perpetually restraining the enforcement of the judgments in ejectment.

It is insisted, on the other hand, that the validity of Belding's claim is not now in question; that the plaintiffs must recover on the strength of their own title, and not on the weakness of that of the defendant; that Hale and Rector are trespassers; that they have no rights to maintain, no injuries to redress.

We concede the legal position taken by the counsel for Belding to be true, but not the facts; settlers making valuable improvements on the public lands, which at the time are not reserved for the exclusive use of the government, have not been regarded as trespassers. This State, by statute, treats and protects such improvements as property, and enforces the right of possession as against all persons who have neither a legal or equitable title to the *land*.

In the case of *Pelham, adm'r. v. Wilson, et al., 4 Ark. 289*, the court say: "The interest that a person has in an improvement,

on the public land, is of a peculiar kind, known only to our laws. It is a possessory right against all the world but the United States."

In *Cain v. Leslie, 15 Ark. 312*, the court say: "A sale of an improvement on public land is recognized by statute, and the purchaser acquires a possessory right which the law protects, and which is good against every body but the government or its grantee." *Hughes v. Sloan, 8 Ark. 146; McFarland v. Matthias, 10 Ark. 560.*

The Federal government, while it punishes those who are purely trespassers, and commit depredations on the public lands, has uniformly rewarded those who, in good faith, have made valuable improvements. If the legal representatives of Belding have any rights here, they have sprung from just such trespasses, and it is difficult to perceive why the same act in Belding should be rewarded, and in Hale and Rector treated as an offense.

It appears that Hale and Rector have made improvements worth fifty thousand dollars, and a court of equity that would permit a third party, without right, through a voidable and inequitable judgment, to take possession of this property, would sadly fail in executing the object for which it was established. Though neither Hale nor Rector have any rights which, measured by the acts of Congress, have as yet matured into a title to the land, it does not follow that they have no privileges or immunities whatever. They are tenants, at sufferance, of whoever may have the legal title, by the laws of this State, entitled to the possession of their improvements, and cannot be ousted except by some one who has a superior right of possession.

We shall therefore proceed to examine what rights may have accrued to Gaines and others, as the legal representatives of Belding; and if we find that they have no legal or equitable claim, as against Hale or Rector, to the lands in their possession, that the judgment at law is irregular and voidable, as it

is alleged to be, the prayer for a perpetual injunction will be granted.

The judgments at law in the Beldings' favor, were based upon a certificate of entry, which, on the 7th of June, 1860, by order of the secretary of the Interior to the commissioner of the general land office, was cancelled.

The act of March 3, 1849, gives to the secretary of the Interior the power of supervision and appeal in all matters relating to the general land office, co-extensive with the authority of the commissioner, to adjudge, and it is well settled that either the commissioner of the general land office or the secretary of the interior may cancel a certificate of entry, or a patent, whenever the same has been improperly issued. The land officers perform a ministerial duty, and, though it may be conceded that when rights have vested, such cancellation would not affect or divest those rights, yet, if erroneously issued, the error should be corrected, in order that parties who have no legal or equitable title to the land, may not, by means of a worthless paper, oust those who have rights which are protected either by Federal or State laws. *Maguire v. Tyler, 1 Block, 195*; *Dozwell v. De LaLauza et al., 20 How. 29*; *Belle v. Hearne et al. 19 How. 252.*

It is therefore proper for us to inquire whether the action of the secretary of the Interior, in cancelling the certificate of entry, was correct, and the effect of such cancellation.

Belding's pre-emption is claimed under the act of 29th May, 1830, which provides "that every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby authorized to enter with the register of the land office, for the district in which lands may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, or to a quarter section, to include his improvements, upon paying to the United States the minimum price of said land."

Section 3 provided "that prior to any entries being made,

under the privileges of this act, proof of settlement or improvement shall be made to the satisfaction of the register and receiver."

It is admitted that Belding failed to make the proof, required by the act, until after the passage of the reservation act of April 20, 1832. The question then presents itself, when does a claimant, under the act of May 29, 1830, acquire a vested interest in the land?

We think there can be no doubt that Congress did not intend that the gratuity should vest in the claimant until after he had made proof of settlement or improvement to the satisfaction of the register and receiver, which, by the terms of the act, is a condition precedent to the right of entry.

The fourth section expressly provides that the provisions of the act shall not be available to any person who shall fail to make the proof and payment required, before the day appointed for the commencement of the sale of lands, including the tract on which the right of pre-emption is claimed; and the fifth section limits the operation of the law to one year.

If the claimants' rights grew out of the settlement and vested on the passage of the law, these sections are mere nullities; for, the right having vested, the commencement of the land sales, or the lapse of a year, would not destroy it. The passage of the act gave to settlers who had cultivated in 1829, and were still in possession, the privilege of pre-empting, if they saw fit so to do, but they were required to exercise this privilege within one year, and before the commencement of the land sales. On making proof to the satisfaction of the register and the receiver, the right to an entry vested, but failing to make this proof within one year, and before the commencement of the land sales, the privilege of a pre-emption was at an end.

It is objected to this ruling that, as the lands were not surveyed at this time, and that Belding, therefore could not comply with so much of the act as required proof of settlement or improvement before the 29th day of May, 1831, and as he had

done all that it was in his power to do, his right vested without making such proof. But as we have before held, the rights of claimants must be measured by the acts of Congress, and must be governed by its provisions, whether they be hard or lenient.

We have not overlooked the fact that Judge WALKER, in delivering the opinion in the case *of Gaines et al. v. Hale, 16 Ark. 21*, very strongly intimated that the reservation act of 1832, did not affect Belding's right to a pre-emption, and that his interest vested from the passage of the act of 1829. He relies on the case of *Lytle et. al. v. The State of Arkansas et. al. 9 How., 314*, to sustain him in this opinion.

We think a careful examination will show a material difference in the two cases.

In the latter case, Cloye's heirs, in addition to their having cultivated the land in 1829, and being in possession in 1830, proved settlement to the satisfaction of the register and receiver, and made payment. It differs also in this, that Governor Pope did not attempt to locate, under the act of the 15th of June, 1832, until after the passage and during the life of the act of 14th of July, 1832, which extended the time for one year from the date of the act, in which to make proof of settlement or improvement to the satisfaction of the register and receiver.

Justices CATRON, NELSON and GRIER, dissented from the opinion, and insisted that Cloye's heirs had no vested right in the land at the time the act of June 15, 1832, was passed.

The basis on which Judge WALKER founds his opinion, we think, sustains our decision. Quoting from the case of *Lytle v. The State of Arkansas*, he says: "The claim of a pre-emption is not that shadowy right which, by some, it is considered to be. Until sanctioned by law it has no existence as a substantial right. But when covered by the law, it becomes a legal right subject to be defeated only by a failure to perform the conditions annexed to it."

Belding failed to perform the conditions annexed; that is,

to make proof of settlement or improvement, to the satisfaction of the register and receiver, and, therefore, had no rights after the time allowed by the act to perform the conditions annexed had passed.

Belding, therefore, acquired no vested interest in the land prior to the 20th day of April, 1832, at which time Congress withdrew the land from entry or sale. No act passed after the act of April, 1832, could vest an interest in the four sections of land, including the Hot Springs as their center, without repealing that act.

No subsequent act did repeal the act of April, 1832.

It then follows, that, as the land in controversy had been withdrawn by act of Congress from entry or location, and appropriated for the future disposal of the United States, the action of the register and receiver, in undertaking to grant preemption in land in which the law says they shall not be granted, though made under the direction of the commissioner of the general land office, was erroneous and void, and the action of the secretary of the Interior, in cancelling the certificate of entry, was proper.

The certificate of entry having been properly cancelled, the judgment at law based upon it must fall.

By the laws of this State the certificate was evidence, which could not be attacked in a court of law, of an inchoate right, which might mature into a perfect title, sufficient to maintain the action of ejectment.

It is well settled that any fact which clearly proves it to be against conscience to execute a judgment at law, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or neglect in himself or his agents, will authorize a court of equity to interfere by injunction. *Maine Insurance Company v. Hodgson, 7 Cranch, 332; Adams' Eq., 5, Am. ed. 391; and cases cited.*

It is, therefore, the duty of this court to declare the rights

of the parties as though this erroneous certificate of entry had not been made.

The rights of parties in the public lands are set forth by the laws of this State, under the title of ejectment, the second section of which provides, that: "The action of ejectment may also be maintained in all cases where the plaintiff claims possession of the premises under or by virtue of, *first*, an entry made with the register and receiver of the proper land office of the United States; *second*, a pre-emption right under the laws of the United States; *third*, *where* an improvement has been made by him, on any of the public lands of the United States, whether the lands have been surveyed or not, and where any other person, than those to whom the right has been given by the preceeding claims of this section, is in the possession of such improvements."

We have just decided that none of the parties to this suit, so far as the record shows, are entitled to the possession of the Hot Springs and four sections of land including them as their center, by virtue of an entry made with the register and receiver of the proper land office of the United States, (the Belding certificate of entry having been cancelled,) nor by virtue of a pre-emption right under the laws of the United States.

The record abundantly shows, however, that all of the parties have made improvements upon different portions of the land, and, under the laws of this State, have a peculiar title, protected by the courts, and are entitled to the possession of their improvements until ousted by the Federal government.

It is urged that the plaintiffs in the suits at law, cannot be inhibited from enforcing their judgment, for the want of a special prayer for a perpetual injunction, but an examination of the record will show that Hale, on page —— of his bill, prays as follows: "May it please your honor to grant unto your orator, the State's most gracious writ of injunction, issuing out of and under the seal of this honorable court, commanding the said William H. Gaines, and Maria, his wife,

Albert Belding, Henry Belding and George Belding, heirs of Ludovicus Belding, and Henry M. Rector, their counsellors, attorneys, solicitors and agents, commanding them, and each of them, absolutely to desist and refrain from proceeding to have any writs of restitution or writs of possession, or mandate of any kind, of and concerning the possession of the land aforesaid, issued or in any manner executed against your orator, until the final termination of this suit in equity, *and that they be perpetually enjoined;*" and Rector, on page 55, of his bill, prays, "that the said judgment obtained in the said action of ejectment be *perpetually* enjoined; and such plaintiffs, their agents and attorneys, be enjoined from issuing out process to obtain, or obtaining possession of the premises named in the suit."

We think these prayers may well be held to be sufficiently specific, as prayers for a perpetual injunction, and, even if not so construed, we think there would be no good reason for not declaring the judgments to be void, and thereby prevent their enforcement.

A writ of injunction may be described to be a judicial process, whereby a party is required to do, or refrain from doing, a particular thing, and the most common sort, is that which operates as a restraint upon the party in the exercise of his real or supposed rights, and this is sometimes called the "remedial writ of injunction." The other kind, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same.

It appears to be the settled practice, not to grant the remedial writ, unless it is specially prayed; because it has been said, the defendant might make a different case by his answer against the general words of the bill, from what he would have done against the specific prayer for an injunction; but this is not true of the judicial writ, which is used for the purpose of enforcing the decree of the court, and it may be issued under the general prayer for relief.

The entire frame and prayer of Hale's, as well as Rector's bill, is to have the judgments at law, and all the claims of title set up by other parties, declared to be void, to have his title defined and enforced, and the judicial writ, which is simply a decretal order enforcing the rights of the complainants, is granted as a necessary consequence of the decree.

It is, therefore, considered that the decree of the Hot Spring circuit court be, and the same is hereby set aside; that the judgments at law, and all claims of title made by parties to this suit, except as hereinafter specified, be declared to be void; that each and all of the parties to this suit, be and are decreed to have a possessory right and title to the respective improvements made by them, as against each other; that each party pay his own costs, and that all necessary orders be made to enforce this decree.

It is, therefore, considered that the decree of the Hot Spring circuit court be, and the same is hereby set aside.

And, it is further ordered, that each and all of the parties to this suit, be decreed to have title to the respective improvements made by them, as against all parties but the United States, and that all parties be and are inhibited from enforcing the judgments at law, and that each party pay his own costs.

McCLURE, J., dissenting, says:

The view I take of this case renders it unnecessary for me to discuss the rights of any of the claimants to the Hot Springs. If my findings had been in accordance with the majority, I would have been compelled to dissent from so much of the decree, as perpetually enjoins Gaines from enforcing his judgment at law.

The heirs of Belding, who are represented by Gaines, prior to 1855, commenced an action of ejectment against Hale and Rector, and certain tenants holding under them, in the Hot Spring circuit court.

At the hearing in the circuit court, the judgment was against the Belding heirs, and seems to have been based upon the ground, that as the act of 20th April, 1832, reserved these lands from sale, the acts of the executive department in permitting their entry were void.

The Belding heirs appealed from this judgment, and at the January term, 1855, this court reversed the judgment of the Hot Spring circuit court, and remanded the same for further proceedings in accordance with the opinion of this court. At the re-hearing in the circuit court, Gaines obtained a judgment in ejectment. From this judgment Hale appealed to this court. At the July term, 1857, that judgment was affirmed by this court. By a writ of error the case was taken to the Supreme Court of the United States, and at the December term, 1859, that court affirmed the judgment of this court.—(*22 Howard, 144.*) Immediately after the affirmation of the judgment of this court, by the Supreme Court of the United States, Hale and Rector filed separate bills in the Hot Spring circuit court, setting out at length the nature of their occupancy of the Hot Springs and the character of their respective claims, and asked that Gaines *et al.*, be enjoined from enforcing the judgment in ejectment. Hale, in his bill, sets up in substance, that Rector and the Belding heirs, acquired all their evidences of title with a full knowledge of all his legal and equitable rights, and asks that all such title be declared void as to them, and in trust for himself, and asks for a decree, vesting the S. W. ¼ of section 33, town, 2 south, range 19 west, in fee simple in himself and heirs. He concluded his bill with a prayer for an injunction against Gaines and Rector *et als.*, commanding them and each of them, to desist and refrain from proceeding to have any writs of restitution or writs of possession, or mandate of any kind, of and concerning the possession of the land aforesaid, issued or in any manner executed against your orator, or any of the tenants holding under him, until the final determination of this suit, and that they be perpetually enjoined. Rector, sets up in substance,

that Hale never acquired any right under the act of 1814, and that his New Madrid location intervened before the Belding heirs acquired any rights, legal or equitable, and concluded his bill with a prayer, that Gaines may be enjoined from enforcing the judgment obtained in the action of ejectment; or suing out process to obtain possession of the premises covered by the New Madrid location, and that the certificate and pre-emption of Belding's heirs be declared invalid, so far as they interfere with his said location. And that the pre-emption claim of Percifull, held by Hale, and the Cherokee certificate, attempted to be located by said Hale, be declared null and void, and that he be enjoined from setting up any right or title to the said Springs in virtue of either, and that by a final decree, that all clouds may be removed from his title to the said Hot Springs, etc. At the hearing, the cases of Rector and Hale were consolidated by agreement of the parties.

Gaines and the heirs of Belding filed their answer to the bills of Rector and Hale, wherein they deny, emphatically, that Hale ever acquired any legal or valid right or claim to the lands, including said Hot Springs, from Percifull or any other person, or by virtue of the Cherokee location. And in answer to the bill of Rector, Gaines denies that Rector acquired any title to the Hot Springs, by reason of the New Madrid location, on the ground that his location had never been filed with, or approved by the recorder of land titles, as was required by the act of February, 17, 1815. Having thus answered, Gaines protests that said complainants, by their said bills, have not made or presented a case to warrant the relief thereby sought, or any relief in the premises, but that the same, and the matters therein set forth, are insufficient, and they demur in law thereto. The answer concludes with a prayer that the temporary injunction, granted at the filing of the bills, may be dissolved, and that they be allowed to execute the judgment in ejectment, and that said bill be dismissed and respondents discharged.

Hale filed an amended bill wherein he sets up, that the certificate of the register and receiver given to the heirs of Belding, had been recalled and cancelled by the order of the secretary of the Interior. Gaines answers, by saying, that he is advised such an order was made by the secretary of the Interior, but submits that the validity of said entry, or of their right of pre-emption, is in no wise affected or impaired thereby. At the hearing, the circuit court found in favor of the Percifull claim, held by Hale, and as to Rector, in favor of the New Madrid location, for so much of his claim, as is not included within the south-west quarter of section thirty-three, town, two south, range nineteen west, and granted a perpetual injunction as against the Belding heirs, from enforcing or proceeding under the judgment in ejectment. From this decree, Gaines appealed, and Rector appealed from so much of the decree, as in any way interferes with the New Madrid location, or any part thereof, which lessens the New Madrid location, about forty or fifty acres.

As to Hale's claim, the majority of the court are of the opinion, that he acquired no right under the pre-emption act of 1814, and that even if he had done so, that he has failed to establish his right before the register and receiver of the land office, who are the officers before whom these proceeding must be had.

As to Rector's claim, the majority are of the opinion that the New Madrid certificates could not be located on the land in controversy in 1819, because such certificates could only be located on lands, the sale of which *was authorized by law;* that it could not be located on the Hot Springs in 1838, because of the lands having been reserved by the act of May 29, 1832; and in disposing of their claims, the majority remark, that "neither Hale or Rector have any rights, which measured by the acts of Congress, have as yet matured into either a legal or equitable title to the land." This finding, of course, fully authorized the reversal of the decree in the circuit court. But

now comes the strange, and to me, incomprehensible part of the decision.

Instead of dismissing the bill and dissolving the injunction, the majority of the court, of its own volition, attacks the judgment at law obtained by Gaines, and which it is nowhere pretended, either by Hale or Rector, is either void or voidable, on the ground of accident, mistake or fraud, and, upon a mere question at law, reverses the decision, not only of this court, but the Supreme Court of the United States. It will be borne in mind that the bill, of both Hale and Rector, alleges that their evidence of title is of such a character that they could not avail themselves of it in the court of law, and that it is upon this ground alone that the portals of a court of equity was entered by these parties. Precisely the same evidence is submitted to this court, on the equity side of this case, so far as Hale and Rector are concerned, as was submitted on the trial, and at the hearing in this court upon the law side of the case,except the fact that the secretary of the Interior ordered the cancellation of the certificate of entry held by Gaines. At the hearing on the equity side of the cause, after the evidence, that was not available in the court of law, the majority found that Hale and Rector have failed to establish any shadow of either a legal or equitable, title to the land in controversy. I am of the opinion that where the bill seeks relief from the court, to which it is addressed, asking a decision as to the superior rights of the complainants, that a court of equity has no power to declare upon the rights of a respondent, who is simply asking to have the bill dismissed with costs, where the court shall have found that the complainants are not entitled to the relief asked. A court of equity only assumes jurisdiction for the purpose of enforcing an *equity*, and if it appear that no equity exists in favor of the complainant, then I am of opinion a court of equity is not authorized to interfere with the judgments of other courts, *on the ground* that a court of law *has committed an error*, and that is what, I conceive, the majority of the court have done in this case. *In Gaines v.*

Hale, (*16 Ark.*, *18*), Judge WALKER says that Hale rests his defense to the action of ejectment upon two grounds:

"*First* That the entry was made before the register and receiver, who had decided against *all* validity of the claim, upon the arbitrary and unauthorized direction of the commissioner of the general land office, in obedience to instructions from the secretary of the Interior." Thus it appears that the question, as to whether the commissioner of the general land office had authority to allow the entry to be made, was fairly and directly presented to the law court, and the court said: "We must, therefore, hold that the first ground of objection to the validity of the entry is not well taken."

The second ground of objection was: "That Belding's heirs failed to make the proof of pre-emption before the 29th day of May, 1831, and that before the passage of the act of July 14, 1832, extending the time within which to prove up pre-emptions claimed, under the act of May 29, 1830, Congress passed the act of April 20, 1832, whereby the land in controversy was wholly withdrawn from the control of the land officers of the government, and that all action of the land officers, in the sale or disposal of the land, is null and void.

In disposing of this question, Judge WALKER says: "That it is unnecessary to discuss the effect of the act of July 14, 1832, upon that of May 19, 1830, or of the act of May 20, 1832, upon the rights of Belding's heirs under these acts, as "the question which they are called upon to decide, is *not* whether Belding's heirs were, in fact, entitled to a pre-emption, but whether, under the state of the case presented before the register and receiver, their action was *extra-judicial and void;*" and, in reply to this proposition, the court say that they "are not void, nor can they be questioned when brought up collaterally for consideration, unless it may possibly be done in a proceeding between the United States and the claimant."

The fair legal presumption is, that all these officers acted within the scope of their lawful duties; and if they have not, I am at a loss to understand by what right Rector and Hale

came in and set them up, when a court of law and a court of equity have both decided that neither of them have any legal or equitable title to the land in dispute.

Again, in *Rector v. Gaines, 19 Ark., 80*, these same questions were presented to this court, and Judge SCOTT, in speaking of the reservation of April 20, 1832, says:

"If this act is operative as against the Belding heirs, the allowance and entry of the land was illegal and void for the want of power in the executive to sell the land in question."

The learned Judge says, following the lead of the Supreme Court of the United States, in *Lytle v. The State, 9 How., 314*, "that the pre-emption right of Belding operates as a prior and intermediate appropriation of the land, on the 29th May, 1830; that the right vested, although it was perfected under the act of July 14, 1832."

The majority of the court are clearly of the opinion, and seem to have come to the conclusion that, even if Hale and Rector had not rights cognizable in a court of law or equity, they would open a court of their own, and not only supervise the law judgments of the Supreme Court of the United States, that had not been attacked for fraud, accident or mistake, but set aside the acts of the officers of the Federal government, not on the ground that Hale or Rector's title was interfered with, but because, in their opinion, the officers were acting beyond the scope of their authority. Yet the majority of the court, in this case, grasp both these questions, and pass upon them with as much gravity as though there were some parties before the court whose rights would be sacrificed if this judgment of law should remain longer without emasculation.

It is a well established principle in law, that the complainant in equity must show a title to the thing he claims, *not in some other person*, but in himself. A defendant only comes into a court of equity by command of the court—he comes there, not to seek relief, but to answer those matters of which he is charged by the complainant, and it is of these matters only that a court of equity can pronounce, when it has been

ascertained that the complainant is not entitled to the relief asked. It does not follow from this that a court of equity has jurisdiction to declare that a defendant has no rights, unless the defendant has asked the court to pass upon them, and this, Gaines has never asked of this court. His plea has been that neither Hale or Rector had any legal or equitable title, and his prayer has been that the injunction be dissolved and the bill dismissed. His title has already been passed upon by a court of competent authority, over whose judgment a court of equity has no supervisory power, in the absence of fraud, accident or mistake.

In the case of *Gaines et al. v. Nicholson*, (*9 How. 356.*) an action of ejectment was pending to try the legal title to a tract of land in Mississippi; the defendants filed a bill, on the equity side of the court, praying for a perpetual injunction, upon the ground that the plaintiff in ejectment had obtained a patent from the United States, by fraud and misrepresentation. The State of Mississippi acquired a right to every sixteenth section, for school purposes, by virtue of certain acts of Congress, and the trustees were authorized to lease the same for the benefit of schools. By the supplemental articles of treaty between the United States and the Choctaw Nation, one section of land was allowed to D. W. Wall *et al.* Wall assigned his interest to Gaines *et al.*, who represented to the President that Wall, at the date of the treaty, resided upon and had made improvements thereon, thus bringing the particular parcel of land within the strict terms of the treaty, and presented a case paramount to any that could be pretended in the State or township, as a school reservation, and the patent issued to Gaines *et al.* Armed with this patent, Gaines *et al.*, commenced an action of ejectment against the school trustees and the tenants holding under them. The defendants in ejectment, filed their bill, alleging misrepresentation and fraud on the part of Gaines *et al.*, in procuring the patent. On the hearing in the circuit court of the United States, a decree was entered that Gaines *et al.*, within sixty days, quit claim and relinquish to said

school trustees and their successors in office, and that in default, the clerk is hereby appointed a commissioner to make said conveyance. From this decree, Gaines *et al.*, appealed to the Supreme Court of the United States, and Justice NELSON, in disposing of the case says: "On looking into the answer and proof, there does not appear any evidence of fraud or imposition, nor anything to rebut the presumption, which we must assume till the contrary is shown, that the patent was issued with a full knowledge of all the circumstances upon which the complainants rely to invalidate it. Fraud is not to be presumed, and the burden therefore lay upon the complainant to establish it; and having failed, all ground for the equitable relief *failed also*, and the court below should have dismissed the bill, leaving the parties to the settlement of their rights in the action at law, as in the absence of fraud or imposition, in the issuing of the patent, the question was one of conflicting title and purely a question of law."

It strikes me that the doctrine laid down in the above case is applicable to the case before this court. As has been stated before, neither fraud, accident, mistake or imposition is charged or proven against Gaines, in procuring the certificate under which the action of ejectment was prosecuted. After patiently hearing the evidence adduced by Hale and Rector, this court, on the law and equity side, has declared that neither of them are entitled to a legal or equitable title to the land. Failing to establish an equity known to the laws of the State or United States, I am forced to the conclusion that the contest between the parties was a conflict of title, and therefore *purely a question of law*, arising under the pre-emption act of 1814, the New Madrid act of 1815, and the act of May 29, 1830, and having so failed, the conclusion, to my mind, is irresistible that this court can in no manner *review*, correct *or revise* the judgment of a law court upon this point, *even if it was erroneous.* In the case of *Richardson v. The city of Baltimore*, (*8 Gill. 433*,) the court held that "a court of equity has no right to interfere to arrest the proceedings of a court of law on the ground of *legal*

error, and that it has no *supervisory power over courts of law*, and that to justify the interposition of equity, there must be some inequitable advantage taken, which would render it unconscientious in the party obtaining it, to enforce the payment." It is not charged that any inequitable advantage was obtained by Gaines, over any of the parties in possession of the land, and if it had been charged, the majority of the court affirm that it was not inequitable. *Marsh v. Edgerton*, (*1 Chand. Wis. 198;*) *Marine Ins. Co. v. Hodson*, (*7 Cranch, 335.*) In *Hendrickson v. Hincklay*, (*16 How. 445*,) the object of the bill was to obtain relief against a judgment at law, and Justice CURTIS, in delivering the opinion of the court, says:

"A court of equity does not interfere with a judgment at law, *unless* the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense." (*7 Cranch. 33;*) *5 How. 192; 14 How. 584.*

This is the burthen of the bills of Rector and Hale. They assert, in order to enter a court of equity, that they could not avail themselves of their defense in the court of law, on the ground that an equitable title could not prevail against the legal, in the law court, where the trial was had. If then this court find that Hale and Rector had no equitable title, I am unable to see by what authority the majority attacks the judgment at law, in favor of Gaines. It seems to me that if Hale and Rector have no equities, they have no reason to complain of the judgment at law any more than any other citizen of the State.

Rector and Hale were sued in a court of law, and claim to have a legal defense, but their evidence was of such a character that it could only be made available in a court of equity. In *Pollock v. Gilbert*' (*16 Georgia, 402*;) in a case involving the principle just stated, it was held, that "when the jurisdiction of the court has once attached to a cause, the decision is final as to all matters *within* its *cognizance*, and operates as a bar to subsequent litigation in the same or any other tribunal, *and no*

degree of wrong or injustice, in the determination of a case at law, will entitle the injured party to resort to equity, unless there is some special ground for its interposition." In *Hempstead et al. v. Watkins*, (*6 Ark. 317.*) this court held, that "if a party defends at law, (and Hale and Rector did), chancery will not take cognizance of the cause, and re-hear it upon the same state of facts upon which it was tried at law, without the addition of any equitable circumstances (and there are none in this instance) to give jurisdiction, but will respect the judgment of a court of competent jurisdiction, already pronounced upon the facts." In *Sturdy v. Jackoway*, (*4 Wallace, 174,*) the Supreme Court of the United States held, that an action of ejectment, under the statute of Arkansas, "is a valid legal bar to a like action, subsequently instituted between the same parties for the same lands or premises, involving the same identical title and rights to the possession of such land." In *Van Wyck v. Seward*, (*1 Edwards' Chancery, 332,*) Van Wyck commenced an action of ejectment against Seward. At the trial, Van Wyck, in order to defeat the deed of Seward, attempted to establish fraud between Seward and his vendor, and in this he failed. Whereupon, he filed his bill, alleging the same facts and fraud that were presented to the court of law, and asked the interposition of a court of equity, and the chancellor said:

"I know no rule or principle by which a party can be permitted to litigate the matter over again, with the former judgment standing against him in full force, even though it should be an action of ejectment."

An examination of the case of *Gaines v. Hale* (*16 Ark. 11*), will show that Hale, in the action at law, set up:

1. That the certificate of entry relied on by Gaines is a mere nullity, and conferred no right to recover the land in question.

2. That the land was reserved by the act of April 20, 1832, for the future disposal of the United States, and the action of the register and receiver, in allowing the entry, was without authority of law, as fully as though they had acted without the instruction of the secretary.

3. That the pre-emption act of May 29, 1830, remained in force but one year, and that in as much as the heirs of Belding did not prove their cultivation, etc., within that year, that the certificate is no evidence of title.

It will be borne in mind that these are the precise questions that the majority now sit in review upon, and in which they say, that not only this court has twice erred upon, but that the Supreme Court of the United States has committed the same blunder, and this they do without having any equity alleged or evidence presented. In *Smith v. McIver*, (*9 Wheaton, 534*,) Chief Justice MARSHALL said, "If the grant be void * * * * it is void at law; if it be true that North Carolina had no power to issue the patents * * * a court of law is as capable of deciding on that as a court of equity * * *. The questions in these cases have all been decided at law, and the party can have no right to bring them on again before a court of chancery. What, were a court of equity, in a case of concurrent jurisdiction, to try a cause already tried at law; without the addition of any equitable circumstance to give jurisdiction, it would act as an appellate court, to affirm or reverse a judgment *already* rendered on the same circumstances, by a competent tribunal." Now, if it be true, as the majority of the court announce, that Hale and Rector have no legal or equitable title to the land, does it not necessarily follow as a conclusion of law and logic, that this court has no power to adjudicate upon a question of *law* that has been passed upon in a law court?

I have heretofore stated that I was of opinion that when this court had declared that neither Hale or Rector had a legal or equitable title, that the rights of the parties ought to be determined by the pre-emption act of 1814, the New Madrid act of 1815, and the pre-emption act of 1830. It is hardly necessary to state that the determination of the rights of the respective parties, under these different acts, are cognizable in a court of law, especially after a court of equity has determined that none of the parties are entitled to relief in that court. In

Reeves v. Cooper, (*1 Beasly, N. J. 224*,) the object of the bill was to restrain the enforcement of a judgment at law, and the court, after declaring that they were of opinion that there was no equity in the bill, remarks that, "This court is asked to correct alleged error in the judgment and proceedings of the Supreme Court, on the ground that the proceedings are erroneous and contrary to law." And, in reply to that proposition, and such I consider to be the nature of the jurisdiction attempted to be exercised by this court, the chancellor said: "It is true that a court of equity will sometimes interfere and grant relief against a judgment obtained by *fraud* or *imposition*, and also against a judgment of *extraordinary hardship*, as where the defendant, in the court at law, was ignorant of the fact upon which he relies for relief pending the suit, or it could not have been received as a defense, or he was prevented from availing himself of the defense by fraud or accident, or by the act of the opposite party, etc., (*6 Johns. Chancy. 86, 2 Green. Ch'y. 168*,) but every one of the questions, presented by this bill, are questions more appropriately belonging to law than equity. The questions involved are all pure questions of law, and the court has the power to give the party adequate relief, if he is entitled to it." And the court declined to adjudicate upon a question of law that had been passed upon by another court, and dissolved the injunction, and such, I conceive, is what ought to be done in this case. I am of opinion that an injunction is a secondary process, except it be for the prevention of torts, and is only to be granted in aid of some primary equity, which *must be disclosed in the same bill that prays it.* (*Washington v. Emery, 4 Jones Equity N. C. 29.*) If there is any equity in the bills of either Rector or Hale, the majority have been unable to find it. I am aware that when the majority of the court declared that neither Hale or Rector had any rights, which, measured by the acts of Congress, have as yet matured into either a legal or equitable title to the land, that they asserted that it did not follow from that fact that they had no rights or privileges whatever. I am compelled to con-

fess my obtuseness as to the distinction so finely drawn, as I have no knowledge of rights brought before a court of justice, that do not come under the head of legal or equitable right. All the right that Hale claims, he says he derives by virtue of the pre-emption made by Percifull, under the act of 1814, and the Cherokee location. Rector claims no rights except such as flow directly from the New Madrid act of 1815. Neither Hale or Rector claim any right to the possession or occupancy of the Hot Springs, under or by virtue of *any other right* or claim. If any equities have arisen to either of them they must have grown out of some act of Congress, and as the majority have not pointed out the particular act under which these rights, which are neither legal or equitable, are derived, and which, in their opinion, require protection to satisfy the conscience of a court when the relief granted is not asked. I may be pardoned for expressing an opinion, that these extraordinary rights are confined to the *lex non scripta* of this particular case. I do not profess to be even conversant with the principles of chancery law, but it appears to me that the object of the bills of both Hale and Rector, was to quiet their title to the Hot Springs, and if I am correct in this respect, then it appears to me that the principle of law laid down in the case of *Nicoll v. The Trustees of Huntington* (*1 Johns. Chancery 166*,) is applicable to the case now before the court. Nicoll, in the case just cited, claimed the lands in controversy by virtue of a patent issued in 1688, and asserted that owing to great changes that had taken place in the beach, between the bay and the ocean, since the patent was issued, that certain guts or inlets, then well known, cannot now be located without the testimony of aged witnesses, and prayed that this title might be established by a decree of the court, and that the trustees of Huntington be enjoined from entering on the lands and taking the profits, etc.

The trustees of Huntington admitted the granting of the patent to Nicoll, but insisted that the lands in controversy were not included therein. Nicoll had maintained several

actions of trespass against parties entering upon the lands in question, upon his continued possession of over one hundred years; but, inasmuch as the lands had become valuable, and inasmuch as the trustees of Huntington persisted in their claim, and were encouraging others to enter upon and carry away grass, etc., in despite of his title, he would be compelled to abandon his rights, or be led into a multiplicity of suits and great expense; therefore, he insisted that he had a right to demand the interposition of a court of equity, on account of the difficulties attending a remedy at law. He further claimed, that if it be found that the trustees had no title, that he, having shown a long and continuous possession, must prevail; and asked that an issue be so framed as to inquire into the title of the trustees, as well as that of himself, and that if neither party had a title, the property was in the State, as if the title was in the State, it would have weight in awarding the costs.

In 1811, a feigned issue was made up, and a verdict was found against the title of Nicoll, and the judge certified that he was of the opinion, and so declared to the jury at the trial, that neither Nicoll or the trustees had any title to the premises. A petition for a re-hearing was filed; and among other reasons, that the feigned issue, as directed, had only brought the title of Nicoll in question, without, at the same time, inquiring into the title of the trustees. The re-hearing was granted, and it is upon the disposition of the questions thus presented, that I find principles of law that are applicable to this case.

The chancellor, in disposing of the case, says: "The foundation of the bill is the legal right of the plaintiff (Nicoll) to the lands in dispute, and his claim to the assistance of this court, arises from the peculiar state of the property and the oppressive nature of the litigation which it involves. The case states a proper ground of equity jurisdiction, and if the title, Nicoll sets up, was sufficiently established at law, *before he came here, or was since established to the satisfaction of the court*, either upon its own view of the testimony, or by verdict upon one or more issues to be awarded at its discretion, it would

then be the duty of the court to declare that right by decree, and protect it by injunction. But, on the other hand, if the title of Nicoll fails on investigation, it would then be useless to put the parties to the expense of another feigned issue."

After reviewing the evidence and claim of title of Nicoll, the chancellor arrives at the conclusion that the land in controversy was not included within the patent upon which Nicoll based his claim to possession and title, and after having thus found, says: "The result is, that possession must be adjudged to belong to, and to be in the party who has the right; and, as Nicoll has no title, he has no lawful possession, and the equity of his bill has totally failed."

In disposing of the proposition to have the court pass upon the title of the trustees of Huntington, and in the event it should be found that they had no title, that the previous possession of Nicoll ought to prevail as to possession, the chancellor said: "It cannot be material whether the title set up by the trustees be good or not, as to the point of the dismissal of the bill. If the trustees have no title, yet the bill must be dismissed, because Nicoll *has no title*, and, consequently, *no equity to support his case.*"

It will be borne in mind that in the case now before the court, Gaines had established a legal title to the Hot Springs before the only forum authorized to pass upon titles of a legal character. I now submit that Hale and Rector, having come into a court of equity, and it having found against them, that they now stand in the position of a stranger, and are not entitled to any relief, by reason of their present possession, as it is not accompanied by any legal or lawful right.

In March, of 1850, the alcalde of San Francisco made a grant of the lots in controversy, and in December, of the same year, the Supreme Court of that State held, in *Woodworth v. Fulton, 4 Cal.*, that all such grants were void for want of authority, and were not evidence of title. By an act of Congress, of March, 1853, town sites were authorized on public lands, to be entered in the land office, for the use and benefit

of the occupants thereof. Treadwell purchased, in July, 1853, of one McHenry, who had entered the same at the land office. In October, 1853, the same question was submitted to the Supreme Court of that State, and by some improper means, Payne ascertained that the opinion of the court had been prepared in the case of *Cotas v. Rasin, 3 Cal.*, wherein the former ruling of the court, as to the validity of the alcalde's titles, was overruled.

With this knowledge in his possession, and before the rendition of the decision of the court, Payne purchased the title held by the grantee of the alcade, for a nominal sum. At the time of this purchase, Treadwell was improving the lots in question, and Payne had full knowledge that such improvements were being made. At the hearing, Treadwell attempted to set up that the unlawful discovery of the forthcoming decision was not only a fraud as to the person from whom Payne purchased, but a fraud upon his (Treadwell's) rights as a citizen to have the law pronounced by the court for all at the same time. The court said, in reply to that proposition, that the title was either in Payne or Payne's vendor; and that so far as Treadwell was concerned, it was a matter of little consequence to him, whether Payne or Payne's vendor held the title, and that so long as the vendor did not complain of the fraud, that a stranger to the title could not avail himself of a fraud. And this I say of the cancellation of the certificate by the secretary of the Interior: That so long as the government does not complain, it is a matter of little consequence, to Hale and Rector, whether the certificate is cancelled or not, if they had no right that would be advanced thereby, and this court has declared they had none.

If Hale and Rector have made valuable improvements upon the land in controversy, I cannot see that this alters the equity of this case. Hale made his improvements under the belief, that the pre-emption of Percifull under the act of 1814, or his Cherokee location, would protect him in doing so. Rector made his improvement under the belief that his New Madrid

location would protect him in doing so. Gaines made his improvement under the belief that the pre-emption act of 1830, would protect him; and I cannot conceive that because Hale and Rector were mistaken as to their rights, that their mistake can be construed into an equity, as against one holding an adjudicated legal title. It may be said, that this legal title is cancelled, and in fact the majority of the court do say that, "the action of the secretary of the Interior, in ordering the certificate cancelled, was proper, and the judgment at law based upon it must fall." It is barely possible that a cancellation of a patent or certificate, by the mere order of the secretary of the Interior, would destroy the force and effect of a judgment at law, but I have been unable to find an instance in which this doctrine has ever been recognized by any of the courts of the Union. In my opinion, the power of that officer to cancel certificates or patents, must be exercised within the scope of his authority, and any citizen, whose interests are affected thereby, has the right to have the *courts* adjudicate as to whether the cancellation was a lawful or unlawful exercise of power: and until this has been done, I apprehend no court, professing to exercise an equity jurisdiction, would accept the action of the secretary of the Interior, in this respect, as forever settling the rights of parties, dealing with the government, and as Gaines, as yet, has not been allowed to enter a forum for that purpose, nor can he until some attempt shall be made by the government or some one holding a legal title therefrom, to interfere with his possession and occupation. In *Hale v. Gaines*, (*22 How., 160,*) Justice CATRON says: "It has been earnestly pressed on our consideration that the entry of Belding's heirs is void, because the land it covers was not subject to entry by an occupying claimant or any one else, after the act of April 20, 1832, had reserved it from sale." In reply to this proposition he says: "The plaintiff, in error, (Hale) is not in a condition to draw in question the validity of Belding's entry * * * being a trespasser, without title in himself, he cannot be heard to set up an outstanding title in the gov-

ernment to defeat the action. If Hale and Rector would not be heard by the Supreme Court of the United States, to set up a title in the government, does it not also follow, that the same parties should not be allowed to plead the cancellation of the certificate, by the secretary of the Interior? What is this but another way of pleading title in the government? If Hale and Rector have no title from the government, and the majority say they have not, what difference does it make to them, or what equity arises in their favor, even if the certificate of purchase, given the Belding heirs, was legally cancelled? Does the cancellation of that certificate confer any right of possession on Rector or Hale? I think not. In *Groom v. Hill* (*9 Mo. 322*), the question arose: whether the commissioner of the general land office had the power to cancel a certificate, in a case where fraud or mistake was not alleged, and the court said: "It is probably the duty of the commissioner to revise the proceedings of the register and receiver and vacate entries which may have been illegally made, and thereby arrest the completion of a title, *originating in fraud, mistake or violation of law*, but until his action assumes a shape recognized by law, it cannot effect the previous sale; that "the sale stands for what it is worth, at the time it was made, and cannot be *vitiated or annulled* by any subsequent *ex parte* proceedings of officers, provided, it was legal and valid at the time it was made, (now mark what the court says,) and of its *legality and validity, the courts must necessarily be the judge.*" Neither fraud or mistake is alleged in this case, and as to the entry and certificate being in "violation of law," Justice CATRON, (*22 How. 160*,) says, that, "Hale is not in a condition to draw in question the validity of Belding's entry, being a trespasser, without title in himself." If Hale and Rector cannot draw in question the validity of Belding's entry, the cancellation of the certificate cuts a very small figure in this case. The pleading this cancellation by the secretary of the Interior is but another mode of pleading title in the government, and this, the Supreme Court of the United States say, cannot be done, and it is upon

authority of this character, that I am compelled to differ with the majority on this point. Whether Gaines has any title, as against the government, is a question that, in my opinion, is not before the court at this time, and for this reason, I express no opinion upon that subject. Nor am I aware of any law, under which State courts obtain or acquire authority or jurisdiction to pass upon the title, as between the United States and one of its citizens, in a proceeding in which such a finding is not necessary to the determination of the rights of the complainants, and I am clearly of opinion, that all such findings are mere gratuities, that can never amount to the force and effect of a judgment.

The majority of the court are of opinion that they are authorized to grant a perpetual injunction, under the prayer for general relief, in the absence of a prayer for specific relief. I am compelled to dissent from their conclusion in this respect, and am of opinion, that, to entitle a complainant to relief, under the general prayer, different from that specifically prayed, the allegations relied upon must not only be such as to afford ground for the relief sought, but they must have been introduced, into the bill, *for the purpose* of showing a claim to the relief, *and not for the mere purpose of corroboratiny the complainant's right to the specific relief prayed*, and that in all cases when it is doubtful with the complainant, or those who advise him, whether he is entitled to the specific relief prayed, that the bill ought to be so framed, that if one species of relief sought is denied, another may be granted. The prayer for specific relief in Hale's bill is, that Rector and Gaines may be enjoined from enforcing any and all writs of possession, *until the determination of this suit*, and such other relief as may be consistent with his rights, *upon the adjudication of his title.* It will be observed that the prayer of Hale is, that the injunction may continue *until the determination of this suit*, and that he may receive such relief as may be consistent with his rights, *upon the adjudication of his title.* He asks for no protection, save such as may be due him upon the adjudication of his

title. His title has been adjudicated, and the majority say he has none; now what relief is he entitled to? The specific prayer of Rector's bill is, that Gaines may be enjoined from enforcing his judgment in ejectment, and that the certificate held by Belding's heirs be declared null and void; that the pre-emption claim of Percifull, and the Cherokee certificate, held by Hale, declared void; that Gaines and Hale be enjoined from setting up any right or title to said Springs, and that, by a decree, all clouds may be removed from his title to the said Hot Springs, and such other relief as may be consistent with the nature of his case. What relief would be consistent with the nature of a case that has no standing in a court of law or equity? To the special relief prayed for, by either Hale or Rector, the majority say, Hale and Rector are not entitled to it, upon the ground presented to the court. But they say that, "settlers making valuable improvements on public lands have not been regarded as trespassers; that this State, by statute, treats and protects such improvements as property." The protection afforded by the State to this class of improvements, to which the court alludes, is found under the title of *ejectment*, which says: "The action of ejectment may also be maintained, where the plaintiff claims possession of the premises, under or by virtue of:

"*First*, An entry made with the register and receiver of the proper land office of the United States.

Second, A pre-emption right under the laws of the United States.

Third, Where an improvement has been made by him on any other public lands of the United States, whether the same has been surveyed or not, and where any other person, other than those to whom the right of action is given by the preceding clauses of this section, is in possession of such improvement."

This section of our statute *does not* protect the improvements of either Hale or Rector, because it expressly provides that the claim of improvement *cannot* be set up against "an entry

made with the register and receiver of the proper land office, or a pre-emption right under the laws of the United States." The Belding heirs claim under and by virtue of a judgment in ejectment, based on a "certificate of entry with the register and receiver of the proper land office," which certificate is based upon a "pre-emption right under the law of the United States."

This case then comes within the rule laid down in the case of *Groom v. Hill*, (*9 Mo. 322*,) where the court declared, under a state of circumstances precisely similar to those in this case, that, "the sale must stand for what it is worth at the time it was made, and cannot be *vitiated and annulled* by any subsequent *ex parte* proceedings of officers, provided it was legal and valid at the time it was made; and of its *legality and validity*, the court must necessarily be the judge." It is hardly necessary for me to state, that neither Hale nor Rector can raise the question of the legality and validity of the entry, after the court had declared that neither of them have "any rights which, measured by the acts of Congress, have matured into a legal or equitable title." In the case of *Frisbie v. Whitney*, (*9 Wal. 187*), the Supreme Court of the United States held, "under the pre-emption laws of the United States, the pre-emptor acquires no vested rights, *until the money has been paid*, and the receipt of the proper land officer given to the purchaser." The Belding heirs have *paid the money*, and obtained the receipt of the proper land officer. This, the Supreme Court of the United States, in the latest decision on the question says, constitutes a vested right. Has the court any authority to declare that this vested right can be adjudged a nullity in a proceeding in which the United States are not a party, and at the instance of men, the majority of this court say, who have no legal or equitable rights? I am disposed to doubt it. The bill no where alludes to any right of the parties under this statute, nor was this suit commenced to retain *possession* under the statute just quoted, nor can an action under that statute be brought in a court of equity.

There is no prayer for an injunction, that in the event the court should find the title is in the United States, as was the case in *Nicoll v. The Trustees of Huntington*, and if there had been, I could not have consented to grant it on the motion of a party that the court declares have neither a legal or equitable title to the land. It is a rule of courts of justice to disregard the right of a party, under a statute of limitation, unless the party desiring to avail himself of its benefit, shall plead the statute. Courts of equity, ought never to grope around among the statutes, to find a statutory right for the benefit of a party that waived all rights he might have had under it, in the court below. If Hale or Rector were entitled to any benefit or right by virtue of this provision of the statute, (a thing I do not concede) they ought to have plead it as fully as they would have pleaded a statute of limitations. The only excuse or authority that the majority of the court pretend to give, for invading the judgment at law, is, that the *certificate* has been cancelled, upon which the judgment was obtained. How this court is advised that the judgment at law was based upon this certificate alone, they do not state in their opinion.

Our statute allowed the action of ejectment to be maintained, upon an entry with the register and receiver of the land office, and also upon a pre-emption made under the laws of the United States. Now the evidence of pre-emption, as well as that of the certificate of the register and receiver of the land office, seems to have been submitted to the law court.

The register and receiver, in their report to the commissioner of the general land office, both agree that Belding was in possession of the Hot Springs, and had a portion of the land in controversy in cultivation, as required by the act of 1830, and the only question of difference between them was as to whether Belding was in possession in his *own* right, or the right of another. The presumption of the law is, that the judgment was authorized by the evidence, and how this court can determine whether the judgment was rendered upon the *certificate*,

or the evidence of pre-emption, is more than I am able to determine.

It will be borne in mind that Gaines only submits his evidence of title in response to the bills of Hale and Rector. I admit that they were entitled to a discovery of the title of Gaines, *so far as was necessary* to establish the superiority of their own, but when this discovery had been made, and the complainants had failed to show, either a legal or equitable title to the land in dispute, I deny their right, or of this court, to inquire into the title of a defendant, disclosed under such circumstances, (*4 Bouv. Inst., 111*).

If the complainants are entitled to any relief, it is upon such equities as they may have acquired under the different acts of Congress, and not under the law of this State, regulating the action of ejectment. They have pleaded no rights under the statute; they have relied on the acts of Congress for possession and title, and by these acts they must stand or fall.

Upon the findings, in relation to the title of Hale and Rector by the majority, I am of the opinion that the injunction ought to be dissolved, and the bill dismissed. I am also of the opinion that the decree as to costs is palpably erroneous.

BOWEN, J., dissenting, says:

The opinion of the majority of the court, in this case, contains the following:

"Counsel for Rector have filed two briefs, of fifty-eight and sixty-eight pages respectively, in which they have insisted that the Supreme Court of the United States, commencing with the case of *Bagnell v. Broderick*, down to the case of *Rector v. Ashley*, have omitted to notice the act of April 29, 1816, and its effect upon the act of February, 7, 1815. If this were true, it would certainly be a most remarkable case of judicial oversight. A careful examination of this act, however, will show that counsel are mistaken, and that the practical effect of the act of 1816, so far as it changes or modifies the act of 1815, is

simply to abolish the office of principal deputy surveyor and all other surveyors' offices that had previously been established," etc.

My own success, in the direction of finding any case decided by the Supreme Court of the United States, in which the act of 1816 has been construed, has not been greater than that of the counsel referred to. Why the act of 1816 has never been noticed, it is not my province to determine. That it has not, I am very clear; and whether from judicial oversight, the oversight of counsel, or from the state of facts in the cases determined, rendering it prudent for the parties seeking to perfect or quiet their titles, not to press a construction of that act, the plain, unvarnished fact stands forth in bold relief that the Supreme Court of the United States never has construed it. I am unwilling to indulge in the presumption that, in the determination of the various cases under the act of 1815, that court silently passed over the act of 1816, on the ground that it would be taken for granted that the non-effect of the latter on the former act was so patent as to render it a work of supererogation on its part to even refer to the latter act. I am equally unwilling to accept as authority the decisions of any court, simply because they belong to the same general class, when it is clearly apparent that the case at bar presents questions not even noticed in former adjudications. The rule on this point is so old and well established that it need only be mentioned to be recognized.

The New Madrid act of February 17, 1815, required, among other things, a return of the plat of location to the recorder, together with notice, etc.

The act of April 29, 1816, provided that "all plats of the surveys, *and all other papers and documents* pertaining to, or which did pertain to, the office of surveyor general, under the Spanish government, within the limits of the territory of Missouri, or to the office of principal deputy surveyor for said territory, or to the office of surveyor general, *or to any office hereafter established or authorized for the purpose of executing or*

RECORDING *surveys of lands* within the limits of the territories of Missouri and Illinois, shall be delivered to the surveyor of lands of the United States, authorized to be appointed by this act; and any plat of survey, duly certified by said surveyor, shall be admitted as evidence in any of the courts of the United States or territories thereof." And the third section provides, that "*any act* of Congress heretofore passed that is repugnant to, or inconsistent with, any of the provisions of this act be, and the same is hereby repealed."

The act of 1815 required the surveyor to return a notice and plat to the recorder. The act of 1816 directed him to make out general and *particular* plats of all lands surveyed, and to send them to the registers and receivers of the land office, and to the commissioner of the general land office. I cannot, therefore, agree with the court, in its position, that "the act of 1816, so far as it changes or modifies the act of 1815, is simply to abolish the office of principal deputy surveyor and all other surveyor's offices that had previously been established."

The office of recorder of land titles was certainly included in the sweeping sentence, "or to any office heretofore established," etc., "for the purpose of executing or *recording* surveys," etc., as used in the act of 1816. The notice and plat required to be returned to the recorder, by the act of 1815, are certainly embraced in the term "all plats of the surveys, *and all other papers and documents*," as used in the act of 1816.

Thus it will be seen that the act of 1816 not only abolished the offices of principal deputy and other surveyors, but likewise created new and different depositories for plats, surveys *and other documents*, and provided new channels through which all plats and surveys found their way to the registers' and receivers' offices, and the head of the land department of the United States, the commissioners' office; and whatever was inconsistent with or repugnant to these provisions, in *any* act of Congress, was expressly repealed.

If these views should eventually be held correct, their bear-

ing, upon the rights of the parties here, would be of immense importance; for, from a most careful consideration of this case, I am much inclined to believe that, adopting the construction herein given, as to the effect of the act of 1816 on that of 1815, Rector fairly establishes his claim to the property in controversy, by showing a compliance, not only on his part, but also on the part of the officers of the government, with the provisions of the statutes. The wide difference of opinion on this one point, however, existing here, renders it unnecessary for me to take up the other points in detail.

SCOTT *v.* CANTRELL.

VENDORS—*When liable for taxes.*—A plea or answer by the maker of a note, given in part consideration for the purchase of lands, that indorsee of the note, knew at the time of the indorsement that there was a controversy between the vendor and vendee (the maker and indorser), concerning who should pay the taxes on the lands so sold—should aver such a character of contract between the vendor and vendee, as would entitle the vendee to a deed with covenants of general warranty or a bond to that effect.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Watkins & Rose, for appellant.

Clark & Williams, for appellee.

WILSHIRE, C. J.

The appellee, William A. Cantrell, brought suit against

Charles G. Scott and Noah H. Badgett, on a note, bearing date May 30, 1868, payable on the first day of September, 1869, for the sum of $2,280, with interest at ten per cent. per annum until paid. The appellant was sued as maker, and Badgett as the indorser of the note to Cantrell.

The appellant answered separately, and averred substantially as follows: That the note in suit was executed by him to his co-defendant, Badgett, in part consideration for the purchase, by him of Badgett, of certain real estate in the city of Little Rock, known as the "Fowler property;" that said Badgett was, at the date of the purchase, and for more than six months theretofore, the owner of said property; that when he purchased said property from Badgett, there was, by law, chargeable thereon, the State, county and city taxes, in and for the year 1868; that he applied to said Badgett and requested him to pay the same, which Badgett refused, and that the appellant, in order to prevent the advertisement and sale of said property, paid said taxes, amounting to the sum of $887 40; and that the appellee, when he became the owner or holder of the note, did so with notice of the dispute or controversy then and previously thereto pending between the appellant and Badgett, as to whose duty or obligation it was to pay said taxes.

A demurrer to the answer being sustained, Scott appealed.

We are of opinion that the demurrer was properly sustained. The answer of Scott states generally that he purchased the property, for the payment of which, in part, the note in suit was given. There is no averment in the answer that Badgett made Scott a deed of any kind, and for aught that appears in the transcript of the record before us, Badgett may have made to Scott a quit claim deed, and that the note was made by Scott, in consideration of such a deed. If the contract of purchase between Scott and Badgett was of such a character as to entitle Scott to a deed with covenants of general warranty, or if Badgett had executed such a bond to him, so as to embrace covenants that follow the land, the answer should show it.

Holding, as we do, it is unnecessary to discuss the question raised by the passage of the act approved July 23, 1868, relating to the assessment and collection of taxes for that year.

Judgment affirmed.

HUGHES v. WATT.

SHERIFF'S DEED.—To constitute a good and valid deed under an execution sale, there must be a valid judgment, a sufficient execution and levy, advertisement and sale.

A sheriff's deed, though *prima facie* evidence of the facts recited, yet a party may put the recitals in issue and go behind the deed to show their falsity, and where their falsity is shown, being public records, it effects the sufficiency of the deed and all concerned with notice.

HOMESTEAD.—Plea of *homestead* is a good defense to a possessory action, as against title acquired under execution.

Appeal from Ashley Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Gallagher, *Newton* and *Hempstead*, for appellant.

We submit that where a *fi. fa.* has been levied on particular lands and afterwards a *ven. ex.* is issued, the sheriff can neither levy on or sell any other property than that on which the *fi. fa.* is levied. *Whiting & Clark v. Beebe, 12 Ark. 422; Keith v. Wilson, 3 Metc. (Ky.) 201; Fenno v. Coulter, 14 Ark. 38; Smith v. Hughes, 24 Ill. 270; Holmes v. McIndoe, 20 Wis. 657.* A homestead is not subject to sale under execution. *Gould's Dig. chap. 68, sec. 29.* In ejectment, a party must establish his title from its own strength and not by the weakness of his adversary's. *Cavert v. Irwin, 3 Serg. & R. 283; 10 Johns. 339; 11 Ib.*

504; 10 Barb. 454; 2 N. H. 35; 34 Ib. 148; 4 Greene (Iowa) 45; Tyler on Ejectment, 72.

J. W. Van Gilder, for appellee.

The answer is intended for an answer at law, and attempts to set up several grounds of defense, none of which are so pleaded as to amount to a defense.

It attempts, first, to contradict the recitals in the sheriff's deed. This cannot be done at law. *State Bank v. Noland, 13 Ark. 299. Newton v. State Bank, 14 Ark. 13.*

GREGG, J.

The appellee brought his complaint at law in the Ashley circuit court, against the appellant, for the south-east quarter of section 19, township 16 south, range 4 west.

The complaint was in the usual form under the Code.

The appellant appeared and filed an answer containing three paragraphs, setting up, in substance:

First. That he has possession, and a right of possession, and denies appellee's title.

Second. He avers that a judgment, on a delivery bond, was had against himself and others; that an execution sued out thereon and levied upon the east half of the northeast quarter, and the north-east quarter of the north-west quarter of section 7, township 19, range 6, and returned without sale; that a *ven. ex.* was issued for the sale of said lands; and that upon such *ven. ex.* and without any levy, the sheriff proceeded to sell the said south-east quarter of section 19, township 16, south range 4 west; that the same was bid off by John D. Haynes, the plaintiff in the execution, and afterward by collusion between the sheriff, Haynes and the appellee, the lands were deeded by the sheriff to the appellee, without payment of any consideration; and that the said deed fraudulently recited that the original execution had been levied upon the lands sold, etc.

Third. That he is residing upon the land and that it is his homestead.

The appellee demurred to the answer, and the court sustained the demurrer to the second and third paragraphs.

The appellant then answered by, in the language of the record, consolidating the first and second paragraphs. Whereupon the court sustained the demurrer to the entire answer. The appellant rested; final judgment was rendered in favor of the appellee, on his complaint, from which this appeal is prosecuted.

The only question is the sufficiency of the answer.

The whole proceeding is under the Code; no specific form need be followed, nor technical words used, and the language, taken in its common acceptation, it appears to us, the first paragraph showed the right of possession to be in the appellant, and that the appellee did not have title. If so, it certainly was a defense to the action.

The second paragraph sets up that the appellee was attempting to recover upon a sheriff's deed, which was regular upon its face, but which had been executed by collusion, and without consideration; that it recited that the lands in controversy had been duly levied upon, when, in point of fact, other and different lands had been levied upon; and that no levy whatever had been made upon the lands in controversy.

To constitute a good and valid deed, under an execution sale, there must be a valid judgment, a sufficient execution and levy, advertisement and sale; and although our statute, *section 65, chapter 68, Gould's Digest*, provides that a sheriff's deed shall be *prima facie* evidence of the facts recited in it, it by no means follows that a party litigant may not put those facts in issue, and go behind the deed to show their falsity; and if the court show such recitals to be false, it certainly affects the sufficiency of the deed, and such being public records, affect all concerned with notice; hence it becomes the duty of those purchasing to see that the records give authority for making

the sale, and upon these grounds, it appears to us the second plea was good.

The third paragraph or plea avers that the applicant was in the possession of the land, and that it is his homestead. We are of opinion that this plea, in general terms, sufficiently shows that, if true, the land cannot be taken in execution, and is a good defense to a possessory action.

It follows that the judgment of the circuit court was erroneous, and it is reversed, and the cause remanded with instructions to overrule the demurrer and proceed according to law.

LIPSCOMB *v.* GRACE.

DELIVERY BOND—*Judgment.*—When an execution is sued out upon a judgment, duly levied upon property, a formal bond taken for its delivery and duly returned forfeited, the former judgment is merged and extinguished, and a statutory judgment springs into existence upon the forfeiture of the forthcoming bond.

BANKRUPT.—It is competent for a surety, before he has made payment, to prove up his contingent liability, on an application for a discharge in bankruptcy, and if he does not so prove up he is barred, by the certificate of discharge, from further action against the bankrupt.

Appeal from Jefferson Circuit Court.

HON. H. B. MORSE, Circuit Judge.

English, Gantt & English, and Snyder & Mallory, for appellant.

It is well settled, by a series of decisions of this court, that

where an execution is issued upon a judgment, levied on personal property, a delivery bond taken, and returned forfeited, a new statutory judgment thereupon springs into existence, which merges and *extinguishes* the original judgment. *Frazier v. McQueen et al.; 20 Ark. 68*, and cases cited; *Douglas et al. v. Twombly, 25 Ark., 124*, and cases cited.

The fact that Grace did not sign the delivery bond, did not prevent the delivery bond judgment from extinguishing the original judgment. By failing to move to quash the delivery bond, at the return term, for want of the signature of Grace, the plaintiff, in the execution, impliedly accepted the bond, and the statutory judgment thereon as completely extinguished the original judgment as if Grace had signed the bond. *Field v. Morse & Hand, 1 Smedes & Mar., 346; Coffee v. Planters' Bank, 11 ib., 458; King v. Terry, 6 How, Miss. R., 513; Head et al., Beaty 5, ib. 480*, and cases cited.

The original judgment of Busby, the delivery bond judgment, and the judgment of Fricker, were all obtained before the date of Lipscomb's petition for discharge in bankruptcy; the debts were provable under the bankrupt act, and he was absolutely and forever discharged from all liabilities upon the debts by his final discharge, which related back to the date of the petition. *Bankrupt act, March 2, 1867, secs. 34, 35, 67, 78; Brightly, Annotated Bankrupt Law, pp. 44, 45, 69.*

Not only the judgment creditors had the right to probate the debts against Lipscomb's estate in bankruptcy, but Grace, as surety, had the right to probate any one of them that he was legally bound as surety for. *Bk. act, secs. 38, 63: Bright. An. Bk., pp. 45, 59.*

That the act does not fall short of effectually and forever discharging the principal debtor because the surety remains bound, is manifest, not only from the sections above cited, but is put beyond controversy by the language of *sec. 78, Bright. n. Bk. L., pp. 69, 70*, thus: "No discharge granted under this act shall release, discharge or effect any person liable for the

same debt for or with the *bankrupt*, either as partner, joint contractor, endorser, *surety*, or otherwise."

Garland & Nash, for appellee.

These were valid and existing judgments against Grace, as surety for Lipscomb, and when he paid them, an implied contract was at once formed, that Lipscomb would pay him, and Grace had his remedy, under our Code, by motion.

When Grace paid the debt, his right against Lipscomb was established. *2 Bouv. Institutes, 75-6-7.*

And, as furnishing a full answer to the defense of bankruptcy, we need cite only *Payne v. Joyner, 6 Ark., 241.*

GREGG, J.

At the May term, 1870, of the Jefferson circuit court, the appellee filed a motion for a summary judgment against the appellant, alleging that, on the 15th day of December, 1859, he, as security, had paid off two several judgments rendered in said court, respectively, on the 2d of December, 1865, and the 30th of May, 1867, against the appellant and himself.

After service and return of the notice, the appellee moved the court for judgment for one thousand and thirty-nine dollars and ten cents, the amount of the two judgments and interest thereon up to date.

The appellant appeared and resisted the motion. He filed his answer, containing four paragraphs. The first avers that the judgment of the 30th of May, 1867, for two hundred dollars, interest, etc., was not the individual debt of appellant, but was on a joint bond of himself and appellee.

In the second paragraph he avers the other note, upon which judgment was had, was not an individual debt, but joint, and that, after judgment, execution issued thereon and was levied upon appellant's property; a delivery bond, with E. Willis and Vital Achard as his securities, was given and forfeited, and

afterwards an execution issued, on the forfeited forthcoming bond, against him and his securities and the appellee, which, on motion of the appellee, was quashed, because the former judgment was merged, and appellant was no party to the judgment on the forthcoming bond, and that appellee was under no obligations to pay off said judgment.

The third denies the payment of the judgments.

The fourth avers appellants discharge in bankruptcy, and, as a part thereof, files his certificate of discharge, by which, in the usual form, a discharge was granted him from all debts and claims which,under the bankrupt act, were provable against his estate, and which existed on the 21st of May, 1868.

A demurrer was interposed and overruled as to the first paragraph, and the parties then went to trial before the court, sitting as a jury.

The court found in favor of the motion, and rendered judgment against the appellant for $1,039 $\frac{10}{100}$, from which he appealed.

The various obligations, writs and bonds referred to in the pleadings, are set out in the record, but there is no bill of exceptions or agreement showing what the evidence was before the court.

The court declared three propositions of law. The first is unobjectionable.

Secondly, the court declared the law to be "that as Grace, the appellee, did not sign the delivery bond, the giving of such bond and its forfeiture, which created a new judgment, did not release the appellee from the prior judgment, and as he was bound by it, he could satisfy it at time."

Thirdly, that "the final discharge of a bankrupt dates back to the time of filing the petition in bankruptcy, and only releases the bankrupt from debts due at the time of filing the petition, and any security debt paid, after filing the petition or discharge, is a valid claim against the bankrupt."

The court below seems to have misapprehended the law on both these propositions. It has been repeatedly held by this

court that when an execution is sued out upon a judgment, duly levied upon property, a formal bond taken for its delivery and duly returned forfeited, that it is a merger of the former judgment, that the former judgment is extinguished, and a statutory judgment springs into existence upon the forfeiture of the forthcoming bond. *Black v. Nettles*, *25 Ark.*, *606; Douglas et al. v. Twombly*, *ib.*, *124; Frazier v. McQueen*, *20 Ark.*, *68; Smiser v. Robinson*, *16 Ark.*, *599; Cochran v. Jordan*, *ib.. 625; Phillips v. Wills*, *14 Ark.*, *595; Biscoe v. Sandefur*, *569; Ruddell v. McGruder*, *11 Ark.*, *578; Reardon*, *ex parte*, *9 Ark.*, *450.*

Upon the third proposition of law, we are aware that this court, in the case of *Payne v. Joyner*, *6*, *Ark.*, *241*, held, under the bankrupt act of 1841, that a party discharged in bankruptcy was liable to a surety on a pre-existing debt, who paid it after the discharge in bankruptcy, but such has not been the uniform ruling, and, in fact, but few courts have so held.

The Supreme Court of Alabama held that a certified bankrupt is discharged from all surety debts, though paid by the surety after the bankrupt obtains his discharge. *Kyle & Gunter v. Bostick and Sherrod*, *10 Ala.* (*N. S.*), *589.*

In the case of *Crafts v. Mott*, *5 Barb.* (*N. Y.*), *311*, the Supreme Court of New York, after announcing that many of the English decisions are not applicable in the United States, because their bankrupt acts are more restricted as to provable claims, say that the claim of a surety, before he has made payment, is a contingent liability, and may be proved up, upon an application for discharge in bankruptcy, and if a surety does not so prove his claim, he is barred by the certificate of discharge.

The rulings in Pennsylvania are direct, that a surety cannot recover against a principal, who has been discharged in bankruptcy, upon payment of an obligation for which the bankrupt was liable before his discharge. *Fulwood v. Bushfield*, *14 Pa.*, *390; Coke v. Lewis*, *8 Barr.*, *493*, *and 2 Barr.*, *343.*

Substantially the same ruling has been held in Tennessee. See *Hardy v. Carter*, *8 Hump.*, *153.*

We would add that we have seen no bankrupt act more comprehensive in its terms, requiring prospective, doubtful and contingent claims to be proved against the estate of a bankrupt, than is the act of 1867. And the Supreme Court of the United States, which is but the court of last resort in this class of cases, and which is the authoritative expounder of the acts of Congress, in the case of *Mace v. Wells, 7 How., 117*, say: "Wells, as the security of Mace, became bound in two joint and several notes, both of which were due before the passage of the bankrupt law in August, 1841. In July, 1841, Wells paid one of these notes. Mace was discharged under the bankrupt law, on the 22d of March, 1843. In March, 1844, Wells paid the other note, and then sued Moore for the recovery of the money on both notes. The facts being submitted to the county court, judgment was entered for the plaintiff for the amount of the note last paid, which judgment was affirmed by the Supreme Court of the State. * * * By the fifth section of the bankrupt act, it is provided that 'all creditors, whose debts are not due and payable until a future day, all annuitants, holders of bottomry and *respondentia* bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims, under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them,' etc. Wells, as surety, was within this section, and might have proved his demand against the bankrupt. He had not paid the last note, but he was liable to pay it as surety, and that gave him a right to prove the claim, under the fifth section. And the fourth section declares 'that from all such demands the bankrupt shall be discharged.'"

This case being in point, the decision of the highest court of appeals, in such matters, should govern us, without reference to a former ruling of our own court.

Let the judgment be reversed, and the case remanded with

instructions to proceed according to law, and not inconsistent with this opinion.

BLACK, *ad.*, *v.* AUDITOR OF STATE.

MANDAMUS.—Mandamus will lie to compel the heads of departments of State to perform a mere ministerial act imposed upon them by law, though not in those acts requiring the exercise by them of judgment and discretion.

PETITION TO BE SWORN TO.—The practice is well settled, that a jurat is necessary to a petition for *mandamus*.

Error to Pulaski Circuit Court.

HON. LIBERTY BARTLETT, Circuit Judge.

E. H. English, for plaintiff in error.

Jordan, Attorney General, defendant.

STOREY, Special C. J.

Cain petitioned the Pulaski circuit court for a *mandamus* against the State auditor, to compel him to pay the sum of $7,018, claimed to be due as his salary as judge of the third judicial circuit, from the first day of July, 1861, to the fourth day of September, 1865. The petition was not verified, nor were any affidavits filed therewith.

The court refused the prayer of the petition, assigning as a reason that the proper remedy was by suit against the State.

Gould's Digest, chapter 166, section 4, provides: "Hereafter,

it shall not be lawful, and it is hereby expressly forbidden, for any person or corporation to sue, or implead, or move against the State in chancery, or any officer, or person acting for or representing the State; and no suit or action shall be brought against said State, or officer or person acting for or representing the same, except at law."

Section 5, which was passed two years later, provides that, "All persons having claims or demands against the State, on any account whatever, shall institute suit therefor in the circuit court in and for the county of Pulaski, and said court shall proceed to take and hear all the testimony for and against the same, and shall certify the proof so taken, under the seal of said court, to the next session of the General Assembly of this State after the taking of the same, together with its opinion in regard to the justness thereof; but said court shall not enter a judgment or decree in any case whatever against this State, upon the testimony so taken, or any other testimony whatever; but the testimony so taken, and the opinion of said court so taken and certified by said court, shall be submitted to the General Assembly of this State for such action as may be deemed necessary thereon."

Conceding for the present that the amount claimed is justly due, is *mandamus* the proper remedy?

It is a well settled principle that *mandamus* will lie against the heads of department of the Federal and State governments, to compel them to perform a mere ministerial act imposed upon them by law, though not in those acts requiring the exercise by them of judgment and discretion. Do the sections above quoted in any way affect the jurisdiction of the courts in issuing a *mandamus?* We think not.

The salaries of the circuit judges are fixed by law; an appropriation has been made to pay these salaries; the ministerial duty of auditing the accounts and issuing his warrant, for the amount, is all that remains to be done. If suit were brought against the State, under the sections above quoted, and an appropriation made by the Legislature, the same min-

isterial duty would remain to be performed. We are satisfied that on both principle and authority, *mandamus* will lie, and is the proper remedy, if the petitioner is in fact entitled to the amount claimed.

In Wisconsin, where their statute is substantially the same, the Supreme Court, by implication, at least, have held that *mandamus* would lie to compel the payment of an account, and have made a distinction between the judgment of an officer in a matter left to his discretion and his judgment, as to the extent of his discretion under the law, holding that the decision of an auditing officer is conclusive as to the amount of a claim which the law permits him to allow, but his decision as to whether the claim is, in its nature, within the statute is not so, but is reviewable on *mandamus*. *Divine v. Harris, 8 Mon. (Ky.) 440; Kendall v. United States, 12 Peters, 526; Zowle v. Pierce, 2 Cal. 165; Danley v. Whitley, 14 Ark. 687; Hempstead v. Underhill, 20 Ark. 337; State v. Hastings, 10 Wis. 518; Citizens Bank of Steubenville v. Wright, 6 Ohio St. 318.*

The next question that presents itself is the sufficiency of the petition, which, as we have before stated, was not verified, nor in any way sustained by affidavit. The practice appears to be well settled that a *jurat* is necessary, for otherwise the time of the court might be taken up with frivolous applications, or merely for the purpose of obtaining the opinion of the court on a supposed statement of facts. *Tapping's Mandamus, 285 and 292; Moses on Mandamus, 201-2-3 and 5; 1 Chitty's General Practice, 706; 2 ib. 354.*

The court therefore did not err in refusing the petition.

Judgment affirmed.

PILLOW *v.* BROWN & CHILDRESS, *Ex. etc.*

SLAVE CONTRACTS—Held: The clause in the State Constitution that "all contracts for the sale or purchase of slaves are null and void and no court in this State shall take cognizance of any suit founded on such contracts," etc., is in violation of the Federal Constitution.

INTEREST—*Suspension of.*—When a debtor, without fault on his part, is prevented from paying the debt at and after maturity, through the act of the creditor or the law, interest should be abated during the time he is so prevented—and this, the debtor should show by affirmative proof.

CONTEMPORANEOUS STIPULATIONS—*Construction of.*—Where a transaction is evidenced by two papers, the connection between which is established by their contents, without any necessity of referring to other matter to connect them together, they will be taken as one entire agreement.

LAW OF NATIONS.—During war, all intercouse is prohibited between enemies.

PENALTIES REMITTED.—Where a person agrees to do an act, which is neither *malum in se* nor *malum prohibitum*, at the time of entering into the agreement, and is prevented from doing the act, by the law, it excuses him from all penalties that would otherwise arise from his omission.

TRUSTS—*When presumed.*—Trusts are never presumed, unless clearly intended by the parties, except in cases, where a failure so to declare, would operate as a fraud upon one of the parties.

Appeal from Phillips Circuit Court.

HON. JAMES M. HANKS, Circuit Judge.

Pillow, Garland & Nash, for appellant.

The main question involved, and raised for the decision of this court is, as to the validity of the notes and the powers of the courts to adjudicate the question—and it is submitted on behalf of the appellant, that slavery, as it is known to have existed in this and other States, was not recognized by the Constitution of the United States, and was not compatible with the spirit and purpose of that instrument. The 6th article of the Federal Constitution renders all State Constitutions and laws, in conflict with it *null* and *void*—and article 5, of the amendments declare: "No person shall be deprived of

life, *liberty* or property, without due process of law." From this it is evident that the negro was a "person," and so designated by the Constitution. As to the meaning of the words "without due process of law," See *Bouv. Law. Dec. vol. 1, p 512; Story's Cons. Law, vol. 3, p. 264, 661; 18 Howard (U. S.) 272.* If *legally free*, all bonds, notes, etc., given to enslave him were void, under the United States Constitution.

Pointer's breach of covenant being occasioned by the law, he was released therefrom, and, in consequence, Pillow was released from his obligations to pay.

The non-performance of a contract will always be excused where it is occasioned by the act of the law. *Chitty on Contracts, pp. 742, 743, and note; Lord Angilcia v. Church Warden of Rugeby, 6 Q. B., pp. 104, 107; Chancy v. Overman, 1 Deven & Botts, p. 402; American Jurist, October, 1833, art. 3, p. 251.*

So, also, if a man contract to do an act, in consideration that another contracted to do certain things on his part, which is then lawful, but afterwards becomes unlawful, or if it should turn out that the latter is unable to do what he engaged, the contract is at an end. *Chitty on Contracts, p. (top) 475; Charter v. Lease, 4th vol., pp. 298 and 231.*

If title to goods sold totally fails, contracts would not be binding and may be rescinded, even though the possession of the vendee be wholly undisturbed. *First vol. Story on Contracts, page (top) 484; Second vol. Kent's Com., sec. 39, pp. 472 and 469, note and authority;* see, also, *Wainright v. Bridges, 19 vol. La. R's. 317.*

A vendor is bound to know that he possesses that which he proposes to sell; and even though the subject of the contract be known to both parties to be subject to a contingency, which may destroy it immediately, yet if the contingency has already happened, *the contract will be void. 2d vol. U. S. Digest, p. 288; Allen & Hammon, 11 Peters, p. 63.*

Lord Chief Justice ABBOT, in his work on Shipping (p. 596), lays down this principle: "If an agreement be made to do an act,

lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is *absolutely dissolved.*" See, also, *Abbot on Shipping, p. 597; 1 Jur. N. S., p. 758; 8 M. & Lee, p. 267; 3 C. L. R., p. 930; 3 B. & P., p. 296; Evans v. Hutton, 4 Man. & Gran.* These are all English cases. See *12 Mass., page 370; 15 Johns., p, 14; 16 Johns., p. 348; 2 Wash. C. C., p. 312*—American cases.

In regard to powers of the people of a State, assembled in convention, it may be well to see what has been decided by the Supreme Court of the United States.

In the case of *Livingston v. Moore, 7 Peters, 546*, that court decreed "that the power of sovereignty existing in a republic resides in the people—not as individuals, but in their politic capacity; that the powers existing in every body politic, in forming a government, is distributed according to the will of the *sovereignty*, and in the *quantity* it *pleases*, and *imposes* what *checks* it pleases upon the public functionaries."

In the case of *The Bank of the United States v. Daniel, in 12 Peters, p. 33*, and in *13 Peters, 520; Charles v. Virgina, 6 Wheaton, 414; Craig v. Missouri, 4 Peters, 463;* and in *Ohio Life Insurance Company v. Debotts, 14 Howard, 428*, the Supreme Court held that the States of the Union were *sovereign within their own limits*, in all matters not surrendered in the Constitution to the Federal government.

In the case of *Dodge v. Worseley, 18 Howard, 349*, the Supreme Court held "that the constitution is supreme over all departments of the government, and anything done, unauthorized by it, is unlawful."

Pike, Adams & Pike, English, Gantt & English, for appellees.

As to the general right of recovery by the executors of Pointer, we respectfully submit to the consideration of the court the following cases, to wit:

A partition of an intestate's estate, consisting of land and

slaves, which was made and confirmed, without objections then taken, by the decree of a court of equity, in 1864, allowed only slaves to complainants, but no land. Held valid. *Slaves did not become free, either de jure or de facto, by the emancipation proclamation, in 1862. Pickett v. Wilkins, 13 Richards. S. C. Eq., 366.*

Emancipation is not a breach of covenant of warranty that slaves sold "are slaves for life," and is not a defense to notes given for the purchase money. The warranty was of the *status* of the slaves *at the time of sale*, not against a future act of government. *Hana v. Armstrong, 34 Ga., 232.* So of a warranty "*to be* slaves for life." *Bass v. Ware, ib. 386.*

A warranty on a sale of slaves, that they "are slaves for life," is not broken by their subsequent emancipation. Neither did the ordinance of emancipation affect such previous sale, but the vendor can recover the whole purchase money. *Bradford v. Jenkins, 41 Miss., 328; Polk, Adr. v. Pledge, 5 Coldwell, 389; Newman v. Stear, 5 Coldwell, 390.*

Compulsory payment of a debt to a receiver, under requisition acts of the Confederate government, is no defense to a suit brought for the same since the war, nor was the running of interest on such debt suspended during the war. *Shortridge v. Macon, U. S. circuit court, 1 Phillips N. C., 392.* See, also, *Brown's Executors v. Hawkins' Executors, 3 Bush. Ky. Reports, 558; Hughes v. Todd, 2 Duvall, 188.*

STORY, Special C. J.

In September, 1865, Pointer filed his bill against Pillow and Coolidge, in which he alleged that, on the 28th day of December, 1860, he sold to Pillow eighty-five negroes, which Pillow took into possession, for the sum of one hundred and nine thousand two hundred and six dollars and twenty-five cents, to secure the payment of which sum Pillow executed his four writings obligatory, payable on the first days of Januay, 1862, 1863–64 and '65, and on the same day executed, jointly with

Mary E. Pillow, his wife, a mortgage in favor of Pointer upon two of his plantations, known as the "Defeat Cane" and "Lake" places, and forty-three of the slaves purchased of Pointer. Pointer further alleged that, on the 16th day of April, 1862, after the recording of the above mentioned mortgage, Pillow made a contract of sale with Henry P. Coolidge, whereby he sold to Coolidge his four plantations, known as "Defeat Cane," "Lake," "River," and "Mound" places, together with all of his slaves, cotton and other personal property, for the sum of $575,000, which sum was payable in five equal installments, and for which Coolidge executed his five bills of exchange.

The contract recites that "there is a mortgage on the 'Defeat Cane' and 'Lake' places, and about forty-three of the negroes, in favor of John Pointer, of Giles county, Tennessee, for the purchase money of eighty-five of the negroes, which is on record in Phillips county. This sale is made subject to this mortgage and all of said Pillow's existing debts, which said Coolidge will pay out of the cotton crop now on hand, and subsequent crops, or out of the purchase money, and when so paid, the same will be credited to the purchase money due from said Coolidge, and allowed accordingly." Pointer also alleged, that the property covered by the mortgage of Pillow and wife to him, was not sufficient to pay the debt due from Pillow to him, the property having greatly depreciated in value during the war, and prays that Coolidge may be declared to be a trustee charged with the payment of all of Pillow's debts; that the stipulation of the 16th of April may be declared to be a lien in favor of the complainant, for the payment of the debt upon all of the property mentioned in the contract; that the defendants, or one of them, may be required to pay the debt; that the mortgage may be foreclosed, and the usual prayer for general relief.

Pillow filed his answer, in which he admits the purchase by him of eighty-five negroes from Pointer; that he gave a mortgage, jointly with his wife, to secure the purchase money;

that a contract of sale of all his slave property, real estate, cotton on hand, etc., was made to Coolidge, and that it was recorded; but he denied that there was any intent to sell the property, or to make Coolidge a trustee for the benefit of his creditors, and alleged that it was intended to create in Coolidge an agency simply for the management of Pillow's property, and that there was no trust, either in fact or in law, created thereby, and in proof thereof, sets forth a duplicate of the stipulation of April 16, 1862, which contains the following additional provision: "This article of agreement witnesseth, that the said Pillow, or his heirs or legal representatives, may, at any time, purchase all said property so sold as aforesaid, by the re-delivery of said Coolidge's bills which he has executed for said purchase money; and when the said bills are returned and delivered to said Coolidge or his representatives, he obligates and binds himself, his heirs and legal representatives, to re-convey the same by deed or conveyance, cancelling the contract aforesaid; and Pillow hereby obligates himself, his heirs and legal representatives, neither to collect or demand the amount of said bills, or any part of them, and to return them for the purpose of cancelling said contract;" and the stipulation further provided that Coolidge should not be responsible for the slaves, but that he was to have the general care of all Pillow's property, and was to receive as "reasonable compensation as would be proper for an agent." Pillow further alleged that the duplicate of the contract of April 16, 1862, was made contemporaneous with the original, and supports this allegation by the testimony of a subscribing witness. Pillow also alleged that Pointer covenanted that the negroes sold by him to Pillow were slaves for life, and that the title was good; that the slaves were all lost by emancipation, and that there was, therefore, a total failure of consideration for the notes; that notes given for slaves were for a consideration which was illegal, and were, therefore, void.

Pillow pleaded, at a later term of the court, that he was a Confederate officer from the beginning to the end of the war;

that Pointer resided in Giles county, Tennessee, before and during the war, and that that part of Tennessee was within the Federal lines from May, 1862, to the end of the war.

Coolidge filed an answer and cross-bill, in which he alleged that the contract of April 16, 1862, was not intended for a sale, but simply to create an agency in him for the management of Pillow's property; alleged the contemporaneous execution of the duplicate contract, with the additional provisions, as we have given them above, and prayed that said contract might be annulled, the bills re-delivered, and that if the court should hold that a trust had been created, it should attach to the lands described in said contract, and not upon the supposed debt due to Pillow from him.

At the fall term, 1865, the death of Pointer was suggested, and suit was revived in the name of Brown & Childress, as executors of Pointer, deceased. The chancellor decreed a foreclosure of the mortgage, with an abatement of interest during a part of the war, and that the two articles of April 16, 1862, and five bills of exchange be delivered up and cancelled. Both parties appealed. The questions for consideration are:

First. The power of the courts to adjudicate upon this class of contracts.

Second. Did slavery exist simply by force of the positive laws of the States, having no power outside of the limits of the States, except so far as enforced by the Federal Constitution, being recognized as purely a right of the State, and not protected by the Constitution of the United States, except on demand of the State, evidenced by existing laws, and therefore not within the provision of the Federal Constitution, prohibiting States from impairing the obligation of contracts?

Third. Is Pillow entitled to an abatement of interest during the war?

Fourth. The effect of the two articles of April 16, 1862.

The first and second questions have been passed upon by the court in *Jacoway v. Denton*, and later cases, and whatever may be the individual opinion of the special judge, it is proper, in

the midst of ever recurring conflict of opinion, to adopt the rule of *Stare decisis.*

A question of some difficulty is presented by the allegation in Pillow's cross-bill, that Pointer resided, during the entire war, inside of the Federal lines, and that he, Pillow, was a Confederate officer, residing inside of the Confederate lines, and prays for abatement of interest for that period of time.

This question first arose in the United States shortly after the war of 1776, and it was held that on contracts made before the war, where the parties belong within the opposing forces, the debt was suspended, and that interest did not run unless the creditor enemy, either in person or by agent, placed it within the lawful power of the debtor to pay the debt.

This position was very ably vindicated by Mr. Jefferson, then secretary of State, in his celebrated reply to Mr. Hammond, the British minister plenipotentiary, and has been repeatedly confirmed by later decisions, made by the United States circuit courts and courts of the different States. In France, early in the seventeenth century, it was held that during a war prescriptions did not run, and that impossibility of communication, caused by the war, excused a failure to protest a bill of exchange. The Supreme Court of the United States say that the time during which the courts in the lately rebellious States were closed to citizens of loyal States, is, in suits brought by them since the war, to be excluded from the computation of the time fixed by the statute of limitations within which suits may be brought. It is true that the learned judge in that case remarked, that unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws until the bar of the statute becomes complete; and it is urged upon us here, that to refuse to allow interest, during the time the parties were separated by the opposing forces, is to punish Pointer for his loyalty, and to reward Pillow for having engaged in a rebellion against the Federal government.

In reply to this, we must say that we do not consider the argument as sound that finds a person liable to *the citizens* of an opposing power, on account of the individual influence he may have had in determining the policy of his government, for such would be the result, if we should hold to the rule as advocated by counsel. In other words, if there is any principle of law whereby debtors, who are separated from their creditors by opposing forces, are remitted from the payment of interest during that time, then it surely will not be insisted, that because Pillow was a Confederate officer, he is outside of that principle. Pillow was responsible to the Federal government, and not to her citizens, for his course during the late rebellion. The Supreme Court of the United States, in a late decision, held that the rule that interest is not recoverable on debts between alien enemies, during a war between their respective countries, (if applicable under any circumstances to citizens of the States in rebellion and citizens of the States adhering to the national government,) does not apply where there is a known agent, appointed to receive the money, resident within the same jurisdiction as the debtor. Chief Justice CHASE, in *Shortlege v. Mason*, held that interest should be allowed, but afterwards, in *Bigler v. Waller*, refused it. The decisions are conflicting, being evidently based upon the apparent equities of the different cases, and it is difficult to discover any general principle running through all.

During war all intercourse between enemies are prohibited, and wherever the law forbids a party from doing an act, not *malum in se*, nor, at the time of entering into the agreement to do the act, *malum prohibitum*, it excuses him from all penalties arising from a failure to perform his contract. This, we think, furnishes a just reason for the abatement of interest, during war, on debts due to the subjects of a belligerent power, from the time the party is entitled to make payment, which would only be at and after maturity, until the return of peace. The principle is a general one and may be stated in these words: Whenever the debtor, without fault on his part, is prevented

from paying the debt, at and after maturity, through the act of the creditor or the law, interest should be abated during the time he is so prevented. It is the duty of the debtor to seek his creditor and to pay his debt. He must show by affirmative proof that it was not through his neglect, accident or misfortune, the debt was not paid at maturity; that he was ready and willing to pay, but that through the act of the creditor or the law, he was prevented. *Hoare v. Allen, 2 Dallas, 102; Bouvier Law, Dic. Int.,s. 12 and 18; Yeaton v. Berney, 3 Legal New. 82; Bigler v. Waller, Ib. 26; Conn. v. Penn, 1 Pet. c. c. 496; Ward v. Smith, 7 Wal. 452.* Pillow has shown no effort to comply with the terms of this contract, and under the above rule is not entitled to an abatement of interest. Pointer prays that the recorded articles of April 16, 1862, may be held to be a conveyance, in trust, for the benefit of the creditors of Pillow, while both Pillow and Coolidge pray that the two articles may be construed together as one entire agreement—that said contract may be annulled and the bills re-delivered.

It is well settled that "when a transaction is endorsed by two papers, the connection between which is established by their contents, without any necessity of referring to other matter to connect them together, they will be taken as one entire agreement." Clearly, both of these articles are, under this rule of law, to be construed together. They both refer to the same subject matter—bear date on the same day—were evidently intended, by the contracting parties, to be construed together, and were undoubtedly made for the purpose alleged in the answer of Pillow and cross bill of Coolidge, viz: to create a secret agency in Coolidge for the management of Pillow's estate. Trusts are either express or implied. Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will. Construing the two articles of April 16, 1862, together, it is evident that an express trust was not created. Implied trusts are those "which are deducible from the nature of the transaction, as a matter of clear intention, although not found in the words of the parties,

or which are superinduced upon the transaction by operation of law, as matter of equity, independent of the particular intention of the parties." A trust is never presumed or implied, as intended by the parties, unless taking all of the circumstances together, that is the fair and reasonable interpretation of the acts and transactions, except it be forced upon the conscience of the party by operation of law, on account of some meditated fraud, imposition, notice of an adverse equity, or other cases of a similar nature. We think a fair construction of the two articles will show that it was contrary to the intention of either Pillow or Coolidge to create a trust, and the only serious question for us to pass upon, is, whether Pointer has been so misled and injured by the recording of the first article or stipulation of April 16, 1862, that to refuse to declare it created a trust in Coolidge for the payment of Pillow's debts, would operate as a fraud upon the rights of Pointer. We cannot discover, from a careful examination of the bill, that he has been thus injured, and we know of no reason why the prayer of Coolidge should not be granted. *Nick's heirs et al. v. Rector, 4 Ark. 278; Story's Eq. Jurisprudence, s. 980 and 1195.*

It is therefore considered that the decree of the court below be set aside; that the mortgage be foreclosed and the property sold—that the plaintiffs recover the amount of said notes and interest, and that the two stipulations of April 16, 1862, and the five bills of exchange, given by Coolidge to Pillow, be delivered up and cancelled, and that a decree be entered in this court accordingly.

McCLURE, J., dissenting.

In the majority opinion four questions are presented and determined. Of the third and fourth I shall not speak. The first and second propositions, and the manner in which they are disposed of, by the majority, are among the things which have led to this dissent, and in order that they may be the

more readily understood, I shall insert them at length. They are as follows:

First. "The power of the courts to adjudicate upon this class of contracts."

Second. "Did slavery exist simply by force of the positive law of the States, having no power outside of the limits of the State, except so far as enforced by the Federal Constitution, being recognized as purely a right of the State and not protected by the Constitution of the United States, except on demand of the State, evidenced by existing laws, and therefore not within the provision of the Federal Constitution prohibiting a State from impairing the obligation of contracts?" In disposing of these important questions, the majority of the court say: "The first and second questions have been passed upon by this court in *Jackoway v. Denton*, (*25 Ark. 625*,) and later cases, and whatever may be the individual opinion of the special judge, it is proper in the midst of ever recurring conflict of opinion, to adopt the rule of *stare decises.*"

It is true that a majority of the court held, in *Jackoway v. Denton*, (*25 Ark. 625*,) that section fourteen, of article 15 of the Constitution of this State, was in conflict with that clause of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts."

If the facts in this case were similar to those presented to the court in *Jackoway v. Denton*, (*25 Ark. 625*,) there might be some excuse for adopting what is called the rule of *stare decises;* but they are not; they are as different as night is from day; there is no similarity between the two cases, save that the consideration, for which the notes were given, was negro slaves. Jackoway and Denton were both citizens of the State of Arkansas, at the giving of the note and at the commencement of the suit, and while the court might well hold that a denial of the use of the courts of the State to citizens of the State, was an infringement upon the contract, and an impairing of its obligation; it does not follow that citizens of *other States* can come into the courts of this State and use them to enforce con-

tracts made in other States, the enforcement of which are forbidden in positive terms by our own Constitution.

The record in this case shows that the sole consideration of the contract, sought to be enforced, was for the purchase of slaves. It also shows that the contract was *not* made in the State of *Arkansas* but in the *State of Tennessee.*

The theory advanced by the majority in relation to contracts, is, that "the laws in existence when it is made are referred to in all contracts, and form a part of them." Although a strict adherence to this doctrine would render our laws, for the enforcement of debts, somewhat similar to those of the Medes and Persians, unchangeable—we have yet to hear of a jurist, who has asserted that the laws of Arkansas, and thirty-five other States of the Union, for the collection of debts, enter into every contract made and executed in the State of Tennessee, until the opinion was rendered in this case. In the case now under consideration, the majority have declared that the citizens of *other States*, at the time of making contracts, have a vested right to a remedy to enforce their contracts in the courts of every State of the Union, and that a denial of such a right, to the citizens of other States, would amount to an impairing of the obligation of the contract. From such a conclusion I must respectfully dissent.

I have stated that the record in this case shows that neither Pointer or Pillow were citizens of the State of Arkansas, at the time of the making of the contract; but, on the contrary, that they were both citizens of the State of Tennessee. Our Constitution declares that "no court of this State shall take cognizance of any suit founded on such contracts," *i. e.* that no court of this State shall take any cognizance of any suit to enforce a contract, the consideration of which grew out of the purchase of slaves. The record in the case shows that the consideration which moved Pillow to the execution of the notes sued on, was for the purchase of negro slaves. In *Jackoway v. Denton*, (*25 Ark. 625*,) the majority of the court held (Jackoway and Denton both being citizens of the State of Ar-

kansas,) that a denial of *jurisdiction*, in that instance, amounted to a denial of *remedy*, and therefore impaired the obligation, of what once was a valid contract. If it be admitted that the sovereign people had not the same power, when in convention assembled, to destroy the *right of property* in a *note*, the consideration of which was for the purchase of slaves, as to destroy *the right* of *property* in *slaves*, I am willing to admit that the closing of the doors of courts against slave contracts, impaired the contract, if it be true that the laws in existence at the time of its creation entered into its possessions and became a part thereof. But does it follow, either as a logical sequence, or a legal deduction, because the laws in Arkansas, at the time a contract is made, become a part thereof for its enforcement, that these same laws entered into and became a part and parcel of the contracts entered into in the State of Tennessee? The majority of the court seem to be of opinion, and in fact many of the citizens of Tennessee agree with them on this point, that the people of Tennessee can make just such contracts as they choose, and that the people of Arkansas have no right to prohibit the use of her courts to enforce Tennessee contracts.

It may be a fault of my education, but I have ever been taught to believe that every State is perfectly competent, and has the exclusive right to prescribe remedies in its own judicial tribunals; to limit the time, as well as the mode of redress, and to deny their *jurisdiction* over cases which its own *policy* or judgment might discountenance; and I have also been taught to believe, from repeated adjudications, and the American text writers, as well as those of England, that the right of citizens of one State or Kingdom, to sue in another, was not in fact, a matter of "*right*," but a thing of *comity*.

STORY, on the conflict of laws, (sec. 18,) says: "A *State* may regulate the manner and circumstances under which property, whether *real* or *personal*, or in *action*, shall be held, transmitted, bequeathed, transferred or enforced; the condition, capacity and state of all persons within it; the *validity of contracts* and

other acts done within it; the resulting rights and duties growing out of these contracts and acts." The State of Arkansas has undertaken to pass on the *validity* of slave contracts. Judge STORY says that a State may not only do this, but it may regulate the manner and circumstances under which *property*, whether real or personal, may be held. The majority of the court take issue with Judge STORY, on this point, and deny the doctrine laid down by him; but candor compels me to say that his reasoning has carried stronger convictions to my mind, in favor of his theory, than the argument presented by the majority.

Continuing, Judge STORY says: (sec. 242,) "Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country." This contract (the payment of the money mentioned in the notes) was to be performed *in Tennessee*, and I will admit that it was a legal and valid contract at the time of its execution. The view I take of this matter is, not whether it was a legal obligation *then*, or whether it is *now*. These questions are foreign to what I regard as the *real* issue. The question which presents itself to my mind is, can the courts of this State enforce contracts for the sale or purchase of slaves, made and to be performed in other States, when the Constitution of this State declares in plain and emphatic terms that they shall not?

There is a well defined rule of construction, running through all the books of the profession, that every word, line and sentence, in a Constitution or law, should receive such construction as would place some meaning upon each word, line and sentence, rather than resort to a construction which would render words and whole lines and sentences nullities, or meaningless phrases. In *Jackoway v. Denton*, (*25 Ark. 625*,) the court declared that a recognition of the force and effect of section fourteen, of article fifteen, of the Constitution of this State, *in that case*, would be in conflict with that provision of the Constitution of the United States, which declares that "no

State shall pass any law impairing the obligation of contracts;" but is that true of this case? I think not; for the provision of the fourteenth section, of article fifteen, which declares that "no court, of this State, shall take cognizance of any suit founded on such (slave) contracts," if given its full operation, force and effect, would not deprive Pointer of a remedy to enforce his contract with Pillow. It may well be argued that Jackoway and Denton, both being citizens of Arkansas, were deprived of a court in which to enforce their contract, when the doors of the State court was closed against them; but this is not true as to Pointer and Pillow, and for this reason, the opinion in *Jackoway v. Denton*, (*25 Ark. 625*,) is not applicable to the state of facts existing in this case; nor can it, with any degree of fairness, be claimed that the rule of *stare decises* is applicable to this case. My convictions are, that the people of this State not only have the right and power to prohibit the use of their courts to enforce the contracts made by citizens of other States, in other States; and that the language of our Constitution is broad enough in its terms to deny to citizens of other States the use of our courts to enforce slave contracts, I have no doubt. Entertaining these convictions, as I do, I have briefly referred to a few of the points which have led to my dissent.

The right of citizens of other States to sue in the courts of this State, is, as laid down by all law writers, a matter of *comity*, which the State may either extend or deny. Our State, in my opinion, by the language employed in section fourteen, of article fifteen, has denied the use of the courts to the enforcement of slave contracts; and while I might be willing to assent to a decision where its enforcement would come in conflict with that provision of the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of a contract, I am unwilling to extend it to a class of cases where neither the facts nor the surroundings of the case raises the point raised in *Jackoway v. Denton.*

GREGG, J., dissenting, says:

We concur in the conclusions of law, arrived at by the special judge in this case, but we do not concur in all the statements made, or propositions defined and argued.

WILSHIRE, C. J., being disqualified did not sit in this case.

HON. WM. STORY, Special C. J.

BURGAUER, *Adm'r.* v. LAIRD.

ADMINSTRATORS—*Authority of.*—An administrator has no authority to sell the real property of his intestate, except in the manner prescribed by statute.

PURCHASER—*Not Trespasser.*—Although the sale is invalid and void, without an order of court for that purpose, yet the purchaser, having gone into possession by consent of the administrator, he is not a trespasser, or wrongfully in possession, and could not be subject to a suit, unless he refused to surrender upon demand.

Appeal from Montgomery Circuit Court.

HON. E. J. SEARLE, Circuit Judge.

Watkins & Rose, for appellant.

Realty of intestate cannot be sold save by the intervention and under the authority of some court of competent jurisdiction; and the answer not averring anything of this kind, and merely alleging a parol purchase thereof from the agent of Burgauer, is clearly insufficient, and seems conclusive as to reversal, without further reference to other points.

Garland & Nash, for appellee.

The only question arising in this case comes up on complaint, answer thereto and demurrer to the answer, and that question is: Is a purchase of land by parol, when a great portion of the purchase money is paid, and possession given, sufficient to protect the vendee, when, too, he has tendered the residue of the purchase money?

We think it is. *Blakeney v. Ferguson, 8 Ark., 272; 20 Ib., 552;* if not, the plaintiff should offer to pay back the money. *Davis v. Tarwater, 15 Ark., 286*, and cases cited.

HARRISON, J.

This was a suit, the proceedings in which were under the Code, by Emanuel Burgauer, as administrator of Moses Burgauer, deceased, against James J. Laird, for the recovery of a lot, or parcel of ground, in the town of Mt. Ida.

The defense set up in the answer was, that the plaintiff, by a parol agreement, had bargained and sold the lot to the defendant for five hundred dollars, in Montgomery county scrip, which had been paid to him, and he had put the defendant in possession of the premises. The plaintiff demurred to the answer, and assigned specially as causes of demurrer: 1. That it did not show that the lot had been legally sold. 2. That the sale, being by parol, was void by the statute of frauds.

The court overruled the demurrer, and, the plaintiff standing upon it, judgment was rendered against him, and he appealed.

It is clear, beyond all question, that the plaintiff had no authority to sell his intestate's real estate without an order of court for that purpose, and except in the manner prescribed by the statute, but, although the sale to the defendant was invalid and void, having gone into the possession with the consent of the plaintiff, as a purchaser, he was not a trespasser or wrong-

fully in possession, and could not, therefore, in justice or reason, be subjected to a suit, unless he had refused to surrender it upon a demand or notice to quit. *Fears v. Merrill, 9 Ark., 559; Jackson v. Bryant, 1 John., 322; Jackson et al. v. Wheeler, 6 ib., 272; Harley v. McCoy, 7 J. J. Marsh, 317; Right v. Beard, 13 East., 115.* The demurrer was, therefore, correctly overruled.

Judgment affirmed.

GREGG, J., dissenting, says:

The answer in this case sets up a defense, that the defendant purchased the property; took possession under the purchase; that he had paid the purchase price, and he prayed that his possession be quieted, and that the plaintiff be compelled to make title. It attempts to set up an equitable right to the fee in the lots.

The complaint is in the usual form, under the Code, for the recovery of real property. It sets up the plaintiff's right, as such administrator, to the property and to the possession, and that the defendant is in possession, and withholds the same.

We agree with the majority of the court, that the plaintiff, as administrator, had no power to sell his intestate's real property without complying with the statute, and having an order from a competent court, and that a purchase from him, as such administrator, without such order, conveyed no valid, legal or equitable title. The complaint follows the forms in the Code.

The answer admits the plaintiff's title, but attempts to set up his own purchase, under which he went into possession, and prays to have title decreed him. This court says the facts he states show no title in him. Then, it seems to us, the demurrer was well taken to the answer.

But the court says he went into possession under the plaintiff's permission, and, therefore, the plaintiff should have demanded that he surrender possession. He does not deny a demand; he does not deny the plaintiff's right to recover, upon

the ground that he had let him peaceably into possession; and, if we presume, that presumption must be against the pleader that that demand was made. Under the general terms and short forms of our Code, it was not necessary that such demand, in words, should have been averred in the complaint; but if so, the court erred in not letting the demurrer relate back to the complaint, and holding it bad, upon the well understood ruling that a bad answer is sufficient for a bad complaint. But, we repeat, the Code prescribed the form of the complaint, and only requires that the plaintiff aver his right of property and possession. The defense here, as we conceive, rested upon the facts which the defendant averred gave him title; that title being insufficient, we hold the demurrer should have been sustained.

LEE v. THE STATE.

CRIMINAL LAW—*Jeopardy of life and limb.*—The principle that a person cannot be twice placed in jeopardy of life or limb for the same offense, and embraced in the Constitutions of most of the States and the Union, is borrowed from the common law, and the decisions are not uniform as to the time when the jeopardy attaches.

BILL OF RIGHTS.—The provisions of the bill of rights, contained in the Constitution of this State, differ from those of most, if not all the other States. It was the intention of the framers of the present Constitution to place a limitation on the legislative branch of the government, and to inhibit it from enacting any law imposing penalties on persons who had once been acquitted by a jury, for the same offense; but this does not deprive the prisoner of his common law rights.

WHEN COURT MAY DISCHARGE JURY.—It is competent for the court, when the jury cannot agree, to discharge them and hold the accused for trial, on the same indictment, by another jury—as also, where a juror in course of the trial becomes so ill, or the prisoner becomes so sick, or in like cases of impossibility to proceed—but beyond this the authority of the court does not extend.

WHAT OPERATES AS AN ACQUITTAL.—Where the indictment is sufficient in form and substance, and the defendant is arraigned, pleads, and the jury is impaneled and sworn to try the issue, it is to be presumed that the defendant is demanding a speedy trial, and a dismissal of the indictment by the court, without the consent of the defendant, and holding him to answer another indictment for the same offense, operates as an acquittal.

Section 178, Code of Criminal Practice, does not authorize the court to dismiss a valid indictment, after arraignment, plea and impaneling of the jury, so as to hold the accused for trial on another indictment for the same offense.

WHEN TIME NOT MATERIAL.—In an indictment for murder, the time of committing the murder is not material, if it appear that it was committed before the finding of the indictment.

PLEA OF FORMER ACQUITTAL.—Where the defendant pleaded former acquittal and not guilty at the same time, the plea of former acquittal should be first tried, and if the plea be found against him, the judgment should be, that he answer the indictment.

Appeal from Jefferson Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Williams, Crawford & Cameron, for appellant.

The appellant submits the following:

First. That the appellant was put in jeopardy of his life by being put on his trial on the merits in the former indictment in the same case; and that his trial under the indictment under which he was convicted, was putting him in jeopardy of his life twice, which should not be done. *Constitution of U. S., 5th Amendment.*

Second. When the defendant pleads to the indictment, and a traverse jury is impaneled and sworn to try the cause, the jeopardy begins. *Bishop on Crim. Law, 856; Commonwealth v. Tuck, 20th Pick., 356, 364; Clark v. State, 23d Miss., 261; The State v. McKee, 1st Bailey, 651; The State v. Blackwell, 9th Alabama, 79; Lindsay v. Commonwealth, 2d Va. Cas., 345; Wortham v. Commonwealth, 5th Rand., 669; Commonwealth v. Wheeler, 2d Mass., 172; U. S. v. Stowell, 2d Curt. C. C., 153, 170; The State v. Thornton, 13 Ire., 256; The State v. Thompson, 3 Hawks, 613; Rex v. Rapee, 1st Crawf. & Din. C. C., 185; Rex v. Wade, 1st Moody, 86; Newsom v. State, 2d Kelly, 60; Reynolds v. State, 3d Kelly, 53; Durham v. State, 9th Ga., 306.*

Third. The jury being full and sworn, jeopardy attaches, from the repetition of which the constitutional rule protects a defendant. *Bishop Crim. Law, 858; State v. Redmond, 17th Iowa, 329, 333; State v. Walker, 26th Indiana, 346.*

Fourth. During the trial, the prosecuting attorney is not authorized to enter a *nolle prosequi;* or, if he enters it even with the consent of the judge, and if he withdraws a juryman and so stops a hearing, the legal effect is an acquittal. *Bishop Crim. Law, 858.* See cases recited under second point, and also *Klock v. People, 2d Parker, C. C., 676.*

Fifth. The defendant in such case is entitled to have a verdict of not guilty returned by the jury; but if this is not done, he may still claim his discharge, and he is not to be brought again in jeopardy for the same offense. *Bishop Crim. Law, 858; U. S. v. Shoemaker, 2d McLean, 114; Mount v. The*

State, 14th Ohio, 295, 305; Reynolds v. The State, 3d Kelly, 53; Parker v. The State, 8th Blackf., 540; People v. Barrett, 2d Caines, 304; Commonwealth v. Tuck, 20th Pick., 356; Ward v. The State, 1st Humph., 253; Grubble v. The State, 2d Green, Iowa, 559.

A defendant who has been placed on his trial, upon the merits, in a court of competent jurisdiction, has been put in legal jeopardy (by analogy,) *State v. Cheek, 25th Ark., 206.*

Montgomery, Attorney General, for appellee.

There is but one question presented to this court: Was the prisoner placed in jeopardy of life and liberty twice for the same offense? We submit he was not. See *Sutcliff v. The State. 18 Ohio, 409, 478; The People v. Oswell, 28 Cal., 456; Shephard v. People, 25 N. Y., 406, 418; Rake v. Pope, 7 Ala., 161; The State v. De Witt, Hill (S. C.), 282; Penn v. Huffman, Addison, 140; Commonwealth v. Mortimer, 2 Va. Cases, 325; Commonwealth v. Wade, 17 Pick., 395, 400; People v. Warren, 1st Parker, 338; Vaughan v. Commonwealth, 2 Va. Cases, 273.*

WILSHIRE, C. J.

At the May term of the Jefferson circuit court, Doctor T. Lee was indicted and tried for the murder of Ida Maria Dota, *alias* Ida Maria Lanfair, the indictment charging the murder to have been committed on the 22d day of September, 1869.

It appears from the transcript that the defendant plead not guilty, to which issue was joined, a jury impaneled, the witnesses sworn and put under the rule, and the cause stated to the jury by counsel, for both the defendant and the State. At this stage of the proceedings, the attorney for the State suggested to the court a variance between the date on which the murder was alleged in the indictment to have been committed and the date alleged in the original affidavit. Whereupon the court below dismissed the indictment, and referred

the case to the grand jury, then in session, who found and presented to that court another indictment, charging Lee with the murder of the said Ida Maria Dota, *alias* Ida Maria Lanfair, on the 1st day of February, 1870.

Upon the second indictment the defendant was arraigned, and interposed two pleas: *First*, Former acquittal of the offense charged in the indictment by the judgment of that court; and, *second*, "That the State ought to be barred in this behalf, and ought not further to prosecute her said indictment against him, because he says that he has once before this time been put in jeopardy of his life for said offense, by being put upon trial in the circuit court of Jefferson county, at the present term thereof, on the 30th day of May, 1870, under an indictment, good in law, found by the grand jury of said county, at said term, in which said trial the jury was impaneled, the witnesses for the State and the defendant were sworn and put under the rule, the indictment read to the jury, and the case stated by both the counsel for the State and defendant, at which stage of the trial, without the consent of the defendant, the court set aside the indictment, discharged the jury, remanded the defendant to prison, and referred the case again to the grand jury, etc.

To the first plea the State took issue, and demurred to the second plea. The court below sustained the demurrer to the defendant's second plea; to which ruling of the court the defendant excepted.

The cause was tried and the defendant found guilty of murder in the first degree.

The defendant moved for a new trial upon the following grounds:

First. That the court erred in sustaining the demurrer to the defendant's second plea.

Second. Instructions asked for by the State.

Third. That the court erred in refusing to give the first instruction asked for by the defendant.

Fourth. That the verdict is contrary to law and evidence.

The court below overruled the motion of the defendant for a new trial, and pronounced the sentence of death upon the defendant, from which he appealed.

The first question demanding attention is that raised by the first ground set up in the motion for a new trial, that the court below erred in sustaining the demurrer to the defendant's second plea, which plea we have thought proper to copy into the statement of this case.

The principle involved in the provision of the Constitutions of most of the States of the Union, as well as that of the United States, that no person shall be subjected for the same offense to be twice put in jeopardy of life and limb, was borrowed from the common law; and, indeed, it has been much doubted whether those constitutional provisions amount to anything more than the common law doctrine involved in the plea of *autrefois acquit*, which plea is founded "upon the principle that no man shall be placed in peril of legal penalties, more than once, upon the same accusation." Wharton, in his treatise on *Criminal Law, p. 574*, says that "at common law this doctrine means nothing more than that when there has been a final verdict, either of acquittal or conviction, on an adequate indictment, the defendant cannot a second time be placed in jeopardy for the particular offense; and, at the first glance, the constitutional provision appears nothing more than a solemn asseveration of the common law maxim."

There seems to be a conflict in the authorities as to when the jeopardy attaches. Under the provisions of the Constitutions of some of the States, their courts hold that the jeopardy attaches from the moment, when the defendant, having pleaded to the indictment and a traverse jury is impaneled and sworn to try the cause—in short, when the tribunal is complete in itself to try the cause, and the defendant properly before it, defending, having answered; while the courts of some other States incline to the opinion that the jeopardy of the Constitution begins only with a verdict rendered.

The provision of the Bill of Rights contained in the Consti-

tution of this State, differs perhaps with that of most, if not all the other States. Section 9, of the Bill of Rights of our CONSTITUTION, provides that "no person, after having been once acquitted by a verdict of jury, for the same offense shall be again put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may, in its discretion, discharge the jury and commit or bail the accused for trial at the same or the next term of said court."

It is evident to our minds that the language of our Constitution, above quoted, shows that it was the intention of the convention that framed and adopted that instrument, to place a limitation upon the legislative branch of the government; that is, that no law should be enacted authorizing the imposition of penalties on persons who had once been acquitted by a jury for the same offense; but this does not deprive the prisoner of his common law right. It is quite as evident that the convention intended by the same clause, that in a criminal prosecution, if the jury disagreed, the court, in its discretion, might discharge them and hold the accused to be tried upon the same indictment by another jury. In the latter case, the Constitution is but a declaration of what the law was held to be before.

Judge COOLEY says that, "in considering State Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed." The learned judge quotes approvingly the language of the Hon. M. Bates, in *Hamilton v. St. Louis county court, 15 Mo. 13*, who said: "What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence of personal and political freedom;

it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made, it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it; it is all derived from a known source. It pre-supposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written Constitution is, in every instance, a limitation upon the powers of government in the hands of agents, for there never was a written republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent, and incapable of definition." *Cooley on Constitutional Law, 37.*

The authority conferred upon the courts, in criminal prosecutions, by the provision of the Constitution referred to, to discharge the jury, etc., is confined to cases where the jury "is divided in opinion," and cannot, we think, be construed to extend beyond that.

Upon examining the indictment first presented against the defendant, upon which he was arraigned and upon which he plead, and a jury was impaneled and sworn to try the issue, we find it sufficient in form and substance to have warranted a conviction upon the proof introduced on the second trial. The statement in the indictment as to the time at which the offense was committed, is not material. If an indictment for murder show that the murder was committed at some time prior to the time of finding the indictment, it is sufficient. *Sections 128 and 130 Criminal Code.*

Finding that the indictment upon which the defendant was first arraigned, and which the court below dismissed, was sufficient, the question recurs: can the court dismiss such an indictment, after the proceedings under it had progressed as

far as in this case, and the accused held to answer another indictment preferred against him for the same offense? Or, was he not entitled to a trial by the jury impaneled and sworn to try the issue on the former indictment?

The eighth section of the Bill of Rights, contained in our Constitution, guarantees to all persons accused of, and proceeded against, for crime, "a speedy and public trial by an impartial jury of the county or judicial district wherein the crime shall have been committed."

This court, in *Stewart v The State, 13 Ark., 720*, Chief Justice WATKINS delivering the opinion, in referring to the constitutional declaration of rights, announced the sound and wholesome doctrine that "this provision, and all those of a similar character, are declaratory of the sense of the people concerning great fundamental principles, designed as limitations upon the powers of the departments of government, in the *enactment, the interpretation and the execution* of the laws." In that case the defendant sought to be discharged upon the ground of the length of time intervening between his arrest and imprisonment and his application for a discharge, which was refused; but in that case the defendant contributed to the delay—first, by taking a change of venue; second, upon his own motion obtaining a continuance, and third, by moving to quash the venire and set aside the panel of petit jurors, etc.

The learned Judge, in *Stewart v. The State*, further said: "That an accused is entitled to a speedy trial, is a proposition which no one will question; but what is a speedy trial, and what consequence will follow, where a speedy trial is denied, are questions that have to be considered with reference to the existing law, and its practical operation, in the determination of individual rights." This doctrine, applied to the law existing at the time of the arraignment of the defendant in this case, upon the indictment first preferred against him, did not authorize the dismissal We find no law authorizing the dismissal of a valid indictment at that stage of the proceedings, nor does it appear by the transcript of the record

before us, that any great or pressing necessity existed, to the end that justice might be done, or the law vindicated, by dismissing the indictment and discharging the jury.

It is true that the Code of Criminal Practice, section 178, authorizes the dismissal, by the court, of indictments for any objection to their form or substance, taken on the trial, or for variance between the indictment and the proof, and that such dismissal shall not bar another prosecution for the same offense. But does that statute confer the power upon the court to dismiss a valid indictment, after the cause had progressed as far as this case had, without the consent of the accused, and hold him for trial upon another indictment for the same offense? Bishop, in his treatise on criminal law, volume 1, section 224, says: "The law delights in the life, liberty and happiness of the subject, and deems statutes which deprive him of these, or of his property, however necessary they may be, in a sense odious." It is a familiar principle of the law, that statutes, and the same principle applies to Constitutions, are to be literally interpreted in favor of persons charged with crime. According to this rule of construction, it would seem that the courts are confined in their power to dismiss an indictment, in a case like the one at bar, to formal or substantial defects, or a variance between the indictment and the proof, and that such power does not extend to an indictment good in form and substance, as we have seen the indictment in this case was. Mr. Bishop, (see *Crim. Law, vol. 1, sec. 864,*) in discussing the doctrine of former jeopardy, says: "It must be borne in mind that the constitutional provision under consideration is not the only impediment to the re-hearing of a criminal cause. It is, indeed, the only one not removable by legislation; but when legislation has not interfered, and the question depends on common law principles, there may be various other absolute bars to a further trial."

In the case of *Klock v. The People, Parker's Crim. Rep., 676,* decided by the Supreme Court of New York, the defendant was indicted and put upon trial for the crime of arson. During

the trial, upon the motion of the prosecuting attorney, without the consent and against the objection of the accused, a juror was withdrawn and the jury discharged. At the ensuing term the district attorney again moved the trial of the indictment. The defendant set up, by way of plea, the foregoing facts, and, upon error, the court held that the accused was entitled to be discharged. The court, in that case, said: "The true ground of the objection lies back of the Constitution, and is found in the principles which have been deemed essential to the full and fair protection of individuals accused of crime, and to secure to them a speedy and impartial trial, and the best means of vindicating their innocence. The practice and the views of courts of criminal jurisdiction, upon questions somewhat analogous to that presented in this case, have passed through some modifications. Kent, J., in *People v. Olcott, 2 J. C., 301*, refers in detail to the earlier cases bearing upon the point; and, while his review of the cases shows distinctly the modifications and changes which have taken place in the practice of courts, it also shows the great tenderness and care manifested by the judges for the rights of the accused, and to secure to them every right essential to their defense, and an anxiety to protect them against any act or omission of the government, or the public prosecutor, which could injuriously affect them."

It was held, in *The State v. Walker, 26 Ind., 346*, that when the accused, in a criminal prosecution is put upon trial, on a valid indictment, before a legal jury, and the jury is discharged by the court without good cause, and without the consent of the defendant, he has incurred the first peril, and the discharge of the jury is equivalent to a verdict of not guilty. So, also, in the case of *The People v. Barrett and Ward, 2 Cains' Cases, 100 to 304*, the Supreme Court of New York held that "where the jury were discharged against the consent of the defendants, (in a case of misdemeanor only), because the district attorney was not prepared with evidence to support the prosecution, such a discharge was *equivalent to an acquittal*,

and the defendants could never be brought to trial again for the same offense." See *Commonwealth v. Cook et al., 6 S. and R, 777*, and cases there cited; *John Mounts v. The State of Ohio, 14 Ohio, 295*, and cases there cited.

We do not wish to be understood as intimating that the court could not, in any other cases than those mentioned by statute, discharge the jury and hold the defendant for trial at another time and by another jury. Doubtless the court would have that power when a criminal cause has been submitted to the jury, and they have retired to consider of their verdict, and it is found to be impossible for them to agree, the court could discharge the jury and hold the accused for trial. So, also, if, during the progress of the trial, one of the jury should become so ill as to be unable to sit in the panel, or if the accused should become sick and unable to be present and proceed with the trial.

Bishop lays down the doctrine to be that, "Whenever, after a trial has commenced, whether for misdemeanor or for felony, the judge discovers any imperfection which will render a verdict against the defendant, either *void* or *voidable* by him, he may stop the trial, and what has been done will be no impediment in the way of any future proceedings. Whenever, also, any thing appears showing plainly that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to exist; and, on making the adjudication matter of record, stop the trial with the like result as before. But, without the adjudication, the stopping of the trial operates to discharge the prisoner. In other words, when the record shows the defendant to have been in actual jeopardy, he is protected thereby from further peril for the same alleged offense. But when it shows, also, in addition to this, something which disproves the peril, it does not show the peril, whatever else it shows, and therefore it does not protect him." *Vol. 1, 873.*

Entertaining the views above expressed, we think the true rule to be that, whenever the accused has been arraigned, a

jury impaneled and sworn, and the cause given them in charge, as was in this case, and there being no objection interposed by the accused to the indictment or the other proceedings, we will presume that he was demanding his constitutional right to a speedy and public trial, by an impartial jury of his country, etc., and the indictment being sufficient, as we have seen, and there appearing by the record to be no other reason for dismissing the indictment than insufficiency, the court would not deny the defendant the right to a speedy and impartial trial by dismissing the indictment. The dismissal of the indictment in this case, we think, under the circumstances, operated as an acquittal of the defendant. The Jefferson circuit court, therefore, erred in sustaining the demurrer to the defendant's second plea.

There is another error disclosed by the record, which, though not objected to here by the appellant's counsel, we deem it our duty to notice. The two pleas, of former acquittal, and not guilty, were submitted to the jury at the same time. The former should have been first tried, and, if the verdict was against him; the judgment upon it would have been that he answer the indictment. In the case of *Rex v. Roche, 1 Leach, 160*, the court said: "In pleas of abatement there are two issues, and they are always tried upon separate charges to the jury. Besides, charging them with two issues at once would lead to the absurdity that, being charged with both, they would be obliged to find upon both; and yet, if the first finding was for the prisoner, they could not go to the second, because that finding would be a *bar*. They are distinct issues; and the jury must be separately charged with them." *Amer. Crim. Law, vol. 1, sec. 538; Hill v. The State, 2 Yerger, 248; The State v. Copeland, 2 Swan, 262.*

The disposition we have made of the questions above discussed, are sufficient to determine this case, and we deem it unnecessary to notice the objections, to the ruling of the court below, in giving and refusing its instructions to the jury.

The judgment of the circuit court is, for the errors aforesaid,

reversed and the cause remanded, with directions to overrule the demurrer to the defendant's second plea, and to proceed in the cause according to law, and not inconsistent with this opinion.

Judges GREGG and MCCLURE, dissenting, say:

We are of opinion that the weight of authority, both in England, and most of the American States, is that a citizen cannot be twice put in jeopardy of life or liberty for the same offense, and that, when a competent court is duly organized and a defendant has plead not guilty to a good indictment, and a jury has been empaneled to try the issue, jeopardy has then attached, and that nothing but his own consent, or unavoidable necessity can authorize a dismissal of the prosecution, or a discharge of the jury, and subject the accused to further prosecution for the same offense.

The question in this case is, whether or not the fundamental law of the State, and the acts of the Legislature, can twice jeopardize the life or liberty of the citizen, or can fix the time at which jeopardy begins, and if either or both can be affected by the sovereign power of the State or by legislative action, has such change been made?

We are not prepared to hold that even the entire sovereignty of the State has the power to subject her citizens to various trials for life or liberty, for one alleged offense, but may she not define when jeopardy begins, when a party has actually been put in peril of life or liberty, so as to free him from further answering to such charge?

It will be seen by examining the many authorities referred to by the Chief Justice, that courts have not been uniform in their ruling as to when a defendant is in jeopardy.

We think the weight of the authority is as he stated it, but it is clear that there has heretofore been no definite and fixed rule prescribing the time when jeopardy attaches, and we are not prepared to say that there is any principle of higher law

or natural right that prevents the sovereign people of a State, when in convention, from defining, within the bounds of reason and justice, when, and not till when, a citizen shall be considered in jeopardy. If so, have the people changed or modified the rule in this respect?

The Constitution of 1836, section 11, article II., 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 shall have been committed; and shall not be compelled to give evidence against himself." Section 12: "That no person shall for the same offense, be twice put in jeopardy of life or limb."

But in the Constitution of 1868, the clauses in reference to the trial of persons for high crimes are, to some extent, changed. Section 9, Article I., is as follows: "No person shall be held to answer a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases of petit larceny, assault, assault and battery, affray, vagrancy, and such other minor cases as the General Assembly shall make cognizable by justices of the peace, or arising in the army or navy of the United States, or in the militia, when in actual service, in time of war or public danger; *and no person, after having been once acquitted by a jury, for the same offense shall again be put in jeopardy of life or liberty;* but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may, in its discretion, discharge the jury, and commit or bail the accused for trial at the same or at the next term of said court; nor shall any person be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons, before conviction, shall be

bailable by sufficient sureties, except for capital offenses—murder and treason—when the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require."

In the Constitution of 1836, we find the declaration that an accused shall not be twice put in jeopardy of life, etc., leaving it solely to the courts to decide what is being in jeopardy, a term, as we have above stated, not well defined; some courts holding that at a certain stage of the proceedings jeopardy attaches, while others hold that it does not attach until further steps have been taken. The proposition as to whether or not a jury, duly empaneled, can be discharged, if so, when and under what circumstances they may be discharged, without the accused having a right to acquittal, are among the vexed questions that for so many years have perplexed the courts, and we think the language of this ninth section, of article one, of our new Constitution, compared with that of sections 11 and 12, article 2, of the old Constitution, shows that the minds of the people's delegates, in convention, were directed to these difficulties, and that, while they attempted still to secure to an accused all the substantial rights afforded by a free and liberal government, they attempted to so define those important rights that guilty parties might not escape for want of a technical compliance with salutary and substantial provisions.

The old Constitution not only declared that in cases of criminal prosecution, the accused should be informed of the nature and cause of the accusation against him, but *he should have a copy thereof.* It is a fact, well known to those of large experience, that many perplexing questions arose in practice as to the time and manner of furnishing such copy, as to whether that furnished was in all respects a perfect copy or was sufficient. The new Constitution attempts to avoid and does not require the copy, but leaves it to the courts to see that the accused is properly advised as to the charges preferred

against him, or for the Legislature to prescribe in what cases a copy shall be furnished. The new Constitution also omits that clause requiring all witnesses to meet the accused face to face.

But, upon the subject now before the court, the new Constitution does not declare, as did the old, that no one shall be twice put in jeopardy of life, etc., but declares that "no person, after having been once acquitted by a jury, for the same offense, shall be again put in jeopardy of life or liberty." And, as an evidence that the convention was then attempting to define when that jeopardy, which would entitle a party to a verdict or a discharge, should attach, they, in the same section, say that the court in its discretion, may discharge the jury, if they differ in opinion, and the accused shall stand for further trial, etc.

It seems to us that the Constitutional Convention had power to define the time (consistent with right and the principles of republican government) when jeopardy does attach, and that a proper interpretation of the new Constitution is, that it does not attach until a verdict is had in the case.

The legislative department seems to have so interpreted this provision. In section 172, Criminal Code of Practice, it is enacted that: "There are but three kinds of pleas to an indictment: *First.* A plea of guilty; *Second.* Not guilty; *Third.* A former conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty."

"Section 178: The dismissal of the indictment by the court, on demurrer, except as provided in section 169, or for an objection to its form or substance, taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense."

We have seriously considered whether or not our strong inclination not to allow one, perhaps guilty of a henious crime, to go free, upon a mere error of the inferior court, without any finding or judgment upon the merits, may not have influenced our construction of these legislative acts, yet it does seem to us they were intended to define, and to some extent restrict the

privileges of an accused; that they only prevent him from being discharged upon technical grounds, and that they are not inconsistent with common right and natural justice.

And, while we are conscious of the great importance of guarding individual rights and hedging in courts, wherever, from ignorance or prejudice, they are liable to overstep the bounds of justice, and the extreme delicacy in construing legislative acts in contravention of well established precedents, yet mature consideration impels us to say that, while we do not approve the action of the circuit court in discharging the jury, after the case had so far progressed, yet, under our late Constitution and statutes, there was no sufficient error to let this accused go hence with his crime unanswered, and that the sentence and judgment of the court below ought to be affirmed.

SIMMONS v. CITY OF CAMDEN.

CORPORATIONS.—Under the general incorporation act, cities and towns have authority to lay out, open, grade and keep in good repair the streets of a city or town, and a suit will not lie at the instance of an individual for damages, resulting from injuries to private property, from the lawful exercise of this authority, by the incorporation, where there has been no negligence, want of care or skill in its exercise.

Appeal from Ouachita Circuit Court.

HON. G. W. MCGOWEN, Circuit Judge.

Warren & Warren, for appellants.

Garland & Nash, for appellee.

HARRISON, J.

William R. Simmons sued the mayor and aldermen of the city of Camden, to recover damages for an injury to his property, occasioned by the grading of Washington street, in said city.

The complaint alleged that the plaintiff was the owner of a lot on said street, with two frame buildings thereon, and that the defendants had graded said street, and in doing so, had thrown up and raised the same so as to make an embankment in front of said lot, six or seven feet high, whereby all access to the buildings from the street was cut off and prevented, and the said premises greatly depreciated in value.

A demurrer to the complaint being sustained, the plaintiff appealed.

There can be no question as to the authority of the defendants to grade the street, or do the act from which the injury to the plaintiff's property resulted, for to lay out, open, grade and keep in good order and repair the streets, within the city, was one of the main objects for which corporate privileges and powers were conferred upon its inhabitants, as is clearly inferable from the acts of incorporation, or its charter, and the several acts amendatory thereof, and such power is expressly given the mayor and aldermen by the general act for the incorporation and government of cities and towns, and there is no complaint that they exceeded their authority in any respect; for no negligence or want of care or skill is alleged and none can be presumed.

The question for our consideration then is: Is the plaintiff entitled to recover for an injury to his property resulting from an act done by the defendants, under lawful authority and in a proper manner?

The maxim that a man shall so use his own property as not to injure his neighbor, imposed upon him the duty, in such use, of exercising care and diligence to prevent or avoid harm or injury to another, but does not impair the enjoyment of his

rights in it, for it is also, a maxim, that he who uses his own right, harms no one.

The application of this principle is seen in the following cases: In *Radcliff's Ex'rs v. Mayor and Aldermen of Brooklyn, 4 Comst. 195*, it was held that where a municipal corporation, under rightful authority, without negligence or want of skill in the execution of the work, grades and levels a street, an action will not lie by an adjoining owner, whose lands are not actually taken, for consequential damages to his premises. Chief Justice BRONSON, in delivering the opinion of the court in that case, said: "As no question has been made on that subject, we must assume that the defendants had acquired the title to the lands in the site of the street, in the form prescribed by law. In leveling and grading the street, they were at work in their own land, doing a lawful act for a lawful purpose. They did not touch the testator's property; and the question is, whether the damage, which resulted to him in consequence of grading the street, must be regarded as *damnum absque injuria*. The maxim *sic utere tuo ut alienum non lædas*, is not of universal application; for, as a general rule, a man who exercises proper care and skill, may do what he will with his own property." * * * * * * * * * "A man may do many things, under a lawful authority, or in his own land, which may result in an injury to the property of others, without being answerable for the consequences. Indeed, an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. Nor will a man be answerable for the consequences of enjoying his own property, in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part."

In *Panton v. Holland, 17 John. 92*, where the defendant, in the exercise of ordinary care and skill, in making an excavation for the purpose of laying the foundation of a house in his own land, dug so near the foundation of plaintiff's house as to cause it to crack and settle, it was held he was not liable for

the injury. In *Lasala v. Holbrook, 4 Paige, 169*, it was held that a person cannot be restrained from making a reasonable improvement on his own premises, upon the ground that it cannot be made without endangering an edifice erected on the adjacent premises, if the owner of the adjacent premises does not possess any special privileges protecting him from the consequences of such improvements, either by prescription or by grant from the person making the improvement, or from under whom he claims title.

In *Thurston v. Hancock, 12, Mass. 220*, the plaintiff had built his house in his own land, within two feet of the boundary line of his own land, and ten years after, the owner of the land adjoining, dug so deep into his own land as to so endanger the house, that the owner was compelled to take it down; it was held that the defendant was not liable for damage to the house, but that the plaintiff was entitled to recover for the damage arising from the falling of his natural soil into the pit so dug. In *Creal v. City of Keokuk, 4 G. Greene, 47*, it was held that the plaintiff was not entitled to recover for an injury to his store-house, in consequence of a change made by the city in a prudent and skillful manner, of the grade of the street on which it was situated, after he had built his store-house.

And in *Humes v. Mayer & Co., 1 Hump. 403*, the mayor and aldermen of Knoxville were held not liable for an injury to the plaintiff's property, caused by an excavation of the street made by them, with a view to its improvement, and with such care and skill as to do as little damage as possible.

These authorities conclusively show that the plaintiff had no cause of action, and that the demurrer to his complaint was rightfully sustained.

Judgment affirmed.

BOSLEY v. SHANNER.

CONTRACTS—*When void from threats or duress.*—To render a contract void because of threats or menaces, it is necessary that the threats and circumstances should be of a character to excite the reasonable apprehensions of a man or person of ordinary courage, and the promise, contract or statement, should be made under the influence of such threats or menace.

Appeal from Woodruff Circuit Court.

HON. WM. STORY, Circuit Judge.

T. D. W. Yonley, for appellant.

Watkins & Rose, for appellee.

GREGG, J.

The appellee brought assumpsit, in the Woodruff circuit court, against the appellant, for certain cotton, a hack and harness.

Appellant appeared and filed three pleas; upon which issues were formed, a trial held, and a verdict and judgment for the appellee. A motion for a new trial was made and overruled, and the case appealed to this court.

The evidence was amply sufficient to sustain a verdict for the value of the cotton.

The appellant complains that the court below instructed the jury, that, "In order that a contract or statement shall be void, because of threats or menaces, it is necessary that the threats and circumstances should be of a character to excite the reasonable apprehensions of a man or person of ordinary courage, and the promise, contract or statement should be made under the influence of such threats or menace."

This instruction was applicable, and by the authority appellant refers to: *Burr v. Burnett, 18 Ark. 214, and cases there*

cited—it is substantially correct. The evidence in the court below authorized the various instructions, finding and judgment there had, and there appears but slight ground for an appeal to this court.

The judgment of the circuit court is affirmed.

STATE v. JOHNSON.

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SUPREME COURT—*Power to issue Writs of Mandamus and Quo Warranto.*—Under the present Constitution, the Supreme Court, in the exercise of its original jurisdiction, has power to issue writs of *mandamus* and *quo warranto.*

SCHEDULE TO CONSTITUTION—*Construction of.*—That clause of the schedule to the Constitution (sec. 10), requiring all officers to qualify "within fifteen days after they shall have been duly notified of their election or appointment," is mandatory, and, for the purpose designed, has all the force and effect of a provision of the Constitution, and is to be construed by the same rules.

The command, and the use of the word "shall," in the schedule, denotes command, that the officer shall qualify within fifteen days after having been duly notified of his election, is nothing more nor less than a grant to qualify within that time.

Where the Constitution designates, in express and explicit terms, the precise time when a fundamental act shall be done, and is *utterly silent* as to the performance at any other time, it cannot be done at any other time.

TRIAL BY JURY—*To what cases does not extend, etc.*—The right of trial by jury, at common law, did not extend to summary proceedings, nor to civil proceedings against a public officer, and the proceding by *quo warranto,* is nothing more nor less than a civil proceeding against a public officer.

The Constitution having given this court jurisdiction to issue the writs, *with power to hear and determine the same,* the court has the power to determine the facts arising on the writs in which it exercises jurisdiction.

Petition for Quo Warranto.

Montgomery, Attorney General, *Yonley and E. W. Gantt*, for the State.

Watkins & Rose, *Rice & Benjamin*, *Gallagher*, *Newton & Hempstead*, *and English*, *Gantt & English*, for respondent.

McCLURE, C. J.

On the 14th of December, 1870, at the suggestion of the attorney general, a rule to show cause was awarded against the respondent, why a writ of *quo warranto* should not be issued against him.

On the 23d of January, a response was filed to the rule, and a demurrer to the suggestion or information of the attorney general. The first cause of demurrer is, that this court has no jurisdiction; the second is, that the information or suggestion shows no sufficient cause of action.

The question of jurisdiction is substantially settled in the case of *Price & Barton v. Page, treasurer, 25 Ark., 557.* While it is conceded that, in the case referred to, the application was for a *mandamus*, the determination of the power to issue that writ, by virtue of the original jurisdiction of this court, necessarily disposed of the jurisdiction of the court in cases of *quo warranto.* And, in exercising the jurisdiction, we do not stand alone: Judges RINGO, DICKINSON, LACEY, JOHNSON, OLDHAM, CROSS, PASCHAL, SEBASTIAN, CONWAY and WALKER, men whose names are familiar to the legal fraternity of the State, and whose erudition and legal lore are second to none who have succeded them, held, for a period of more than fifteen years, after the adoption of the Constitution of 1836, that this court had orginal jurisdiction in *mandamus* and *quo warranto.*

From 1851 to 1864, this court held that it had no original jurisdiction in *mandamus* and *quo warranto.* In 1864, Judges PIKE, ENGLISH and COMPTON reversed the opinion of 1851, and followed in the wake of Judges RINGO, DICKINSON, JOHNSON, OLDHAM, CROSS, PASCHAL, SEBASTIAN, CONWAY and WALKER. It

may be urged that the opinion urged by Judges PIKE, ENGLISH and COMPTON in 1864, is not entitled to much weight, they being the Judges of the Supreme Court at a time when Arkansas was supposed to belong to the Confederate States.

To this it may be replied, that Judges PIKE, ENGLISH and COMPTON were construing the provisions of the Constitution of 1861, which is *identical* with that of 1836, construed by Judge SCOTT; that they were acting under the solemnity of an oath that bound their consciences and controled their legal judgments, to the same extent, as was the conscience and judgment of Judge SCOTT bound. As lawyers, and men of legal ability, they have few equals and no superiors; and whether the opinion and decision in *The State v. Samuel W. Williams*, has the force of a judgment now, it is, at least, entitled to much respect and weight, emanating, as it does, from such a high source.

In the case of *The State v. Williams*, we find the following language, on the subject of jurisdiction of this court in *quo warranto:* "We, therefore, declare it to be now the opinion of this court, that, in cases involving the civil rights of the State as sovereign, affecting vitally its character and the proper administration of the government, in which the public has a direct and immediate interest, and when the right to a public office, franchise, liberty or privilege is the subject matter of the controversy, *this court is, by the Constitution, invested with the original jurisdiction*, to be exercised by means of a writ of *mandamus* or *quo warranto*, according as the State may, by her attorney general, ask for one or the other, in order to cause the admission of the proper person to, or to oust the party illegally holding such public office, franchise, liberty or privilege, with power, not only to issue the writ, but to hear and determine the same, being *pro hoc vice*, both a court of first instance and in the last resort. But we will not extend the remedy beyond the limits prescribed by the old writ, nor permit private persons to interfere and file relations in this court."

Feeling that we are fully sustained in exercising jurisdiction

in *mandamus* and *quo warranto*, by Judges familiar with the law, its practice and its precedents, we will now take up the second ground of demurrer. The question raised by the second ground is: "Is that clause of the schedule to the Constitution of 1868, directory or mandatory, as to qualifying within fifteen days after receiving notice of election?"

It is urged by counsel for respondent, that the clause in the schedule is directory and not mandatory. It is also urged that the schedule is but an ordinance of the convention, and that the rule of construction, applicable to statutes, should apply, rather than that applicable to Constitutions. In the case of *Ridley v. Sherbrook*, (*3 Cold. 569*,) the Supreme Court of Tennessee held, that, "the provisions of the schedule, for the purpose for which they were designed, *had all the force of Constitutional provisions.*" This is the only decision upon the subject we have been able to find, in the limited search we have made, and having no disposition to question the correctness of the decision of that court, we will proceed to discuss whether the provision was mandatory or directory.

It is urged by counsel for the respondent, that, "statutes directing the mode of proceeding by public officers are directory, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute." While, to some extent, this is a general rule, yet it by no means follows that it is an universal rule. In the case of the *People v. Cook*, (*14 Barb. 290, 8 N. Y. 67*,) the rule contended for by respondent was laid down, and it is insisted, is applicable to this case. We are unable to comprehend the analogy, and it does not exist; for there is a vast difference between a statute that directs how an officer shall proceed *after* he is an officer, and a statute that directs how he shall proceed in order to *become* an officer.

Treating the schedule to the Constitution in the light of a mere ordinance of the convention, and entitled to no more consideration than an act of the Legislature, let us see if it is directory or mandatory. It declares that "*All* officers *shall*

qualify and enter upon the discharge of the duties of their offices, within fifteen days after they have been duly notified of their election or appointment." (Sec. 10, Sched.) One of the first rules of construction is, to ascertain the intention of the law-making power, and carry that intention into effect, if it do not contravene the fundamental law of the land. It is not insisted, that the determination, that the clause of the schedule above quoted, as either a mandatory or directory provision, would contravene any provision of the Constitution, and all that now remains for us to determine is, whether it is mandatory or directory. Another well established rule of construction is, "where there is nothing doubtful—nothing ambiguous—no words made use of which operate to defeat the manifest intention of the Legislature, there is nothing left for construction." (*2 Ohio, 65; 9 Ohio, 558.*) Now let us apply these plain simple rules to the language before us. "All officers *shall* qualify and enter upon the discharge of their offices, within fifteen days after they have been duly notified of their election or appointment." Is there any thing doubtful about the meaning of this language? Is there any thing ambiguous about it? Is it not plain and easy of comprehension? Is there any reason why any new term should be interpolated into the clause quoted, in order to save any natural or acquired right to the citizen? There is none that we know of, and in the absence of a necessity, we are unable to see why it should be done. If the Lieutenant Governor failed to qualify within the fifteen days, or wholly failed to qualify, the existence or permanency of the State government would not have been jeopardized, nor would any public or private interest have suffered. It is true that the Constitution makes it his duty to preside in the deliberations of the Senate, but his failure to preside would not work a suspension of legislation, for the Constitution provides for the election of a President *pro tempore.* If the schedule declared that all persons elected under the provisions thereof, should qualify before entering upon the discharge of the duties of their respective offices, and fixed no specific time

within which the qualification should take place, such a provision would have been directory, but such is not the character of the schedule. The command, and the use of the word "shall," denotes command, that the officer *shall* qualify within fifteen days after having been duly notified of his election, is nothing more nor less than a grant to qualify within that time.

Another well settled rule of construction is, that "no word ever should be *rejected*, if the statute will admit of a rational and consistent construction, without rejecting it." *3 Ohio, 193; 8 Ohio State, 564.* Now, why should the words, "within fifteen days after they have been duly notified of their election or appointment," be stricken out of the schedule? It is reasonable to presume that these words were placed in the schedule for some purpose, if so, what right have we to reject them, or treat them as surplusage?

What reason or object could the Constitutional Convention have had by the use of the words, "within fifteen days after they have been duly notified of their election or appointment," *if it was not to place a limitation on the time* in which an officer was to qualify? The mere insertion of any number of days, within which an officer was to qualify, evidences an intention to limit the time in which the person elected or appointed, should qualify.

But counsel for respondent urge that there is no declaration that the person elected shall not qualify *after* the fifteen days, *and that because there is not*, that qualification at any subsequent time may be pleaded in bar against the State, in an action or proceeding commenced to recover the office from one who has not complied with the terms of the grant. If this should be the rule of construction applied to statutes, it would become necessary for the Legislature, in every instance, in a statute to declare, if the thing to be done was not done at the time fixed by law, that it should be void. This rule of construction would create interminiable confusion with a large majority of our present statutes, and work irreparable mischief if it once attained a foothold.

In Maine, (*6 Shepley, 548,*) the question was presented to the Supreme Court, whether the Legislature could make an apportionment, at a time other than that named in the Constitution, and the court laid down the law to be, that "where the Constitution designates in express and explicit terms, the precise time when a fundamental act shall be done, and is *utterly silent* as to the performance at any other time, it cannot be done at any other time." In the case now before us the schedule declares that the qualification shall take place within fifteen days after notice. The Tennessee courts say, that the schedule, for the purposes, is as binding as any other portion of the Constitution. The schedule is silent as to qualification, at any other time after the fifteen days, and in such case, the Supreme Court of Maine say, that where the Constitution is silent as to the performance at any other time, it cannot be done at any other time. Believing this to be the better rule of construction, as applicable to a case of this kind, we are clearly of opinion that the demurrer should be overruled.

On the 17th of February, 1871, the respondent filed certain affidavits in support of the response to the rule to show cause. The attorney general then informed the court, that he desired to, and could successfully, controvert the facts set forth in the affidavits, and in order that he might have that opportunity, it was ordered that the writ of *quo warranto* issue, as the only question about which there is any controversy is, whether the Lieutenant-Governor qualified within fifteen days after having been duly notified of his election.

To the writ of *quo warranto*, a response was filed, setting up really two pleas:

First, That the Congress of the United States, by an act, passed March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States," had declared that, "no legal State government existed in the State of Arkansas;" and that under the provisions of said act, and acts supplemental thereto, it was the object and intent of said acts to enable the people of Arkansas to form a State government,

republican in form, by the framing and adoption of a Constitution, in conformity with the Constitution of the United States, and which should provide that the elective franchise shall be enjoyed by the persons mentioned in said act, and the adoption of article fourteen, by the Legislature of said State, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and that then and thereafter, the preceding sections of said act shall be inoperative in said State. The plea insists, if such an expression may be allowed in this connection, that the present Constitution did not go into effect until the 22d of June, 1868, and that he qualified more than fifteen days before that date, as Lieutenant-Governor of the State of Arkansas.

[The second plea sets up that he qualified as Lieutenant-Governor within fifteen days after he was duly notified of his election. To the first plea, the attorney general filed a demurrer, and a replication as to the second.]

[The demurrer to the first plea was sustained. On the 20th of February, the respondent filed a motion for a jury to try the issue of fact presented by the second plea, the replication and similiter.]

McCLURE, C. J.

Here we have a question presented for our consideration, that is not free from difficulty. On the one hand, to refuse a jury to try the issue of fact presented, is at variance with the ideas usually announced from the political rostrum, or spoken of in unguarded terms by the sycophant and demagogue, who caters and bends to public opinion, "that thrift may follow fawning." On the other, we are constrained in our action by the solemnity of an oath, and the limits of the Constitution. Our Constitution declares, "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy." Counsel for the re-

spondent urge, that this provision of the Bill of Rights entitles him to a jury to pass upon the question of fact.

It has been truly said that "a Constitution is not the beginning of government," and that it is adopted with a knowledge that it is, and was made in harmony and consonance with the condition of things existing at the time of its adoption.

In the Constitution of 1836, the 6th section of the Bill of Rights, declares that, "the right of trial by jury should remain inviolate." It will be observed that the Constitution of 1868, in addition to declaring "the right of trial by jury shall remain inviolate," adds the words, "and shall extend to all cases at law, without regard to the amount in controversy." Have the words added, any meaning, or are they mere senseless things? Why are they added? Shall these words be treated as a redundant expression, in order to bring this proceeding within the rule contended for by the respondent?

In the case of the *State v. Ashley*, (*1 Ark. 284*), the point was made, in argument, by Judge Watkins, who was attorney in that case, that the court could not exercise original jurisdiction in *quo warranto*, because, in the determination of the proceeding, matters of fact usually, and almost necessarily arise; and that in the exercise of the power to hear and determine the same, inasmuch as this court had not been provided with a jury, it being a well settled principle of the law, that whether the jurisdiction was original or appellate, the jurisdiction could not be exercised without the intervention of an act of the Legislature, would controvene that provision of the Bill of Rights, which asserts "the right of trial by jury shall remain inviolate."

In response to this position Mr. Pike said, it "hardly merits notice." He further states that the right of trial by jury was the right of trial, "existing at the adoption of the Constitution," which was, that "every man shall be tried by his peers of the vicinage," and that no free man shall be arrested or im-

prisoned, or deprived of his free hold, except by the regular judgment of his peers, or the law of the land."

Chief Justice RINGO, after hearing these arguments, in a very able and elaborate opinion, held that the court had *jurisdiction*, but he no where states or gives any expression upon the argument presented, and it is fairly inferable that the exercise of jurisdiction, in his opinion, did not controvene the right of trial by jury.

It will be admitted, by those of the profession, who are familiar with the practice of the law, that the proceedings in which a jury was not required at common law, that the clause of the Constitution, declaring the right of trial by jury, shall remain inviolate, does not give it.

When the Constitution was framed, adopted and ratified by the framers and the people, it was well known that this court was not provided with a jury, or the means to procure it, and yet, with this knowledge before them, they gave this court jurisdiction in *mandamus* and *quo warranto*, *with power to hear and determine the same.* That the people, themselves, had not only the right, but power to provide that this court should determine questions of fact, arising on the writs, in which it exercises jurisdiction, we presume will not be denied.

Whether the right of trial by jury ever existed as a matter of right in *quo warranto*, is not a matter easily determined, by direct precedent. The respondent claims that such is the uniform practice, not only in this country, but in England, and in support of that position, quite a number of authorities have been submitted to our consideration. On a careful examination of the authorities cited, we have found them to apply to *informations in the nature of a quo warranto*, the former being a criminal prosecution, and the latter a proceeding upon a writ, in the nature of a writ of right, which partakes more of what is now known as a summary proceeding, than a "case at law."

The right of trial by jury, at common law, never existed in equitable proceedings, in admiralty or summary proceedings, or proceedings against officers of a civil nature, nor did it

exist in cases where private property was taken for public use, and yet in all these proceedings, questions of fact, involving the tenure to property in untold amounts, are adjudicated upon by the courts, without the intervention of a jury.

So far as we can now trace the right of trial by jury, at common law, it did not extend to equitable actions, admiralty or summary proceedings, nor in cases where private property was taken for public use, nor in procedings *in rem*, nor in civil proceedings against public officers, and this proceeding is nothing more or less than a civil proceeding against a public officer. By Magna Charta, it is declared that "no freeman shall be arrested or imprisoned, or deprived of his *freehold*, except by the regular judgment of his peers, or the law of the land."

In the seventeenth year of the reign of King John, at Runnymede, these concessions were made by the crown, and from that time forward, to some extent, the rights of Englishmen have been determined by the concession then made. King John's construction of the concession was, that it did not protect the "*goods and chattels;*" and, as an evidence of this, we have but to refer the unread to history of the time, and it will be found that armed forces were sent against the secret enemies of the king, and they were despoiled of their goods, without observing any form of law. Langton and his associates, and many others, were thrown into prison and despoiled of their goods, without the intervention of a jury, notwithstanding Magna Charta. *Ling. His. Eng., vol. 2, 225 n.* So far as our research has extended, the right of trial by jury, at common law, only extended to criminal prosecutions, and in actions where a freehold or goods and chattels were in dispute.

The term, "goods and chattels," includes personal property, choses in action, and chattels real. The right to an office is neither personal property, or a chose in action, or chattels real, in the sense used at law. In information in the nature of a *quo warranto*, it is expressly provided by an act of parliament, (*3 Geo., 2 ch., 25*), that a jury shall be struck before a proper

officer, on the demand of the king or the respondent. This statute was passed for the special purpose and to the end that his majesty's courts, at Westminster, might be provided with juries to try questions of fact. If this right existed before this time, it was certainly a work of supererogation on the part of parliament to enact the law, and the inference to be drawn from this fact is, that, prior to the date of the statute, the issues of fact were tried by the court, even in cases of informations in the nature of *quo warranto*, which, at best, is but little more than a summary proceeding to ascertain the right to an office.

As yet, this court is the only tribunal in the State having jurisdiction in *quo warranto*. Under the Constitution of 1836, the circuit courts were courts of original jurisdiction; they are not so now; the circuit courts are mere creatures of the Legislature, and without any constitutional jurisdiction. It is clear that the eighteenth section of the Civil Code, regulating the jurisdiction of the circuit courts, does not confer upon them the power to hear and determine the high prerogative writs used for the protection of the sovereignty of the State. It is not intended to intimate that the Legislature has no power to confer the jurisdiction, but that it has not conferred it.

We have already stated that, when the members of the convention framed and adopted the present Constitution, they were well aware that this court was not to have a jury, and that the jurisdiction in these writs was conferred with a full knowledge of this fact. The proceeding at law is not a criminal action, and yet, from the tearful and pathetic argument of the counsel, one would be led to suppose that the respondent was being tried for murder or treason, and the argument is based upon the false assumption that his client is to be hanged, without the intervention of a jury. The object of this proceeding is to require the respondent to come into court, and show the title to the office, the functions of which he has been exercising. If he has title, no harm can befall him; if he

has no title, he is simply ousted from the office, whose functions he has usurped. No penalty, imprisonment or fine is imposed, no matter what way the judgment goes.

It has been frequently held, that right of trial by jury, at common law, never extended to cases of defaulting or delinquent officers of the government. *2 Stew., 131; 6 Man., 641; Hardin's Rep., 5; 17 Ala., 516*, and the States in which these holdings have been made, have denied a jury when demanded, on the sole ground that, in actions against public officers, the right of trial by jury did not exist at common law, if the actions were not of a criminal nature. Believing this to be the correct distinction, we are unable to see wherein the denial of a jury would contravene the right of trial by jury, as it existed at common law, or as it existed at the adoption of the Constitution. If we were to consult our own conscience, or desired to shirk the duty imposed on us by the Constitution, we should at once order a jury, to dispose of this question; but, inasmuch as neither the Constitution nor the Legislature has provided this court with a jury, or the means of obtaining one; and, inasmuch as there would be no court in the State, with jurisdiction, to protect the officers of the State from usurpation, if this court were to refuse to exercise the jurisdiction conferred, we feel it to be our duty, under all the circumstances, to overrule the motion for a jury.

[On the 20th of February, 1871, a motion for a jury was filed, under XIV. amendment to the Constitution of the United States.]

McCLURE, C. J.

We see nothing in this motion that was not really disposed of in the first demand for a jury. We have carefully examined the opinion of Judge BRADLEY, submitted by counsel for respondent, and can come to no other conclusion than that he made a hasty and ill-advised *obiter dictum*, in the case referred to; and, as an evidence of this fact, we direct attention of coun-

sel to the fact that he says the civil rights bill and the XIV. amendment have no relation to each other.

On the very next day he comes into court and says that he is convinced that he was in error in that respect, and recants his position of the day previous. This, taken in connection with the fact that the case turned on a question of jurisdiction, and that the remarks made were not pertinent to the disposition of the case, entitles the argument to no more weight than that of any other lawyer of equal ability. The fourteenth amendment originated in Congress, and many of the same men who aided in proposing the amendment to the States, were in Congress when the enforcement act was passed. Under such circumstances it will not be unreasonable to presume that congressional construction is of as much weight on that subject as the opinion of Judge BRADLEY. Congress, under the authority given that body, to enforce the amendments, undertakes to define the rights sought to be preserved and protected by the fourteenth amendment, and by the sixteenth section of said act it is declared, "That all persons within the jurisdiction of the United States, shall have the same right in every State and territory of the United States, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other; any law, statute, ordinance, regulation or custom, to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon any person immigrating to such State from any other foreign country; and any law of any State, in conflict with this provision, is hereby declared null and void." There seems to be no intention to extend the right of trial by jury to cases where it did not exist before, and we do not think the fourteenth amendment was adopted for any such purpose. The motion is overruled.

[On the 22d of February, 1871, a motion was made to dismiss for want of jurisdiction, on the ground that this court had no power or authority to impanel a jury.]

McCLURE, C. J.

It has already been very clearly intimated that this court would hear the facts in this proceeding and dispose of the case on its merits. If the case should be dismissed at this stage, the jurisdiction in *quo warranto* would cease when an issue of fact was presented for trial, and the result of such a holding would be that it would have jurisdiction in cases where no question of fact was presented, and that if a question of fact should be presented, this court would be ousted of jurisdiction. The jurisdiction of this court is not to be measured, nor does it hang upon so feeble a tenure.

[On the 25th of February, 1871, the court, after hearing the evidence, delivered the following opinion.]

McCLURE, C. J.

The court are unanimously of opinion that the evidence presented in this case shows that the respondent qualified and entered upon the discharge of his duties within the time prescribed in the schedule. The fact of election of respondent being conceded, the only thing at issue in the case is established. It is therefore considered that the respondent have and use and exercise the rights, privileges and franchises of the office of Lieutenant Governor of the State of Arkansas, and that he be allowed his costs in this behalf expended.

GREGG, J., dissenting, says:

The relation of the attorney general, after announcing that the respondent had usurped and exercised the office of Lieu-

tenant Governor without warrant or sufficient authority, admits his election to that office, but alleges that he failed to take his oath of office and enter upon the duties thereof, within fifteen days after he was notified of his said election.

Second. That he refused to qualify according to law, and file a copy of his oath in the office of the secretary of State, whereby he had forfeited any right he may have had to that office.

It has been intimated, in argument, that a *quo warranto* is a favored prosecution; but upon the demurrer to this writ, it has not been contended that the attorney general, in his relation, is not bound to state facts which, if true, by law, the respondent is not entitled to hold the office; in other words, he must state facts which show that the State is entitled to a judgment of ouster.

In this, as in other suits at law, the pleader should state facts, matters issuable, and not conclusions or inferences of law; and if the facts charged constitute no cause of action against the accused, he may suggest that to the court, and be relieved from making any response. This is the ground assumed by the respondent here, and denied by the relator.

The latter clause of the tenth article of the schedule to the Constitution of 1868, declares that, "all officers shall qualify and enter upon the discharge of the duties of their offices within fifteen (15) days after they have been duly notified of their election or appointment."

The principal questions urged upon the attention of the court are:

First. The relator urges that this clause in the schedule is mandatory, and must be complied with; and if respondent failed to comply therewith he forfeited all rights he had acquired to the office, and could not afterwards assume the franchises, powers and privileges of that office. And the respondent urges that this clause of the schedule is directory, and if the party does not take the oath of office within the time stated he may thereafter take such oath and enter upon the duties of

the office; and that if a failure to take such oath within the time is a violation of said clause, there is no penalty affixed for such neglect or violation, and it is not within the scope of judicial authority to create a penalty or declare what that penalty shall be.

Although this precise case is new in this court, there have been many questions strikingly analogous in principle to the ones here presented.

Mr. Sedgewick, in his work on statutory and constitutional law, 368, says: "When statutes direct certain proceedings to be done in a certain way, *or at a certain time*, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid though the command of the statute is disregarded or disobeyed." See, to the same points, *Cooley's Const. Lim.*, *74*, *et seq.*

Whether or not the general principle here enunciated, is applicable to the case before the court, depends upon the question as to whether or not the time for taking the official oath, as stated in this schedule, is of the essence of the thing to be done. To arrive at that we should look to the purport, meaning and intent of this act, or schedule. A Constitution had been framed, the fundamental principles of an original law had been agreed upon, and now it was desired to have the assent of the people to this fundamental law; and the delegates then undertook to direct in what manner the people should express their assent or dissent to this law, and in what manner they should choose officers to fill the various positions provided for in such organic law, and at what time and in what manner these officers should enter upon the discharge of the duties of their respective offices. It directs how the elections shall be held; provides for commissioners and judges of elections; directs how elections may be contested, and the result declared; and, in short, prescribes the manner of forming a government, in accord with the organic law thus agreed upon. This ordinance was to declare the manner of getting up the machinery

of the new government. This schedule was no part of the fundamental law of that government, as was insisted in argument. Instead of being a part of those "fundamental maxims and unvarying fixed rules by which all departments of the State government should at all times shape their course," it was a most fleeting and temporary enactment; instead of being declared a principle to regulate law-makers as well as individuals, it fixed its own hasty dissolution. That fundamental law, like a will of the schedule, could not go into full force and effect until all the functions of the schedule had been performed. The termination of its existence was the recognized beginning of the Constitution's authority and power over the people, and the departments of the State; therefore, instead of this being of the ground work, or fundamental principles of government, it did not even claim the stability of an ordinary statute; it pretended only a temporary existence, *for a temporary purpose*, and in all of its offices it was most peculiarly advisory—directing the manner of forming an organization which was to carry out the laws enacted. And the taking the oath of office was a preliminary step to the object intended.

If the person elected, failed or refused to qualify as directed, the proper authorities might have taken measures to declare the office vacant; but if no such steps were taken, and no vacancy declared until he came forward and qualified, and entered upon the duties of the office, no forfeiture could be declared; and all penalties for non-compliance with statute law, should be fixed by law, and a court cannot say forfeiture of the office shall be the penalty, when the law-making department have not so declared.

In the case of *Glidden v. Towle*, *11 Foster*, *166–7*, the Supreme Court of New Hampshire, held, upon a statute requiring town officers to appear and take an oath within six days after their election, that, "These are general provisions in regard to town officers, but they apply to fence viewers in the same manner as though specifically enacted in regard to them. Were it

made to appear that the fence viewer, in question, had been duly notified of his election, as required by statute, and had neglected to take the oath of office, as therein stated, the selectmen might, perhaps, have treated his conduct as a refusal to accept the office, and appointed another in his stead. But nothing of the kind appears, and, in the absence of any time being fixed in which a vacancy is declared to exist, or of any one being appointed in his stead, we see no objection to his taking the oath at the time he did, and of his entering upon the duties of his office." (He was elected in March, and did not take the oath until the 26th of July following.)

In case where a sheriff, by statute, was required to file bond within twenty days after notice of his election, the Supreme Court of New York, held, "that the statute may be considered in that respect, directory to the sheriff merely, and not as imposing an absolute limitation upon him." *12 Wend. 483.*

In the case of the Mohawk and Hudson Railroad Company, the Supreme Court of New York, said: "The statute requiring inspectors of corporate elections to take an oath, is simply directory in its terms, and without any nullifying clause, on account of omission," etc. *19 Wend. 143.* Nor is there any nullifying clause in the schedule under consideration.

The court of appeals, in New Jersey, in the case of *Kearney v. Andrews, 2 Stockton's Ch. 24*, under a staute that required the officers of a town to take an oath of office within ten days after an election, say "it was directory, only, and that the alderman and member duly elected did not forfeit their offices by their neglect of being sworn in within ten days after their election. The counsel, in my judgment, are right in this construction; the neglect to take the oath of office did not, *ipso facto*, vacate the office.

"The officers elected would have been legally qualified to discharge their duties of office had they been sworn in after the expiration of ten days, but an officer * * * may resign his office, or he may refuse to act; and, in either case, his office may be declared vacant, and his place supplied. It,

therefore, he is required to take an oath of office, and he declines to do it within the time prescribed by law, while such neglect does not, *ipso facto*, vacate his office, the body, of which he is a member, may declare the office vacant, upon the ground of his refusal or neglect to assume the responsibilities in the mode directed by law." This lucid statement of the law, by that learned court, needs no comment.

In the case of Heath and others, the Supreme Court of New York say: "Nothing is better settled, as a general rule, than that, where a statute requires an act to be done by an officer within a certain time, for a public purpose, the statute shall be taken to be merely directory; and though he neglect his duty, by allowing the time to go by, if he afterwards perform, the public shall not suffer by the delay." *3 Hill, 47;* see, also, *6 Wend., 486.*

In the case before the court, it certainly will not be insisted that the taking of this oath, by the Lieutenant Governor, was an act to be done for a public purpose; and this very learned court say, a neglect of duty in letting the time go by, if he afterwards perform, the public shall not suffer by the delay. And no vacancy is alleged to have occurred, nor injury done, in this instance.

We are clearly of the opinion that qualification and entering upon duty by the Lieutenant Governor, after the expiration of the fifteen days, would entitle him to the office. The schedule, in its whole scope and spirit, is a directory act, and no negative words are used prohibiting the taking of the oath at any time after the fifteen days, and no penalty is affixed for failing to take it within that time.

The taking of the oath was collateral and preliminary to the main object of filling and exercising the functions of the office, and not the essence of holding or doing the duties thereof.

For the same reasons that this demurrer should have been held good, we are of opinion the demurrer to the respondent's second plea should have been overruled.

We also disagree with a majority of the court upon the mo-

tion filed praying for a trial, of the issue of fact herein joined, by a jury.

We regard the right of trial by jury, in actions *at law*, as one of those fundamental principles of liberty that may be claimed by any suitor, when his right of property, liberty or character is put in issue before a court of *law*.

Our Bill of Rights, section 61, declares that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy."

It has been assumed, in argument, that this is a peculiar action, and that, while this court is, by the Constitution, clothed with power to issue this writ, and to hear and determine the same, there is no authority given or mode prescribed by which a jury can be brought into court to try the issue of fact, and that it necessarily follows that the court must determine all questions of both law and fact. This by no means follows. If it be true that this court has jurisdiction to hear and determine this cause, then the ordinary legal means, necessary to ascertain the facts, follow as an incident to such power. See *State v. Morrill, 16 Ark., 384; Fletcher v. Oliver, 25 Ark., 298.*

If, to say no statute has directed how we shall procure a jury, is sufficient to deprive the respondent of a trial by jury, is it not equally forcible to say there is no statute directing in what form process of summons shall be issued, to whom directed, by whom, how and at what time it shall be served, when and in what manner returned? and, therefore, the court cannot take jurisdiction of the respondent and decide his case. Yet, by an appeal to the inherent powers of the court, and its just discretion, we readily formed a writ, quickly decided the sheriff should execute it, and as readily determined how it should be returned, and that, thereby, we had jurisdiction of the respondent and his case.

If this discretion was proper, why cannot the same inherent powers and judicious discretion direct a jury returned to the bar to decide the facts in the cause upon which the court

would determine the rights of the parties? If the latter discretion and power cannot be exercised, the right to determine the case should be held in abeyance and await legislative action. See *38 Mo. (7 Wright) 539.*

But we are of opinion that where the fundamental law authorizes and empowers a superior court to hear and determine a cause, the grant carries with it the incidents necessary to carry out that power, and that the usual modes of trial, as understood and regulated by the common law, may be adopted to ascertain the necessary facts in the case; *1 Tenn. 363*; and that while the court responds to issues of law, a jury should respond to issues of fact; and if no mode of trial has been prescribed, the common law is in force and should be pursued.

This is said to be unlike an information in the nature of a *quo warranto*, wherein a party may demand a jury trial.

We are aware that anciently, under the common law, there were proceedings in the nature of a *quo warranto*, so-called, prosecuted by the crown officer, upon which the accused, if convicted, was subjected to puishment as well as ouster from office. These were criminal informations or prosecutions, and differed from the suit by *quo warranto*, which had for its leading object to determine the respondent's right to the emoluments and franchises of an office. But the forms and proceedings by *quo warranto* were so cumbersome and fraught with such disadvantages that it was abandoned by the English courts as far back as the date of Queen Anne; and an information in the nature of *quo warranto*, adopted for the very purpose of the ancient writ—the trial of the right to an office—and most of the American States pursue, by statute, a similar remedy to try the right of a claimant to an office.

Hence, in looking over the precedents of trials, they are generally upon such informations in the nature of *quo warranto*, but are, in substance, the same as *quo warranto*, each being for the distinct purpose of trying the right to an office; and we must look to the substance of the proceedings, and not to the name merely. In informations in the nature of *quo warranto*, as

far back as Charles II, and William III., we find the accused had a trial by jury. *King v. Mayor of London, 1 Shower, 254; King v. Carpenter, 2 Shower, 47; King v. Bridge, 1 William Blackstone, 45.*

In the case of the *King v. Francis*, as far back as 1788, an objection was made to granting a new trial on an information in the nature of a *quo warranto.* "The court granted a new trial, saying that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in Streye, in which a new trial had been granted." *2 Term, 484.*

These cases show that, in the King's Bench of England, these proceedings were considered civil actions, over one hundred years ago, and they were there tried by jury. And Mr. Selwin, in his *Nisi Prius, vol. 2, 1180*, says: "In a *quo warranto* to try defendant's right to be bailiff of Scarborough, in setting out his right, he showed his election," etc., etc., "and it being objected on the trial that this record ought not to be read against the defendant, and the judge having allowed it to be read, and left the whole evidence on both sides to the jury, to consider whether these persons were bailiffs," etc.

This shows, then, a jury trial, not on an information in the nature of *quo warranto*, but upon a writ of *quo warranto.* So, if there was a real difference, it is not shown in the mode of trial.

In Pennsylvania an information in the nature of a *quo warranto*, to test the right of an accused to hold an office, is triable by a jury. *Com. v. Woelper, et al. 3 Serg. & R. 28.*

In the case of the *Commonwealth v. Del. and H. Canal Company*, upon *quo warranto*, the court, in speaking of their statute authorizing special proceedings in that case by *quo warranto*, etc., say: "It is matter of no importance to the parties whether this authority is exercised in the common law or in the equity form, provided the right of trial by jury is not interfered with, as it cannot be in this case." *43 Pa. sec. 300.*

Here this able court recognized the right of trial by jury in

quo warranto, as a *common law right*, saying that the State might proceed in the equitable form under their statute, provided the right of trial by jury should not be interfered with, clearly indicating that they recognized no power in the Legislature to deprive the respondent of a jury trial; and how much more should we regard this right when guaranteed by our Constitution and laws.

In the case of the *Commonwealth, ex rel. Jackson v. Smith, 45 Pa. sec. 59*, the Supreme Court say: "This was a proceeding founded on petition of Isaac Jackson, *et al.*, against Smith *et al.*, praying that the process of law be awarded, etc.; that "defendants show by what authority they claim to have, use and exercise the liberties, duties and privileges of said office. On this petition a writ of *quo warranto* issued as prayed for." The defendants, by plea, denied the election of the relators, and claimed that they were duly elected; to which the relators replied that the defendants were not duly elected, and thereupon issue was joined; the case was tried before LOWRIE, J., and resulted in a verdict for relators, etc.

In the case of the *Attorney General, rel., v. Lindsey, 4 George (Miss.) 508*, the court say, that, a *quo warranto* and an information in the nature of a *quo warranto* are the same. Under the modern practice both are but suits at law, to determine a right to office. See, also, *38 Mo. 539*.

In Indiana, in the case of the *Bank of Vincennes v. The State*, in a suit of an information in the nature of *quo warranto*, various issues were made up, and they were submitted to a jury for a trial. This was no proceeding to have the bank convicted, fined or imprisoned, but a civil suit to determine whether or not she, as a corporation, could exercise certain privileges claimed by her, and that learned court treated the verdict as it would in other cases at law; *1 Blackf., 269;* and in the case in *38 Mo.*, referred to, the court refused to allow the case heard before them, because no provision had been made by law for a jury trial. These cases show how other courts proceeded to determine a right to the franchises of an

office; and in cases of this character, where an issue of fact was to be determined by the testimony of witnesses, we have not been able to find any case in which a court, since the beginning of the days of English liberty, upon direct application, refused a litigant the right of trial by jury.

Yet we rest our conclusions not so much upon these rulings, as upon the fundamental maxims of free institutions and popular governments; upon principles recognized as the foundation of civil liberty, and, beyond memory, ingrafted upon the common law of England, and made a part of the frame-work of the original law of the American States, and that of the Union of those States. That venerable author, Sir William Blackstone, in speaking of the value of the trial by jury, says: "In Magna Charta it is more than once insisted on as the principal bulwark of our liberties." *Vol. 2, 350.* Further on he says: "Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law, and it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases? But this we must refer to the ensuing book of these Commentaries, only observing, for the present, that it is the most transcendent privilege which any subject can enjoy or wish for; that he cannot be affected, either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals," * * * "and therefore, a celebrated French writer, who concludes, that because Rome, Sparta and Carthage have lost their liberties, therefore, those of England, in time, must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury. * * * It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity and himself, to maintain to the utmost of his power, this valuable constitution in all its rights; * * * *and above all*, to guard with the most jealous circumspection,

the introduction of *new* and *arbitrary* methods *of trial*, which under *a variety of plausible pretences* may, in time, imperceptibly. undermine this best preservative of English liberty."

In conclusion of this question: If this right was not a pillar in the foundation of free government, the declarations in our Constitution, that "*it shall remain inviolate*," and our statute, that, "All issues of fact joined in any suit at law, in any court of record, shall be tried either by the court, by jury, or by arbitrators; *First*, the trial shall be by the court, where neither party shall demand a trial by jury; *Second, a trial shall be by jury when either party shall demand such* trial; *Third*, It shall be tried by arbitrators on the agreement of the parties to refer the matter in dispute to arbitrators;" *Gould's Digest, section 99, chapter 133*, would determine our ruling.

No one denies this being *a suit at law, in a court of record;* and there can be no question but the issue is purely *one of fact.* This law says in all such cases, the trial *shall be by jury, where either party demands it.* As no exceptions are made in this law, we are of opinion, a jury trial ought to have been awarded.

The power of this court to exercise original jurisdiction in cases of *quo warranto and mandamus*, is a question not free from difficulty. The various Constitutions of the State, from that of 1836, to the present time, we regard as substantially the same upon this subject.

In the earlier history of the State, the question seemed not to have attracted any marked attention and discussion, and this court assumed jurisdiction, and occasionally the same was exercised, up to the twelfth volume of the Reports, when, in the case of *Allis, ex parte*, a most elaborate consideration of the subject was had, and it was determined that such writs should be issued by this court, only in the exercise of its appellate powers, or superintending control over inferior tribunals, when such interposition was necessary to prevent a failure of justice; and that ruling was the settled law of this court up to the twenty-fifth volume of Reports. See, *Marr, ex parte, 12*

Ark. 84; Allis, ex parte, 12 Ark. 102; Crise, ex parte, 16 ib., 195; Goad, ex parte, ib. 411; Jones v. City of Little Rock, 25 Ark. 287.

We concur in the doctrine announced in those cases.

The opinion, by our Chief Justice this morning referred to, in the so-called Confederate court, of the State against Williams, is, by us, regarded of less weight than most learned opinions—not from a want of ability on the part of the distinguished gentlemen who are said to have presided over that tribunal, but from the occasion and circumstances that produced what is said to have been their opinion. There was certainly a want of that calm reflection necessary to a judicious opinion upon important questions of constitutional law. We need not resort to our knowledge of that intense prejudice and excitement, seen only in the last convulsions of a desperate war, and which challenge the reason of great as well as smaller minds. But the opinion, upon its face, shows that it was brought forth under a terrible military rule; and that the court's own existence, if not destroyed, was seriously questioned by the war power under which it existed; and the authority it assumed to represent, had dominion over but a small part of the State.

What purports to be their opinion, sets out by declaring that they will only assume jurisdiction in a case "involving the civil rights of the State as sovereign, affecting vitally its character, and the proper administration of the government." These writs, not be issued at the suit of individuals, but only as the State, by her attorney general, may ask; yet, the very case then before them was at the instance of one claiming to be a temporary attorney general, and against the acknowledged attorney general of the State, and the court assumed jurisdiction over the person of the accused, when, according to their own records, he was residing in and protected by a hostile government. With this stretch of jurisdiction, and the language of the Judge who wrote the opinion, pouring out such a mass of bitter invectives against the lawful government, and heap-

ing like abuse upon a late Confederate for laying down arms, (an example that he himself soon followed), shows conclusively to us a want of such frame of mind as renders opinions profound and authoritative; and had that gentleman then been holding a valid court, he should have shown more of deliberate judgment, and less of passion, than appears in the pamphlet presented us, before we could have recognized his *ipse dixit* as weighty authority.

The importance of having a court of appeals, a court for the correction of errors, situate remote from the excitement and passions that so often attend original trials, certainly was anticipated by the framers of our system of laws, and we think the whole theory of our jurisprudence is a cogent argument against the exercise of original jurisdiction by this court. And we regret that our state of health, since this trial began, has prevented us from elaborating this subject.

We concur in the finding of the court, on the facts of the case.

HASTINGS *v* WHITE, *et al.*

CONSTITUTIONAL LAW.—The act, approved March 5th, 1867, known as the Confederate money act, is unconstitutional.

Appeal from Randolph Circuit Court.

HON. L. L. MACK, Circuit Judge.

Ratcliffe, English, Gantt & English, for appellant.

GREGG, J.

This was an action of debt, brought in the Randolph circuit court. The case was appealed from a judgment there to this court, and decided at the December term, 1866. *24 Ark. 269.* The judgment in the circuit court was there reversed, and the case remanded with instructions to sustain the demurrer to appellee's second plea, wherein he set up that the note was to be discharged in Confederate money. In the meantime, the General Assembly passed "An act for the relief of persons bound by contract for the payment of Confederate money, or other paper currency," approved March 5, 1867.

The court below attempted to conform its action to this act, and not to the mandate of this court, and again pronounced judgment in favor of the appellee, upon the same pleadings, from which this appeal is prosecuted.

In the case of *Leach v. Smith and wife, 25 Ark. 246*, the act of the Legislature, above referred to, was by this court declared unconstitutional.

The judgment of the Randolph circuit court is again reversed, and the case remanded, to be proceeded in according to law.

GATLIN & GIBSON *v.* WILCOX.

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CONTRACT—Contracts, ordinarily, can only be rescinded by mutual consent of the parties and cannot, in general, be rescinded in *toto by one.*

RECISION—The infringement or partial failure of performance by one party to a contract, for which there may be a compensation in damages, does not authorize a recision or put an end to a contract.

NEW TRIALS.—While this court will not revise the decision of the circuit court, refusing a new trial, where the only ground presented is mere weight of evidence—yet a verdict should be set aside where it is clearly against the weight of evidence, so that at first blush it would shock our sense of justice.

Appeal from Crawford Circuit Court.

HON. E. D. HAM, Circuit Judge.

Jesse Turner, for appellants.

Contracts can only be rescinded by the mutual consent of the parties; and a contract cannot, in general, be rescinded *in toto*, by one of the parties, when both of them cannot be placed in the identical situation which they occupied, and cannot stand upon the same terms as those which existed when the contract was made. It is also a clearly recognized principle, that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to. See *Chitty on Cont. 4 Am. Ed. 573-4; 2 Parsons on Cont. 3 Ed. 191-2 and note nn.; 5 East. 449; Ad. & Ell. 599; 4 Mass. 502; 15 Mass. 319; 2 Watts, 433; 5 Ohio, 386; 17 Ark. 603; 20 Ark. 424.*

Garland & Nash, for appellee.

1. In this case, as Gatlin and Gibson did not comply with their contract, it was optionary with England, for whom appellee was security, to treat the contract as at an end, and having done so, they cannot complain. *Bellows v. Cheek, 20 Ark. 424*, and cases cited.

2. This is especially true for the benefit of Wilcox, who was only surety. England could not make a new contract to bind Wilcox without his consent; so that if Mrs. Turner's testimony be all true, and still more definite, it could not affect Wilcox's right here. *2 Vesey, 540; 6 Ark. 317; 15 Gray, (Mass.) 173; 7 Hill (N. Y.) 116.*

3. But as this case is presented here purely upon the weight of testimony, and as the verdict is not without testimony to support it, this court will not award a new trial. *25 Ark. 49; Rose' Digest, p. 559, section 45.*

BENNETT, J.

The appellants leased their ferry privilege, from the south bank of the Arkansas river, opposite Van Buren, to William F. England and appellee, for the period of four years, commencing on the first day of May, 1868, at the rate of five hundred dollars per year, payments to be made quarterly. Default having been made in the payment of the first year's rent, a suit was instituted before a justice of the peace, to recover a balance of three hundred dollars due the appellants. Judgment was obtained in favor of appellee. Appellants appealed to the circuit court. In the circuit court the case was tried by a jury, and appellee again had judgment. Appellants moved for a new trial:

First. Because the verdict is contrary to evidence.

Second. Because the verdict is contrary to law.

Motion overruled; bill of exceptions setting out the evidence filed, and appeal taken to this court.

This case is presented here purely upon the weight of evidence, and it being a case originating in a justice of the peace's court, where no formal pleadings were requisite, we can only arrive at the issues by a careful review of the evidence adduced upon the trial. The appellants, to sustain the issue on their part, introduced and read in evidence to the jury their account, as follows:

"William F. England and Granville Wilcox,

To Richard C. Gatlin and Robert L. Gibson, Dr.

1868 and 1869. To rent of ferry, from the first day of May, 1868 to the first day of May, 1869, at the rate of $500 00, to be paid in quarterly installments, as per contract herewith filed, marked "A." $500 00

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By cash paid of March, 1869 - - - - $200 00

Balance due, - - - $300 00

And also, the accompanying contract between the plaintiffs and William F. England and the appellee:

"This agreement, made the fourth day of April, one thousand eight hundred and sixty-eight, between R. C. Gatlin and R. S. Gibson, of the county of Sebastian and State of Arkansas, of the first part, and William F. England, as principal, and Granville Wilcox, as security, of the county of Crawford, State of Arkansas, of the second part, witnesseth that the said party of the first part hath letten, and by these presents, doth grant, devise and let unto the said party of the second part, all the privileges in the ferry, known as the Gibson ferry, for the term of four years from the first day of May, 1868, at the yearly rent of five hundred dollars, to be paid in equal quarter-yearly payments, and the said party of the second part doth covenant to pay to the said party of the first part, the said yearly rent, as hereiu specified, namely: in quarterly payments on the first day of August, November, February and May, in each and every year; and at the end of said term, the said party of the second part will quit and surrender the premises."

Said contract was signed, sealed and delivered.

Jesse Turner also stated, in behalf of the appellants, that sometime during the winter of 1869, the said contract was placed in his hands by the appellants for collection; that he instituted suit upon it before justice Lytle, and during the pendency of that suit, William F. England came into his office and told him, although he thought the appellants had done wrong in renting or leasing to Mr. C. G. Scott, the right of way for passengers, crossing at Scott's ferry, up the river bank on the south side of the river to the Fort Smith road, yet, he had concluded to carry out the contract in good faith; that he was going up the Ohio to have a steam ferry-boat built, and would, when said boat was completed, return to Van Buren, and establish a ferry at that place, and said he would pay $200 00, on said contract, and the remaining $300 00, the balance of one year's rent, within ninety days from that date. In a few days Mr. Tott England, son of Mr. W. F. England,

accompanied by Robert S. Gibson, one of the appellants, in the presence of the witness, paid over to said Gibson said sum of $200 00; that William F. England left for the Ohio in a few days, and has never returned.

The appellee, to sustain the issue on his side, introduced, as a witness, Richard C. Gatling, one of the plaintiffs, who stated that sometime in the month of June, after the contract, he rented or leased the right of way to one Charles G. Scott, so that passengers and travellers could more conveniently get to Scott's ferry-boats, which were running near, or within the vicinity of the ferry privilege leased to appellee. It was also shown that Gatlin, one of the appellants, set their fence back from the river, so as to make a convenient road to and from Scott's ferry, and that he allowed Scott to make a landing on his (Gatlin's) land. This was all the evidence introduced.

It appears from the evidence that a recovery, in the court below, was resisted on the ground that the appellee, for himself and England, had a right to rescind and repudiate the contract, and thereby avoid its binding force, after appellants had leased the right of way to Scott. It is shown by the evidence that, although England complained because of the appellants having leased this right of way to Scott, he nevertheless, subsequently affirmed and recognized the binding force of the contract and determined to carry it out to the letter, and as an earnest of this, paid two hundred dollars on the rent and promised to pay the balance.

We think the lease of the right of way to Scott, was no infringement of the ferry privilege previously granted to England and appellee. In the words of the contract, it was simply the right to keep and maintain a ferry from appellants' land, across the river, to the opposite shore. Even, upon the assumption that the lease of the right of way to Scott, over appellants' land, was an infringement of the ferry privilege previously granted to England and appellee, it does not follow that England, or the appellee, or both would have a right to rescind the contract and thereby defeat the action. Ordinarily, contracts

can only be rescinded by the mutual consent of parties, and a contract cannot, in general, be rescinded in *toto* by one. It is also a clearly recognized principle, that if there is only a partial failure of performance by one party to the contract, for which there may be compensation in damages, the contract is not put an end to. See, *Chitty on Contracts, 4 Am. Ed. 573-4; 2 Par. on Cont. 3 Ed. 191-2, and note nn , 5 East 449; 4 Mass. 502; 15 Mass. 319; 5 Ohio, 387; 17 Ark. 603; 20 Ark. 434.*

The application of these principles dispels even the shadow of a pretext for a rescission of the contract. Nor can it be said that the appellee did plead recoupment. As was said in the case of *Desha v. Robinson, 17 Ark. 245,* "The general principle under which recoupment is allowed, is where one brings an action for a breach of contract between him and the defendant, and the latter can show that some stipulation in the same contract was made by the plaintiff, which he has violated, then the defendant may, if he choose, instead of bringing a cross-action, recoup his damages arising from the breach committed by the plaintiff, whether the damages be liquidated or not." In the case at bar the evidence does not show that appellee suffered any damage at all, from the leasing the right of way to Scott by Gatlin, nor is it shown, in any manner, that appellee or England ever made any complaint in regard to said lease to appellants; nor is it shown that appellee or England ever offered to give up their lease, or in any manner tried to have their contract annulled until after it was sought to be enforced.

We are aware, that this court has repeatedly held, that it will not revise the decision of the circuit court, refusing a new trial, where the only ground presented is mere weight of evidence, unless there is a total want of evidence upon some point absolutely necessary to a recovery, or unless the verdict is clearly and palpably contrary to the weight of evidence. When there is a conflict of evidence, the jury being the exclusive judges of the facts, their verdict will not be disturbed; *Sparks v. Beaver, 11 Ark. 630; State Bank v. McGuire, 14 Ark.*

530; Brooks v. Perry, 23 Ark. 32. Yet, at the same time, while we would not deviate from the rule thus established, we believe it to be our duty to say, a verdict should be set aside, when it is clearly against the weight of evidence, so that at first blush it would shock our sense of justice and right. It was so held in *Howell v. Webb, 2 Ark. 360; Vandever v. Wilson, 5 Ark. 407; Hagan v. Henry, 6 Ark. 86; Lewis v Reed, ib 428, Drennan v. Brown, 10 Ark. 138; Calvert v. Stone, 10 Ark. 491; State Bank v. Wooddy, ib. 638.*

From a review of the evidence, as presented, we are unable to find any evidence upon the part of the appellee that could, in any manner, warrant the jury in finding a verdict in his favor. If we were able to do so, in a slight degree, we should hesitate in disturbing the verdict of the jury. But we think this a case which comes clearly within the rule "that the verdict at first blush, shocks our sense of justice and right." The judgment of the circuit court is reversed and cause remanded to be proceeded in according to law.

TOUHY & GREEN *v.* RECTOR.

APPEALS—*Practice on, from Justices' court.*—Upon appeal from a justice of the peace, the circuit court does not review the case as upon error, but tries it anew, as if no judgment had been rendered, and no appeal can be taken except from the judgment.

It is error, on dismissal of an appeal, for want of jurisdiction, to render judgment for costs.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

T. D. W. Yonley and Farr & Fletcher, for appellants.

Duffie & Jones, for appellee.

HARRISON, J.

Rector, on the 12th day of August, 1870, recovered, before a justice of the peace of Pulaski county, a judgment against Touhy & Green for two hundred dollars, from which, as appears from the justice's docket, the defendants, on the same day, "prayed an appeal to the circuit court, which was granted, by their giving bond;" but it does not appear, from the entries on the docket, or otherwise, that an affidavit for appeal was made or filed, or that an appeal bond was taken and approved by him; and no transcript was ever filed in the circuit court, except the one in the proceedings hereafter mentioned.

On the 21st day of May, 1869, an execution was issued on the judgment, which the defendant applied to the justice to quash, upon the ground, as appears by their motion, among the papers of the case, that an appeal had been taken from the judgment; and, upon his refusal to do so, they appealed from his decision to the circuit court.

The transcript filed with the clerk, upon which their appeal was obtained, contained not only the decision from which they sought an appeal, which, if the same were a judgment, was all that was required by the Code, but, also, all the entries in the justice's docket relating to the case, according to the former practice.

The circuit court, on motion of the plaintiff, dismissed the case, but rendered judgment in his favor, against the defendants, for costs,

When the judgment in this case was rendered, and until the adoption of the Code, an affidavit was a prerequisite to the granting of an appeal by a justice of the peace; and as none appears to have been made, it is, therefore, very clear, notwithstanding the statement upon the docket, that it "was granted

by their giving bond," that no appeal from the judgment was in fact taken.

Upon appeal from a justice of the peace, the circuit court does not review the case, as upon error, but tries it anew, as if no judgment had been rendered; and no appeal can be taken except from the judgment. *Code, secs. 828 and 830.* If errors are committed in proceedings, subsequent to the judgment, the court possesses other means appropriate for their correction.

The cause was, therefore, properly dismissed, but the circuit court, having no jurisdiction, its judgment in favor of Rector for costs was erroneous and void, and must be set aside.

NOBLE *et al.* *v.* NOBLE.

EQUITY—*Fraudulent contracts binding on parties thereto.*—All executed contracts tainted with fraud, are binding upon the immediate parties.

CONTRACTS—*When void as to general creditors.*—A secret, voluntary conveyance made by an embarrassed creditor to another creditor in *preference,* is fraudulent and void as to general creditors, to that extent, but is binding on the parties thereto, and a court of equity will not relieve either party to such conveyance.

Appeal from Ashley Circuit Court.

HON. H. B. MORSE, Circuit Judge.

Watkins & Rose, for appellants.

The court erred in refusing to allow parol evidence to show that the absolute deed, was, in fact a trust and mortgage.

Hoffman's Chy. R. 31, and cases cited on *note, p. 34; 5 Page Chy. 10*, and cases there cited in note *1.*

W. D. Moore and English, Gantt & English, for appellee.

The appellee being the widow of the intestate, Littleberry R., was legally entitled to dower of one-third, for life, of the lands in question. *Gould's Dig. ch. 60, sec. 1, p. 451; New Digest, ch. 11, sec. 1. (if it is the law of the State upon this subject.)*

Although the court below may have erred in excluding the parol testimony, to show that the deed from Robert W. to Littleberry R. was a mortgage, and not an absolute conveyance, still the decree ought to be affirmed, notwithstanding this error of the court below, upon this question of law. *Davis v. Gibson, 2 Ark. 115; Payne v. Bruton, 10 Ib. 54; Sweepzer v. Gaines, 19 Ib. 96; Walker v. Walker, 7 Ib. 543; Moore v. Maxwell, 18 Ib. 469.*

The dower right of the appellee was not affected by the sale of the lands under judgment and execution in favor of Dade's representatives. It was sold as the property of Robert W. Noble, under a judgment against *him*, not against *her husband, Littleberry R.;* but if it had been a judgment against her husband, her dower right was not defeated by the sale, because the execution issued, and the sale occurred after the death of her husband. *James v. Marcus, 18 Ark. 421.*

BENNETT, J.

Martha R. Noble filed her petition in the Ashley circuit court in chancery, to the March term thereof, 1870, praying dower in certain lands, of which, as she alleged, her husband, Littleberry R. Noble, died seized. The appellants being in possession of the land, answered, admitting that Littleberry R. Noble, at the time of his death, held the legal title to the lands by a deed absolute on its face, but the fact was that these lands were formerly owned by one of the appellants, Robert

W. Noble, and were conveyed to said Littleberry, to secure the payment of certain debts owing by said Robert W. Noble to various parties, besides a debt which he *believed*, at the time, he owed to said Littleberry R. Noble, who was his son, amounting to about fifteen hundred dollars.

Robert W. Noble was also surety for one S. B. Wiggins, on a large debt due to one H. C. Dade, which debt was in course of litigation in the Ashley circuit court, and amounted to several thousand dollars. And the said R. W. Noble being apprehensive that recovery would be obtained against him as surety, and his property sold to pay it, and not having property sufficient to pay the debt and his own debts, and desiring to pay his own debts in preference to security debts, made an arrangement with the said Littleberry R. Noble, by which he, the said Littleberry R. Noble, agreed to pay his debts, upon condition that he would convey to him his lands, by such a deed as would give him power to dispose of the same in any way he might desire to do, for the purpose of raising money to meet his debts; and in consideration of said agreement, the appellant, R. W. Noble, conveyed to said L. R. Noble said lands, by his deed absolute on its face. It is further alleged in the answer, that said Littleberry R. Noble, in his lifetime, did not pretend to have any other or different right to or interest in said lands, than as a trust to pay the debts of his father, said Robert W. Noble, with the proceeds of the same. That a portion of these lands had been conveyed by said Littleberry, in payment of a part of his father's debts, and had come to the ownership and possession of appellees, under such conveyance, and that appellee, in the lifetime of her husband, and since his death, had notice of all these matters.

On the hearing, appellants offered to prove by parol testimony, that the deed of Littleberry was intended to operate only as a mortgage, and was received by him as a trust, etc.

This was objected to by appellee, and the court sustained the objection and excluded the testimony, and held the deed

good, and awarded dower. From which decree appellants prayed an appeal.

The appellee does not deny that parol testimony is admissible to prove that a deed absolute on its face, was intended only as a mortgage, or as a security for a loan or debt, but they claim that the facts, as stated by the appellants in their answer, being true, the deed was a fraud upon the creditors of Robert W. Noble, therefore it was valid, as between the parties, their heirs, executors, administrators, etc.

The only question raised by the record, then, is: Was the deed in question a voluntary conveyance, made in fraud of the rights of creditors? If so, it can make but little difference, between the parties, whether it was intended as a mortgage, trust, or an absolute deed, because the parties to the original fraud cannot now be heard, asking to take advantage of their own wrong, and no court will take jurisdiction for the purpose of relieving them. It is their own folly to have made such a conveyance. A conveyance of this sort, it has been said with great truth and force, is void only as against creditors, and then only to the extent in which it may be necessary to deal with conveyed estate for their satisfaction. To this extent, and this alone, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditors, and the conveyance stands. *1 Story Eq. Jurisprudence, sec. 371.*

Here the deed was executed, and it was voluntary. What were the motives inducing the execution of the same? Appellant, Robert W. Noble, being the owner of the land in question, was indebted, as he believed, to the intestate, in the sum of fifteen hundred dollars, and to other parties, whose claims were then in the hands of an attorney for collection, to the amount of two thousand dollars. He was, also, security for one Wiggins for a large amount.

Turning to the answer of the appellants, we find these words: "The defendant, Robert W. Noble, was also surety for one S. B. Wiggins, in a large debt due to one H. C. Dade, which debt was in course of litigation in the Ashley circuit

court, and amounted to several thousand dollars; and said R. W. Noble, being apprehensive that a recovery would be obtained against him, as security, and his property sold to pay it, and not having property sufficient to pay *the debt, and his own debts, and desiring to pay his own debts in preference to security debts, made an arrangement with Littleberry R. Noble, whereby he (Littleberry R. Noble) agreed to pay his debts*, upon condition that he would convey to him his lands, by such a deed as would give him power to dispose of the same."

It is clear, then, that the motive inducing this conveyance was for the purpose of attempting to avoid the payment of the security debt to Dade, or, at least, to avoid doing so until all his own personal debts had been paid. Was this fraud silent? Whether a transaction is fair or fraudulent, is often a question of law; it is the judgment of law upon facts and intents. Cases have been repeatedly decided, in which even persons have given a full and fair price for goods and property, and when the possession has been actually changed, yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent. *Bridge v. Eggleston, 14 Mass., 245; Harrison v. Trustees of Phillips Academy, 12 Mass., 456.* Thus, where a person, with knowledge of a decree against the defendant, bought a house and goods belonging to him, and gave a full price for them; the court said that the purchase, being with a manifest view to defeat the creditor, was fraudulent. So, if a man should know of a judgment and execution, and with a view to defeat it, should purchase the debtor's goods, the transaction would be *iniquitous. Worsely v. DeMattos, 1 Burr., 474, 475.*

We are aware that cases of this sort are carefully to be distinguished from others, where sale or assignment, or other conveyance, amounts to giving preference in payment to another creditor, for such a preference or assignment is not treated as *malu fide*, but merely doing what the law admits to be rightful. But secret preference, made to cover up property and

screen it from the eyes of creditors, has always been treated as frauds upon their rights.

In this case it is not pretended that there was a loan by Littleberry R. Noble to Robert W. Noble, or that the deed was intended to secure any debt between them, but it is admitted by the appellants that a part of the consideration of said deed was a debt of about fifteen hundred dollars, due from Robert W. Noble to the intestate, and was in *payment* of that debt, and not mere security. This certainly was some consideration for the deed, and, as between the parties and their legal representatives, to this extent, must be valid.

We have thus fully gone into the intention of the grantor and grantee, at the time of the execution of the deed, for the purpose of seeing what effect the admission or the rejection of the testimony sought to be introduced would have had upon the final decree of the court.

The fourth section of our Statute of Frauds declares that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, * * made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers, prior and subsequent, shall be void."

The general rule, however, has been declared to be that all executed contracts tainted with fraud are binding upon the immediate parties. When the contract is executed it is binding, as the law will not relieve either party, no matter how great may be the hardship to which he shall have subjected himself. *Payne v. Benton, 5 Eng., 53; Butt v. Aylett, 6 Eng., 475; Anderson v. Dunn, 19 Ark., 650.*

As shown by the answer of the appellants, this was a voluntary conveyance, made for the purpose of making a preference in the payment of some creditors, and with the intent, at least, to hinder, delay, and may be, defraud others of their lawful rights, there can no doubt.

Admitting the facts as sought to be proven, upon the whole

consideration of the case, although the court below may have erred in excluding parol testimony to show that the deed from Robert W. Noble to Littleberry R. Noble was intended as a mortgage, yet, we think, appellants are estopped from coming into a court of equity, for the purpose of setting aside the voluntary conveyance made, under such circumstances, by them or either one of them.

The decree upon the whole record is correct, and should be affirmed.

THOMPSON v. THE STATE.

CRIMINAL LAW—*Continuances*—Continuances in criminal, as well as in civil cases, as a general proposition, are within the sound discretion of the court, and its refusal to grant a continuance is never ground for a new trial, unless it clearly appears to have been an abuse of such discretion, and manifestly operates as a denial of justice.

VERDICTS—*When set aside—improper influences.*—The provisions of the Criminal Code of Practice, to protect a jury from improper influence, are directory and cautionary, and the omission of the court, in the conduct of a trial, to comply with them, will not, of itself, vitiate a verdict or be cause for a new trial, without some evidence that some prejudice or injury has resulted to the defendant in consequence of the omission.

Where evidence is adduced and shows that the jury were not in anywise influenced, biased or prejudiced by the exposure, the verdict will not be disturbed.

Should find degree.—In an indictment for murder, if the jury find the accused guilty, they should find, by their verdict, whether it be murder in the first or second degree; and if they fail so to find, by their verdict, the degree of guilt, it cannot be ascertained by reference to the indictment.

REQUISITES OF INDICTMENT—The Code of Criminal Practice, except in respect to particular words employed in the description of certain offenses, is not to be held as dispensing with the clearness and certainty, in charging the offense, recognized by the former practice and the common law.

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Appeal from Yell Circuit Court.

HON. WILLIAM N. MAY, Circuit Judge.

Garland & Nash, for appellant.

In a case of felony, the defendant waives nothing that the record shows to be defective, unless there is an express waiver; and on error or appeal he has the benefit of all objections that he might have urged below. *Sweeden's case, 19 Ark., 205; Friel's case, 21 Ark., 212.* The indictment is not in form and charges no offense specifically. *Code of Practice p 288, sec 122; Gould's Digest, 327 et seq.* for definition of murder; *Edward's case, 25 Ark. 444.* The jury was not drawn as required by law, nor was there a waiver by the parties. *Code p 302, secs. 123–4.* The jury were not sufficiently sworn. *Code p 307–8, sec 219; Gould's Digest, p 467, (6 oath), b. in criminal cases, secs. 28 to 34.* The verdict should have stated the degree of murder or homicide the party was guilty of. See *Gould's Dig., 327–8–29, et seq.* for murder, manslaughter, etc., and the following cases: *Sec. 7, 328, Gould's Dig.; 19 California, 426; 23 N. Y. (9 Smith) 293; 6 California, 543; 12 Md, 514; 6 Mich., 273; 7 Clark (Iowa) 236; 24 Texas, 410; 20 Mo. (5 Bennett) 319; 24 Penn. (12 Harris) 389–90; 6 Ind. 485; 3 ib. 438; 39 N. Y. 245.* The testimony of Thompson's daughter and Mrs. Julia Lee should have been admitted. *Pitman v. State, 22 Ark. 354,* and cases cited; *Roscoe Cr. Ev., p 23; 1 Phil. Ev. 234; 2 ib. Cowen and Hill's Notes, pp. 588–9, et seq; 1 Greenl. Ev., sec 101.* The motion for continuance should have been granted. *Whar. Crim. Law, p 832 (2 ed) (a); see 2 Head., 217 (Tenn.); 3 Steward & Porter (Ala.) 308; 5 Georgia, 137; Cotton's case, 31 Miss., 504; Meredith's case, 18 B. Monroe (Ky) 49.* For the same reasons the record motion to continue should have been granted. The separation of the jury was good ground for new trial, and the offer to show these irregularities, should have been received. *12 Ark. 810–13; ib. 317; 20 Ark. 53; Wharton Sup. 895; Graham & Waterman, New Trials, vol 2, 537 et seq; 1 Chitty Crim.*

L. Marg., pp 628–9; 7 New Hamp., 287; 15 Penn. (3 Harris) Pfeifer v. Commonwealth, p 468, et seq. The sixth and seventh instructions were calculated to mislead the jury, and should not have been given. *6 Eng. (11 Ark.) 460; 2 Bishop Crim. L. 630.* The offer to show, by Martin's own affidavit, that he was not properly sworn, should have been received. See *Code sec. 243, Crim. Pr.;* as, also, the offer to show the jury was not admonished. See *Code, sec. 244, Crim. Practice.*

Montgomery, Attorney General, for appellee.

A verdict of the jury, that the defendant is guilty, as charged in the indictment, is a good verdict of guilty of murder in the first degree, if the indictment is good, and charges murder in the first degree.

Is the indictment, in this case, good, and does it charge the crime of murder in the first degree? It is good, and charges that crime. *Friel v. The State, 21 Ark., 213: Brown v. The State, 10 Ark., 607; Bishop Crim. Pr., 832 to 834,* and cases cited.

As to the question of the jury being placed in charge of a sworn officer, see *Gibbons v. The People, 23 Ill. 518; Stow v. The State, 4 Humph. 27; 1 Bishop Crim. Pro. 820 to 828,* and cases there cited.

HARRISON, J.

The appellant was indicted in the Johnson circuit court, at the September term, 1870, for the murder of David C. Stillwell.

The indictment was as follows:

"JOHNSON CIRCUIT COURT.

"The State of Arkansas against "Joseph Thompson. } Murder.

"The grand jury of the county of Johnson, in the name and by the authority of the State of Arkansas, accuse Joseph Thompson of the crime of murder, committed as follows, to wit: The said Joseph Thompson, on the 14th day of May A. D. 1870, in the county of Johnson, in the State aforesaid, did

premeditatedly, willfully and maliciously, with double-barreled shot-gun, loaded with gunpowder and leaden bullets, kill and murder one David C. Stillwell, against the peace and dignity of the State of Arkansas.

"T. M. GIBSON, *Prosecuting Atty. pro tem.*"

The defendant applied for a change of venue, and the case was removed to the county of Yell.

At the November term, 1870, of the circuit court of that county, he was put upon his trial and the jury returned the following verdict:

"We, the jury, find the defendant guilty, as charged in the indictment."

He moved for a new trial, but his motion was overruled, and judgment and sentence of death were pronounced against him.

Various exceptions were reserved by the defendant, in the course of the proceedings, and assigned as grounds for a new trial; but, as it appears from his bill of exceptions, that much of the evidence was not preserved, and that it contains only such as was deemed most important, such of them as were predicated upon the evidence cannot be considered by us; for it would be impossible to determine, without having the whole of the evidence before us, whether they were well taken or not; but must presume that the decisions of the court were correctly made, according to the maxim, *omnium praesumuntur rite et solemniter esse acta donec probetur in contrarium.*

The first ground of the motion was the refusal of the court to allow a continuance of the case.

The defendant made two applications for a continuance. The first on the 15th day of November, on account of the absence of certain of his witnesses and counsel. The court, upon overruling this, set the case for trial on the 20th, in order, as the bill of exceptions states, to afford the defendant an opportunity to procure the attendance of his witnesses.

On the 23d of the same month, he made the second application, on account of the absence of other witnesses, and two of the same. No other facts or circumstances of the case were

stated in his motion than those he alleged he expected to prove by the absent witnesses, which were, in substance, that the deceased was a violent, turbulent and dangerous man, who commonly went armed, and who boasted of having killed one or two men; that on several occasions, shortly before the killing, he made threats against the life of the defendant, and that he and his brother, Green Stillwell, and brother-in-law, P. H. Morgan, had actually formed a conspiracy to kill him, which facts were well known to the defendant before the deceased was killed.

It would seem reasonable to presume that the defendant's last motion for a continuance set forth all the grounds for it that then existed. The exception taken to the refusal of his former application must, therefore, be considered as waived by the latter.

The granting of continuances in criminal, as well as in civil cases, is, as a general proposition, within the sound discretion of the court, and its refusal to allow a continuance, is, therefore, never ground for a new trial, unless it clearly appears to have been an abuse of such discretion, and manifestly operates as a denial of justice. The motion for the continuance, not setting forth the facts or circumstances tending to prove that the killing of the deceased was in necessary self-defense, or otherwise show the relevancy or materiality of the testimony of the absent witnesses to the defendant's defense, no prejudice or injury appears to have resulted to him from the denial of the continuance.

The other grounds of the motion, that we are called upon to notice, and which may be considered together, are:

First. That the officer in charge of the jury was not sworn to keep them together, and to suffer no person to speak to or communicate with them on any subject connected with the trial, during the adjournment of the court.

Second. That the jury were not admonished by the court, at its adjournment, that it was their duty not to permit any one to speak to or communicate with them on any subject con-

nected with the trial, and that they should not converse among themselves on any subject connected with the trial, or form, or express any opinion thereon, until the cause was finally submitted to them.

Third. That three of the jurors, each on a different occasion, separated themselves from the panel, and went from the jury room, in company with an officer who had not been sworn as required by the statute, the others, meanwhile, remaining without an officer in charge of them.

Courts certainly should be very careful to protect the jury from every improper influence; and the provisions of the Code, designed for that purpose, should never be disregarded. These provisions are, however, directory and cautionary only, and a failure to comply with them will not absolutely, or without some evidence that some prejudice or injury has resulted to the defendant, in consequence of an omission to comply with them, vitiate the verdict, and be cause for a new trial.

The conclusion to be derived from the former decisions of this court, and which seems to be well supported by the authorities, as to the consequence of the misconduct of jury, in cases of mere exposure to improper influences, we understand to be this: Where evidence is adduced, and shows that the jury were not, in any way, influenced, biased or prejudiced by the exposure, the verdict will not be disturbed; but unless it is proven that it failed of an effect, the presumption will be against the purity of the trial, and the verdict will be set aside.

But it does not appear that there was any direct exposure. The jurors, who left the panel, were accompanied by the officer in charge of them, who, we must presume, did his duty and kept them out of the way of all improper influences; and there is no reason for supposing the others might have been exposed to any during his absence.

The motion for a new trial, we think, was properly overruled; but our attention is directed to the verdict and the in-

dictment. The jury did not find, by their verdict, the degree of murder of which they found the defendant guilty.

By the statute, murder is classed according to the circumstances in which it is committed, into first and second degrees, the punishment of the first being death, and for the latter, imprisonment in the penitentiary; and, on the conviction of the accused of murder, the jury are required to find, by their verdict, whether it be murder in the first or second degree. These two degrees are not, however, distinct offenses, and no distinction as to degree is made in charging the offense; the same averments which are necessary to charge murder in the first degree, are also required to charge it in the second; and if, upon an indictment for murder, the jury find the deceased guilty but fail, as they did in this case, to find, by their verdict, the degree of guilt, it cannot be ascertained by reference to the indictment. *2 Bishop on Criminal Proceedings, sec. 565.*

In the case of *The State v. Moran, 7 Iowa. 236*, the Supreme Court of Iowa says: "It is said, however, that the indictment charges the crime of murder in the first degree, and that when the jury, by their verdict, found the defendant "guilty as charged in the indictment," they did, in legal effect, ascertain that he was guilty in the degree charged. This argument, however, leaves it to the court to deduce the intention of the jury from a verdict, general in its language, whereas the law requires that the jury shall find specifically the fact, whether guilt is of the first or second degrees. When jurors find, by their verdict, that a prisoner is "guilty," or "guilty as charged in the indictment," it is not assuming too much to say that, as a general thing, they have simply found him guilty of a criminal homicide, without reference to the degree of his guilt. And to say that, upon such a verdict, the court might properly conclude that they intended the highest offense, would be to presume against, instead of in favor of, human life."

And, in Alabama, where they have a statute similar to our own, in a case where the indictment charged the murder to have been committed by poison, the Supreme Court of that

State held, that a judgment could not be rendered upon a conviction upon it, without the degree of the crime being ascertained by the jury. *Johnson v. The State, 11 Ala., 618; McCauley v. The United States, 1 Morris, 476; Kirby v. The State, 7 Yer., 259; Dick v. The State, 3 Ohio S., 89; The State v. Upton, 20 Mo., 397; Slaughter v. The State, 24 Texas, 410; Ford v. The State, 12 Md., 514; Commonwealth v. Gardner, 11 Gray, 438; Commonwealth v. Desmartean; Ib., 8; Green v. Commonwealth, 12 Allen, 170.*

It is a well established rule, in criminal law, that an indictment must contain such a description of the facts and circumstances as constitute the offense charged; that the person accused may be informed of the specific charge which he is called upon to answer, and the court and the jury the issue they are to try.

Russell, speaking of an indictment for murder, says: "The indictment should, in all respects, be adapted as closely to the truth as possible. It is essential to set forth particularly the manner of the death, and the means by which it was effected." *1 Russsll on Crime, 557.*

Lord HALE says: "An indictment is nothing else but a plain, brief and certain narrative of the offense committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature." *2 Hale, 169.*

Lord ELLENBOROUGH, in the case of *The King v. Stevens and Agnew, 6 East., 239*, said: "Every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy."

And, in the case of *The King v. Horne, Cowp, 672*, Lord Chief Justice DEGREY observed: "The charge must contain such a description of the offense that the defendant may know what crime it is with which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty, upon the premises delivered to them, and that the court may see such a definite crime that they may

apply the punishment which the law prescribes. This I take to be what is meant by the different degrees of certainty, mentioned in the books; and it consists of two parts—the *matter* to be charged, and the *manner* of charging it. As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage."

The Supreme Court of Ohio, in the case of *Lambertin v. The State, 11 Ohio, 282*, says: "It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged; that it should set forth facts constituting the crime, so that the accused may have notice of what he is to meet, of the act done which it behooves him to contest, and so that the court, applying the law to the facts charged against him, may see that a crime has been committed."

And Chief Justice RINGO, in delivering the opinion of this court in Graham *v.* The State, says: "The object of that certainty required in an indictment is to notify the accused of the specific charge made against him, and to show the court that the offense charged is indictable. The phraseology should therefore be so explicit and unambiguous as to be intelligible to the accused and to the court, and prevent another prosecution for the same offense in the event of a conviction or acquittal on the writs." *Graham v. The State; 1 Ark., 171.*

The indictment which, so far as it pertains to form, is in that prescribed by the Code, charges that the defendant did, premeditatedly, willfully and maliciously, with a double-barrel shot-gun, loaded with gun-powder and leaden bullets, kill and murder one David C. Stillwell, against the peace and dignity of the State of Arkansas.

We do not conceive that the Code, except perhaps, in respect to the particular words of art employed in the description of certain offenses, dispenses with the clearness and certainty in charging the offense recognized by the former practice, and the common law. Section 121 says the indictment must con-

tain "a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." And section 123 says: "The indictment must be *direct and certain*, as regards, first, the party charged; second, the offense charged; third, the county in which the offense was committed; fourth, the particular circumstances of the offense charged, where they are necessary to constitute a complete offense."

In Kentucky, where the provisions of their Code, in relation to indictments are exactly similar to ours, the court of Appeals, in Mount *v.* Commonwealth, *1 Duv.*, *90*, says: "The principle has been repeatedly recognized and acted on by this court, that an indictment must set forth the offense with such degree of certainty as will apprise the defendant of the nature of the particular accusation on which he is to be tried, and as will enable him to plead the indictment and judgment thereon in bar of any subsequent prosecution for the same offense." And in Taylor *v.* Commonwealth, *ib.*, *160*, it says: "The facts necessary to constitue the offense must be alleged, and that it is not sufficient that the essential facts may be inferred from those which are stated." *Com. Dig.*, *Indictment*, (*G. 3*).

In the indictment before us there is nothing but the general and indefinite charge that the defendant killed and murdered the deceased with a double-barrelled shot-gun, loaded with gunpowder and leaden bullets. The particular facts and circumstances of the killing, by which it might judicially appear that the offense had been committed, and the accused be sufficiently informed of the true nature of the charge against him, so that he might be able to prepare for his defense, are not attempted to be set forth.

For the insufficiency of the indictment and the defect in the verdict, the judgment is reversed, and the cause will be remanded with instructions to arrest the judgment and to quash the indictment; and the defendant will be ordered to be detained in custody to answer a new indictment.

ALLEN v. THE STATE.

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MURDER—*Verdict must find degree*—A verdict of conviction in a case of murder, which does not find the degree of murder, is so fatally defective, that no judgment can be entered upon it.

WHEN OBJECTION WAIVED—When a verdict is so defective that no judgment can be entered upon it, the defendant who might have had it perfected when rendered, is considered as consenting to it, and as waiving any objection to being put to answer before another jury.

Appeal from Arkansas Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

R. A. Whitimore, for appellant.

Montgomery, Att'y Gen'l, for appellee.

HARRISON, J.

The appellant was tried in the Arkansas circuit court, for the murder of Mark Hubbard.

The jury returned a verdict of "guilty, as charged in the indictment."

The defendant moved in arrest of judgment, because the verdict did not find the degree of the crime; and for his discharge from custody, on the ground that, having been once put in jeopardy, he could not be tried again upon the same charge; but his motion was overruled, and he was sentenced to be hanged.

We have decided, at the present term, in the case of Thompson *v.* The State, *ante*, that a verdict of conviction, in a case of murder, which does not find the degree of murder, is so fatally defective that no judgment can be entered upon it. *Thompson v. The State, ante, and authorities there cited.*

The court, however, very properly refused to discharge the defendant, for it is well established by the authorities that

when a verdict is so defective that no judgment can he entered upon it, the defendant, who might have had it perfected when rendered, is considered as consenting to it, and as waiving any objections to being put to answer before another jury.

The judgment of the court below is reversed, and the cause remanded to it, with instructions to arrest the judgment and award a new trial.

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McKenzie v. The State.

Murder—*Time of intent immaterial.*—Where the State proves beyond a reasonable doubt, that the accused perpetrated the murder, by lying in wait, or by other kind of willful, deliberate, malicious and premeditated killing, it is murder in the first degree, and the *time* when the intent was formed to take life is not material, so it be shown the design thus formed was before the act of killing.

Sanity—*Burden of proof.*—The legal presumption is in favor of sanity, and the killing not being denied, but assumed to be excusable, the burden of proof is upon the accused, and if he fail, by sufficient evidence, to change the presumption raised against him by the killing, the jury being the judges of the weight of the testimony, the case would be legally adjudged against him.

Record—*Must show objections.*—Where the record fails to show that the defendant objected to the instructions given by the court, or that the court refused to give instructions asked by the defendant, the objection will not be heard here.

Jeopardy.—When, after the jury has been selected and sworn, unauthorized separation and misconduct is satisfactorily shown, the court may quash the venire, discharge the selected jurors, and award a new venire; and the defendant will not be entitled to a discharge from sentence under the verdict found against him, by reason of being formerly put in jeopardy.

When Attaches.—Jeopardy cannot attach until the jury is duly impanelled, and all the machinery of the court fully organized.

Discretion of Courts.—In preliminary steps of a trial, a proper discretion may be exercised by any of the courts of original jurisdiction, which, if not grossly abused, will not be considered here.

Improper Influence—*New Trial.*—When it is made to appear, to the satisfaction of the court, that what may have appeared to be an improper influence upon the jury, was not so in fact, the court should overrule a motion for a new trial, based on that ground.

Appeal from Sebastian Circuit Court.

HON. E. J. SEARLE, Special Judge.

Du Val & King, for appellant.

Montgomery, Attorney General, for appellee.

GREGG, J.

At the April term, 1867, the appellant was indicted, in the Fort Smith district of Sebastian county, for the murder of Charles W. Brown. In June following, the defendant was brought before the court, was served with a copy of the indictment, duly arraigned, a venire properly returned, and after more than half the requisite number of jurors had been selected and sworn, they were discharged for alleged misconduct on their part, the venire set aside and another venire ordered; the jury was therefrom selected and sworn, argument of counsel and charge of the court heard, and a verdict of murder in the first degree was returned against the accused. He moved the court for a new trial, because, as he alleged, the finding was contrary to law, and the instructions of the court. *Second*, It was contrary to the evidence. *Third*, It was contrary to law and evidence. *Fourth*, The court erred in refusing to give the jury the first and second instructions asked by the appellant. *Fifth*, The court erred in discharging eight of the jurors who had been sworn, and three who had been selected and not sworn. *Sixth*. Because the court pronounced Jackson Coffman a good juror, and after he had been selected by the State, discharged him before the appellant had accepted or rejected him. *Seventh*, Because one of the jurors, during the trial, received a note in writing from a bystander, without appellant knowing what was written on the paper.

The court overruled the motion for a new trial. Upon similar grounds the appellant moved in arrest of judgment, which motion was also overruled.

The appellant excepted, filed his bill of exceptions, setting out the evidence and instructions of the court, and prayed an

appeal to this court. The court below stayed the proceedings upon its judgment, and allowed a *supersedeas* to be entered, and forwarded a transcript to this court without granting the appeal.

After some delay the case was presented to this court, and when reached for determination a *procedendo* was awarded to the circuit court to grant the appellant an appeal to this court. At a regular term of that court, on the 21st of October, 1870, the defendant was brought before the court, and the prayer in his application for an appeal was granted, and a transcript filed in this court, the 27th of December, 1870.

The first ground set up in the motion for a new trial was not sufficient, as will appear from a discussion of the other causes.

The second ground is, that the finding of the jury was not warranted by the evidence, the substance of which follows:

John Speet testified that he came to Noble's brewery, in Fort Smith, and McKenzie, the appellant, and Brown, the deceased, were sitting near each other at the door of the brewery. Brown said to McKenzie, "let us go home;" McKenzie called him a d–d son of a bitch, and told him to kiss (an indecent part of his person). Brown then said: "I do not wear any pistol." McKenzie said: "You are not able to wear any such things." McKenzie then put on his shoes and got up from his seat, inside the door, stepped back about two steps, raised his coat, drew a revolver from his side, and said: "You d––d son of a bitch, don't bother me any more," and shot Brown, who fell. Brown was then about three steps outside the door.

Mrs. Nobles testified that as soon as the pistol fired, she went into the brewery, and saw the man in the back room with a pistol in his hand, and saw the man lying dead out at the door.

Frank Wesley testified that he was near the brewery; saw Brown standing, and saw him fall and die, about three steps out from the door; did not see McKenzie any more until an officer had arrested him.

Mrs. Brown testified that she saw the accused and her husband, the deceased, on the 17th of June, 1867, near Fort Smith, on the Van Buren road, and in about three hours thereafter she saw the body of the deceased lying near Noble's brewery; that on the morning of the same day, she heard the accused tell deceased that he would kill him that day; that the accused then had no pistol, but about half an hour afterwards she saw him with a pistol and lead in his hand; that she and others came to town with accused and deceased, in a wagon, soon after dinner; she knew of no difficulty between the accused and deceased; they talked together on the road; the accused told deceased to shut his mouth, that he knew nothing, but she supposed they were joking.

Crawford testified that he knew the accused and deceased; saw them at Fishback's farm, where they lived, in the forenoon; they were playing, slapping each other and running around, and he heard the accused say, "I will kill him before night." McKenzie seemed to be drunk; saw him with a pistol; they started to town soon after dinner; in the evening he heard that Brown had been killed.

Other witnesses testified as to the killing, the wound, etc.; but the most material, for the prosecution, was the above alluded to.

All the witnesses showed that they knew of no previous quarrel between the parties.

The defendant introduced several witnesses. The first testified that the appellant was of singular habits or mind; another said he regarded him as very much broken down, physically and mentally; had not considered him in his right mind for ninety days, and not more responsible than a lunatic; that when drunk, he is different from other persons; never heard him say anything angry or vicious; he seemed prostrated; he went with one Taylor, and they were up much night and day.

The next witness testified that he was a graduate of Maryland University, and had practiced medicine twenty years; had

for several months known the accused, and he had concluded he was simple-minded; and, if talking to medical men, he would call him insane—not in the full sense of that term; he was of opinion he was imbecile to such an extent as at times to render him unconscious of any act, and that this imbecility was increased by the excessive use of intoxicating drinks; he was of opinion the accused would generally know the difference between right and wrong, and would be responsible for his acts; but it is probable, in his case, that the use of intoxicating drinks to any great extent would render him totally insane.

The next witness said he had practiced medicine, etc., seventeen years, and had known the accused six months, and he was of opinion his mind was very much impaired from some bad habits, or the commission of some crime, that had preyed upon his mind so as to produce mental imbecility; and that that would be greatly increased by excessive use of strong drink.

The next testified that he had seen freaks in the accused that made him think that he was not a man of sound mind; and again he had thought him a very intelligent man; he is a man of no sense when on a spree, no reason, or control of himself when under the influence of liquor; he saw him once when he was putting a band on a gutter, and told him he was not putting it on very straight; he made no reply, but picked it up and kissed it; and that witness went and told the foreman he was "a perfect luna." This was in March, 1867; the accused said but little when sober, and at such times he considered that he would know right from wrong.

Jackson Brooks testified that he saw the accused at the brewery; he was about the bar pretty much all day, and he saw him drinking "right smart;" thinks he was sober in the morning, but about three o'clock he was pretty tight; this was the 17th of June, 1867.

The next witness said, he came to town with the accused, and he took a glass of beer at the "Last Chance," and again

drank at the brewery, and was pretty drunk; this was the only time he ever saw him drunk.

The State then introduced a witness, who said he had for several months known the accused, and regarded him not very bright—hardly medium sense.

The next witness said he and the accused were both carpenters, and worked together in the government shop; had known him since December, 1866; was foreman over him, and could not say he ever thought he wanted sense; he was a good man and a good mechanic; that he knew the witness who said he told him, as foreman, that the accused was "a perfect luna," and did not remember of his ever having such talk to him.

The next witness said the accused had worked for him a month and a half, and he thought him an ordinarily sensible man.

The next witness said he was a carpenter; had frequently seen the accused; worked in the shop with him, and never saw any thing in him that indicated insanity.

The next witness stated the same.

The next said he had been with the accused every day for two weeks next before the killing, and saw no evidence of insanity.

The widow of the deceased then testified that she had never seen any indications of the accused being insane, and that about a week before the killing she heard the accused say if he were to commit murder he would claim to be insane, and when he got out of it he would be as smart as any of them.

We have thus, at length referred to the substance of the evidence, because the principal question here presented is as to the sufficiency of this evidence to sustain the verdict of murder in the first degree. The rule is well understood that where the State proves beyond a reasonable doubt that the accused perpetrated the murder by lying in wait, or by other kind of willful, deliberate, malicious and premeditated killing, it is murder in the first degree. The intention is manifested by the

circumstances connected with the act of killing. Express malice is that which is capable of proof, and malice is implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition, and this court has decided that the length of time is not material so that the killing was the result of a willful, corrupt and malicious intent to take life. A design thus formed before the act of killing is sufficient. *Bivens vs. State, 11 Ark., 460, sec 2; Va. Cases., 483, and 6, Randolph (Va.), 121.*

There can be no question, leaving the insanity out of view, but that the evidence here shows a willful, intentional killing, and not only a want of considerable provocation, but without the slightest provocation. Take the entire testimony and there is not the slightest word or act from the deceased towards him, in any way calculated to injure him or arouse his passions. On the other hand, there is some evidence going to show that he, before, and at the time of the killing, was harboring malice towards the deceased. A settled intent to commit the most diabolical crimes may, and often does, remain secret until an opportunity offers to carry the wicked purpose into effect, and by concealing the malice, and cause of ill-will that exists, a wicked one can better hope to accomplish his purpose and escape punishment; hence it is wise for the law to presume that every one intends the first and natural consequences of his act.

In this case two witnesses testify to threats made on the morning before the killing. One of these same witnesses testified that, a week before, the accused declared what he would do in case he should commit murder, and the fact of his preparing himself with a deadly weapon, immediatly after making the threats, his impolitic, if not insulting, words while going to Fort Smith, and the unprovoked attack and killing of the deceased, certainly well justified the jury in finding that the killing was willful, malicious and premeditated.

To refute this very violent presumption against him, the

prisoner attempted to set up that he was then insane, and not conscious of the act he did.

The legal presumption is in favor of sanity, and that the party intended to do what was the natural consequence of his act, and if he made no denial of the killing, but assumed that he was excusable, he thereby took the burden of proof; and if he failed to produce evidence sufficient to change the presumption raised against him by the proof of the killing, the penalty of the law would be legally adjudged against him, and the jury is the only proper tribunal to determine the weight of the evidence, and this verdict certainly was not a finding without evidence.

It was by the physicians, and some others, testified that the accused was imbecile—a man of weak mind, and liable to be much affected from excessive use of strong drink; but while this may have been probable, even if it had been most likely, it is by no means conclusively shown that such result as an excusable insanity would follow from the free use of intoxicating liquors; and in that conflict of evidence the jury alone could determine.

If it had been shown that drunkenness would necessarily produce insanity in the accused, the proof is by no means conclusive that at the time of the killing he had been laboring under the influence of ardent spirits long enough, or to an extent sufficient, to produce that insanity.

One witness spoke of his drinking some the day before the killing, another supposed he was drinking in the morning before the killing in the afternoon; but one who had been with him for two weeks, except the previous day, said he was sober for that whole time. Different other witnesses testified that he was sober in the forenoon of that day, and when he came to town. Brooks testified that he, at the time of the killing, was drunk, or, as he termed it, "pretty tight;" that he had seen him about the brewery *nearly all day*, and had seen him drink. This statement is not well sustained by other witnesses. It was shown by a number of them that he

did not come to town until after noon, and that the killing was about three o'clock, and this made it quite clear that he was not there *nearly all day*, and that Brooks did not fairly state the facts. Except a glass of beer, no one else testified that he had been drinking after coming to town.

To place no stress upon the evidence tending to show he was sane, and, if not at the time, up to near the time of killing, and we do not see how the jury on either point—being drunk, or being insane, if drunk—could well have found in the accused's favor; and would it not endanger the rights of society beyond what the law will allow, to hold that any one who voluntarily beclouds his mind with intoxicating drinks may thereby be excused in taking the life of an innocent man? *See Bishop on Criminal Law, vol 1, secs. 494 and 499, and note 1.*

The third ground for a new trial is disposed of in the consideration of the second and fourth.

Upon the fourth ground, the law, as was given in charge by the court, is set out, and the record fails to show that the accused excepted to any of the instructions given by the court, or that the court did not give all the instructions asked by the defendant there, and the finding seems to be altogether consistent with the instructions.

The fifth cause for a new trial, if good, is one that was more applicable in arrest of judgment. After eight of the jurors of the original panel had been selected and sworn, unauthorized separation and misconduct was shown to the satisfaction of the court; (it was shown, a witness in the case had talked to some of the jurors, etc.) whereupon the venire was quashed, and the selected jurors discharged, and a new venire awarded. The law scrupulously guards the rights of an accused in such cases, but in preliminary steps, a proper discretion may be exercised by any of the courts of original jurisdiction, which, if not grossly abused will not be considered here; and if in this case the misconduct of the jurors was such as would have required the court to set aside their verdict, had they remained and returned one, it was judicious to discharge them without

the labor and expense of a long trial; and, without evidence to the contrary, we will always presume such was the case—that a proper discretion was exercised. The defendant was not entitled to a discharge from sentence, under the verdict found against him, by reason of being formerly put in jeopardy of life, as held in the case of *Doctor T. Lee, v. the State*, decided at the present term. Such jeopardy cannot attach until the jury is duly impaneled and all the machinery of the court fully organized for trial and judgment. *Commonwealth v. Cook, 6 Story, 586; State v. Melville, 2 Georgia, 24; People v. McGowan, 17 Wend., 386; Cooly on Con. Lim., 326 and 327, and other cases there cited.*

The sixth objection was, that the court discharged a juror for cause, after the State's counsel had accepted him, and before the defendant had passed upon him. This was clearly within the discretion of the court. There can be no question as to the right of the court, if a juror is found to be incompetent, to discharge him at any time before he is accepted and sworn to try the case.

The last ground assigned for a new trial was, that a bystander, during the trial, handed one of the jurors a slip of paper with writing on it.

In cases of this magnitude it is highly improper to allow any communication made to jurors, not known and assented to by the defendant, except matters of vital interest to the jurors, and such only as are entirely disconnected with the case before them, and such communications should be by express permission of the judge, and in his presence, or that of a sworn officer.

It was held by this court, in the case of *Collier v. State, 20 Ark., 36*, that where it is made to appear to the satisfaction of the court, that what may have appeared to be an improper influence upon the jury, was not so in fact, the court should overrule a motion for a new trial. The record here shows that the court being fully advised of the matters and things in the motion, upon hearing the motion, found that the causes assigned were not sufficient to grant a new trial, and the record

shows a want of proof that an improper influence was had on the juror.

Upon the whole case, the appellant has failed to show that he was prejudiced by any ruling of the court.

The testimony shows a most wanton and unneccessary killing of a fellow man, and while his attempt to prove his own insanity at the time of the killing, was such as may have afforded him a hope of acquittal, yet it was strongly rebutted; so much so, as to remove any doubt that might have been raised as to his criminal intent and responsibility, and the jury having so decided, the judgment and sentence of the court below must be, and the same is, in all things affirmed.

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RHEA, *Administrator, et al v.* PURYEAR, *et al.*

ADMINISTRATORS—*Parties to Suits.*—When there is no allegation of indebtedness against a deceased person's estate, or that the administration had not been closed, and the record discloses no interest favorable or adverse of any of the defendants in the assets of the estate; and no grounds upon which they might be liable in another suit, it is not necessary that the administrator be made a party.

AGENT—*Fraudulent acts of.*—It is fraud on the part of an agent entrusted with money for a specific purpose, to attempt to control such means for his own benefit, and in his own name, and any profit or advantage resulting therefrom, reverts in equity to the principal.

A party purchasing lands with his own money, under an agreement that such purchase should be made, will not be permitted to hold them against the beneficiary.

MISTAKES—*Corrected after cause submitted.*—Discovery of mistake in the number of lands after a cause is submitted for final hearing, may be corrected.

Appeal from Randolph Circuit Court.

HON. L. B. MACK, Circuit Judge.

Byers & Cox, for appellant.

We submit that the court erred in permitting the bill to be amended after the cause was submitted, so as to make the allegations correspond with the proof. *Shields v. Barron, 17 How. U. S. R. 144. Patterson v. Fowler, Ex'r., 23 Ark. 470.* No facts are in issue unless charged in the bill, and no proof can be offered or relief granted for facts not charged in the bill. *Story's Eqt. R. sec. 257; Crocket v. Lee, 7 Wheaton 522; Jackson v. Ashton, 11 Peters 229; James v. McKendre, 6 John. 564; 1 Daniel P. C. & Pr. P. 377 and note 2.* The only prayer in the bill is for specific relief, in such case no other relief can be granted. *1 Dan'l P. C. & pr. p. 376; notes 1, 2, 3 and 4* and authorities there referred to.

The complainant's part of the agreement, set up in the bill, has not been performed and cannot be secured, and hence, there is a want of mutuality. *Adam's Eqt. p. 237 and note 2, and authorities there referred to; Shields v. Trammel, 19 Ark. 51; McNeil v. Janes, 21 Ark. 277.* The contract was in parol and there was no such part performance as would take the case out of the statute by frauds. *Adam's Eqt. p. 247, 86, note 1; Baker v. Hauldbraugh 15 Ark. 322; Keats v. Rector, 1 Ark. 139; Underhill v. Allen 18 Ark. 466; Johnson v. Craig, 21 Ark. 533.*

GREGG, J.

On the 18th of April, 1859, the appellees filed their bill, in chancery, in the Randolph circuit court, in which they alleged that Seymour Puryear, in the fall of 1852, furnished John Rhea with $102, and employed him to go to the United States land office at Batesville, Arkansas, and enter for him the south half of the south-east quarter of section 28, township 19, north of range 1 west; that he went, but instead of entering said eighty acres in the name of Puryear, he purchased a land warrant, and entered the whole of said quarter section in his own name, and represented to Puryear that the quarter section had not been divided, and he was compelled to enter the whole,

but if he wanted it, upon the payment of the balance of the purchase money, he would deed the whole to him, which sum Puryear proposed to pay as soon as he became able to do so.

It is further alleged that Seymour Puryear was in possession of said lands, and so continued up to his death, and that his administrator and heirs remained in possession for about one year thereafter, and that said Rhea promised that he would make title to complainant, but when the remainder of the purchase money was tendered, he refused, and that in the month of January, 1857, he died, leaving the defendants his heirs.

Complainants pray that the defendants be required to make them title to said land; that they specifically perform said contract, and for general relief.

At the May term, 1859, complainants obtained leave to amend their bill, as to the names of some of the defendants; a guardian *ad litem*, was appointed, and an answer filed for a minor, and the cause continued. At the next November term the other defendants filed their joint answers, to which answers replications were entered, and the cause set for hearing, with leave to take depositions generally.

At the May term, 1860, depositions were published, a suggestion made of the loss of the defendant's answer, a rule made upon the clerk to produce it, and an order made that a substitute be filed, in case the same is not produced by the next term; at which time the administrator filed a substitute answer, and the cause, by consent, was continued.

At the November term, 1865, the parties, by solicitors, appeared, and the cause was continued; and at the May term, 1866, it was suggested that the minor had arrived at full age; her answer was put in and replied to, other necessary changes in parties made, and another order to continue and take depositions. At the next term a similar order was made. At the May term, 1867, depositions were published, and again continued, with leave to take depositions generally.

The defendants answer that they are the representatives and heirs of John Rhea, and that the complainants are the heirs

of Seymour Puryear; that Rhea entered the lands described in the bill at the time therein stated, and that the parties died about the times stated; but they deny that any part of the lands were entered with Puryear's money, or for his use, and insist the same were entered with Rhea's own money, and for his own use; and they deny that the same was ever in the possession of said Puryear, or his heirs—the complainants.

At the November term, 1867, the cause was submitted to the court for final determination; and after the same was so submitted, it appeared there was a variance in the description of the land, between the allegations in the bill and the proofs submitted; and the solicitors for the complainants moved the court to allow them to amend their bill, by changing the numbers of the lands in the bill to correspond with the numbers in the depositions, to which the defendants objected; but the court overruled their objections, allowed such amendments to be made in the bill; and ordered that the defendants amend their answers; that new issues be formed, and that the cause be again set down for final hearing at the next term, and that leave be granted to the parties to take depositions generally; and that the complainants pay all costs accrued subsequent to the May term, 1860. To all of which the defendants excepted. The numbers of the lands in the bill were slightly changed, and at the May term, 1868, the cause was submitted on the original issues.

And, notwithstanding the great number of continuances, and rules to take depositions, the only ones brought before the court were those of Davis, Hoffstetler and Carter.

Davis testifies that he was at Rhea's; Puryear came there, and he heard him say to Rhea: "I have understood you are not going to make me title to my land," (referring to the land where he resided.) Rhea assured him that he would whenever he paid the purchase money and interest; said he would give bond for title, and if he died, his family would make title, and if he lived, he would make title to-morrow, next

day, or any time thereafter, when the money and interest were presented.

Hoffstetler testifies that he was with Rhea when he entered the south half of the southeast quarter of section twenty-eight, township nineteen, north of range one west, for Puryear; he thinks Puryear put $102 into Rhea's hands for that purpose; Rhea said he could "not save it without taking the whole quarter;" said he did not know how Puryear would like it, but he was going to save it in his own name, to keep himself safe for his eighty-acre warrant that he had bought. When the parties met, Rhea told Puryear how he had done, and inquired if he wanted the whole quarter; he responded he did; Rhea told him that as soon as he would pay him back the money he had had to pay out for the land warrant, and interest on his money, he would make him title; Puryear agreed to repay the money as soon as he could. Rhea, at the time, said Puryear had employed him to go and save the land for him; Rhea always appeared willing to make the title when repaid; Puryear had part of the lands inclosed and in cultivation, and Rhea permitted him to retain possession as long as he lived.

Carter testifies that he knew the parties deceased in life; that in 1852 or 1853, Puryear employed Rhea to go to Batesville to enter the south half of the southeast quarter of section twenty-eight, in township nineteen, north of range one west, and that he gave him the money to make the entry with; that himself and one Harvey loaned Puryear $102 in money, with which to have the entry made, and it was agreed Rhea should so expend that money; afterwards, at Batesville, Rhea said he could not enter that eighty acres without entering the whole quarter, and that he had given Wash. Hunter his note for an eighty-dollar land warrant, and with that and Puryear's money, he had entered the whole quarter; that he had entered in his own name, and did not know how Puryear would like it; that the land was worth the money, and if Puryear did not like it, he would pay him back his money and

keep the land, but if he wanted it, he could have it by paying him the money he was out; that he would make title whenever Puryear paid him the eighty dollars and interest; Puryear had some of the land in cultivation; Rhea permitted him to remain in possession of it up to his death, and his heirs held it for some time thereafter; Rhea died about three years after Puryear; does not know that Puryear ever tendered Rhea the eighty dollars.

Upon the proof, the court found in favor of the complainant, as to the south half of the southeast quarter of section twenty-eight, township nineteen north, range one west, and that Rhea was the agent of Puryear in entering said land; that the same was entered with Puryear's money, and of right belonged to him; that the north half of said quarter was entered by Rhea, and of right belonged to him, and the court decreed that no relief be granted as to said north half of said quarter section, and that said defendants be divested of all right and title to the south half of said quarter section; that the same pass to and vest in said complainants, and that the defendants pay all costs not before decreed; from which decree the defendants appealed.

It is here urged that the court below erred in not finding in favor of the demurrer clause in the answer, because the administrator of Puryear was not a party.

It was also urged as grounds of demurrer that the bill was brought for a specific performance of a contract resting in parol; that no part was performed; that the complainants did not gain possession under it; did not pay the purchase money; did not make valuable improvements, and that the contract was within the statute of frauds, and the court should have so found; that the court should have found that there was no equity in the bill.

It is also urged that the court erred in declaring a resulting trust when the bill does not claim such relief, and that likewise the court erred in allowing complainants to amend their bill

after the cause had been submitted to the court for final determination.

Should the court have found against the complainants, upon the demurrer clause in the defendants' answer alleging that Carter, as administrator, was not made a party complainant? We think not. We see no possible ground upon which the defendants in this suit could have been prejudiced for want of such party to the bill. There is no allegation of indebtedness against Puryear's estate, or that the administration had not been closed. The record discloses no interests, favorable or adverse, of any of the defendants in the assets of that estate, and no grounds upon which they might be liable in another suit. And, upon a careful examination of the bill, we find no admission that Carter or any one else was an administrator of Puryear's estate at or after the bringing of this suit. The bill states that during the year next after the death of Puryear, John Carter, as administrator, and the heirs of Puryear possessed the lands.

Puryear died in 1852; the statute law required the administration to close within two years, unless for good cause, the court of probate should extend the time for final settlement; then, if he was administrator in 1853, it was his duty to have closed that administration in 1855, and the presumption would certainly be rash and against law to suppose such administration continued until the 18th of April, 1859, nearly seven years, at which time this suit was commenced. Then it is assumed that there was an administrator, (with no allegations to that effect), and so far as we can see, no necessity for the appointment of one.

We can not see the force of the next and principal ground urged against the complainants' recovery. This was not a sale and proposed transfer of lands, as contemplated by the statute, to prevent frauds, etc., which requires real estate contracts to be in writing, or the payment made or certain performance done before relief can be had.

The ground here assumed, and I may say established, is that

Rhea was the agent of Puryear, employed to invest Puryear's money in specific property, and for Puryear's use, being thus intrusted it was a fraud on his part to attempt to control such means for his own benefit or in his own name, and all profit or advantage resulting therefrom would certainly in equity inure to Puryear; and these facts appearing in the bill and proofs were sufficient to sustain a decree without any express words declaring that a resulting trust existed in favor of Puryear's heirs. Some courts go further and declare that acts fraudulent in themselves are overridden by the statute.

In *Miller et al. v. Colton et al.*, the Supreme Court of Georgia say: "We fully recognize the doctrine that a court of equity will not permit the statute of frauds to be set up as a defense, by a party infected with fraud, and that parol trusts in real estate may be established in direct contradiction to the statute on the ground of fraud." *5 Ga., 346.*

In many cases, even where parties purchased real estate with their own money, the courts have holden that it would be a fraud to allow them to hold the lands against those beneficially interested, and for whom it had been agreed such purchases should be made. *Jones v. Hubbard, 6 Munford, 263; Davis et al. v. Hopkins, 15 Ill., 522; Miller v. Thomas, 14 Ill.; Trapnall v. Brown, 19 Ark., 39; Pyatt v. Oliver et al., 2 McLean, C. C. R. 267; Furguson et al. v. Williams et al., 20 Ark., 272; Cain v. Leslie, 15 Ark., 312.*

In the last case, by agreement, Leslie, with his own money, entered lands, including Cain's improvements, and afterwards refused to convey to Cain, but conveyed one-half to others, who it was alleged connived with Leslie to obtain the lands. Chief Justice WATKINS said: "It seems to be clearly a case where, unless the agreement be performed, an unconscionable fraud and deceit will have been practiced upon the complainant."

Finally, we are asked to reverse this decree because the complainants were permitted to amend their bill upon a discovery of a mistake in the numbers of the land, after the cause was

submitted for final hearing. An objection like that ought not to be tolerated on the law side of a court, and in equity, where an enlarged discretion should always be exercised to meet the ends of substantial justice, such exceptions become frivolous.

The Chancellor below gave the defendants until the next term to amend their answers, ordered the issues to be formed anew, again set the case down for hearing, and granted the parties further leave to take depositions; and then taxed complainants, because of their oversight, with the costs of five terms of the court. To have granted the appellants more would have outraged justice upon a pretense of doing equity.

Upon the record we find no error prejudicial to the appellants.

The decree is affirmed.

HANAUER & CO. *v.* CASEY, *Admr.*

ATTACHMENT—*Priority.*—A sale of lands under a junior attachment does not release the lien of a prior attachment, and the money arising from such sale is not to be applied in payment of the prior attachment.

If lands be sold at the same time under both executions, and the levy of the prior attachment thereby discharged, then the money arising therefrom, or so much thereof, should be applied in payment of the judgment under the prior attachment.

EXECUTION SALES—*Proceeds, how applied.*—Personal property is bound from the time the execution came into the hands of the sheriff, and where there are several executions, coming to hand at different times, and a sale under the last, the proceeds should be applied in satisfaction of the others in their order.

Appeal from Randolph Circuit Court.

HON. ELISHA BAXTER, Circuit Judge.

Byers & Cox, for appellants.

We submit: In the *first* place, according to the rule laid down by the Supreme Court of this State, in the case of *Trapnall et al v. Jordan et al, 7 Ark., 430,* the court had no jurisdiction of the subject matter of Casey's petition, and we suppose the circuit court should be bound by the same. See *sec. 7, ch. 96 Gould's Dig., p. 63–4.*

In the second place, the sheriff was not made a party, was not served with a notice, and the order, as to him, would be *coram non judice*, and void. *State Bank v. Noland, 13 Ark., 299; Newton v. State Bank, 14 Ark., 13; same v. same, 22 Ark., 27; Adamson v. Cummins, 10 Ark. 541.*

In the third place, the decision is directly in the face of the clear and palpably plain language of the statute, and in effect nullifies the statute, (see *sec. 6, chap. 96, Gould's Dig., p. 634*), and we submit should be reversed.

Watkins & Rose, for appellee.

This case is governed by section 52, chap. 17 Gould's Digest, by which the proceeds of the sale go to the extinguishment of the oldest lien, no matter how the property may be sold; and this seems to be the universal rule where there is no statutory provision to the contrary. *State v. Salyers, 19 Ind., 432; Straley's appeal, 43 Penn. S. R., 89; Thompson v. Cardel. 27 Ga., 273; 1 Tenn. R, 729; Russell v. Gibbs, 5 Carr., 390; Rowe v. Richardson. 5 Barb., 385; Lynch v. Hanahan, 9 Rich., (Law. S. C.) 186; Gilmer v. Warren, 17 Ga., 426; 1 Paige Chy., 181, 558; Neill v. Lancks, 6 Barb., 470; Bagley v. Reeves, 20 Ala., 427; Brown v. Hamlin 23 Miss., 392; Peck v. Tiffany, 2 Comst., 451; Steele v Hanna, 8 Blackf., 326; Newton v. Nunnelly, 4 Ga., 356.*

The question as to the sheriff being made a party, cannot arise here, as he is not making any contest. *Ringgold v. Stone, 20 Ark., 526;* and, being an officer of the court, he is presumed to have notice. *Brant's appeal, 20 Tenn., 8 (Harris) 364.*

"Where the parties, interested in the distribution of money in the sheriff's hands, appear, and state an agreed case, the court may determine the right, although the sheriff has not made the application." *Turner v. Lawrence, 11 Ala., 426.* The court will not disturb the verdict below for any error which could not injure the appellants. *Clark v. Barnett, 24 Ark., 30; Blackwell v. Patlan, 7 Cranch., 471; Campbell v. Pratt, 2 Pet., 354; Greenleaf v. Brith, 5 Ill., 132; Boardman v. Reed, 6 Id., 328; Phillips v. Preston, 5 How., 278; McMicken v. Webb, 6 Id., 292; Randon v. Toby, 11 Id., 493; Thomas v. Lawson, 21 Id., 343; Chandler v. Van Roeder, 24 Id., 225; Thompson v. Roberts, Id., 233.*

HARRISON, J.

James M Casey, as administrator of Andrew J. White, deceased, brought suit, by attachment, in the Randolph circuit court, against Hiram A. Kelsey. The writ was, on the 19th day of March, 1869, levied on certain lands, and judgment for his debt was recovered on the 9th of May, 1868. On the 20th day of March, 1867, the same lands were again attached, at the suit of Louis Hanauer and Jacob Hanauer, before a justice of the peace, and judgment was recovered by them. Executions on both judgments were delivered to the sheriff at the same time, and the lands were sold by him under each, on the first day of the March term, 1869. They were offered first under Louis and Jacob Hanauer's execution, and purchased for seventy-five dollars, by John P. Brimmage, jr., and then under Casey's, and purchased for eight dollars, by Ewing Y. Mitchell.

Casey, upon the return of the executions, moved that the sheriff be ordered to pay the money arising from the sale, under Louis and Jacob Hanauer's execution, to him, upon the ground that his attachment was prior to theirs. Louis and Jacob Hanauer appeared and resisted the motion, but the same was sustained by the court, and the money was ordered to be paid to Casey, and they appealed from the decision.

The provision of section 52, chapter 17, Digest, that where there are more attachments than one upon the same property, they shall be paid according to the priority of their levies, was intended to secure the liens of the prior against the junior attachments, and it is very clear that it does not mean that where there shall be a sale of the property under a junior attachment, which does not have the effect to discharge the prior liens, the money arising from it shall be applied to the payment of the prior attachments. It is true, where several executions come to the hands of the sheriff, at different times, and he sells personal property under the last, the others are to be first paid; but this is because the property levied on is bound, by the executions, from the time of the delivery of them to him; and upon a sale thereof, he must, to be entitled to receive the price, deliver the same to the purchaser, which, as a matter of course, releases the liens, and an absolute title passes to the purchaser. *Russell v. Gibbs, 5 Cow, 390; Peck v. Tiffany, 2 Comst., 451.*

A different rule, however, prevails as to the application of the proceeds of a sale of real estate.

Section 6, chap. 96, Digest, says: "A sale of lands under a junior judgment shall pass the titles of the defendant, subject to the lien of all prior judgments and decrees then in force;" and *section 7*, that "the money arising from such sale shall be applied to the payment of the judgment under which it may have been made." The reason of this provision of the statute is too apparent to require any remark, and the rule established by it is equally applicable to sales of real estate in attachment proceedings.

Had the lands been sold at the same time, under both executions, and the levy of Casey's attachment thereby discharged, there can be no question that he would have been entitled to the money, or to the amount of his judgment out of it, if it had brought so much. But the sale of them under Louis and Jacob Hanauer's execution, neither discharging or impairing the lien of his attachment, we are unable to see how he can

set up any just claim to the proceeds of it. *Sandford v. Roosa, 12 John. 162.*

We are, therefore, of the opinion that the court below erred in making the order appealed from, and its decision is reversed, and the cause remanded to it with instruction to overrule the appellee's motion.

LAIRD *v.* HODGES.

USURY—*Lex-loci*—While the law of the place of the contract interprets and construes it—the law of the place where it is put in suit, determines all questions as to the manner in which the same may be enforced.

HOW PLEADED—Usury should be specifically pleaded; it is not sufficient to aver that a note was made, signed, sealed and delivered at a particular place; facts, sufficient to show the intention of the parties, should be averred.

REQUISITES OF PLEA.—A *corrupt agreement* and the *intention* to take or reserve more than the legal rate of interest, are essential ingredients in all usurious contracts, and must be averred in a plea of usury.

Appeal from Crittenden Circuit Court.

HON. JAMES M. HANKS, Circuit Judge.

O. P. Lyles, for appellant.

B. C. Brown, for appellee.

BENNETT, J.

This suit was instituted in the circuit court of Crittenden county, at the November term, 1866, by Laird against Hodges, on a promissory note, of which the following is a copy:

"$666 66. DELTA, MISS., June 7, 1860.

Forty-three months after date, I promise to pay to the order of Emile Gassit six hundred and sixty-six $\frac{66}{100}$ dollars, with ten per cent. interest from January 1, 1866. Value received.

(Signed.) A. HODGES."

Indorsed: "Pickett, Hodges & Ward," with a blank indorsement as follows: "I waive demand and notice.

E. GASSIT."

The defendant files a plea of general issue, and a special plea. "And for a further plea in this behalf the defendant says '*actio non*,' because he says that the supposed promissory note, in the said petition described, was not executed and delivered by this defendant to the said Emile Gassit, at Delta, in the State of Mississippi, as in and by said petition is supposed, but that the same was executed and delivered by this defendant to the said Emile Gassit, at Memphis, in the State of Tennessee, to wit: on the first day of June, 1860. And the said defendant further avers that, by the law of the said State of Tennessee, any promissory note or other instrument wherein is reserved any greater rate of interest than the rate of six per centum per annum, is wholly void. So the defendant says "that the said supposed promissory note was and is wholly void."

Plaintiff replies: "That, at the date of the execution of the note, said Gassit, the payee, was a resident of the State of Mississippi, and that although said note was executed in the State of Tennessee, it was then and there agreed and understood by and between said Emile Gassit and the said defendant, that the said contract should be performed and payment of said note made in the State of Mississippi."

To this replication a demurrer was sustained. Plaintiff resting, judgment for costs was rendered against him.

This was a proceeding by petition and summons, in the usual form of the statute.

The first question that arises is, whether the defendant has pleaded a good plea in bar? for if he has not, the plaintiff

must have judgment, notwithstanding his replication may be bad, according to the well settled rule that judgment must be against the party who, in pleading, commits the first fault.

The plea, no doubt, was intended as a plea of usury, as it was seeking to avoid the payment of the note upon the ground of illegal interest.

Whatever view we may entertain in regard to the question of the *lex loci*; and while the law of the place of the contract interprets and construes it—the law of the place where it is put in suit—*lex loci*—determines all questions as to the manner in which the same may be enforced. The pleadings in form and substance must, of course, conform to the practice, in such cases, in our courts.

To avoid the payment of money demanded, upon the ground of usury, it must be *specifically* pleaded. The plea filed in this cause is fatally defective in several particulars.

The defendant fails to allege such facts as will show that it was intended by the parties that the contract was to be made *payable* in Tennessee, the law of which it was said to have violated. It is not enough to aver the mere fact that the note was written, signed and delivered in Tennessee.

The parties may have resided in Delta, Mississippi, and were only temporarily in Memphis, Tennessee, for the transaction of this or any other business. Or, one party may have been a resident of Mississippi, and the other of Tennessee. The note being payable generally, it is necessary to fully allege the intention of the parties as to the place of payment, as that is very material, as by it is to be determined the law of the contract. And enough must be alleged to show that the note was payable in Tennessee, if the defendant desires to place the contract under the law of that State. If the note had been payable at a particular place, parol evidence would not be admissible to show it payable elsewhere, or payable generally. By it being made payable generally, the parties may be presumed to have intended that the law of the place where it was made should govern. But this note was dated at Delta, Mis-

sissippi, and that may be said to be *prima facie* the place of payment, or, at least, to show the place where made. Neither of these facts, in themselves, can be said to be conclusive of the intention of the parties as to where the note was to be paid. The contrary has been adjudged. See *Anderson v. Drake*, *14*, *Johns. Rep.*, *114*.

A party to a contract, general as to its payment, who seeks to show that it has a particular place for its payment, must aver that such a place was the intention of the parties where it should be paid.

Another fatal defect in the plea is its failure to allege a *corrupt agreement*, to take more interest than the law allows. This is a material averment. "The corrupt agreement is the essence of a usurious contract, which is nothing more than taking more interest than is allowed by law. It must be averred and proved to support the defense." *McFarland et al v. State Bank*, *4 Ark.*, *55*.

In *Moody v. Hawkins*, *25 Ark.*, *191*, this court say: "The *intention* to take or reserve more than the legal rate of interest is an essential ingredient in all usurious contracts, and must always be averred in a plea of usury."

For these failures in the plea, it is bad, and should not have been entertained by the court below. The replication would have been a good one if the plea had been perfect.

Judgment reversed, cause remanded, to be proceeded with in accordance with law.

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FORD v. WARD.

NEW TRIALS.—This court will not reverse the decision of the circuit court refusing a new trial, when the only ground presented is the weight of evidence.

CONTRACT—*When implied.*—Where a party accepts the beneficial results of another's services, the law implies a previous request and a subsequent promise.

AMENDMENTS.—Under the Code of Practice, the court may permit "amendments at any time in furtherance of justice," and in the exercise of that discretion, this court will not interfere, on appeal, unless it has been grossly abused.

Appeal from St. Francis Circuit Court.

HON. JAMES M. HANKS, Circuit Judge.

Garland & Nash, for appellant.

The plea of limitation was a meritorious defense, and it was error for the court below to refuse to receive it before the cause was submitted. *Code of Practice, p. 61, secs. 155-56.*

The court erred in not giving the second instruction asked by Ford, that is, "a past consideration will not support a promise." See *1 Parsons on Contracts, p. 345, et seq.; Williams v. Perkins, 21 Ark., 18.*

The damages are excessive, and the verdict must be set aside. *23 Ark., 215; 9 Ib., 395; 19 Ib., 234; 15 Ib., 345; Opinion of Fairchild, Judge, in Patterson v. Thompson, 24 Ark., 53, et seq.*

Watkins & Rose, for appellee.

Out of Ford's *assent* to Ward continuing his services, and Ford's accepting and retaining the beneficial results of Ward's services, the law implies a previous request and subsequent promise. *1 Parsons on Con., 392.* The verdict is not contrary to the evidence, and if it was, on the testimony shown, the court would not grant a new trial. See *Rose's Dig., p. 555,*

secs. 38 and 45, and Id. p. 49, secs. 41 and 16 Ark., 237; 19 Id. 671; 13 Id., 295. As to excessive damages, see *23 Ark., 215.* If they were, there may be a remittitur here. *9 Ark., 395.*

BENNETT, J.

This was an action of assumpsit, commenced by attachment, brought by the appellee against appellant, in the St. Francis circuit court. Declaration in the common counts, for services rendered as superintendent of plantation and attention to business of Ford, by Ward, and for money paid, goods furnished, etc.

Ford answered, denying the performance of services, the purchase of goods, etc., and averring that plaintiff took control of plantation without consent of defendant, and averring that plaintiff is indebted to defendant in a large sum, for rent and damages.

Upon the trial of the cause, appellee obtained verdict, and a judgment for the sum of $\$3,308\frac{40}{100}$, and for costs. Appellant filed motion for new trial, because the verdict was contrary to the law and the evidence; because the damages assessed by the jury are excessive; because the court erred in refusing to permit defendant to interpose the plea of the statute of limitations of three years; because the court erred in allowing the letter of William G. Ford to be read, without proof of handwriting; because the court erred in refusing to give the second and fourth instructions asked for by the defendant; which motion the court overruled, and the appellants appealed to this court.

In 1863 William G. Ford, then absent, was the owner of a plantation in St. Francis county, which was superintended by Rice, his agent, living on the place. Rice being pressed into the Confederate service, employed Weatherly to act in his place until Rice could return. Rice being killed shortly after this, and Weatherly being unable and unwilling, from its dangerous character, to continue in this matter, employed

Ward, the appellee in this case, to take charge of the plantation and property, to manage it for Ford, which he did from say April, in 1863, till the first of January, 1865, at which time the plantation was turned over to Woodward, a duly authorized agent of Ford.

The first ground of objection, that the verdict was contrary to the evidence, we deem not well taken. Without recapitulating the evidence, it may suffice to say that the above statement of facts is well supported by the evidence; and also that on account of Ford's absence, and the difficulty of communicating with him, (he being within the Federal lines), he was not consulted with, though efforts were made to that end, about Ward's taking charge of his plantation; but Ford was aware of it some time afterwards, and did not dissent from it; but, on the contrary, suffered it to continue until he finally sent another person. In fact, upon an examination of the whole testimony, we are not even prepared to say that the weight of the evidence was not with the appellee; but of this we need express no opinion; it was for the jury to say. In the exercise of their discretion they have said, and we will not disturb their verdict.

This court has repeatedly held that it will not reverse the decision of the circuit court refusing a new trial, when the only ground presented is the mere weight of evidence. When there is a conflict of evidence, the jury being the exclusive judges of the facts, their verdict will not be disturbed. *Drennen v. Brown, 10 Ark., 138; Sparks v. Beaver, 11 id., 630; State Bank v. McGuire, 14 id., 530; Brooks v. Perry, 23 id., 32.*

It is next contended that the motion for a new trial should have been sustained, because the verdict was contrary to law. While reviewing this part of the case, we may as well consider the objection made to the refusal of the court to give to the jury certain instructions asked for by Ford.

The second instruction, which was refused, is as follows: "A past consideration will not support a promise."

The defense of Ford rests solely upon the ground that he

never procured or consented to Ward's taking charge and control of the plantation.

It is true that every contract is founded upon mutual agreements of the parties, and that agreement may either be formally stated in words or committed to writing, or it may be a legal inference, drawn from the circumstances of the case, in order to explain the situation, conduct and relations of the parties. This being an implied contract, the law will only supply that which, although not stated, must be presumed to have been the agreement intended by the parties.

Judge STORY, in his work on Contracts, page 5, section 12, says: "The law presumes such agreements to have been made as justice and reason would dictate, and assists the parties to any transaction in an honest explanation of it. But a promise, will not be implied, contravening the express declarations of the party charged, made at the time of the supposed agreement, unless such declarations be at variance with some legal duty, and then the law will imply a promise to perform that duty. Whenever a party avails himself of the benefit of services done for him, although without his express authority or request, the law supplies the formal words of contract, and presumes him to have promised an adequate compensation."

Thus it will be seen that previous consent is not necessary to make all contracts obligatory. *Assent*, under certain circumstances, is sufficient. Did Ford ever assent to Ward's taking charge and control of his plantation?

It fully appears that when a knowledge of what had been done by Ward came to Ford, he did not repudiate him, but allowed him to continue, thereby assenting to his controlling and managing his property, until such a time as suited his convenience to make other arrangements.

Ford also wrote Ward, November 14, 1864, in which he says: "A long time has elapsed since I had a line from you, but trust you are managing to the best advantage for my interest." In the same letter Ford says: "To Mr. Woodward I have given full power of attorney," and "you will do me the favor to co-

operate with him in such measures as he may find it desirable to adopt."

Furthermore, he (Ford,) by his agent (Woodward,) accepted and retained the beneficial results of Ward's services; and in such cases the law implies both a previous request and a subsequent promise.

In this view it is therefore immaterial whether Ford, after suit brought, promised to pay Ward for his services or not. The case was sufficient without it, and if he did promise, there was a sufficient consideration implied. The instruction if good law was abstract, and had no relation to the case.

The fourth instruction asked for and refused was: "If the jury believe that after Ward had taken charge of Ford's property, etc., that Ford promised to pay him for doing so, such promise will not be sufficient to support this action unless supported by some other competent testimony."

The object of the instruction is very vague and indefinite. If it was designed that the court should instruct the jury that more than one witness is necessary in order to find a given fact, it was properly refused. The testimony of one witness, though opposed by a score of others who are considered by the jury incredible, is sufficient and binding on the jury, and their verdict must accord with it. The credibility of testimony is a matter within the cognizance of the jury. It is for them to believe or disbelieve a witness, or to believe or disbelieve a part or any portion of his evidence. This necessarily results from their right and duty to weigh the testimony. It is not necessary that a witness be impeached to be disbelieved. The jury may think that he is mistaken, or they may doubt his statement, though his general character for truth and veracity be not attacked. "In general, jurors are the unfettered, illimitable and final judges, whenever a question of credibility arises in respect to one or more witnesses, whether the latter be concurring or conflicting." *Winchell v. Latham. 6 Cowan, 682; Ackley v. Kellogg, 8 Cowan, 223; Fowler v. The Ætna Fire Insurance Company of New York, 7 Wend. 270.*

The third ground for a new trial is, that the damages assessed by the jury are excessive.

Great difficulty has always existed in determining to what degree the damages must be deemed excessive, in order to call for the exercise of the correcting power of a court. This is a question not susceptible of any fixed and definite rule. Unless the verdict is so extravagant as to excite a suspicion that the jury have been controlled by improper influences, the court will not be justified in interfering. On *page 1136, 3 Graham & Waterman, on New Trials*, we find the following words: "It should be borne in mind that, although when the plaintiff complains of no injury to his person or his feelings; when no malice is shown; when no right is involved beyond a mere question of property; when there is a clear standard for the measure of damages, and no difficulty in applying it, the measure of damages is a question of law, and is necessarily under the control of the court; yet that, in those actions in which damages can be gauged by no fixed standard, but necessarily vest in the sound discretion of the jury, the court interferes with the verdict on the mere ground of excessive damages with reluctance, and never, except in a clear case."

If the verdict does substantial justice a new trial will not be granted.

In *McClintock et al. v. Lary et al., 23 Ark. 215*, it was held: "When the question of damages is fairly left to the jury this court will not set aside the verdict for excessive damages unless there be good ground shown."

The case at bar was based upon an account current, calling for a balance of $4,217 30. The evidence clearly sustained the bill in most of its items. The verdict was for $3,308 40. If the damages have been assessed neither at the highest nor the lowest estimate of the witnesses, and there is nothing to indicate that the jury acted under the influence of passion or bias, a new trial will not be granted. *Graham & Waterman, vol. 3, 1161.*

In the case at bar we see no error in overruling the motion for a new trial, on the ground of excessive damages.

Another reason assigned why a new trial should be granted is, that the court below refused to allow appellant to amend his answer by inserting the defense of the statute of limitation of three years. As shown by the bill of exceptions, this defense was only sought to be interposed after the jury had been impaneled, to try the cause, and some evidence introduced. As a question of practice we think it was entirely within the discretion of the court, and we will not be warranted in saying that this discretion has been abused, unless a right has been invaded.

Section 155, page 61, Code of Practice, says: "The court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceedings to the facts proved. The court may likewise, in its discretion, allow an answer or reply to be made after the time limited by this Code, or by an order to enlarge such time."

The section above quoted is in wording the same as section 161, of the Kentucky Code, and it was held by the Supreme Court of that State in the case of Barbour *v.* Moss, adm'r., M. S. opinion, July, 1857: "When the defendant must have known the facts contained in an amended answer, which he proposes to file, at the time of the filing of his original answer, it is no abuse of discretion to refuse leave to file it." In the lawful exercise of that discretion the circuit court acted judicially in refusing to allow the pleadings to be filed; and that discretion can not be controlled by this court on appeal, unless it has been grossly abused, which it has not been in this case.

The bill of exceptions does not show that there was any objection made to the introduction of the Ford letter upon the

trial, for want of authentication. This objection should have been made when it was offered in evidence, and if the objection was overruled, exceptions saved at the time. This not having been done, it is to be presumed that whatever objection there may have been to the letter, as evidence, was waived.

Having disposed of all the causes assigned in the motion for a new trial, there remains but one other point in the case. Our attention is called to it in the briefs of the attorneys for the appellants. By the bill of exceptions it is shown that in passing upon the motion for a new trial, the judge, who presided below, referring to the proposition made in the motion that the verdict was contrary to the testimony, remarked that "he did not know whether it was or not, that he could not hear the testimony."

It is unquestionably the duty of a judge, sitting at *nisi prius*, to hear and carefully note all the proceedings of his court, while in session; yet in this case there could be no very great harm done, as the remark only related to the *hearing* of the testimony.

The bill of exceptions contains all of the evidence given in the cause, as it expressly states, and this court having that evidence before us, and seeing that it fully sustains the verdict, it will not be disturbed merely because some point of it did not reach the ear of the judge. The remark was *extra judicial*, to say the least.

The judgment must be affirmed.

KIRBY *v.* VANTRECE, ET AL.

DOWER—Under the former territorial statute, to sustain the right of dower, the husband must have had a strict *legal title*—but under the late statute, it is only necessary that he be *seized* of an estate of inheritance.

To what estate attaches.—A valid purchase and continuous possession by a party, for the space of eleven years or more, without deed, will be deemed quite sufficient to perfect his legal title; and though his legal title be not perfected by prescription or limitation, yet if he have so perfect an equity as to entitle him to a legal title in fee, whenever demanded, he would, in the language of the statute, be "seized of an estate of inheritance," to which the right of dower would attach upon his death.

Appeal from Hot Spring Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Watkins & Rose, for appellant.

Appellant was entitled to dower—her husband bought the land in 1857, and died in possession of same. The proceeds which he used to pay for the lands belonged to him. *Walker's A. M. Law, 238; 2 Erle & J. 81; 1 Har. & G. 276; 1 Comst. 473; 8 Page 137; 3 Barb. Chy. 169; 15 Ark. 180.* Kirby had an "equitable fee," and in such a widow is endowable. *Sec. 2 chap. 11, New Dig.; Adams' Eq. 140; 1 Jones N. C. 430.*

Gallagher, Newton & Hempstead, for appellee.

A widow is not entitled to dower in the equitable estate of her husband in lands. *Blakely v. Furgeson, 20 Ark. 552–53*, and cases there cited. *Thorn v. Ingram, 25 Ark. 52.* The purchase by William P. Kirby, created a *resulting trust* in favor of Abernatha Kirby. *Hill on Trustees, p. 91; 4 Kent Com. p. 305; Tiffany & But's Trusts & Trustees, p. 20, et seq.; Ferguson v. Williamson, 20 Ark. 292.* And such trust is not within the statute of frauds. *McGuire v. Ramsey, 9 Ark. 518.* There was not such a reduction to possession of the wife's interest, in

the Stribling estate, as to give Kirby a right thereto. *Moss v. Ashbrook, 20 Ark. 128.*

GREGG, J.

This suit, commenced by an application, on the part of the appellant, to the probate court of Hot Spring county, for dower in three hundred and seventy and 7-100 acres of land, of which she alleged her late husband, William P. Kirby, died seized and possessed.

Some of the defendants disputed her right of dower in the NE. NE. of section 3, township 5, south of range 18 west, containing 44 55-100 acres, part of the lands claimed by her.

It appears that William P. Kirby first married Abernatha, the daughter of Robert Stribling, by whom he had one child, the defendant, James R. Kirby; that said Stribling died, seized and possessed of real estate and slave property worth over $12,000, of which, the last named 44 55-100 acres was a part; that at a sale of the property of said Stribling, made under a decree of court, January 1, 1857, William P. Kirby bid off this piece of land at $100, and in payment thereof gave a receipt for that amount, of what was due his wife, Abernatha, as an heir. He received no deed for the land, but then took it into possession and held it up to May 22, 1869, the date of his death. After he went into possession of this land Abernatha died, and he married the appellant, by whom he had other children, and with whom he cohabited up to his death.

There was some evidence tending to show that William P. Kirby, in his lifetime, intended this piece of land for the sole use of James R.; on the other hand, there was evidence tending to show that he wanted his widow to reside on this land, and there raise his children. This, however is not material.

This cause, by consent, was transferred to and heard in the chancery court of that county, and the appellant's bill, as to

the said $44\frac{55}{100}$ acres of land, was dismissed, and a decree rendered against her for costs, from which she appealed to this court.

In the case of *Blakeney et al v. Furguson et al, 20 Ark., 553*, this court held that Mrs. Furguson was not entitled to dower in certain lands, of which her husband died possessed, which lands had been purchased at tax sale, and no deed ever made to him. But this ruling, and some other cases, was under territorial statute, which provided that a widow should be endowed where her "husband was seized and possessed of lands during coverture, either by virtue of a deed, patent, entry, warrant or survey, and to which she has not relinquished her right," etc., while the statute, in force during the transaction now under consideration, provides that "the widow shall be endowed of the third part of all the lands whereof the husband was seized of an estate of inheritance at any time during the marriage,". etc.

Under the former statute, to sustain the right of dower, the husband must have had a strict legal title; under the latter statute, it is only necessary that he be seized of an estate of inheritance—a distinction that the chancellor, in the haste of circuit practice, seems to have overlooked.

It can readily be seen, by reference to *Vol. 1 Scribner on Dower, 402*, that, in a large proportion of the States, a widow is entitled to dower in equitable estates. *Rowton v. Rowton, 1 Henning & Munford, 91; Thompson v. Thompson; 1 Jones, N. C. 430.*

But to assume that a perfect equity, alone, is not sufficient to pass a right of dower, would not be sufficient to defeat this appellant. Her husband, as appears by the record, went into possession under a valid purchase, and held continuous possession for over eleven years, which we deem quite sufficient to perfect his legal title, and her right to dower certainly could not be made to depend upon the manner in which her husband acquired legal title. *2 Scribner on Dower, 61–2.*

Had this suit sprung up before Kirby's right, by prescrip-

tion or limitation, ripened into a full legal title, he had so perfect an equity as entitled him to a legal title in fee, whenever demanded; and thus, being for years the actual owner, and possessed of these lands, certainly, in the language of the statute, he was "seized of an estate of inheritance," to which the right of dower attached.

We are, therefore, of opinion that the chancery court below erred in dismissing the appellant's petition and decreeing costs against her; and, for this error, the decree of that court is reversed, and this cause remanded, with directions to sustain said petition, and to proceed to have dower assigned said appellant, according to law and not inconsistent with this opinion.

SAWIN & SICKLES *v.* IZARD BROS. & PREWITT.

PRACTICE—*When finding reversed.*—The finding of the court below will not be disturbed, unless it is so obviously against the weight of evidence as to be palpably unjust.

Appeal from St. Francis Circuit Court.

HON. WM. STORY, Circuit Judge.

Brown & Lyles, for appellant.

Watkins & Rose, for appellees.

HARRISON, J.

Izard Bros. & Prewitt brought five suits, on due bills, against Sawin & Sickles, and recovered judgment on each. The defendants appealed to the circuit court, where the suits were

consolidated, and the plaintiffs again recovered judgment. The defendants then appealed to this court. No questions of law were reserved at the trial, and the execution of the due bills was the only point in controversy. It is unnecessary to set out the evidence; to our mind it is conclusive, and if less satisfactory, or even doubtful, the finding of the court would not be disturbed, unless it was so obviously against the weight of evidence as to be palpably unjust.

The defendants further claimed a new trial, because the court, whilst sitting as a jury, after the plaintiffs' witnesses had been examined, and the defendant, Sawin, had testified for defendants, but before Mitchell, another of their witnesses, sworn at the same time with Sawin, was called, remarked that the court was satisfied that the due bills were executed by the defendants.

It does not appear that the remark was excepted to at the time it was made, and the witness was not introduced or offered. But we are unable to conceive how such a remark could have prejudiced the defendants, or to regard the objection otherwise than frivolous.

The judgment is affirmed.

FREEMAN *et al* v. REAGAN.

ADMINISTRATION—*Interposition of equitable powers.*—While a court of chancery will not assume to take charge of an administration going on in the court of probate, yet there may arise cases of fraud or waste which would call for the interposition of equitable powers, not exercised by courts of probate.

Where the removal of the administrator, by the probate court, would not show the fraud, nor cancel or shorten the process of cancellation of a deed obtained from the administrator by fraud and duress, nor the grounds of defense be made better or worse, a court of equity, having power to control properly any proceeds that may result from its decree, may interpose.

FRAUDULENT DEED—*When set aside, etc.*—The rule in equity, that a party seeking to set aside a contract, must place, or offer to place the opposite party in *statu quo,* is not applicable to a case where a deed has been obtained by fraud and without a valid consideration.

PRACTICE.—Where a demurrer points out no specific defect in the bill, although allegations that ought to have been made, were omitted in the bill, yet, if the result of the suit, so far as the defendant is concerned, could not have been different, and the decree in the court below is a full and final adjustment of all his rights in the premises; and if those who may be liable to further costs or litigations do not complain, a demurrer ought not to avail the defendant.

Appeal from Arkansas Circuit Court.

HON. WM. M. HARRISON, Circuit Judge.

Watkins & Rose, for appellant.

The evidence of duress is confined to Bunyard, but it is not made out. *Burr v. Burton, 18 Ark., 218.*

The answer of Freeman being full, explicit and responsive in denial of the allegations of the bill, it is entitled, as evidence, to its full weight. *Jordan v. Fenno, 13 Ark., 593; Byrd v. Belding, 18 Id., 118; Spence v, Dodd, Id., 19, 166.*

The complainants, seeking a recision, do not propose to place the defendants in *statu quo* or offer to restore the value of what was paid by him. *Desha v. Robinson, 17 Ark., 237; Seaborn v. Sutherland, 17 ib., 603; Bellows v. Cheek, 20 ib., 438;* and this

is the rule even in cases of usury, *18 Ark*, *369*, *375*. The answer of Freeman contains a clause of demurrer, which is available. *Lovett v. Langmire*, *14 Ark*, *339; Menk v. Anthony*, *11 ib.*, *711; Sullivan v. Hadley*, *16 ib.*, *150*.

The heirs are competent to maintain this suit; the right of action passed to the administrators. *Anthony v. Peay*, *18 Ark.*, *24; Leman v. Rector 15*, *ib.*, *436; Pope v. Boyd 22 ib.*, *535; Worsham v. Field*, *ib.*, *448; 1 Hilliard on Mort. p. 280*.

Payment to the heirs would have been no defense by administrators. *17 Ark*, *122; Rust v. Worthington. ib.*, *129; Slocumb v. Blackburn*, *18 Ark*, *319; Buck v. Cook*, *21*, *ib.*, *572*.

The bill should have been dismissed without prejudice to administrators to sue.

Clark & Williams, for appellee.

Whether the acts of the administrators were fraudulent, was a question of fact, dependent upon and susceptible of proof, and the Chancellor in determining it, was sitting as a jury, bound to decide according to the weight of testimony—and the case comes clearly within the principle laid down in *Branch v. Mitchell*, *24 Ark.*, *431*, *443; Johnson v. Ashley*, *7 Ark.*, *470; 13 Ark.*, *295; Myers v. State*, *7 Ark.*, *174; Drennen v. Brown*; *20 Ark.*, *138; Masón v. Edington*, *23 Ark.*, *208; Rose Digest*, *559*, and cases cited.

The administrators were trustees, acting for the benefit of complainants, as the heirs of the estate, and as such were bound to the utmost good faith towards the interests of the *cestui que trust*. See *Jackson v. Repdegraff*, *1 Rob. Va. 107; Nichols v. Peak*, *1 Beasely* (*N. J.*) *69; Barksdale v. Finney*, *14 Gratt* (*Va.*) *338; Hargraves v. Batty*, *19*, *Geo.*, *130; Morris v. Thompson*, *19 Ill.*, *112*.

The deed was not in accordance with the order made, and was never confirmed in any manner by the court—and was not valid. *See 1 Kage 2 and p. 60*, *61; Darkin v. Marze 1*, *as v. 22; 1 Town & v. 406; 2 Daniel. 1454–5; Act 21st February*, *1859; 1 Sugdon*, *264*, *265*, *266; 4 Trent*, *330*, and cases cited.

GREGG, J.

The appellees brought their bill in equity, against the appellant and others, to the May term, 1867, of the Arkansas circuit court.

It is alleged in the bill that Lewis Thompson, now deceased, on the 21st day of October, 1868, sold certain lands to appellant for $3,840, executed his bond for title, and took three bonds for the purchase money, each for $1,280, due respectively the 25th of December, 1859, 1860 and 1861; that the first bond was paid, but the others have not been paid; that Thompson died in 1862, leaving a widow, and the complainants, his heirs; that, in May, 1862, letters of administration were granted his widow and Larkin F. Bunyard, upon his estate, and that appellant and others, at the July term, 1863, of the probate court, fraudulently procured an order for said administrator and administratrix to make a deed to the appellant; that the deed was made; that lawful money was not paid, as provided for in the bond; that through duress and to avoid conscription into the rebel army, the administrator received Confederate notes and executed a deed, the notes being worthless; and that the widow, who has since died, also signed the deed through fraud and undue influence.

The appellant answered, admitting the contract for the lands, the execution of the obligations, the payment of the first bond, the death of Thompson and wife, the grant of letters of administration, and the making of the probate court order and the deed, and that complainants are the heirs, etc.; but he denies all frauds and confederation to obtain the title; alleges payment of the obligations, and that the deed was duly made.

Bunyard's answer admitted all the material allegations in the bill.

The court below decreed in favor of the complainants, but allowed Freeman ten cents on the dollar for the amount paid. Whether or not the allowance of that sum was error, is a question not before this court, because no appeal was taken or com-

plaint made by the parties against whom that allowance was made.

The validity of the deed and the payment of Freeman's last two obligations are the questions before us—one party alleging that only Confederate notes of no value had been paid, and that the deed was obtained through fraud; the other, that full consideration had been paid and the deed fairly obtained.

The substance of the proof is that Freeman made no attempt to pay off his indebtedness until the summer of 1863, when the Confederate States' notes were rapidly declining in value; he then showed anxiety to pay such notes at their face value. Bunyard and the widow refused to accept. Freeman told them he would spend all he was worth before he would pay anything else; and he employed Colonel Morris, the sheriff of the county, and who was secretary for the administrator and administratrix, to influence them to take these notes, and make him a deed. Bunyard told Morris he thought they would be of no account, and the widow refused to take them. Bunyard had been keeping out of the Confederate army. Armed conscripting squads were scouring the country. Bunyard was frightened and hiding, and men believed themselves in danger of great personal violence if they refused to accept Confederate notes as current money, which then were estimated as being worth about ten cents on the dollar; yet no one was known then to refuse them for debts or property.

No direct threats of violence were made against Bunyard. Morris told them they could get nothing but Confederate money; that Freeman had the advantage of them, and that it was that or nothing.

He swears that Mrs. Thompson was a woman of weak mind, and he used every effort he could think of to get her to sign the deed. Finally he got her to go to town to get the money. He asked her to give bond for the return of the money, etc., and she refused, and burst out to crying.

When Bunyard refused to act, Morris told him it would be better for him to take the money and execute the deed. If he

did, he thought "he would not be pestered," as Bunyard swears, he understood he would not be conscripted, and that he believed Freeman and Morris could have him taken to the army or saved from conscription. No willingness was expressed, but no further objection was made. Freeman had the deed written and sent to him, where he was secreted in the brush, and he there signed and acknowledged it.

The deed was very informal and did not properly recite the contract with Thompson, in his lifetime; the appointment of his administrators; the making of the probate court orders; etc., but, taken in connection with the orders shown to exist, it sufficiently shows the character in which the grantors conveyed; especially so, when both parties allege that the deed was made in their representative character, and proofs, *aliunde*, show that fact.

Upon these facts the chancellor found for the complainants, but allowed as a credit ten cents on the dollar on $2,705 by Freeman, paid to Bunyard, in Confederate and Arkansas State treasury warrants, and decreed that the deed be cancelled; that Freeman pay the balance of the purchase price; that the same be a lien upon the land, and that a commissioner sell the same, if payment is not made, etc. From which decree Freeman has appealed to this court.

The appellant makes some technical objections against a recovery. That these heirs are not legitimate complainants; that there is no offer to return the sums paid; etc., and then, that no sufficient fraud is shown on the part of the appellant to avoid the deed made him, and that the acceptance of the Confederate money was a consummation of the agreement made between himself and Thompson; and, being a contract executed, cannot now be inquired into or attacked for want of consideration.

There can be no question but the heirs are vitally interested in the preservation of the effects of the estate, and, while they might well have applied to the probate court to have removed a faithless administrator, we are slow to hold that there is no

other court competent to relieve against any of the numerous frauds that may be practiced against estates in the hands of faithless, incompetent or corrupt administrators; and while a court of chancery will not assume to take control of an administration going on in the court of probate, we think there may arise cases of fraud or waste which would call loudly for the interposition of equitable powers not exercised by courts of probate.

In this case the removal of the administrator would not have shown the fraud nor have canceled the deed, nor would the process after that to a cancellation of the deed been any shorter than the course pursued in this suit; nor would the appellant's grounds of defense been made better or worse, and we see no want of power in a court of equity to properly control any proceeds that may result from the decree, or orders, or process upon such decree as shall be rendered in doing justice between the parties.

The appellant places stress upon the rule that those in equity, attempting to set aside a contract, must place, or offer to place, the opposite party in *statu quo*, returning, or offering to return, what may have been received. We fail to see the application of the rule in this case. The complainants ask to set aside a deed because it was obtained through fraud, in violation of a contract that they were ready and willing to abide by, and without any consideration, upon a mere pretended payment in worthless paper.

If a trustee conveyed away valuable property to which they were entitled, for worthless and illegal notes, they could offer to return nothing upon asking to cancel the deed; and especially so, when such notes are in the hands of one of the defendants.

In answer to the bill the appellant responded that the allegations of confederation and fraud were wholly untrue; and it is insisted that such answer is responsive to the bill, and is entitled to full consideration and weight before the court. That is not questioned, but, like other testimony, it is subject to such criticism as the circumstances justify; and in this case

we would infer the chancellor examined it with some severity. He answers that the administrator was at perfect liberty to act in the premises, without any compulsion on his part or otherwise. He could with propriety respond as to the influences he brought to bear on him; but, where others are charged with aiding in the duress, and respondent responding that he himself was not present, how then did he know the administrator acted with perfect freedom? Yet he unequivocally asserts that as a fact. He answers that the order, authorizing the execution of the deed, was obtained by the grantors on their own motion, and without his knowledge. How could he positively answer that the order was made on their own motion, when in the very same sentence he declares he had no knowledge of the making of the order? The assertion of facts that could not have been within his knowledge, gave the chancellor room to doubt like assertions of matters that might or might not have been within his knowledge.

He responds that Confederate money was current, etc. To assert that these notes were current, does not well comport with the testimony of the witnesses. He further avers that the grantors were not only willing, but anxious to receive such currency in payment for the land. Weighed with the other evidence, the chancellor may have thought this wilfully untrue. If they were anxious to receive such Confederate notes, why did respondent express his gratitude to Colonel Morris for influencing her beyond what any one else could have done? These responses were made not as beliefs, but as facts.

No steps to pay were taken before or soon after Thompson's death; but when the death of the Confederacy seemed approaching, and her notes had gone down to ten cents on the dollar, the appellant became quite active in his demands for title, and, with the unusual influence of Colonel Morris, he pressed this matter to a conclusion.

Armed squads were scouring the country and forcing into the Confederate ranks all who were able to carry a musket or answer at fatigue call. In this condition of things, much less

than an ordinary effort would reach the fears and control the actions of such men as Bunyard; and such influence as was brought to bear on the widow, seemed sufficient to control her judgment and induced her to do what she would not have done, if properly advised and protected.

The testimony shows that Bunyard was a timid man, whose fear of death or injury would have influenced him to any pecuniary sacrifice, rather than assume the responsibility of a campaign in the army; and, when convinced that the act would save him from conscription, he executed the deed and surrendered Freeman's obligation.

In the case of *Strayhorn v. Giles*, our court said: "Fraud avoids a contract *ab initio*, both at law and in equity, whether committed by the party himself or his authorized agent." *22 Ark., 517.*

Judge STORY says: "Actual or positive fraud include cases of the intentional and successful employment of any cunning, deception or artifice used to circumvent, cheat or deceive another." *1 Story Equity Jurisprudence, 186.*

Mr. Bouvier, in his Law Dictionary, says: "Positive fraud consists in doing oneself, or causing another to do, such things as induce the opposite party into error or retain him there."

The widow's ignorance, Bunyard's cowardice and readiness to forfeit a valuable estate to save himself from hardships and danger, might be viewed with less sympathy if they had been conveying away their own individual property, and they alone were to suffer from their stupidity or cowardice; but a court of equity cannot wink at their attempt to consume a trust fund in their hands for the benefit of persons then unable to protect themselves.

The evidence not only shows appellant's consent to obtain this property without consideration, other than illegal and almost worthless notes, but that he was the moving, active agent in producing that result, fully cognizant of and party to the fraud.

The demurrer clause in the appellant's answer, points out no specific defect in the bill.

We are of opinion the bill should have alleged that the amounts of these obligations should be paid to a properly qualified administrator, for the extinguishment of such demands as may have been legally probated, and the residue to be distributed among the heirs, or that all such demands had been paid, the administration closed, and that the same were due them as heirs.

In either event, however, the result of this suit, so far as the appellant is concerned, could not have been different; and to order a rehearing could not shorten litigation; and whether or not this is a final settlement of all the matters connected with this litigation, is of but little concern to him; it is a full and final adjustment of all his rights in the premises; and if further controversy arises between the heirs and legal representatives of Thompson, as to the distribution of the proceeds of this suit, this appellant will not be a party thereto; or in any manner liable therein; and the court below certainly has ample power to require such bond, of any commissioner appointed therein, as will well secure the proceeds until competent proof be legitimately brought before that court to show whether an administrator or the heirs are entitled thereto, and the same paid out accordingly. And if those liable to be involved in further litigation and costs do not complain of such defect, we are inclined to hold that one not affected by it cannot complain; and hence, the appellant's demurrer, here urged, ought not to avail him, and that the decree of the court below ought to be affirmed, with directions to that court to require a commissioner, under sufficient bond, to proceed to collect the amount decreed, with interest, and to pay the same over to such parties *only* as that court may direct.

With these directions, the decree is affirmed.

HARRISON, J., being disqualified, did not sit in this case.

HON. S. R. HARRINGTON, special Supreme Judge.

HUTTON, *adm'r. of Bogan, et al.* v. MOORE, *adm'r.*

EQUITY—*Pleading and practice.*—When the defendants to the original bill, by their cross-bill, take upon themselves the affirmative and submit their rights to the consciences of those originally complaining, they are compelled to abide by the responses of the original complainants, unless by more than equal evidence, they disprove such responses.

WHAT CONSTITUTES SALE AND DELIVERY.—In the agreement for the sale of goods, when the price is to be subsequently fixed by means agreed upon, until the price is so fixed, there is no such action or contract as amounts to a perfect sale or delivery.

VENDOR'S LIEN—*When available to assignee, etc.*—When the vendor of lands neither makes nor agrees to make a conveyance, until the purchase money is paid, and the vendee's obligations executed for the purchase money, claim upon their face, that they were executed for the specific lands, and the public records show that the vendor holds the title, the vendor's lien is available to the assignee of the notes or obligations, as also to the vendors' legal representatives.

When not available.—If vendor conveys title without reservation, his lien is an individual equity, of no force, until declared by a court of equity and does not pass as a right to an assignee of the purchase money notes.

Appeal from Phillips Circuit Court.

HON. JOHN E. BENNETT, Circuit Judge.

Adams & Dixon, and Pike & Pike, for appellant.

All that is essential to the *sale* of a chattel at common law, is the agreement of the parties, that the *property*, in the subject matter, should pass from the vendor to the vendee. *1 Parsons on contracts, 519; 5th edition.*

Where the terms of the contract expressly postpone delivery, or payment, or both, to a future day, here also the sale is valid, and no legal presumption obstructs the intention of the parties, and the *property*, in the chattel sold, *passes immediately*. In this case no earnest is necessary to bind the bargain. *Id.* See also note (*a*).

Upon a completed sale, the property in the thing sold passes to the purchaser; one of these things implies the other; if the property passes, it is a completed sale, and if a completed sale, then the property passes. *1 Parsons, 525, 526.*

If the property passes, though not the right of possession, and the thing sold perish, the loss falls on the purchaser. *1 Parsons on Contracts, 526: 5th edition.*

A sale, says Sir WILLIAM BLACKSTONE "is a contract for the transfer of property from one person to another for a valuable consideration." *2 Bl. Com., 463.*

To constitute a sale at common law, all that is necessary is the agreement of competent parties, that the *property* in the subject matter shall *then* pass from the seller to the buyer for a fixed price. *Parsons Mercantile Law, 42.*

The sale is made when the agreement is made. The *completion* of the sale does not depend upon the delivery of the goods by the seller, nor upon the payment of the price by the buyer. By the mutual assent of the parties to the terms of the sale, the buyer acquires, *at once*, the property, and all the rights and liabilities of property; so that in case of any loss or depreciation of the articles purchased, the buyer will be the sufferer, as he will be the gainer by any increase in their value. *Parsons Mercantile Law, 42.*

Watkins & Rose, Palmer & Sanders, for appellees.

When anything remains to be done by the vendor, unless some mere trifling act, the property does not pass, as in *Shepley v. Davis, 5 Taunton, 617; Buck v. Davis, 2 M. & S. 397; Wallace v. Breeds, 13 East. 522; Simmons v. Swift, 2, B. & C., 857; Chitty's Cont., p. 399.* In this case there was clearly no delivery, nor anything approaching it, though afar off. See *Kaufman v. Stone, 25 Ark., 336; Belleer v. Block, 19, Ark., 573.*

In *Fagan v. Faulkner, 5 Ark., 165*, the decision was based on the same rule; as also in *Gillam v. Tawles. 15 ib., 64; Jones v. Pearce*, decided at the present term.

There is no attempt to show that Bogan ever made any appropriation of any payment of these notes. If any payments were made, in default of Bogan to make the appropriation, the creditor could make it. *2 Pars. Cont., 141.*

Garland & Nash, for appellees.

Payment is the only question presented in the whole case. The appellants' pleading payment, the burden of proof was upon them, of course. *Gresley Eq. Ev. 288;* and this must have been established beyond any fair or reasonable question. *Ib, sup., 1 Ark. 338.*

The fact that the notes or claims were in the hands of Moore's administrators, makes a strong presumption that they were not paid. *5 Ark., 558; 2 Greenleaf, Ev. sec. 516—36.*

The court properly excluded the depositions relative to the contract in writing. *Gresley sup., 174, 176, 195; Starkie, Ev. 53-61, 542, et seq.; Rose Dig., 320; (20 b.)* Also the deposition of Kittrel. *Gould's Dig., p. 436, sec. 6;* also the deposition of Mrs. Bogan. *16 Ark., 671; 15 ib., 281.*

The payment sought to be established, if made at all, was upon a debt due Wm. F. Moore & J. T. Moore, in mercantile business, and not to J. T. Moore for the land, and could not be set off against the claim here, if proven. *4 Ark., 602; 14 Ark., 668.*

The declarations by J. F. Moore, at this late day, must be received as the weakest kind of evidence. *Prater v. Frazier, 6 Eng. (11 Ark.) 249.* From the depositions, every presumption is, the debt was not paid at all. *Kaufman & Co. v. Stone, 25 Ark., 336.* If the testimony is conflicting, so as to leave doubt, the court will not disturb the verdict below. *Branch v. Mitchell, 24 Ark., 432.*

The minors were not necessary parties. Bogan's administrators being entitled to hold the land, as well as its rents and profits, were the only defendants, necessary to be made. *3 Ark., 364.*

GREGG, J.

On the second day of April, 1866, the appellees filed their bill, in equity, in the Phillips circuit court, against the executor, widow and heirs of Isaac M. Bogan, deceased, and John S. Horner and Edward D. Ragland.

They charged in the bill that, on the 14th of May, 1859, James T. Moore owned in fee the northwest quarter of section twenty-seven, in township one south, of range four east; and that, for the sum of twenty dollars per acre, he then sold the same to Isaac M. Bogan, and took his three notes therefor, each for the sum of $1,036 66⅔, due respectively on the first of January, 1860, 1861 and 1862, and gave bond for title. That James T. Moore, in 1861, assigned and transferred to John D. Horner the note due the first of January, 1861; that all of said notes show upon their face that they were given for said land, and that they are wholly unpaid; that said Isaac M. Bogan and James T. Moore both died, and that lettters of executorship and administration had been granted to parties named in this suit, and that the lands are in the possession of Ragland, as a tenant of the executor of Bogan. It is also charged that all of said notes are liens upon said lands; that Horner is not attempting to enforce his lien, and by reason of James T. Moore's indorsement, his estate is liable for the account. They pray that a decree may be rendered for the amount of all the notes, and that Horner may be compelled to bring in his note; that a lien be declared upon the lands for the payment of all the notes; that all equity of redemption on the part of Bogan's legal representatives be foreclosed, and if the money be not paid by a day certain, that the lands be sold, etc.

At the May term, 1866, of that court, Anna S., the widow, and William F. Motley, the executor of Bogan, deceased, answered the bill.

They admit the title, sale and purchase for the price alleged, and that the parties executed notes and a title bond, as alleged; that letters of executorship and administration were granted, as stated; that Motley, as such executor, holds the lands, and that Ragland is his lessee. They declare that they know nothing of the alleged assignment of one note to Horner, and aver if such was made, it was a fraud upon the rights of Bogan,

and ask all the advantages that can be claimed against such note, etc. They respond that the other two notes are not justly in the hands of said administrator, as assets of the estate of James T. Moore, but that they properly belong to respondent, Motley, as the executor of Bogan, because he, in his lifetime, had fully paid off the same. They deny any knowledge of Horner's interest, and admit that he has made no effort to establish any lien against such lands, and ask that he be held to strict proof as to the assignment, etc.

These respondents then, in a cross bill, allege that Moore, the deceased, and his father, were the merchants of Isaac M. Bogan, through whom he made all his moneyed arrangements, and that, through them, he paid off the full amount of all of said notes—partly in cash, and the remainder in cotton; that in the fall of 1861, he delivered them one hundred and thirty-six bales, weighing eighty-two thousand seven hundred and twenty pounds, at ten cents per pound, the price agreed upon between the parties; that amounted to $8,272, out of which said James T. Moore was paid the entire balance due upon the purchase price of the lands; that Isaac M. Bogan was in the habit of leaving his valuable papers, for safe-keeping, with Moore and these notes he failed to lift when paid off. They pray that all the notes may be brought into court and canceled; that the contract be specifically performed by the complainants, and a decree that they make deeds, etc.

The complainants respond to the cross bill, that their intestate was a merchant; that Bogan dealt with him, and made most of his moneyed arrangements through his firm, but that no part of said notes was ever paid; that the mercantile firm of their intestate kept regular books, etc., and that, as shown by the books for the years 1859, 1860, 1861 and 1862, Bogan purchased of the firm over $8,000 worth of merchandise and plantation supplies, and that he paid in cash and otherwise large sums, but not equal to his purchases, by over $2,300; they admit that the Moores agreed to buy Bogan's cotton crop in the year 1861, and they were to pay for the same ten cents per

pound, if the cotton equaled a certain sample, but that they never received any part of the cotton, because none was tendered them equal to the sample.

Horner responded to the cross bill, that he did not know as to the business done between the Moores and Bogan, but he believes nothing was ever paid on the note assigned to him. He responds that he knows nothing of such representations made by the Moores, as his co-defendants to their bill, have alleged, but that James T. Moore assigned the note to him in August, 1859, for a valuable consideration; that not over thirty days thereafter he notified Isaac M. Bogan that he held that note of his, and would look to him for its payment; that Bogan admitted he owed it, and promised to pay, but did not; and about the 12th of April, 1861, he brought suit against Bogan, on the note, and had him served with process. He charges that Bogan never did pay that note; but if he did, it was after the assignment and notice, and is not binding on him. He offers to bring in the note, and asks to be discharged.

Replications were entered, and the cause set for hearing, and depositions taken and read to the following effect:

Hutton, the appellant, testified that Isaac M. Bogan, in June or July, 1861, sold the Moores all his crop of cotton, then growing, at ten cents per pound, to be delivered in Helena; that Bogan raised that year one hundred and ninety-seven bales, and delivered to the Moores one hundred and seventy-six bales of that crop (or one hundred and seventy-eight, not positive which;) that the remainder (twenty-one or nineteen bales,) were burned on Bogan's plantation; that after Bogan had delivered fifty or sixty bales, Moore's clerk refused to receive any more; that Bogan, the next day, sent for him, and told him the Moores had refused his cotton, and they went to Helena to see the Moores, and that James T. Moore said the cotton would not sell, and for Bogan to go home and put up his cotton like a white man and send it in. He did so, and they received it. Bogan owed me $2,000, and by Moore's consent sixteen bales were delivered me at ten cents per pound, in part payment.

The cotton delivered to the Moores was to go in liquidation of the notes given for the land. After Bogan's death James T. Moore told me to send for Mrs. Bogan, that he wanted to make her a title to the land; that but little was between them; that if he had to pay for the twenty-one bales burned at Bogan's, he would owe her, but he thought he ought not to pay for what was not delivered; and if I would bring her in he would make her the deed; that the land had been fully paid for, and she was entitled to the deed.

Upon cross examination he said: "I was not present when the contract was made, but was when the agreement was written; the sixteen bales I received were delivered me by Riter; the order was upon him; I was on Bogan's farm when the bales of cotton were sent, but do not know that the Moores received them, of my own knowledge.

Jasper Hays testified that in the fall of 1861 he was in Moore's store, and heard James T. Moore say he was taking Bogan's cotton on the last payment for his land. W. F. Moore pulled a sample out of a bale, a load being present, and said it was not as good as we expected, but said nothing about not taking it.

Mary A. Russell testified that she heard James T. Moore, near Christmas, 1861, say he had bought Bogan's cotton; that they had settled with Bogan easier than he expected; that he did not think there was more than twenty-seven or thirty-seven dollars between them, any how not exceeding fifty dollars; he had bought Bogan's cotton, and thought he would loose largely on it.

M. B. Kittrell testified that in the spring of 1861 he bought two sections of land of Bogan, and deposited his deeds at Helena in Moore's safe, and Moore said he was surprised that Bogan had made him the deed, as he was the most careless man he ever saw; that he had sold him the place on which he lived, two or three years before, and that Bogan had paid him the purchase money, or nearly all of it, and he did not have

the scratch of a pen to show for what he had paid. These statements were made by Moore in February, 1861.

Anna S. Bogan testified that in the summer of 1864, James T. Moore, in Helena, told her that he wanted her to come in town that he might make her a deed for the land; that it was paid for, and he wanted her satisfied; that he was willing to pay for all the cotton he had received, but did not think he ought to pay for the nineteen bales burned on Bogan's farm.

For the original complainants, Bumpass testified that he was clerk for the Moores in 1859, 1860, 1861, and until they quit business in 1862; that in the fall or winter of 1861 the Moores bought Bogan's cotton by sample; the sample was placed in witness' care and classed as middling; they were to give ten cents per pound, to be delivered as picked, and to correspond with the sample; that witness was to inspect and weigh, and to report to Moores if the cotton brought in did not come up to the sample; two or three loads came up to sample; after that it was nothing like the sample; that he quit weighing, and Bogan came in and canceled the trade, so far as the ten cents per pound was connected with it; they then agreed to leave the matter to disinterested persons, and the rate was to compare with middling at ten cents per pound; that the cotton was very inferior ordinary; over one hundred bales were delivered; did not know the number; that he frequently heard James T. Moore tell Bogan he did not claim the cotton, and would not receive it until he brought in referees as agreed upon; this was after the cotton had been stored in Burton's shed; all cotton sent to Moores at Helena was stored there, whether owned by them or stored for customers, and the Moores were responsible for storage.

Manier testified that he was employed by Moores as bookkeeper, from December, 1861 to June, 1862; the books showed that Bogan was indebted to the Moores, and he heard conversations between them to the same effect; he drew off Bogan's account, and gave it to him, and he never heard any objections to it; the accounts were kept correctly; Moores agreed to take

cotton from Bogan, of a certain grade and at a stipulated price, but he thinks the Moores did not receive the cotton; that it was stored at Burton's shed, but he does not know by whose order.

Tappan testified that in the spring of 1861 he filled up the indorsement on the note transferred to Horner, and as an attorney brought suit on it, etc.

Cage testified that in the spring of 1862, Bogan and Moore came to him and stated that Bogan had sold his cotton crop to Moores and it did not come up to sample, and they wished arbitrators to determine how much it was worth, compared with middling, at an agreed price; that Bogan said his cotton did not come up to his contract, but it was the best he could do, and Moores were willing to receive it at what it was worth; he declined to act as arbitrator, and did not know whether or not they settled.

Righter testified that this cotton staid in his warehouse, and he understood, from Moores and Bogan, that Moores had bought the cotton; it was to be of a certain class and price, and they differed about the class, and Moores would not receive a portion of it, and he was appealed to to examine and class the cotton, and he did so, and classed it from inferior to middling; a number of bales were not above good ordinary, and the cotton was rejected by Moores; that Bogan offered to sell the cotton to him, and he thought he purchased some of it, but if so, did not remember to whom he paid the money; that Bogan repeatedly offered to sell him the cotton; some of the cotton in witness' care was burned by the Confederate authorities; but his books were destroyed by soldiers, and he did not know what became of this particular lot of cotton.

Weatherly and Cage prove the handwriting of James T. Moore and Bogan to a written agreement dated November 6, 1861, produced, in which it was said Moores have this day bought Bogan's cotton crop for 1861, at ten cents per pound, but to be delivered as fast as gathered, in good order and in good merchantable condition, etc.

Richard Cook testified that in the spring of 1862 he heard Moore tell Bogan he would not receive his cotton at the price agreed upon, etc.

James Cook testified that he heard old man Moore tell Bogan that his son James would not receive the cotton on his note, but they would take it on store account at nine cents, etc; that he examined this cotton; it was low middling, badly handled, etc.

The court below ruled out the evidence of Anna S. Bogan and Kittrell, and also oral statements as to the terms of the contract.

Upon the final hearing, the court found for the original complainants; decreed that the notes be paid, and declared the sums due a lien upon the lands, and ordered them sold if payment was not made by a day named; from which decree this appeal was taken.

Under the issues made up in this cause the defendants to the original bill assumed the burden of proof; they canceled the bargain and sale upon the terms alleged; the execution of the notes; and that they are still held by the legal representatives of the payee. This entitled the complainants to a decree. And, to rebut the presumption thus raised against the defendants, they allege that the notes were paid off, but by accident or misplaced confidence, left in the payee's possession. The question therefore is, whether or not the defendants have shown payment.

In their cross-bill they call upon complainants to answer, who respond that such payment was not made; that the large sums, by them received, were not equal to the goods and supplies sold deceased; and these responses they attempt to fortify by their clerk, book-keeper, etc.

The defendants neither confessed or denied the purchase of the goods or plantation supplies, only they state that their testator was to pay $1,556 75 for rent, corn, stock, and farming implements; but they allege he paid the Moores large sums of money, amounting to about $15,200, besides his whole cot-

ton crop for the year 1861, which was worth over $8,000. They seem, however, to have failed to introduce any proof of these payments, except general admissions made by James T. Moore, in his lifetime, and those mostly in reference to the cotton crop of 1861.

If, as alleged, large sums of money were paid the Moores by Sims, by Hill, and by the Memphis bank, as well as by Bogan himself, it seems strange that neither receipts or witnesses could be found to certify to any of these payments.

If we should admit the depositions that the court below, under the practice then, excluded, we would have Hutton, Haynes, Kittrell, Anna S. Bogan, and Mrs. Russell testifying that James T. Moore, in his lifetime, admitted that he bought Bogan's cotton crop in 1861, and that Bogan had paid off, or nearly paid off, all that he owed him.

Yet this could not prevail over the answers and strong proofs of the complainants.

Proof of oral admissions, especially when gathered from casual hearing of varied conversations, interrupted by business and social engagements, is far from being the most satisfactory evidence. Under such circumstances witnesses may misunderstand the language, or more likely misinterpret the meaning of those speaking.

In this case some of these witnesses assert quite positively that James T. Moore declared he had been paid the full amount of all these notes; yet, take the whole testimony together, and it is to some extent inconsistent in itself, and with our business experience. Hutton testified that the Moores bought the cotton in June or July. The written contract shows that it was made the 6th of November.

Kittrell testified that in February, 1861, Moore told him that Bogan had bought the land two or three years before, and had paid for it, but had not the scratch of a pen to show for it. And it seems that Kittrell would have remembered the time of this conversation, as he had bought two sections

of land, and was then taking the deed for that, and was quite a distance from home, etc.

Hutton testified that Moore told him he wanted Anna S. Bogan to come to town; that he wanted to make her a deed to the land; and she testified that he told her, in Helena, that he wanted her to come in, that he wanted to make the deed to her. No reason is given why the deed was not then made; and if Moore was such a practical business man, as the evidence shows him to have been, he well knew that the deed could as well be made in her absence as with her present; and, so far as giving her satisfaction, she could not have been other than satisfied to have had the land conveyed to her; and there certainly could have been no good reason for having her again come to Helena, or having her and Hutton come together, merely to receive a deed; and if Moore expressed a desire to see her satisfied in the settlement, it would strongly imply that he held some claims against the estate that might be unsatisfactory to her.

Again, if Moore, with his general business information, had been going to make a deed for those lands, would he not likely have named the other legatees, who were alike interested in that estate?

It is true that slight variations from ordinary business transactions often appear in testimony, and contradictions as to time, distance, etc., when not directly material to the issue, may elicit comment and require the close attention of the court or jury, and yet not destroy the force of the evidence. The importance of such discrepancies depends much upon their materiality upon the issue made up, upon their connection with other facts, upon the means of the witness' information, and such circumstances as tend to show whether the discrepancies arise from want of attention or from intentional misrepresentation.

To rebut the proof introduced by the defendants, the complainants proved by the book-keeper and clerk of that mercantile firm, that correct accounts were kept; that Bogan was

over $2,000 in arrears, without reference to the land transaction; that Bogan received his account and made no objection to it; that the cotton crop of 1861 was not received; and this is corroborated by Cage, Righter and Cook. They show that Bogan and the Moores had not settled as late as the spring of 1862; and by others, it is shown that Bogan knew Horner had one of his notes, and he did not pay it.

The testimony strongly tends to show that Bogan and the Moores, in the Spring of 1862, had not agreed as to the transfer of the cotton, and, consequently, the property must have been in the original proprietor. The testimony also tends strongly to the conclusion that the first agreement between the parties failed to ripen into an executed contract, because such cotton as was contracted for was not delivered, and another agreement was had to take cotton of a different grade, and at a different price, to be fixed by referees, who failed to act.

Then, if the first agreement was not carried into effect, or was by consent rescinded, and another and different understanding had to the effect that the Moores should take the cotton when the price, by the means agreed upon, had been fixed, until that was done there was no such action or contract as amounted to a pefected sale and delivery.

This court, through Justice HARRISON, in the case of *Jones et al v. Pearce, 25 Ark., 545*, referred to authorities and commented upon the law of sale and delivery, and we refer thereto for authorities and a more full exposition of this subject.

In this transaction the Moores were acting as the merchants and agents of Bogan, and at the same time attempting to deal with him for the cotton, and to this extent were acting in a double capacity; and without considering this fact, we might, at first glance, suppose the evidence sufficient to constitute a delivery of the cotton and the passing of title, with such action to be had as would ascertain the amount to be paid; but as it is shown the Moores were the merchants of Bogan, through whom he was accustomed to do such business, and the

cotton was stored in the shed of Burton or Righter, where cotton belonging to Moores' customers, as well as their own, was stored by their direction, tends to show that they were receiving that cotton for Bogan, and in the ordinary course of business, as his merchants or agents; and this, taken in connection with what seems to be well established facts, that after the rescinding of the first contract, Bogan disposed of some of the cotton in payment of other debts, and frequently tried to agree upon terms by which the Moores would take it on his indebtedness to them, and repeatedly offered to sell to others, and the cotton remained in the custody of the warehouseman until it was finally lost, we think makes it sufficiently clear that the cotton, so far as it was controlled by the Moores, was under their orders as Bogan's merchants, and for his use, and not in their possession as their own property under a purchase from Bogan. At all events, as the burden of proof was on the representatives of Bogan, the evidence is not sufficient to disturb the finding of the chancellor.

Upon the proof, the finding of the Chancellor in favor of the complaints, in our opinion, was right, and this is the more clear in view of the fact that the defendants took the affimaative and submitted their rights to the consciences of those originally complaining, by whose response the law compels them to abide, unless by more than equal evidence they disprove such responses.

We are therefore clearly of the opinion there was no error in the finding of the facts by the court below.

We are also of opinion that the Chancellor did not err in declaring a vendor's lien upon the lands, and that they be held subject to the payment of all the notes and interest thereon.

Moore sold Bogan the lands, but neither made or agreed to make any deed of conveyance until the purchase price should be paid; and Bogan, in executing his obligations for the purchase price, showed upon their face that they were executed for the specific lands in litigation, which might have given them better circulation as negotiable paper, and the public

records showed that Moore held the title of the land, which gave him a lien at least equal to a mortgage; and, under this state of case, we hold the vendor's lien was available to Horner as well as Moore's representatives.

In some of the States the courts have holden that a vendor's equitable lien passes by the mere assignment of the notes given for the purchase money. *Kerr v. Hazelliegg, 11 Ind., 443; Moore v. Raymond, 15 Texas, 554; Norville v. Johnson, 5 Hump., 489; Johnson v. Gwathmey, 4 Litt., 317.*

The better opinion is, that when a vendor conveys title without reservation, his lien is an individual equity of no force until declared by a court of equity, and does not pass as a right to an assignee of the purchase money notes. *18 Ark., 142; 20 Miss., 165; 14 Ga., 216; 3 Yerg., 27; 9 Ga., 86; 32 Ill., 524.*

In this case the vendor withheld the title of the lands, and took notes showing upon their face for what lands they were given. See *Lewis v. Coralland, 21 Cal., 178; Terry v. George, 37 Miss., 539; Murray v. Able, 19 Texas, 219; McAlpin v. Bennett, 19 Texas, 497; Amory v. Riley, 9 Ind., 490; Haley v. Bennett, 5 Porter, 452; Brisco v. Bronaugh, 1 Texas, 326; Clover v. Rawlings, 9 S. and M., 122; Stratton v. Gould, 40 Miss., 777; Brumfield v. Palmer, 7 Blackf., 230; 7 Ala., 318; 9 Hump., 508; 3 Yerg., 84.*

The decree of the court below is in all things affirmed with costs.

BENNETT, J. did not sit in this case.

HON. S. R. HARRINGTON, Special Supreme Judge.

BOGAN'S *Adm'r. v.* OTEY, *et al.*

Appeal from Phillips Circuit Court.

HON. JOHN T. BENNETT, Circuit Judge.

Adams & Dixon and Pike & Pike, for appellant.

Palmer & Sanders, Watkins & Rose and Garland & Nash, for appellees.

GREGG, J.

All the questions presented in this case have been determined in the case of these appellants against W. E. & C. L. Moore, as administrators of James T. Moore, dec'd.

The decree of the court below is affirmed.

BENNETT, J. did not sit in this case.

HON. S. R. HARRINGTON, Special Supreme Judge.

BUMPASS & HICKS v. TAGGART.

EVIDENCE—*When presumed legal.*—Where the record shows nothing to the contrary, it must be presumed that the evidence received by the court below was legal.

DEFAULT—*Admits truth of allegations*—Where the defendant has been duly notified and makes no answer, he thereby admits the truth of the allegations in the declaration.

NOTE MAY BE STAMPED AFTER SUIT COMMENCED.—A note not stamped in accordance with the *stamp act*, does not thereby become void or invalidated, but may be stamped, even after suit commenced, to the satisfaction of the court.

STAMP ACT—*How construed*—While Congress has the power to prescribe evidence, and especially what shall be instruments of evidence in the Federal courts, it is powerless to prescribe them for State courts, and the act of Congress of June 30, 1864, known as the "*stamp act*," is not to be so construed.

PARTNERS—*Suit against—requisite of pleadings.*—In declaration on promissory note, signed by defendants, by their firm name, it is sufficient to allege that they made the note, without stating that they were partners or setting forth in the body of the declaration, the manner or style in which they executed the note.

Appeal from Phillips Circuit Court.

HON. JOHN E. BENNETT, Circuit Judge.

Palmer & Sanders, for appellants.

Before the note could have been offered as evidence in a court of law, it should have been stamped with the proper amount. *Dorris v. Grace, 24 Ark. 326.* There is a fatal variance between the note sued on and the one offered in evidence. See *notes to Ky. Code, page 420-422. 1 Metc. 339, ib. 430.* There is an entire failure of proof as to John H. Hicks. *Notes to Ky. Code, p. 424, g. g. et seq; Gasper v. Adams, 28 Barb. 441.*

Clark & Williams, for appellee.

That it was not necessary to allege the partnership in order

to connect Hicks with the note (it being signed in the firm name of C. M. Bumpass & Co.) See *Sweeney v. Burnside, 17-38. Trowbridge v. Pilcher, 4-157; Kent v. Wells, 21-41.*

HARRINGTON, Special Judge.

This is a case brought by Edward R. Taggart, plaintiff in the court below, against Creed M. Bumpass and John H. Hicks, upon a promissory note.

The complaint is as follows:

"Edward R. Taggart, plaintiff, vs. Creed M. Bumpass and John H. Hicks, defendants.	Phillips circuit court. Complaint at law.

"The plaintiff, Edward R. Taggart, states that the defendants, Creed M. Bumpass and John H. Hicks, by their promissory note, dated July 3, 1869, agreed to pay to the plaintiff one thousand and eighty-eight dollars, on or before the first day of January next after said date; which note is herewith filed and made a part of this complaint. No part of said debt has been paid; wherefore he prays judgment for his debt and for other relief."

The note filed therewith is in the following words:

"HELENA, ARK., July 3, 1869.

"On or before the first day of January next we promise to pay to the order of E. R. Taggart one thousand and eighty-eight dollars for value received.

"C. M. BUMPASS & CO."

This action was commenced on the 7th day of May, 1870, and on the same day an affidavit was made by the attorney for plaintiff, and filed in the case, setting forth that he believed there was no good and valid defense to said action upon the merits of the case, and that, if a defense was made, it would be for delay merely. Service was duly made on each of said defendants, and, no answer being made, judgment was given the plaintiff.

An appeal, with supersedeas, was granted by this court, and the appellants now ask that said judgment be reversed, and allege as grounds therefor:

First. That the note sued on and offered in evidence was not stamped, as required by law.

Second. That the note described in the complaint is not the instrument exhibited therewith.

As no answer was made in this case, in the court below, no ruling of that court can properly be before us, unless it fall under the maxim that "all acts of an inferior court are presumed to be rightly done, in a superior court;" and, as the record shows nothing to the contrary, it must be presumed that the evidence of indebtedness received by the court below was legal evidence.

Besides, notice was duly given the defendants, and no answer made; thereby the defendants admitted the truth of the allegations contained in the declaration. See *12 Ark. 599, and authorities there cited.*

Or, if the note were sufficiently stamped, or without stamp, it would not thereby become void, but could, even after suit had been commenced thereon, have been stamped to the satisfaction of the law. See *24 Ark. 326*—and our statute expressly declares "that no judgment will be reversed, impaired or affected for any defect of form contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court in which such judgment was rendered; but such defects and imperfections shall be supplied and amended by the Supreme Court, or shall be *deemed to have been supplied* and amended." See *Gould's Digest, chapter 134, section 36.*

Again, no instrument of writing is subject to the invalidating effect of the stamp act, unless the stamp was omitted "with intent to evade the provisions of this act." *Act of Congress, June 30, 1864, section 158.* And, in order to defeat a recovery on an unstamped note, it must appear not only that the

note is unstamped, but that the stamp has been *fraudulently* omitted. *34 Cal., 167; 10 Allen, 250, and 47 Barbour, 187.*

But the case before us does not require us to go to the extent we have already gone, in sustaining the court below in giving judgment for the plaintiff. Yet, another question presents itself, involving a closer consideration of the law itself—the act of Congress of June 30, 1864, entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," and especially section —, which provides "that hereafter no deed, instrument, document, writing or paper required by law to be stamped, which has been signed or issued without being duly stamped, or 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 tax, shall have been affixed thereto as prescribed by law."

Does this refer to State courts?

This law was placed upon our books in the time of the nation's need and the nation's haste, and so willing were the people at the time to provide the revenue to support the government, that courts, under the pressure of public sentiment, may not have well considered the statutes, and have given it a more liberal interpretation than Congress ever intended it to have, for we cannot presume that Congress intended to do what was clearly unwarranted by the constitution of the United States.

The object of this act is to raise money to support the government, and for this purpose vast powers were granted by the States, in forming the constitution of the United States, to the Congress established by it; but all powers not delegated to the United States by the constitution, nor prohibited by it to the States, were reserved to the States respectively, or to the people.

The character of our government, somewhat complex, is fitly expressed in the motto on the seal of the United States—"*E pluribus unum.*" It is one government composed of many governments. Each government must be, and is, equally sovereign

within its sphere, and Congress is just as much bound to respect and not to impede the free exercise, by the States of their retained rights, as States are to respect and to not impede the free exercise by the federal government, of all her delegated rights. See, on this subject, the very able opinion of Chief Justice MARSHALL, in *McCulloch v. State of Maryland*, *4 Wheaton*, *316*.

While, then, the power to levy taxes, for the purposes indicated in the constitution, may be admitted, it cannot be admitted that it can be so exercised as take, from the domain of State legislation, such subjects as are properly and naturally confided to it, and the care of which has not been surrendered to Congress by the States.

The court, whose action we are reviewing, was created by the State, and is maintained by the State, and created and maintained by those rights and powers inherent and reserved to the States, and in no manner prohibited by the federal constitution. To this court, the laws of the State are supreme rules of action. Can Congress, then, come into this court and change her rules of action? In other words, can Congress declare what instrument shall be or shall not be evidence in a State court, in a case therein pending, growing entirely out of a domestic transaction, and which the laws of the State declare shall be evidence?

We do not think it requires any argument to prove that Congress, under the constitution, has no such power, and under pretense of levying taxes, cannot so direct that power as to enter into a State court, and take from it the powers with which the State laws have vested it.

The Supreme Court of Illinois, in *Craig v. Dimock*, said: "To hold that Congress, in the exercise of the taxing power, can enter into State courts and prescribe what shall be evidence therein, is so revolting to all our notions of federal and State powers as to compel us to refuse to yield acquiescence in such a doctrine. By admitting it, the power and sovereignty of the State over legitimate subjects of State power and sovereignty,

is at once annihilated." *47 Ill., 308, also, 38 Ill., 343 and 349.*

And the Supreme Court of Massachusetts, in *Carpenter v. Snelling*, said: "We are not aware that this power" (referring to the application of this law to State courts) "has ever been judicially sanctioned." There are numerous and weighty arguments against its existence, and we cannot hold that there was an intention to exercise it; whereas, in the provision now under consideration, the language is fairly susceptible of a meaning, which will give it full operation and effect within the recognized scope of the constitutional authority of Congress." *97 Mass., 457.*

We will not deny the power of Congress to require such instruments to be stamped, nor the consequent power to punish by fine, intentional evasion of the law.

By conceding this, we yield all that is necessary to enable the Government to carry into full effect the taxing power, and at the same time sustain and uphold, in its utmost limit, the exclusive power of the State to say what shall be evidence in her own courts of justice, in a domestic transaction wholly unconnected in every respect with the General Government.

It is not questioned that Congress has power to prescribe evidence, and especially what shall be instruments of evidence, in the Federal courts, but it is powerless to prescribe them for State courts.

Since, then, the act does, in terms, prescribe such rules to State courts, we must conclude that the provisions of the act were only intended to apply to Federal courts; for we can not, by implication, hold that the intention of Congress was to invade the jurisdiction of the State in the administration of justice between her citizens.

The second ground urged by the appellant for reversing the judgment, is that the note described in the complaint is not the instrument exhibited.

The complaint sets forth that Creed M. Bumpass and John H. Hicks, by their promissory note, agreed to pay, etc., said note, filed herewith, etc. And the note filed agrees in every

particular—date, terms and amount—with the declaration, except it is signed "C. M. Bumpass & Co."

No plea of *non assumpsit*, or other, has been made by the defendants; neither is it claimed nor alleged that Creed M. Bumpass and John H. Hicks are not the copartners, C. M. Bumpass & Co. And the practice is well settled that it is sufficient, in a declaration upon a promissory note, signed by the defendants by their name, to allege that they made the note, without stating that they were partners, or setting forth in the body of the declaration the manner or style in which they executed the note. See *17 Ark., 38; 4 Ark., 157, and 21 Ark., 411.*

The appellee claims that the proceedings have all been regular, and according to law, and, by his attorney, indorses upon the record that he has carefully examined the case, and believes that the appeal is prosecuted for the purpose of delay merely.

Thereupon he moves the court to affirm the judgment with ten per cent. damages, as a delay case.

And the court, having examined the record, and finding no error in the proceedings, are of opinion that the appeal was prosecuted for delay merely.

Judgment is affirmed.

BENNETT, J. did not sit in this case.

HON. S. R. HARRINGTON Special Supreme Judge.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

JUNE TERM, A. D. 1871.

KING *v.* CALDWELL.

PRACTICE—*Amendments*—Under section 8, Code of Civil Practice, it is competent for the court to substitute a several for a joint cause of action—make changes of parties—insert allegations necessary to a full and fair investigation of the merits, and no objections to such amendments will avail a litigant, unless such changes have misled a party to his prejudice, and not then, unless the party misled, show to the court in what respect he has been misled or prejudiced.

DISCONTINUANCE—*Record should be amended.*—Where several defendants are jointly sued, the action may be discontinued as to all but one, and prosecuted as to that one, on the joint action—but if the plaintiff wish to proceed as in a single action against that defendant, the record should be so amended.

DEFENDANT—*Entitled to benefit of joint plea.*—Where the action is prosecuted against the remaining defendant, on the joint cause of action, it is error in the court to refuse him the benefit of the joint plea and to give instructions which cut off his defense under it.

VERDICT—*Not disturbed if defendant had all his defense.*—When there are several counts and the pleas have been abandoned as to one, it is incorrect for the jury to return a verdict on more than one issue; but if the evidence offered by defendant would have only defeated the first count and the others would not have thereby been affected, and he had the full benefit of all his defense, and the plaintiff was entitled to recover under the testimony on the other counts—the verdict will not be disturbed.

DISMISSAL—*Error in, how made available.*—Error in refusing to dismiss as to some defendants and in permitting the record to be amended after jury sworn, will not avail, unless asked for by the defendant in the court below.

Appeal from Pope Circuit Court.

HON. W. N. MAY, Circuit Judge.

Gallagher, Newton & Hempstead, for appellant.

The rule is well settled, in this State, that in actions *ex-contractu*, a dismissal as to one defendant served with process, is a dismissal as to all. *Frazier v. State Bank, 4 Ark. 509; Bebee v. R. E. Bank, 4 Ark. 546; Sillivant v. Reardon, 5 Ark. 540; Ashley v. Hyde, 1 Eng. 92; Pleasant v. State Bank, 3 Eng. 456; Pinfoy v. Hill, 18 Ark. 361.*

The plea of non-assumpsit *sworn to* put in issue the execution of the instrument sued on, and the court should have allowed evidence going to show that it was a forgery: *Gould's Dig. p. 86, secs. 103, 105; McCollum v. Cushing, 22 Ark. 544.*

The instrument sued on was of a two-fold character; that of a receipt and a promise to pay. Receipts are always susceptible of explanation or contradiction by parol evidence. *Humphries v. McGraw, 5 Ark. 61; R. E. Bank v. Reardon, 5 Ark. 558; Burton v. Merrick, 21 Ark. 357; 2 Pars. on Cont. 68.*

The first instruction of the appellee was erroneous, as it withheld from the jury any inquiry as to damages to King by

appellee's breach of the contract. King's special plea being in substance, if not technically, a plea of recoupment. *Davis v. Calvert, 17 Ark. 85; Desha v. Robinson, 17 Ark. 228; Wheat v. Dotson, 7 Eng. 699; Smith v. Capers, 8 Eng. 9.*

Clark & Williams, for appellee.

The plaintiff's only remedy, before the adoption of the Code, was to dismiss and bring a new action. Could he under the Code accomplish this, by a change of proceedings, without going out of court? We submit that it was competent to do so. See *Code of Civil Practice, sec. 155.* The plaintiff should have amended the declaration, so as to show that the contract was a separate one, made by defendant King—but was it error in not doing it? And if it was, has not the defendant waived it by his subsequent proceedings? The record shows that he did, by his subsequent pleas of failure of consideration and non-assumpsit, wherein he treated the contract as separate and made by defendant, King. And the testimony on the trial adduced, was adapted to the contract, as a separate contract; and not having required the declaration to be amended so as to adapt it to such proof, he cannot object to the variance for the first time in this court. See *Code of Civil Practice, sec. 150.*

There is no conflict in the testimony to sustain the verdict and judgment under these common counts, and the judgment is *right on the whole record. Davis v. Gibson, 2 Ark. 115; Payne v. Bruton, 10 ib. 54; Sweepser v. Gaines, 19 ib. 96; Walker v. Walker, 7 ib. 543.*

GREGG, J.

On the 7th of August, 1867, the appellee filed his declaration in assumpsit, in the Pope circuit court, against the appellant, Daniel Harkey and James Williamson, founded upon an instrument in writing, signed G. E. King, in which the receipt of thirty bales of cotton was acknowledged, and a promise to pay ten cents per pound for the same. The declaration also

contained common counts for cotton sold etc., and alleged that the three, jointly, undertook and promised in the name and style of G. E. King. At the October term, 1868, the defendants all appeared, craved oyer of the instrument sued on, and finally plead non-assumpsit and *non est factum.*

On the 2d of April, 1869, the plea of *non est factum* was, by the court, stricken from the files and the plaintiff, in short, entered his replication to the plea of *non-assumpsit;* and in the same record entry, it appears that on the plaintiff's motion, the cause was discontinued as to the defendants, Daniel C. Harkey and James Williamson, and it was ordered that "they go hence without day," and thereupon the defendant, King, filed a separate plea of failure of consideration, to which replication was entered, a jury was called, who found the issues for the plaintiff, and assessed his damages at $733 $\frac{05}{100}$.

The defendant moved for a new trial, upon the ground that the court refused to dismiss the suit as to him, when a discontinuance was taken as to his co-defendants; that the court excluded competent testimony; that the court improperly gave the plaintiff's instructions and refused the defendant's instructions; that the plaintiff was allowed to answer his pleadings after the jury was summoned; that the verdict was contrary to evidence.

The court overruled the motion, and the defendant prayed an appeal. The defendant filed his bill of exceptions, in which he set out the evidence and instructions, and his exceptions to the rulings of the court.

Changes in parties and the substitution of a several instead of a joint cause of action, after the parties had all appeard in court and plead, formerly could not be allowed; but chapter eight, of the Civil Code of Practice, requires the court, in which the trial is had, to allow any and all changes in parties, or the insertion of different allegations, necessary to a full and fair investigation, upon the merits of the matter in controversy between the parties, and no exception taken to the allowing of such changes or amendments can avail any adverse litigant,

unless such changes or amendments have misled that party to his prejudice, and then that fact must be shown to the lower court and the party misled must show in what respect he has been misled and prejudiced. See *Code of Civil Practice of Ark., p. 60.*

We seldom find a record which exhibits more carelessness on the part of attorneys, or irregularities in the proceedings of a court, than appears in this. When the plaintiff determined to abandon his suit as to Harkey and Williamson, and treat the matter as a separate transaction with King, which, from the various steps taken, we must suppose he proposed doing, he should have so amended his declaration and other proceedings, as to have conformed them to the new state of case.

If his action had been well brought, and he saw fit to discharge two of the defendants from responsibility, he might have dismissed such two, and continued proceedings upon a joint cause of action, against one defendant only. If, however, the plaintiff wished to proceed against a single defendant, upon an individual cause of action, his record should have been amended.

In this case, from the time of the discontinuance as to Harkey and Williamson, other than the filing of a separate plea by King, there was no step taken to conform the record to a proceeding against him in a several action; however, it seems the court and plaintiff's counsel treated the case as an action against King alone, but as the record stood upon the trial, it was certainly erroneous for the court to refuse to allow King the benefit of his joint plea of *non-assumpsit*, and so far as his defense went to the first count in the declaration, wherein the plaintiff had declared upon a written promise, the court refused to recognize the plea, and allowed evidence and gave instructions, which cut off that defense.

Notwithstanding this plea was by the plaintiff's counsel and the court treated as abandoned, they had the jury to return a verdict on more than one issue, which was manifestly incorrect, if only one plea and issue was before the court; but

if the evidence, offered by the defendant, had been received and had fully established all he proposed to, it would only have defeated the plaintiff's recovery on the first count, the others would not have been affected thereby, and as to them, he had the full benefit of all the defense he was able to make; and taking his own testimony, in connection with that of the plaintiff and his witnesses, the plaintiff was entitled to recover, on the common counts. There was no conflict in the evidence on but one material point, and as to that, the jury seemed to have no difficulty in forming a conclusion. If permitting the record to be amended after the jury was sworn, as alleged, or the refusal to dismiss King, after Harvey and Williamson had been dismissed, had been error, it could avail the defendant nothing, because the record does not show that he ever asked to be discharged, nor that such amendment was ever asked for, or made. Notwithstanding the errors alluded to, upon the whole record, as it appears before us, the finding and judgment is right, and in accordance with the former rulings of this court. It is affirmed with costs. *Sweepser v. Gaines, 19 Ark., 96; Payne v. Bruton, 10 Ark , 84,* and other cases.

Marr, *et al.* *v.* The State.

Forfeited Recognizance—*Practice on.*—Errors in the recitals of a writ or *scire facias,* on forfeited recognizance, are amendable on motion to quash, in the court below, and unless such motion is made, it will not avail here.

The proper practice on forfeited recognizance, is to take an interlocutory judgment, and issue a *scire facias* thereon, though a mere default may be entered, and a *scire facias* issued, requiring the delinquents to show cause why a judgment should not be entered.

Where the proper interlocutory judgment was taken in the first instance, the later judgment should only declare the former final, and order execution.

Appeal from Scott Circuit Court.

HON. E. D. HAM, Circuit Judge.

Clark & Williams, for appellants.

We submit: That the instrument entered into before the sheriff, was not a *recognizance*, but simply a *bond*, and that no forfeiture could be had, nor could a *scire facias* issue upon it: *Hicks v. The State*; and if it were a recognizance, it is not in the form prescribed by the statute. *See Gould's Digest 400, chap. 52, secs. 59, 60;* nor was it acknowledged, *5 Jacobs, 393; 2 Saund. R. p 8 i n (8.)* It was not a record, and could not be a recognizance. *See Hicks v. State 3 Ark., 313; Gray v. The State 5 Ark., 266; State v. Williams, 17 Ark., 371; Tidd's Practice, 284; Long v. The State, 3; Ib 289; Black'f 308.*

The judgment is erroneous on the face of the *scire facias;* the party was bound to appear on the 5th Monday in August, 1868; whereas, the *scire facias* alleges that he failed to keep the recognizance, by failing to appear on the 5th Monday after the 4th Monday in August, 1868. *See Acts of 1860–61, p 378;* the recitals were therefore void; *Thurston v. Commonwealth 3, Dana 224; Commonwealth v. Crayhorn 2, Dana 138; Carlies v. Waddle 1, Barb. 355; Butler v. The State of Miss. 12, S. & M. 470; Commonwealth v. Bolton 1, Serg't & R 328; State v. Sulivan 3, Yerg. 281.*

The judgment should have been affirmative of the judgment upon the forfeiture, and not generally against the securities. *Dangerfield v. The State, 4 How. Miss. 658; Johnston v. State 3 Ark. 524; Davis v. Commonwealth, 4 Monroe, 118; Pinkard v. The People 1, Scam. 187.*

Montgomery, Attorney General, for appellee.

GREGG, J.

It appears from the record that a *capias* issued upon an

indictment, filed in the Scott circuit court, against Allen Marr, for arson, upon which he was arrested by the sheriff of said county, and to procure his release from custody, he, his co-appellants and William C. Gibson, on the 25th of July, 1868, entered into a recognizance, bound in the sum of one thousand dollars, reciting therein, his arrest upon a capias, the charge against him, that he was to appear before the judge of said court, at the court house in said county, on the 5th Monday after the 4th Monday in August, 1868, and then and there answer to an indictment pending against him for arson; and conditioned that if he should so appear on the first day of said court, at the time and place aforesaid, and answer said charge, and not depart the court without leave, the bond to be void.

At the next regular term, in October, 1868, the defendant, Allen Marr, was called and failed to appear, and his securities above named (except J. A. Marr, omitted) were called to produce him in court, and they also made default, whereupon the court adjudged the recognizance forfeited and that the State recover of the defendants called, the sum of one thousand dollars; upon this a *scire facias* was issued against all the obligors; service was had on all but William C. Gibson; at the next term of the court a discontinuance was taken as to him. The defendant, Hough, then appeared in court, and filed a motion to quash the recognizance. *First*, because the capias was made returnable on a day when the court was not authorized to sit. *Second*, because said Allen Marr, by the recognizance, was bound to appear on the 5th Monday after the 4th Monday in August, 1868, when, by law, the court could not be holden on that day. *Third*, because there was no law authorizing said sheriff to take a recognizance at the time they entered into this one.

This motion was, by the court, considered and overruled, and exceptions taken thereto; no further pleadings were interposed, and on motion of the prosecuting attorney, the court rendered judgment, for the amount of the recognizance, against all the defendants except Gibson, as to whom a discontinuance had

been taken, to which the defendants excepted and appealed to this court.

When the capias had been served, and Marr had entered into recognizance for his appearance, and the writ returned, it had fulfilled its office, and whether all the recitals in it, or the *scire facias* were correct or not, was not then material. If they had been erroneous and material, the writs could have been amended by the court. So the first ground, assigned for quashing the recognizance, was not well taken.

The second ground assigned amounts to nothing. The counsel, for appellants, here admit that the fifth Monday after the fourth Monday in August was the proper time for holding the court.

The third was as groundless as the second, because the statute law, in such cases, expressly authorizes the sheriff to take such recognizance.

The counsel here submit, that Allen Marr, being required to be before the court on the 5th Monday in August, 1868, is fatal. It is only necessary to say that this misprision was in the *scire facias* only. The *scire facias* was amendable, had a motion to quash it been made in the court below; as no such motion was made there, it cannot be heard here, and the recognizance, as appears in the record, recites the correct dates, and the obligors thereon, are estopped from going behind it. It is further urged that the failure to render a judgment against J. A. Marr, before the issuance of the *scire facias*, is fatal to the final judgment. The practice in this State has not been uniform, but the better practice is, to take the forfeiture, and at the same time an interlocutory judgment, as directed by statute, and to issue a *scire facias*, calling upon the delinquents to show cause, if they can, why the judgment shall not be made final. But this practice is not regarded as the only remedy. A mere default may be entered in the first instance and a *scire facias* issued, requiring the delinquents to show cause why judgment shall not be rendered for the amount of the recognizance so forfeited. But this departure from statutory regulation, in

practice, is not encouraged, and especially is it irregular to enter judgment for the amount of the recognizance upon the return of the *scire facias*, if the proper interlocutory judgment was entered upon the default. The latter judgment should only declare the former final and order execution.

It is further urged, that this recognizance is not conditioned in the terms of the law; that it is not properly acknowledged before the sheriff, and that the recitals therein are not sufficiently full and explicit. It is sufficient to say, it is a substantial compliance with the statute. If the acknowledgment was not in due form, or the recitals full, the court below was the proper tribunal to have heard such objections. *5 Ark. 433.* The parties, who knew the condition of their obligation, and were sufficiently advised of the proceedings being had to obtain judgment thereon, interposed no defense, and cannot profit by raising technical objections in this court, to the forms of proceeding in the court below. No substantial error appearing, prejudicial to the merits in this case, the judgment of the court below is affirmed with costs.

SYKES *v.* LAFFERRY.

26 414
65 421

APPEALS—*How prosecuted*—Under the Code of Civil Practice, to give this court jurisdiction on appeal, the record should disclose the fact, either that a motion was made for an appeal, during the term at which the final order or judgment was rendered, or that a *formal* application was made to the clerk of the Supreme Court, in term time or vacation, for an appeal and the granting of the same by him.

Appeal from Johnson County Circuit Court.

Clark & Williams, for appellant.

BENNETT, J.

This is an action on a promissory note for the sum of thirty dollars, originally brought before a justice of the peace, from whose judgment an appeal was taken to the circuit court, where a judgment was rendered, in favor of the defendants, at the September term, 1868. The Code of Practice, by which the courts of the State are now governed, had not then gone into absolute effect. We are at a loss to determine whether the appellant is prosecuting his appeal under the statute, regulating appeals before the adoption of the Code, or under it.

If under the former, this court has no jurisdiction in the case, as he has not complied with the statutory requirements regulating appeals. The old statute declares that the circuit court shall make an order allowing appeals, upon the performance of certain conditions therein specified. In the case of *Berry v. Singer, 4 Eng. 129*, this court say: "It is the order allowing an appeal, and not the prayer for it, that operates to transfer the jurisdiction from the circuit to the Supreme Court. This being a question of jurisdiction, no presumption can be indulged, so that although the record should affirmatively show every prerequisite had been complied with, yet no jurisdiction could attach, to this court, without an order expressly allowing the appeal." Also, in the case of the *Bank of the State v. Hinchcliff, 4 Ark. 444*, the court say: "The filing of the affidavit, as required by law, constitutes a condition precedent to the right of a party to appeal." There is nothing to show upon the record, in the case at bar, that there was either an affidavit, prayer for an appeal, or an order of court granting the appeal. If the appellants are seeking to prosecute their appeal under the old practice, it is clear that this court has not acquired jurisdiction.

Under the Code there are two ways in which an appeal may be prosecuted. 1st. By a motion made during the term at which the judgment or final order was rendered. 2d. Upon

application of either party to the clerk of the Supreme Court, in term time or in vacation. *Sec. 859, Title XIX.*

The record does not declare the fact, that there was any motion for an appeal, in the court below, nor that there has been application to the clerk of this court, to grant such an appeal.

True, the papers are marked "Filed Jan. 24, 1870," but that does not constitute an application for an appeal. There should be a formal petition to that effect and a granting of the same by the clerk, in order to invest this court with jurisdiction to hear and determine the case on its merits; therefore, the case is dismissed.

GREGG, J., dissenting.

We are of opinion the substantial requisites for an appeal have been complied with in this case, and that it should have been heard upon the merits and reversed.

Section 859, of the Civil Code of Practice, declares that an appeal shall be granted as a matter of right, either by the court in which the judgment is rendered or by the clerk of this court, in term time or in vacation, on the application of the party demanding such appeal.

In this case, the appellant procured a duly certified transcript from the court below, filed the same in due time with the clerk of this court, and paid the fees necessary to have the case docketed and heard in this court. No summons was necessary; both parties appeared in this court and filed their respective briefs and arguments to the merits, and made no objection to the manner in which the case had been brought into this court. The case being thus submitted, we think this court should not have raised a technical objection. See *Harlin v. Binnie, etc., 22 Ark. 220.* We are of opinion the appellant had done substantially all the law required of him; that no particular words are necessary to be used in asking an appeal of the clerk. No affidavit, or other pre-requisite is required of him, but when he brought a proper transcript, presented it to the clerk for a hear-

ing in this court, and paid the requisite fees, it then became the duty of the clerk to order the appeal and docket the case for a hearing in this court, and if the clerk docketed the case but failed to make any order granting the appeal, it was his fault, not the fault or neglect of the appellant, for which he should be turned out of this court, without having the case heard upon the merits, and especially so when the opposite party does not ask any benefit or advantage in this court, because of any neglect or omission in bringing the case into this court, and by order, the clerk, at any time, before a final disposition of the case, might make an order granting the appeal.

BARCLAY, ET AL. EXRS. ETC. *v.* DAWSON, ADM'R. ET AL.

ANSWER—*When, as to matters within knowledge.*—Where the defendant answers as to matters within his own knowledge, and the answer is directly responsive to the allegations of the bill, it requires two witnesses, or one witness with corroborating circumstances, to overturn the answer.

When as to facts not within knowledge.—Where defendant answers as to matters not within his knowledge, one witness on the part of the plaintiff, is sufficient to overthrow the answer.

When bill dismissed on answer—Where the allegations of the bill are not within the personal knowledge of the defendant, and he admits, or states in his answer, that he has no knowledge of the same, save as stated in the bill; and neither party introduces any proof on the trial, the bill is properly dismissed for the want of equity.

Appeal from St. Francis Circuit Court.

HON. WM. STORY, Circuit Judge.

W. G. Whipple, for appellants.

The testimony of one witness will be sufficient against the denial of an answer, where the defendant can have no personal knowledge of the fact. The same principle holds where the fact denied cannot be supposed within the knowledge of the defendant. In such case, the only effect of the denial in the answer, is to put the complainant to the proof. *Watson v. Palmer*, *5 Ark. 506; Barraque v. Siler*, *9 Ark. 550; Burr v. Burton*, *18 Ark. 228; Combs v. Basnell*, *1 Dana*, *474; Lawrence v. Lawrence*, *5 Bibb*, *357; Dulith v. Cawsault*, *5 Cranch*, *C. C. 352; Dagans v. Gettings*, *2 Gill & Johnson*, *216.*

The decrees, *pro confesso*, were simply interlocutory as to the defendants who failed to appear. *Anthony v. Shannon*, *8 Ark. 52; Crittenden, ex-parte*, *20 Ark. 333; Tucker v. Yell*, *25 Ark. 420*; and the case should have thereafter been set down for hearing and proof. *Rose v. Woodruff*, *4 Johns. Chan. R. 547; Barb. Ch. Pr. 1*, *369.*

Brown & Lyles, for appellees.

No proof is made of a mortgage, and a conveyance having been made, and no notice brought home to any of the vendees, the bill was properly dismissed by the court below, and that decree should be here affirmed.

SEARLE, J.

The facts and proceedings in the court below, so far as a statement of which is necessary to develope the questions to be considered and determined in this court, are briefly as follows: The complainants brought their action, in that court, to foreclose a mortgage upon certain real estate, alleging, among other things, in their bill of complaint, that the original deed of mortgage was lost, and the county records, in which said deed was recorded, were destroyed. All the defendants were, either actually or constructively, subpœnaed; all failed to ap-

pear, with the exception of the defendant, Dawson, and decrees, *pro confesso*, were entered against them. Dawson answered. At the final hearing of the cause, no proof was offered on the part of the complainant, or of the defendant, Dawson; and the court rendered a decree dismissing the complaint, for *want of equity*. The only inquiry suggested by the record, as it comes before us, is, did the court below err in dismissing this cause for want of equity?

The bill is sufficient, both in form and substance; it contains, besides the averments necessary to be avered in ordinary bills for foreclosure, the further averments that the complainants were not in possession of the deed of mortgage upon which the action was brought, the same having been lost; that they have not a copy of said mortgage, and that the records of St. Francis county, in which said mortgage was recorded, were destroyed by fire. The bill is verified by the affidavit of one of the solicitors of the complainants, who swears that the facts are true "to the best of his knowledge, information and belief;" but the extent of his knowledge or information is not shown, either by the bill or by depositions; nor does the note, exhibited with the bill, show that it was secured by mortgage.

The bill seems fully to set forth a proper case for the interposition of a court of equity, for the purpose of foreclosure. The answer is responsive to the matter of the bill, and after admitting or denying the other allegations of the bill, avers "that the appellants have no knowledge or information, save by said bill of complaint," and therefore denies it to be true that a deed of mortgage was ever executed, acknowledged and delivered, as alleged in the bill of complaint. The answer is sworn to by the defendant, Dawson, as administrator, etc.

It is a well established rule, in equity jurisprudence, that when the defendant, under oath, interposes, in his answer, matters of defense, directly responsive to the allegations of the bill, and within his personal knowledge, it is incumbent on the complainant to substantiate the averments of his bill by the testimony of two witnesses, or one witness with strong cor-

roborating circumstances. *Menifee v. Menifee, 8 Ark., 10; Aiken v. Harrington, 12 Ark., 391; Jordan v. Fenno, 13 Ark., 596.*

It is also a well established rule that when the matter of the answer is not within the knowledge of the pleader, the evidence of one witness on the part of the complainant will be sufficient to overthrow the answer. *Watson et al v. Palmer et al, 5 Ark., 506; Barraque v. Siter, 9 Ark., 550; Burr v. Burton, 18 Ark., 228; Combs v. Boswell, 1 Dana, 474; Lawrence v. Lawrence, 5 Bibb, 357.*

From these rules it seems clear that the complainant in equity, appealing, by his bill, to the conscience of the defendant, makes his answer evidence, when it is under oath, responsive to the bill, and embraces matter within his personal knowledge.

In the case under consideration, if the matters of denial, contained in the defendant's answer, had been within his personal knowledge, they would have refuted the averments of the bill and overthrown its equities. But the allegations of the bill were not within the personal knowledge of the defendant, for, as administrator, in which capacity he was sued, the material facts stated in his answer could not be supposed to be within his knowledge; moreover, he asserts in his answer that he had no knowledge of them, save by the bill of complaint. The allegations, then, of the defendant, not being evidence, simply presented issues of fact as to the matters they denied, and threw the burthen of proving them upon the complainants.

But at the final hearing of the cause, the complainants failed to produce any evidence to make good the allegations of their bill. The adjudication was upon the bill, answer and exhibits alone, and the chancellor properly dismissed the bill for want of equity.

Finding no error, the decree is affirmed.

FLEMING v. JOHNSON, ET AL.

26 421
54 484

PROBATE COURTS—*Jurisdiction.*—It was competent for the probate courts, under the Constitution of 1836, and act approved December 24, 1846, to order guardians to sell the real estate of their wards, at public or private sale, as the court in its discretion might direct.

COURTS—*Discretionary power of*—When, by constitutional or legislative authority, discretionary power is conferred upon a court, its exercise is a judicial act, and cannot be controlled by a superior or appellate court on appeal, unless it has been grossly abused.

SALES—*Confirmation cures defects.*—The confirmation of a sale, made in pursuance of an order of court, cures all defects or irregularities, unless it is attacked directly.

ADMINISTRATOR'S SALE—*When presumed regular.*—Probate courts are superior courts, and the regularity of their proceedings are presumed; and when the validity, derived under a guardian's or administrator's sale, comes in question, in a collateral suit, this court will only look to see if the probate court had jurisdiction—unless error be patent upon the face of the proceeding.

PURCHASERS AT ADMINISTRATOR'S SALE.—Where the probate court has jurisdiction of the subject matter, the papers and proceedings in the case upon which an order of sale is had, are presumed to have been regular, and a purchaser, at a guardian's or administrator's sale, will not be bound to look further back than the order of the court, or to inquire as to its mistakes.

GUARDIANS—*For what appointed.*—A guardian for an *infant* is appointed solely because of the infancy, and no inquiry is made as to sanity.

Appeal from Scott Circuit Court.

HON. E. D. HAM, Circuit Judge.

Garland & Nash, for appellant.

It is submitted, that the appellant proved every thing in the court below, that the law required of him. See *Daniel v. Lefevre, 19 Ark. 201.*

The probate court had no power to grant an order of sale to be made, unless publicly. *Gould's Dig. chap. 81, sec. 17, et seq; Ib. chap. 4, sec. 182, et seq;* and all proceedings of this kind

must be in strict accordance with law. *18 Ark. 449; 19 ib. 516; Probate Court Law and Practice, by John W. Clinton, p. 470; Ib. 286–290.*

Jurisdiction of another court must always be shown by the record from that court. *2 Ark, 60; 3 Ib. 532; 1 Greenleaf Ev. 540–1.*

English, Gantt & English, for appellees.

The constitution of 1836 and the act of December 23, 1846, gave power to the probate court to grant orders to guardians to sell the real estate of their wards, and left the manner and terms of such sales to the discretion of the court. See *Art. VI. Sec. 10, Const. 1836; Act 23d December, 1846*; and that discretion could not have been controlled by a superior court, in a direct proceeding, on appeal, unless it had been grossly abused. See *Redmond, guard v. Anderson, 18 Ark. 451; George v. Norris, 23 Ark. 129; Sadler v. Rose, 18 Ark. 600; Nelson & wife v. Green, 22 Ark. 367.* Much less could a sale, ordered in the exercise of that discretion, and completed, and confirmed by the court, as in this case, be declared void in this collateral proceeding. *Borden v. State, 6 Eng. 519; Sturdy v. Jacoway, 19 Ark. 516; Marr, ex-parte, 7 Eng. 84; Rogers v. Wilson, 6 Eng. 507; Bennett v. Owen, 6 Eng. 177; Thompson v. Tolmie, 2 Peters, 157; Grignari's Lessee v. Aston, 2 How. U. S. 338,* and cases cited, full and in point. *Schnider et al. v. McFarland et al., 4 Wend. 139; Atkins and wife v. Kinnar, 2 Wallace U. S. 210; Jackson ex dem. McFail et al. v. Crawfords, 12 Wend. 533.*

The probate court had power to make an order for *private* sale, where the statute left the manner of the sale to its discretion. See *Jackson, ex dem. Bear v. Irwin, 10 Wend. 447; Florentine v. Barton, 2 Wallace, U. S. 210; Gilmore v. Rogers, 41 Penn. State R. 121.* Though evidence and other papers on which the court acted judicially, may not be of record or on file, it is sufficient that the jurisdiction of the subject matter appear from the record entry of the order of sale. See *Grig-*

nari's Lessee v. Acton, 2 How. U. S. 388, and cases above cited. And the contents of a lost or destroyed record may be proven by parol. *Davis, ad. v. Petit et al. 6 Eng. (11 Ark.) 349.*

BENNETT, J.

This was an action of ejectment brought in the name of William Warren Fleming, as a person of unsound mind, by his guardian, Nancy J. Fleming, against Raphel M. Johnson, Charles Robinson, Laring Jasenburger, William Harris and James H. Harris, for lot No. 1, block No. 8, in Fort Smith, Arkansas. This action was commenced in Sebastian and removed, by change of venue, to Scott circuit court, where it was tried on the general issue. Verdict and judgment for defendants. Motion for a new trial overruled. Exceptions and appeal by the plaintiff.

When the title of the plaintiff in ejectment is controverted under the general issue, he must prove, 1st. That he had the legal estate in the premises at the time of the commencement of the suit. 2d. That he also had the right of entry; and 3d. That the defendant, or those claiming under him, were in possession of the premises at the time when the suit was commenced. See *2 Greenleaf, sec. 304; Daniel et al. v. Lefevre, 19 Ark. 202.*

At the trial, appellants produced and proved a transcript from the records of the probate court of Sebastian county, Fort Smith District, showing that, on the 8th day of January, 1859, Nancy J. Fleming, the mother of the plaintiff, was appointed his guardian—her petition representing him to be a person of unsound mind, and incapable of conducting his own affairs. Also a deed from John Rogers, the original proprietor of the city of Fort Smith, and wife, to John Pearson, bearing date 27th April, 1843, for the lot in controversy. Also a deed, of the same date, from John Pearson and wife, to the plaintiff. The plaintiff also proved that the defendants were in possession of the premises at the time of the institution of the suit, and closed.

The defendants then offered in evidence a certified transcript of the record of orders of the probate court of Sebastian, showing that, on the 15th day of January 1856, William W. Fleming, on his own petition, was appointed the guardian of his son, William Warren Fleming, a minor, under the age of 14 years.

The defendants also offered in evidence a certified transcript of the records of same court, wherein William W. Fleming, as guardian of William Warren Fleming, presents his petition for the sale of real estate, belonging to said minor, William Warren Fleming, described as follows, on the plat and plan of the city of Fort Smith: lot No. 1, in block No. 8, measuring seventy feet front on Garrison Avenue, by one hundred feet on Ozark street. Also the defendants offered the order of said probate court on the petition, which, among other things, is in words as follows: "It is therefore ordered by the court here that the said William W. Fleming be, and he is hereby authorized and directed to sell the aforesaid lot No. 1, in block No. 8, in the city of Fort Smith, and execute to the purchaser or purchasers thereof, a deed or deeds of conveyance, to him or them, of all the right, title, or interest of the said William Warren Fleming; and the said guardian of the said William Warren Fleming, is hereby authorized and directed to sell said lot at *private sale: provided*, he shall not sell the same at less than two thousand dollars, not less than two-thirds to be paid down, and the residue in one, two and three years, bearing interest from date."

The defendants then offered in evidence an order of the same court, made April 22, 1856, which order states that "W. W. Fleming files his report, in the matter of William Warren Fleming, a minor, whereby it appears that he has, according to the order of a previous court, that is to say, at the January term, 1856, of this court, sold to R. M. Johnson, lot No. 1, in block 8, in the city of Fort Smith, at *private sale*, for the sum of two thousand dollars, and has received the sum of eight hundred and fifty dollars, and has taken notes with good security

for the payment of the residue, in one, two and three years, with interest from date, and prays that the report may be confirmed. Whereupon, it appearing that the previous order of the court has been complied with, and that said sale is in accordance with law and said order, it is considered that said sale be, and the same is hereby *confirmed* and that said *report be approved.*" Also an order, entered up at the October term of the probate court, wherein it appears that the account current of William Fleming, as guardian of William Warren Fleming, was approved and confirmed.

In addition to the usual certificate of authentication of the transcript of the record of the probate court, embracing the above orders, the clerk of the court further certifies that he had made diligent search, in his office, for the original letters of gaurdianship, bond of guardian, petition for the sale of the real estate, and the account current in the matter of the guardianship of William Warren Fleming, and that all the original papers and records thereof, were destroyed or lost, as he believed, during the war, and they were not to be found in his office.

The bill of exceptions states that the plaintiff objected to the introduction of the transcript of the above orders, on the following grounds:

First. Because the order of sale, authorized the sale of the premises therein specified, at private sale, and not at a public vendue, as prescribed by law.

Second. Because it did not appear upon the face of the order of sale, that it was authorized by any statute, in force in this State or otherwise; or that the court making it, had jurisdiction of the subject matter.

Whereupon defendants, to show that the court acquired jurisdiction, called a witness, by whom they proved, against plaintiff's objection, the loss of the petitions of said William Warren Fleming, for the appointment of a guardian for said William Warren Fleming and for the order for the sale of said premises—and also, the loss of the account current, men-

tioned in the record, and that the petition set forth the facts, recited in the order; and thereupon, the court permitted the paper, purporting to be a transcript of the order, and account etc., etc., to be read in evidence to the jury, to which the plaintiff excepted, etc. The defendants then produced, and offered to read in evidence, a deed bearing date, the 31st of January, 1856, executed by William W. Fleming, as guardian of William Warren Fleming, to defendant, Raphel M. Johnson, for the said premises, duly acknowledged and recorded, etc., etc. To the reading of which to the jury, the plaintiff objected, on the following grounds:

First. Because it did not appear that the grantor therein, had authority to sell or convey the said premises.

Second. Because the recitals therein show that the premises were sold at private sale, and not at public vendue; and

Third. Because there is nothing to show that the premises were appraised before they were sold, or sold for two-thirds of their appraised value; and further, because it is not shown that the order of the sale therein recited, was authorized by law. But the objections were overruled, and the deed permitted to be read to the jury; to which the plaintiff excepted.

The deed recites the order of sale above copied, and shows, on its face, a sale in compliance with the order in all respects. After introducing the deed, the defendants closed.

The plaintiff then offered to prove, that William Warren Fleming was insane, from the time he was six or seven years of age, down to the time of the trial; to which the defendants objected, on the ground that it was inadmissible and irrelevant; and the court refused to permit the introduction of such proof, and the plaintiff excepted. Plaintiff proved that he was born on the 14th day of April, 1842. Plaintiff was permitted to introduce, against the objection of the defendants, a copy of a bond, bearing date 31st day of January, 1856, (same date of guardian's deed), executed by William W. Fleming, to defendant, Johnson; and also a covenant executed by defendant John-

son, to William W. Fleming, bearing same date of said bond, which are both set out in the bill of exceptions.

The bond from Fleming to Johnson is in the penal sum of $4,000. It recites the sale and conveyance of the premises in controversy, by William W. Fleming, as guardian of his son, William Warren, under the order of probate court, price, terms, mode, and time of payments; and that as a further security and inducement for Johnson to make the purchase and accept the conveyance of Fleming as such guardian. The substance of the covenant is, after reciting the bond, that if Fleming's son, on coming of age, should not make the conveyance stipulated for in the condition of the bond, Johnson, his heirs, etc., would not, nevertheless, consider the condition of the bond broken, so long as he or they should not be disturbed by the said William Warren, or any person claiming under him. Plaintiff also read in evidence a bill of sale for a negro woman and child, executed by defendant, Johnson, to William W. Fleming, dated 8th of January, 1856, reciting $800, as the consideration. Also proved, by a witness, that defendant Johnson, sold William W. Fleming a negro woman and child, for $850, in part payment of said premises.

Defendant, Johnson, was then sworn, on the part of the defense, and testified that William W. Fleming proposed to sell the premises to him after all the improvements thereon had been burned down; that they were not worth, then, exceeding $2,000, and that he agreed to purchase them, if the said Fleming could make a title to them; and that finally he agreed to purchase them at that price, as he wanted to erect a store house on them—he, William W. Fleming, undertaking to make a title; and it was agreed that he, Johnson, would sell him a negro woman and child at $850, in part payment of the premises. That accordingly, he, Johnson, sold him the negroes and executed the bill of sale to him, above mentioned, which was to go in part payment of the premises; that is to say, the price of the negroes was to go in part payment of the $2,000. That subsequently, he, William W. Fleming, procured an order of

the court of probate to sell the premises, and executed to him the deed above mentioned. That soon afterwards he sold two thirds of said lot for $1200. Six hundred of which was paid in stone work, upon the house erected by him on said lot. That said William W. Fleming sold the negro woman and child, in two or three months, after the execution of the bill of sale to him, for $1100. The defendants also proved that, at the time Johnson purchased the premises, they were worth from twelve to eighteen hundred dollars, which was all the testimony in the case.

The plaintiff asked the court to instruct the jury:

First. That the sale of the premises by William W. Fleming to defendant, Johnson, if made at private sale was void.

Second. That the order of sale made by the probate court was illegal and void, because it authorized the sale to be made at private sale.

Third. That the deed, executed under the order of sale, was void also, for the reason that the recitals in it show that the sale was made at private and not at public sale.

Fourth. That if the jury believe from the evidence, that the order, for the sale of the premises, read in evidence by defendant, was procured by fraud, and that defendant, Johnson, purchased the premises with a knowledge of the same, they should hold the order of sale void and inoperative.

Fifth. That in determining whether the order of sale was procured fraudulently, the jury will take into consideration all the attending circumstances.

Sixth. That if the jury believe from the evidence that the premises in controversy were sold by plaintiff's guardian for any thing, other than money, they should regard the deed from the guardian to the defendant, Johnson, void, and as passing no title to the premises.

The court refused to give the *first*, *second* and *third* instructions, moved by plaintiff, but gave the *fourth*, *fifth* and *sixth*. In refusing to give the first, second and third instructions, plaintiff excepted.

The court, at the instance of the defendant, gave in charge to the jury the following instructions:

First. That if the jury believe from the evidence, that William W. Fleming was guardian for the said William Warren Fleming, duly appointed by the probate court of Sebastian county, and as such, made application to the probate court of Sebastian county for the sale of the lands in controversy, and filed and presented his petition to said court, verified by his affidavit, that his ward was possessed of the real estate in controversy, and that the same could not be made available, to the said plaintiff, in its then condition, without the outlay of a large sum of money, which, in his opinion, should not be used for that purpose, and that he was unable to advance the same for his ward, and that, at that time, he could sell said real estate for a good price, and as the value of real estate was then fluctuating, he believed it to be the interest of his said ward to sell the same and invest the same in negro property, or in improved real estate; and that said petition was verified by the affidavit of a disinterested person, of known good character; and that said probate court, upon said petition, decided that said real estate, under the then existing circumstances, was not available to said minor, and that his estate would be benefitted by the sale thereof; and authorized and directed the said guardian to sell the same, and to execute to the purchasers thereof, a deed thereto, conveying all the right, title and interest of said William Warren Fleming, and make return of his proceedings to said court, and that the said guardian was authorized to sell said lands at private sale, provided he should not sell the same for less than one third, to be paid down, and the residue in one, two and three years, bearing interest from date; and that in compliance with said order, and whilst the said William Warren Fleming was still a minor, he, said guardian, sold said real estate to said Raphel M. Johnson, and executed to him a deed of conveyance thereto, in accordance with the terms of said order; and that such sale was reported to said

probate court of Sebastian county and confirmed by said court, they should find for the defendants.

Second. If the jury find, from the evidence, that William W. Fleming, in his individual capacity, purchased a negro woman and child from defendant, Johnson, at $850, and afterwards, in making the sale of the property in question, his guardian agreed to advance the price of payment for said property, and did actually account for that amount, in his report to and settlement with the court, such a transaction would not render the sale invalid.

Plaintiff files motion for a new trial, for the following reasons:

First. That the verdict was not sustained by sufficient evidence.

Second. That the verdict was contrary to law "and the eternal principles of right and justice."

Third. That the court erred in permitting the transcript of the record and proceedings of the Sebastian probate court, introduced by defendant, to be read in evidence.

Fourth. That the court erred in permitting the deed from William W. Fleming, as guardian of plaintiff, to defendant, Johnson, to be read in evidence to the jury.

Fifth. That the court erred in excluding testimony offered by the plaintiff.

Sixth. That the court erred in giving the instructions called for by defendants, and in refusing the instructions called for by the plaintiff.

The admission, by the court below, of the transcript of the order of the probate court, for the sale of the premises, etc.; the admission of the guardian's deed, executed to Johnson, under and in pursuance of the order of sale; the refusal of the court to give to the jury the first, second and third instructions, moved by the appellant; the giving of the first instruction asked by the appellees; and the third, fourth and sixth grounds assigned for a new trial, present but one principal question, and that is, whether the probate court had power to

authorize the guardian to sell the property of his ward at *private sale.*

The order of the probate court, for the sale of the real estate in question, was made on the fifteenth day of January, 1856, and it is to this time our attention is directed, to learn what was the statute law of the State governing the disposition of the property of minors. *Secs. 180 and 181, of chap. 4, of Gould's Digest*, reads as follows: "The probate court shall have power, upon the proper affidavit being filed, as hereinafter provided for, to grant orders to executors, administrators and guardians to sell any estate, not otherwise provided for."

"The executor, administrator or guardian who may make application for the sale of real estate, shall first make affidavit that the said real estate cannot, under present circumstances, be available to the estate, and that said estate will be benefitted by said sale, showing the reason why; and shall present the affidavit of some disinterested person of known good character, verifying the same facts, set forth in his or their affidavit; whereupon, the court may grant an order for the sale of said real estate, which sale shall be conducted as *the court may direct*, and upon terms approved by the court."

These sections are a part of an act of the Legislature, approved December 24, 1846, and were in full force and effect at the time of the sale. By this enactment, the probate court had power to grant orders to guardians to sell the real estate of their wards, "*which sale shall be conducted* as the court may direct, and *upon terms approved by the court.*" The power of the court to order a private sale, under the act, or a public sale, at discretion, does not admit of serious doubt. Although the probate courts, in making orders to guardians to sell lands under the act, might, in the exercise of the discretion given them by the act, as to the mode of sale, direct the guardian to sell, after appraisement, and at public sale, to the highest bidder; or the court might fix the value of the property itself, and direct the sale to be public or private, at discretion, the

whole matter, under the act, being at the discretion of the court.

The constitution of 1836, under which the sale in question occurred, conferred upon the probate court "such jurisdiction in matters relating to the estates of deceased persons, executors, administrators and guardians, as may be prescribed by law, until otherwise directed by the General Assembly." *Art. 6, sec. 10.* The act of December 23, 1846, gave power to the court to grant orders to sell real estate of their wards upon the prescribed petition and affidavits, but left the manner and terms of such sales to the discretion of the court. In Jackson, *ex-dem, Bear v. Irwin, 10 Wend., 447*, SAVAGE, Chief Justice, said: "It is objected that the lot should have been sold at *public sale.* The statute of 1801, which we have been considering, gives no direction as to the manner in which sales should be made; they might be at public or private sale, in the discretion of the executors or administrators, who were to make the sales. Were it not for the act of 1813, I apprehend that objection would not have the appearance of plausibility."

The Judge then proceeds to show that in the revision of 1813, there was a provision relating to the surrogate's powers, that no lands or tenements should be sold by virtue of such order of sale, unless such sale be at public vendue, etc. He then decides that the private sale in question was made under the act of 1801, and not under the act of 1813, and hence was valid.

In *Florentine v. Barton, 2 Wallace, 217*, Justice GREER said: "There may have been many reasons why it would be for the benefit of the estate and creditors, that the land should be sold at private and not public sale."

The above decisions, we think, fully sustain our position, that, under the statute in force at the time this sale was made, the court could order such an one as its discretion would dictate, whether public or private. When, by constitutional or legislative authority, a court is left with discretionary power to act in certain cases, the lawful exercise of that discretion is

a judicial act, which, even in a direct proceeding, cannot be controlled by a superior or appellate court, on appeal, unless it has been grossly abused. It is a general rule that the confirmation of a sale, made in pursuance of an order of court, cures all defects or irregularities, and its validity is put beyond question by that fact, unless it is attacked directly. See *Simond's Estate, 19 Penn., 439; Jacob's Appeal, 23 Penn., 477; Bland v. Manchester, 24 Miss., 62; Ewing v. Vaurman, 19 Wisconsin.* Then, again, it has been repeatedly declared by this court that probate courts are superior ones. If such be the case, all reasonable presumptions of law are in favor of the regularity of their proceedings, the record of which, beyond which this court cannot look, in this case, shows it had jurisdiction, and furnishes satisfactory grounds upon which to presume that it was lawfully exercised.

We are fully of the opinion that when a title, derived under an administrator or guardian's sale comes in question in a collateral suit, and not in a direct proceeding to review the order of sale, etc., this court can only look to see that the probate court had jurisdiction of the subject matter of the order, etc., and will not inquire into errors or irregularities, unless patent upon its face. For, when the jurisdiction of the subject appears, the proceedings are presumed to have been regular, and we think it is sufficient that the jurisdiction of the subject matter appears from the record entry of the order of sale, though the evidence, and other papers on which the court acted judicially, may not be of record or on file. As to attacking a title, acquired under an order of a probate court, in a collateral proceeding, the court in the case of *Jackson ex. dem. Jenkins v. Robinson, 4 Wend. 436*, say: "However extraordinary or erroneous be the determination and proceeding of a court of limited authority, if it acts within its proper jurisdiction as to the subject matter, place and person, its judgments or decrees cannot be impeached or invalidated in a collateral action."

This was an action of ejectment, in which the plaintiff was

solely relying upon an administrator's deed, made in pursuance of an order of sale in the surrogate's court, which the defendant sought to overturn, by offering to prove that, by the inventory, affidavit and papers, presented to the surrogate, by the administrator, on his application for the order of sale, it did not appear that, at the time of such application, any debts remained due from the estate of the intestate, etc., which evidence was objected to and overruled by the judge; which rulings were sustained as seen above. Also in the case of *Jackson ex. dem. John McFail et al. v. Crawford*, which was also an action in ejectment, in which plaintiff claims, as heir at law of John McFail, and the defendant is in possession, under title derived from an administrator's sale, by virtue of a surrogate's order. The right of the parties depended entirely upon the validity of the sale. The court say: "upon the surrogate obtaining jurisdiction over the subject matter, that, in deciding whether there is personal property sufficient to pay the debts, he acts judicially, and if he should decide erroneously in respect to it, or should make a mistake as to any other matter submitted to his examination and decision, it would not affect his jurisdiction; that the proceeding would not on that account be void, but voidable only; that they could not be impeached for any irregularity before the surrogate, in a collateral action, but must be corrected on appeal." "The court will intend that the court below had proper evidence to justify his decree, which being unappealed from, is conclusive. *6 Cowan, 494.* His decision is *res judicata*, and can not be collaterally questioned." *6 Johns. C. R. 381.*

"The record of the proceedings, in a court of limited jurisdiction, regular and correct on the face of it, cannot be impeached in a collateral action." *8 John R. 50; 8 Cowen, 178.* "The judgment of a court of exclusive jurisdiction, directly on the point, is conclusive." *1 Phillips, Ev. 242.* "Nothing which might have been insisted on, by way of appeal, can be urged in answer to the evidence furnished by the decree." *1 Starkie's Ev., 253.*

Judge SCOTT, in the very able and elaborate opinion given in the case of *Borden et al. v. State, etc.*, after having argued the question as to the status of probate courts, and in what light their judgments should be held, says: "We feel warranted, therefore, not only on the score of authority, but for cogent reasons of public policy, to fix these courts upon the footing of superior courts." Also, "entertaining these views and so holding the law to be as to the two foregoing propositions, we have but to say, as to the supposed error in the case before us, that the general and well settled rule of law in such case, is, that when the proceedings of such a court are collaterally drawn in question, and it appears on the face of them, that the court had jurisdiction of the subject matter, such proceedings are voidable only, although there may be obvious errors, and, therefore, we can judicially see only what the court has done, and not whether it has proceeded in *verso ordine*, erroneously, according to the proof before them or what they have omitted or ought to have done." See also, *Marr. Exparte, 7 Eng. 84.; Rogers v. Wilson, 6 Eng., 507; Bennett v. Owen, 6 Eng., 177; Sturdy v. Jackoway, 19, Ark., 516.*

This principle runs through all these cases, and hundreds of others that might be cited. Then, shall it be said that after the probate court, in the exercise of that discretion, which the statute has given it, has entered up its order of sale, if properly within its jurisdiction, and it has been completed and confirmed by said court, as in this case, that such order of sale and confirmation may be declared void, and held for naught in a collateral proceeding? We think not. Under such circumstances, to hold the doings of the court were a nullity, would be, to say the least of it, going a great way. Here was a subject matter legitimately and peculiarly within the jurisdiction of the probate court. An application by a guardian for the sale of lands belonging to his ward, brought regularly before the court—that application considered and decided upon, and that too, with a sufficient margin in the record for the presumption, that facts were established by facts, to fully authorize

the order given, and without any objection to it in point of correctness, much less of power.

But it is urged by appellants, that the defendants below could not by witnesses show jurisdiction in a court, when the record offered did not establish it—inasmuch as jurisdiction of another court must always be shown by the records from that court. Jurisdiction has been thus defined by the Supreme Court of the United States, in *6 Peters, 709.* "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented, which brings this power into action." In *12 Peters, 718*, the court say, "Any movement by a court, is necessarily the exercise of jurisdiction; so to exercise any judicial power over the subject matter and the parties, the only question is, whether on the case before the court their action is judicial or extra-judicial, with or without the authority of law, to render a judgment or decree upon the right of litigant parties. If the law confers the power to render a judgment or decree, then the court had jurisdiction." There can be no doubt of the jurisdiction of probate courts in all matters relating to estates of deceased persons or minors, under the Constitution of 1836, or the law of 1846. In making any order in relation to the same, the courts are presumed to have adjudged any question necessary to justify such order or decree. The order of sale in this instance clearly sets out that the guardian presented his petition, verified by affidavit, setting forth that his ward was possessed of certain real estate, and described the same; also alleges facts as reasons why it would be to the interest of his ward, why it should be sold. All these were statutory requirements, and were fully complied with. The order was made, and the presumption is that the court had all the original papers before them for adjudication. The court is not bound to enter on record the evidence on which any fact is decided. The proceedings on which an action of the court is founded, are usually kept on separate papers, which are often mislaid or lost. A purchaser, under such a sale, is not bound to look further back, than the order of the court,

or to inquire as to its mistakes. A different doctrine would (especially after a lapse of a number of years) render titles under judicial sales worthless, and a "mere trap to the unwary." These propositions are discussed at great length and fully decided in the case of *Gignari's Lessee v. Astor, 2 How. P. 338.* Any further argument would be superfluous. Even if it were necessary to have produced the original petition, affidavits, etc., upon which the order was founded, in order to show jurisdiction, this has been met by the introduction of parol evidence to establish the loss of the account current, mentioned in the record entry, and that the petition set forth the facts recited in the order. The clerk of the court testified that he had made diligent search in his office for the original letters of guardianship, bond, petition, etc. The degree of diligence, says the court in the case of *Simpson v. Watson, 45 Maine, 288,* "That is required to establish the destruction or loss of a written instrument, or to prove the non-existence of a record, will depend much upon circumstances. When the transaction to be established is of ancient date, and only one appropriate place of deposit exists for the preservation of such instrument or record, and there is no suggestion that they may be found elsewhere, and that place of deposit is carefully examined without success, an inference of unrecoverable loss or destruction would thereupon arise, while if the transaction were of recent date, such an inference might not be authorized, though the surrounding facts were of a similar character." Although in the case before us, the search for the missing papers and records does not appear to have been of a very extended character, yet when we reflect that it referred to a transaction, happening before the late civil commotion, and that in many instances, during that period, the records and papers belonging to the courts were removed from their former place and carried many miles away, the evidence of loss or non-existence of missing papers and records was such as would authorize any court to admit parol evidence to establish their contents, or resort to evidence of an inferior character.

Another point raised by the appellants is, that the court erred in excluding the proof that the ward of the guardian was insane from the time he was six years of age, down to the time of the trial. It appears that the appellant, William Warren Fleming was born April 14, 1842. His father, William W. Fleming, was duly appointed guardian by the probate court on the 15th of January, 1856, when he, the son, was under the age of fourteen years. The order for the sale of the lot was made at the same term of the court, and the report of the sale was made, approved, and the sale confirmed at the April term following

The matter in issue on the trial was the validity of the sale; and it was immaterial and irrelevant whether the appellant was *sane* or *insane*, when his father was appointed his guardian, or when the order of sale was granted, or when the sale was made, confirmed, etc., he being all the while an infant. The probate court appoints a guardian for an infant, solely because of the infancy, and no inquiry is made as to sanity. The law regards the infant, whether sane or insane, as incapable of acting for itself, and provides for it to be placed under a guardianship, which continues until it is of age, and then this guardianship ceases. *Gould's Digest, chap. 81 p. 570.* The law also provides for the appointment of guardians for adult persons, when found, upon proper inquest, to be insane, etc. *Gould's Digest, chap. 89, p. 605.* The two kinds of guardianship are as distinct as the two statutes which provide for them. The latter begins where the former ends, after the infant is of age.

The only remaining question is that of fraud, as raised by the fourth, fifth and sixth instructions, given by the court to the jury, on the part of the appellant and the second instruction given by appellees. This, we think, was fairly left to the jury to determine. If that question could be inquired into here, in a collateral proceeding, the evidence utterly failed to show any; on the contrary the evidence shows that the order was regularly and with the utmost fairness obtained. There

is nothing throughout the whole record that tends in the least to show fraud or unfairness in the sale.

There is no error in the record, and the judgment must be affirmed.

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CURTIS v. THE STATE.

VERDICT—*Where different grades charged.*—In an indictment charging a public offense of different grades, or containing several counts charging different grades of the offense, a general verdict of "guilty, as charged in the indictment," not finding the degree of the offense, it will be presumed that the jury found in favor of the higher grade of the offense charged.

Appeal from Clark Circuit Court.

HON. T. G. T. STEEL, Circuit Judge.

J. L. Witherspoon, for appellant.

We submit that the court erred in overruling the motion for a new trial. See *Chap. Dig. 120; 2 Wharton, 2947*, and *Stewart v. State, 13 Ark. 749.* Fraudulent practice is not a felony under our statute; *224, Chaps. New Dig.* There are no grades in it as in larceny; *McKenzie v. State, 6 Eng, 594; People v. Haynes, 14 Wendell, 572 & 3; 11 Wend. 18.* Criminal and penal statutes must be construed strictly, and that construction given them that is most favorable to the defendant; *4 John. N. Y. R. 296; Sedgwick on Statutory Law, 324–5 and 333; 1 Bish. Crim. L. 4 ed. secs. 205, 220–1, 234–5 and note, and secs. 249, 250 and 251; Shay v. The People 22 N. Y. 317; Secs, 10 and 11, p. 202. chap. New Dig.; 2 Bish.*

Crim. L, sec. 345. The grade of offense should be found by the jury. *1 Bish. Crim. Proceed. sec. 835; 2 Ib. sec. 138; 722, 724 and note; 6th Ed. Whar. Crim. L. 1868; Lock v. State, 32, N. Y. 106.*

Montgomery, Attorney General, for appellee.

"The jurisdiction of circuit courts extends to all crimes except certain affrays, and assaults and batteries." *Tucker ex-parte, 25 Ark. 567; Code p. 261, sec. 10.* For statutory exactment, see Chapters of Digest, page 224.

McCLURE, C. J.

Curtis was indicted in the circuit court of Clark county, for fraudulent practices; tried, found guilty and sentenced to the penitentiary for two years. A motion for a new trial was made upon the following grounds:

First. Because said verdict is against the law and the evidence.

Second. Because the court instructed the jury contrary to law, or made remarks in regard to the law of the case, which were erroneous, and were taken by the jury as instructions.

Third. Because the panel, from which the jury was selected, was selected by the sheriff, who was not sworn by the court as required by section 19, of the new Digest, under the head of "Jurors." The motion for a new trial was overruled and the defendant excepted. In the absence of a bill of exceptions we are unable to say whether the verdict was against law and evidence, or whether the jury were erroneously instructed. The third ground for a new trial is not made a cause for a new trial under the Code.

The only question in the case that now remains is, did the court err in refusing to arrest the judgment? The 272d section of the Code declares: "The only grounds upon which a judgment shall be arrested is, that the facts stated in the indict-

ment do not constitute a public offense within the jurisdiction." There is no question but the circuit court had jurisdiction of the offense. (*25 Ark. 567.*) The only question before the court is, does the indictment charge a public offense? It is urged, with some vehemence, that the verdict of the jury does not fix the value of the property obtained by the fraudulent practice, and that, in as much as the prisoner is to be punished as for a larceny, for this species of crime, the finding of the jury should also state the value of the property, to the end that the punishment for grand or petit larceny may be inflicted, and as there is no such finding in this case, the court below ought to have presumed the property to have been of less value than twenty-five dollars, and inflicted the penalty accordingly. This question, under the Code, cannot be raised in arrest of judgment, as it says: "The *only* ground upon which a judgment shall be arrested is, that the facts stated *in the indictment*, do not constitute a public offense within the jurisdiction of the court." In the case of *Tepper v. The Commonwealth of Kentucky*, (*1 Met. 9*), an attempt was made to reverse the judgment on the ground that the court had no jurisdiction of the case, and the Supreme Court of the State said: "It no where appears that the appellant objected to the jurisdiction of the court before which he was tried; but if he had, and had saved the point by exception, *it could not avail for reversal in this court.* * * * Such motion (in arrest of judgment) cannot go behind the indictment. The *only* inquiry, permissable upon it, relates *to the sufficiency of the indictment.*"

The Code says: "an indictment must contain the title of the prosecution—the name of the court in which the indictment is presented—the names of the parties, and a statement of the acts constituting the offense, in ordinary and concise language, in such a manner as to enable a person of common understanding to know what is intended," *sec. 121.*

Section 128 of the Criminal Code says: "The indictment is sufficient if it can be understood therefrom:

First. That it was found by a grand jury of a county, im-

paneled in a court having authority to receive it, though the name of the court is not accurately stated.

Second. That the offense was committed within the jurisdiction of the court, and at some time prior to the time of finding the indictment.

Third. That the act or omission charged as the offense, is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case."

This indictment is not susceptible to objection for any of the causes mentioned in the first and second clauses of section 128, and if to objection at all, it is on the ground that the offense is not stated with sufficient certainty to enable the court to pronounce judgment on conviction.

The verdict of the jury is, that "We, the jury, find the defendant guilty in the manner and form as charged in the indictment." The only inquiry then for the court below, was, does the indictment charge an offense, and if so, what is the punishment applicable to it? That it charges an offense there can be no question. But the appellant insists, that in as much as the finding of the jury does not disclose the value of the goods obtained by the fraudulent practice, the court can not render a judgment, because it is not known whether the jury found the appellant guilty of obtaining twenty-five dollars value of property, or more, and that the value of the property obtained determines the judgment to be pronounced.

In the case of *Conkey v. The People* (*5 Park Crim. Rep. 36*,) there were three counts in the indictment: 1st, rape; 2d, assisting Herrington to commit a rape; and 3d, an assault with intent to commit a rape. The verdict of the jury was, that "they find the prisoner guilty of the offense charged in the indictment." It was claimed that such verdict found the prisoner guilty of all the offenses charged, without specifying which; but the court held, that in effect it was a general verdict and that in such case, the practice was to pass judgment on the count charging the highest grade of offense—that if the

jury had intended to have found the prisoner guilty of one of the inferior grades of the offense, they would unquestionably have employed language expressing such an intention. (*Whar. Crim. Law, sec. 3048; 12 Serg. & Rawle, 69.*)

The indictment, in this case, charges a public offense within the jurisdiction of the court, the penalty attached to which, on conviction, would be such as is imposed for grand larceny. The finding of the jury is responsive to this charge, and the judgment of the court is in entire harmony with the verdict. The fair presumption is, that if the jury had found that the property obtained was less than twenty-five dollars, in value, they would so have returned. The absence of any such finding, coupled with the fact that they find the prisoner guilty "in manner and form as charged in the indictment," precludes the idea, that they found the value of the property taken to be of less value than twenty-five dollars. In murder, it is the duty of the jury to find the degree; but this is only so, because of statutory invasions of the common law, as to that offense. On an indictment for murder, at common law, a general verdict of guilty was followed by a judgment upon the highest grade of offense; but if the jury so elected, they could find for any of the lower grades and the judgment was pronounced upon the grade so found. In all cases, where the finding was for a less grade than that charged in the indictment, (at common law,) the practice has been for the jury to depart from a general verdict of guilty, and to enumerate the grade, and in all cases, where there has been no departure from the general verdict of guilty, the judgment has always attached to the highest grade charged. An application of these rules, to the case at bar, convinces us that there is no inconsistency between the verdict and the judgment, nor is the judgment at variance with the offense charged in the indictment. The judgment will be affirmed.

KNOTT v. KNOTT.

Appeal from Jefferson Circuit Court.

HON. WM. M. HARRISON, Circuit Judge.

Yell, for appellant.

Bell & Carlton, for appellee.

GREGG, J.

This was an action of debt, by petition, brought in the Jefferson circuit court, at its November term, A. D. 1865, for the inforcement of the payment of certain notes. The notes were executed on the first of February, A. D. 1859, and their consideration were slaves. The notes were not stamped, as required by the United States revenue law, until a short time before they were offered in evidence, upon the trial of the case. Judgment was rendered for plaintiff, from which this appeal was taken.

The only questions raised by the bill of exceptions are; first, as to the validity of the contract; and, second, as to whether the notes were evidence of the obligation on the part of the defendant, before they were stamped. Both of these questions have been determined by this court; the first, by the decision in the case of *Jacoway, adm'r. v. Denton, 25 Ark., 625;* and the second, by the decision in the case of *Bumpass et al v. Edward R. Taggart.*

These decisions are conclusive of this case.

Judgment affirmed, with costs.

HARRISON, J., being disqualified, did not sit in this case.

HON. JOHN WHYTOCK, special Supreme Judge.

WHITE v. WARD AND WIFE.

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TRUSTEES—*Purchase by, fraudulent.*—The purchase, by a trustee or agent, of the property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it.

Any such purchase is an abuse of such confidence and relationship, and any title, benefit or advantage derived therefrom, by the purchaser, is, in equity, fraudulently acquired, and inures to the benefit of the *cestui que trust*, or principal.

Appeal from Jefferson Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Grace, Garland & Nash, for appellant.

Bell & Carlton, for appellees.

BENNETT, J.

Complainant filed her bill in chancery, in the Jefferson circuit court, against Ward and wife, the appellees, to set aside and cancel a deed made to them, when, as the complainant avers, John C. Ward, one of the defendants, bought the land with her money, and fraudulently took the deed to himself and his wife, when it should have been made to Mrs. White.

Ward's defense is, that complainant was owing him, and besides was in debt to his wife for money unaccounted for, while she was guardian of Mrs. Ward; and that Mrs. White, the complainant, assigned her bond for title to Ward, and directed her vendor to make the deed to Ward and wife. The cause, upon the hearing before the chancellor was dismissed, and complainant appealed.

Without stating the testimony minutely, as detailed by the several witnesses, the following is about the true state of the case:

The complainant, Mrs. White, the mother of Sarah F. S. Ward, about the month of October, 1860, purchased a tract of

land, situated in Jefferson county, Arkansas, for which she was to pay thirty-six hundred dollars—eighteen hundred dollars of which she paid in cash, and for the balance, she executed her note, payable at a future day, she taking a bond for title to the property purchased. J. C. Ward, one of the defendants, and son-in-law of complainant, was a merchant, and had business transactions in his store with Mrs. White, and was her general agent and confidential adviser, and by him Mrs. White transacted her business. When the agent of Peirson Simpson came for payment of the residue of the purchase money, he was referred, by Mrs. White, to Ward for settlement. In fact, when said agent of Simpson came to the house of complainant, he brought a letter or note from the said John C. Ward to the complainant, requesting the complainant to make no arrangement with him, the agent, but to send him back to him, Ward, and he would settle with him, which the complainant did. Mrs. Ward positively asserts that, through the influence of Ward, he got her to assign the bond for title to him, which she never read, or heard read, upon the express statement by Ward that it was all right and proper. Ward asserts that Mrs. White either read the assignment, or that he sent it to her and she signed it, but is not positive. Ward also seeks to hold the land under a claim of indebtedness to his wife, by Mrs. White, after completing the purchase by and with Mrs. White's means or credit.

From the above statement of the case, there can be no doubt but that Ward was acting as the agent of Mrs. White in the settlement of the note and the making of the deed to the property. The rule of equity is, (in every Code of jurisprudence with which we are acquainted), that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, *per interpositem personam*, carries fraud on the face of it. See *Lord Hardwicke v. Vernon, 4 Ves. Jr. 411; Same 14 Ves. Jr. 504; Michand et al. v. Girad et al., 4 How. 553.* This general rule stands upon the great moral obligation to re-

frain from placing persons in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private. The value of this prohibition is most felt, and its application is more frequent in the private relations in which a vendor and purchaser may stand towards each other. This disability, to purchase, also arises in consequence of that relation between agent and principal which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty, his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the *possibility*, that in some cases, the sense of duty may prevail over the matters of self-interest, but it provides against the *probability* in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty. It therefore prohibits a party from purchasing on his own account, that which his duty or trust requires him to sell on account of another, and from purchasing on account of another, that which he sells on his own account. In the case of *Wormley v. Wormley*, *8 Wheat. 421*, the U. S. court declared that no rule is better settled than that a trustee cannot become the purchaser of the trust estate. It had been previously ruled in the case of *Prevost v. Gratz*, *6 Wheat. 481*, and afterwards, in *Ringo et al. v. Burns et al. 10 Peters*, *269*, "That if any agent discovers a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; and if he does, he will be held as a trustee, holding for his principal. In the case of *Church v. Marine Insurance Company*, *1 Mason. 341*, it was held, "That an agent or trustee cannot, directly or indirectly, become the purchaser of the trust property which is confided to his care. The law will not suffer any man to earn profit or expose him to temptation of a dereliction of his duty, by allowing him to act, at the same time, in the *double capacity* of *agent* and purchaser, either at a public or private sale."

The purchase of the land by Ward, while he was acting as

agent for Mrs. White, either as a trustee or agent, must inure, in equity, to Mrs. White's benefit. Ward could not defraud her by getting her to assign the bond for title to him, and by reason of said assignment, he could procure the deed to the property in his own or his wife's name, whereby he was directly or indirectly to be benefitted.

As to the manner in which the assignment was obtained by Ward, there can be no doubt that the defendant, Ward, necessarily must have had a great, if not an undue influence or control over the complainant; so much so, that the parties were not, at the time, treating on equal terms. A contract obtained from one party, so much in the power of the other, cannot be sanctioned, if confidence has been abused—if the weaker one has been overreached, or the inference is plain that advantage has been taken of age and imbecility—or the partiality of a parent or relation has been artfully made use of to strip her of her property—and possibly reduce her to dependence and want.

Mrs. White states she signed the assignment of the bond for title, without reading it or knowing of its contents, and solely upon the representation of Ward, that it was "all right and proper;" not knowing it was transferring all her rights and title to the land. The only inducement to perform this act was, the declaration of the person in whom she had confided for a number of years. It is evident that Ward had the entire confidence of his mother-in-law. Every motive of duty, not only as an agent, but of a relative, required him to speak the truth and not falsely. Nor can there be any ground for upholding this deed, on the principle that Ward was "procuring a home for Mrs. White," or that he intended for Mrs. White to live with him on the place as long as she lived, if she desired, or that he (Ward) was doing Mrs. White a great favor to secure a home for her, and save the place from the creditors." All these are simply declarations of Ward's, which must be considered as relating to the future; and they can have no effect in supporting the present deed. Nor will the law allow Ward to settle his accounts with Mrs. White, whether individual, or on

account of the guardianship of his wife, in this way. There have been provided proper tribunals for the adjudication of all such claims. Wherefore, from the examination of the whole case, there is little difficulty in deciding that Ward procured the assignment of the bond for title, and consequently obtained the deed under such terms as he desired, through undue influence and fraud. And whatever interest he or his co-defendant may have, by reason of said deed, in the land, belongs of right to said complainant. See *3 Cowen, 537; 14 Vesey, 273; 1st Story's Eq. sec. 238, 257; 9 How. 55.*

From a full review of the facts in the case, and a careful examination of the law applicable to them, we are satisfied that there is error in the decision of the court below and the same is hereby reversed. A decree will be entered here, divesting the title of the defendants to the lands mentioned in the bill out of them, and investing the same in the complainant.

WAYMACK *v.* HEILMAN, ET AL.

EQUITY—*Parol evidence.*—The rule that parol evidence is not admissible to contradict, vary or materially affect a written contract, is not contravened by the admission of such evidence to show a failure, a want, or an illegal consideration in a written contract.

CONFEDERATE MONEY—A contract, the consideration of which was Confederate money, is illegal and void.

Appeal from Pulaski Chancery Court.

HON. T. D. W. YONLEY, Chancellor.

Clark & Williams, for appellant.

Wassell & Moore, for appellees.

BENNETT, J.

In October, 1864, John H. Rosenbaum executed to Micajah Waymack, the appellant, his writing obligatory for $500, and a mortgage on lands, in the county of Pulaski, to secure the sum. Rosenbaum died, leaving the appellees his heirs at law.

In 1866 Waymack filed his bill to foreclose the mortgage; appellees answered the bill, setting up, as a defense, that the consideration of the writing obligatory and deed of mortgage was "Confederate money," lent and advanced to Rosenbaum by appellant. The bill was dismissed for want of equity; complainant brought error. There are but two questions presented by the bill, answer and proof.

First. Is the proof adduced sufficient to sustain the averments in the answer?

Second. Is a contract, the consideration of which is Confederate money, illegal and void?

The first is a question of fact, the second a question of law.

The answer was supported solely by the deposition of Henry C. Heilman, the son of the defendant, Mrs. Heilman, who testified "that he saw Mr. Waymack, the complainant, at the house of the defendant, Mrs. Heilman, and he proposed to sell her a mortgage on John Rosenbaum's tract of land. He (Waymack) said that John Rosenbaum had made the mortgage to him for $500, in Confederate money, and he offered to sell it to her (Mrs. Heilman,) for half the amount in greenbacks."

This was all the testimony in the case. It is urged by appellants that parol evidence cannot be introduced to show consideration, as the action is founded upon a written instrument.

We can see no point in this objection. Although it is a settled principle, both in the English and American courts, that parol evidence is not admissible to contradict, vary or materially affect, by way of explanation, a contract in writing, upon the ground that written evidence is of a higher grade than the

mere verbal declarations of witnesses, and consequently when parties have agreed upon terms of a contract, which is afterwards reduced to writing, the verbal agreement is merged into the written contract. Yet it has been often held as no violation of these doctrines, or if so, in terms as well settled as these doctrines themselves, that although, upon the face of the instrument in writing, the usual expression of consideration, such as "for value received," may be found, yet the maker may show, as against the payee, or other person standing in the same situation, that the note or bond was given without consideration, or that the consideration has failed, or that fraud, in respect to it, was practiced upon him by the other party and under some circumstances, that the consideration was illegal. The American cases to this point are collected by the learned annotators upon *Phillips' Evidence, Cowen & Hill, Ed. 3 vol. 158-172.*

The rule which forbids the admission of parol evidence to contradict or vary a written contract, is not infringed by any evidence of known and established usage respecting the subject to which the contract relates. See *Vaugine et al. v. Taylor et al., 18 Ark. 65; Clinton v. Estes, 20 Ark. 216*, and cases there cited.

The question of admissibility having been disposed of, it remains but to ascertain whether the testimony presented sustains the answer. The evidence, though weak, we think was sufficient for the chancellor to have found that the consideration of the note, for the security of which the mortgage was executed, was for Confederate money.

Was such a contract illegal and void? We deem this question as *res adjudicata.* The language of this court in the case of *Latham v. Clark, 25 Ark. 574*, is conclusive.

The doctrine seems now to be pretty well settled that the courts, in cases where the contract is founded upon an illegal consideration, will leave the parties where it finds them, giving no relief and no countenance to claims of this sort.

Finding no error in the proceedings of the court below, the decision will be affirmed.

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PALMER v. McCHESNEY.

MANDAMUS---*Hearing upon.*—Under section 519, Code of Practice, the *hearing* upon *mandamus* is to be by the *court*, and not by the judge at chambers.

SPECIAL JUDGE---*Election of.*---Under section 758, the clerk is not authorized to hold an election for a special judge at chambers.

APPEALS---*What requisite.*---*Appeals* only lie from the final orders or judgments of the circuit court, and only from such final orders or judgments as cannot be corrected, on motion, in the court below, and not then, until the question has been submitted to and overruled by the inferior court.

Appeal from Independence Circuit Court.

HON. ELISHA BAXTER, Circuit Judge.

Watkins & Rose, for appellant.

Montgomery & Warwick, for appellee.

McCLURE, C. J.

This cause comes here from Independence county. It appears, from the transcript in the case, that McChesney, as school trustee, presented to the judge of the Independence circuit court, at chambers, a petition for a *mandamus*, the prayer of which was to compel the appellant to pay over to him certain money collected as school funds. The defendant demurred to the petition; the judge overruled the demurrer, and the appellant answered. It is not necessary to say anything about the matters set up in the answer, only that the multitude of counsel evinced great ignorance of the law.

The appellant filed with the clerk an affidavit, under the provisions of section 758, stating that he did not believe that the judge would give him a fair and impartial trial, together with a motion for a special judge, which motion was overruled by the court. Thereupon the judge awarded a *mandamus* against the appellant, and Palmer prayed an appeal to this court, and filed a *supersedas* bond. All these proceedings occurred *at chambers*. Section 517 of the Code says: "The *court*

shall hear and decide all questions of law or fact arising on the motion, and the granting or refusing of the writ shall be the final order in the motion."

Section 518 says: "During the pendency of the motion, the *court*, or judge, *in vacation*, may make temporary orders for preventing damages or injury to the applicant, until the motion is decided."

Section 519 says: "The writ of *mandamus*, as treated of in this chapter, is *an order of a court*, of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law," etc.

The language of the Code, just quoted, goes to show, clearly, that the hearing upon *mandamus is by the court*, and not by a judge at chambers. At a hearing at chambers, it very seldom happens that there are any attorneys present, save such as are employed in the case. How, then, can the clerk, under the provisions of section 758, hold an election for special judge, of the practising attorneys of the court, not engaged in the case?

Appeals only lie to this court from the judgment or final order of the circuit court, (section 566), and they only lie in relation to such final orders and judgments as cannot be corrected, on motion, in the lower court, and not then, until the inferior court has had the question submitted to it, and has overruled the same. (Section 886.)

The transcript, in this case, does not purport to be the copy of the record of any court of this State, and, of course, does not show the final order or judgment of any court.

The case will be stricken from the docket.

English & Wilshire v. Chicot County.

County—*Powers of—how construed.*—Counties are political corporations, and as such, their powers are strictly construed.

Auditing accounts.—The power to audit and settle claims for or against a county, must be confined to such claims as the county had authority to contract.

Subscription to Railroad Stock.—The power to subscribe the internal improvement fund of a county, to the capital stock of a railroad company, does not carry with it the power to make the county responsible in her political character.

Cannot issue bonds in payment.—The act of January, 25, 1855, authorizing counties, "*having or controlling* internal improvement funds or credits granted to it by the State," to subscribe to the capital stock of any valid, duly authorized railroad company, did not authorize the counties to issue bonds of the counties in payment thereof, which, by any possibility would have to be paid by the tax payers of the county.

Appeal from Chicot Circuit Court.

Hon. H. B. Morse, Circuit Judge.

English, Gantt & English, for appellants.

The county court of Chicot had authority to subscribe the internal improvement fund of that county; see *sec. 52, chap. 101., p. 713, Gould's Dig.;* and that the Mississippi, Ouachita and Red River railroad company, was a valid and duly authorized railroad company; see *State v. same, 20 Ark., 495, on quo warranto.* Having authority to subscribe for stock, the power to issue its bonds, for stock taken, follows as an incident. *Seybert v. City of Pittsburg, 1 Wallace U. S., 272; 2 ib., 110; Commonwealth ex rel., Ribneth v. Council Pittsburg, 41 Penn. State R. 278;* and the presumption is, that the bonds were regularly issued; *Hartrup v. Madison City, 1 Wallace, 291.* Even if there were irregularities in issuing the bonds, they are nevertheless valid in the hands of *bona fide* holders; *Mercer Co. v. Hacket, 1 Wallace, 83; ib., 392.*

Garland & Nash, for appellees.

McCLURE, C. J.

It appears from the record, in this case, that the county of Chicot issued ten, $1000 bonds, in May of 1860, to the Mississippi, Ouachita and Red River railroad company, payable five years after the date thereof, with interest thereon, payable annually, at the rate of eight per cent. per annum.

The bonds numbered 2, 3, 4, 6, 7, and 8, have the following endorsements thereon, respectively :

"Pay to the order of Lloyd Tilghman, E. & C. Wilson, Secretary and Treasurer, M. O. and R. R. R. R. Co."

Pay to the order of English and Wilshire for collection.

A. M. TILGHMAN, Executrix.

In April of 1868, English & Wilshire presented these bonds to the county court, and asked an order for the payment of the principal and interest of these bonds. The county court refused to make an order for the payment of the bonds, and English & Wilshire prayed an appeal to the circuit court, which was granted. The action of the county court was sustained by the circuit court and they appealed to this court.

It appears from the record, that certain citizens of Chicot county presented a petition to the county court to subscribe the internal improvement fund of the said county to the capital stock of the Mississippi, Ouachita and Red River railroad company, for the purpose of enabling said company to complete said road, "to a point west of the Mississippi overflow, on the high lands of Drew county." In response to this petition the county court "ordered, adjudged, and decreed, that said county of Chicot, do subscribe to the capital stock of said railroad company, the sum of ten thousand ($10,000,) dollars, for the payment of which the internal improvement fund of said county, not already appropriated by order of this court, is hereby appropriated."

"And it was further ordered, adjudged, and decreed, that said county of Chicot shall issue, under the bond and seal of the county judge, attested by the clerk of the court, under his

official seal, ten bonds, each for the sum of $1000, payable in five or ten years from date, as the county attorney of this county shall deem most proper, bearing eight per cent interest, payable annually."

"And it was further ordered, adjudged, and decreed that all of the internal improvement fund of said county, now in the hands of the internal improvement commissioner, and not already appropriated by this court, or that may hereafter come into the hands of said commissioner, with all interest that may accrue on the same, is hereby set apart and appropriated as a fund to meet and liquidate the principal and interest of said bonds, as the same may become due."

And it was further "ordered, adjudged, and decreed, that the subscription is ordered upon the condition that said railroad company will receive said bonds at par, in payment for stock in said railroad," and the county attorney was authorized and empowered to represent the interest of the county, etc.

On the 23d of July, 1860, the county court had a settlement with the internal improvement commissioner, and it was ascertained that said commissioner had the sum of $8,669 86 of the internal improvement fund on hand. On the 5th of November, 1861, the internal improvement commissioner made another report to, and settlement with the county court, and from this report it appears that he received $9,864 60, of internal improvement fund since his previous settlement.

Thus it will be seen, that the commissioner received $18,534 46, which was specifically set apart for the express purpose of paying the bonds now in controversy. The fifth section of the act of January 22, 1855, authorized "the county court, of any county, to subscribe to the capital stock of any valid and duly organized railroad company, incorporated under any act of this State," the internal improvement fund, and to appoint an agent to represent the interest of the county. The proceedings we have detailed at some length, seem to have been taken under the provisions of this statute.

Of the $18,534 46, the county court ordered the commis-

sioner to cancel the bonds of the county, held by him, to the amount of $6,000 00, and that $6,000 of the capital stock of the railroad company be deposited in lieu thereof. Whether more than $6,000 00 of railroad stock was issued to the county does not appear; nor does the subsequent settlement of the commissioner show any other payment for railroad stock.

The question arising in this case is; did the act of January 22, 1855, authorize the county court *to issue the bonds of the county*, in payment of railroad stock? The bonds issued by the county court, and that are now in controversy, read as follows: "The county of Chicot acknowledges to be indebted to the Mississippi, Ouachita and Red River railroad company, in the sum of one thousand dollars, which sum the said county of Chicot promises to pay to the order of said railroad company, five years after date, with interest thereon, at the rate of eight per cent. per annum, payable annually." This bond, as will be observed, says nothing about the internal improvement fund being pledged to its payment, but at its head, it says, that it is "issued by an order of the county court, at the April term 1860."

The law referred to, authorizes counties "having or controlling internal improvement funds, or credits granted to it by the State," to subscribe to the capital stock of any valid and duly organized railroad company. The authority conferred by this act, as will be observed, is *not* that counties having internal improvement funds may *issue bonds;* but that counties having internal improvement funds may "subscribe to the capital stock of any duly organized railroad company of this State." It was not the intention of the framers of the act of January 22, 1855, to authorize the county court of any county in the State, to subscribe for stock in a railroad and issue bonds of a county in payment thereof that, by any possibility, would have to be paid by the tax payers of the county. It seems to have been the intention of the framers of the act, that the amount of stock which a county might subscribe for, should not exceed the amount that the internal improvement fund of the county would pay.

But to return to the question; did this act authorizing counties to "*subscribe*" for railroad stock, authorize the county court *to issue bonds* of the county to pay for it? In the enumeration of powers that belong to county courts, as fixed by section VII of Gould's Digest, chapter forty nine, (317,) we do not find that county courts are authorized to issue the bonds of the county for any purpose. Counties are political corporations and are created for specific purposes, which are well known. The county court stands in the same relation to the county, as do the board of directors to a private corporation. The powers of a corporation are construed strictly, and the act, creating it, is never construed to include only the exercise of such unexpressed powers as are absolutely necessary to carry into effect such as are expressly delegated. The power to tax the tax payers of Chicot county to pay for stock subscribed to a railroad company is not given by any statute within our knowledge, in force at the time these bonds were executed, and in the absence of any such statute the county court did right to reject the claim. But let us look at the question in another light and admit for the purpose of the argument, and we admit it for the purpose of the argument only, that the act authorized the county court to issue *the bonds of the county*, and pledged the internal improvement fund to their redemption; what then is the condition of the bondholders? We have said that the bond declares on the face of it, that it was "issued by an order of the county court, at the April adjourned term, 1860."

The question now arises, is not every holder of the bonds bound to take notice of the order of the court, and the conditions under which they were issued?

By the terms of the order, authorizing the issue of the bonds, it is very clear that the county court intended the holders of the bonds, at maturity, should look to the internal improvement fund, and not to the tax payers of the county, for payment.

The order of April 26, 1860, is as follows: "And it is further ordered, adjudged and decreed that all of the internal im-

provement fund of said county, now in the hands of the internal improvement commissioner, and not already appropriated by this court, or that may hereafter come to the hands of said commissioner, with all interest that may accrue on the same, is hereby set apart and appropriated, as a fund, to meet and liquidate the principal and interest of said bonds, as the principal and interest may, respectively, fall due."

This was a specific appropriation of *all* the money belonging to that fund, which was then in the hands of the commissioner, and *all* that might thereafter come into his hands; and the county court had no more authority to direct this fund, after having thus appropriated it, from that specific purpose, than its members had to divide it among themselves. From the moment the county court made the order, the commissioner of the internal improvement fund became a trustee for the bondholders, and the county court no longer had control of the fund.

If the commissioner obeyed the order, there is, according to his own showing of money received, the sum of $21,039 36, in his hands, with which to pay this debt. If he has disobeyed the order, it furnishes no reason why the tax payers of Chicot county should now pay the bonds; nor does his disobedience furnish the county court with any legal excuse or reason for allowing it as a claim against the *county*, to be paid by future taxation. This claim is not a debt against the county, because, at the time the bonds were given, there was no law authorizing the creation of any such debt, as a county debt; nor is there any law, that we are aware of, that would authorize the county court to audit and pay a claim that they had no authority to incur under the laws of the State, and which they have not since been authorized to do.

It is urged that the act of January, the 22d, 1855, authorized the counties of this State, having internal improvement funds, to subscribe to the capital stock of a railroad company, and that the authority "*to subscribe*," carried with it, as an incident, the right and power to *issue bonds* in payment thereof;

and the case of *Seybert v. The City of Pittsburg*, (*1, Wal., 272,*) is cited as an authority in point. We do not so regard it.

In that case, counties and cities were authorized to subscribe to the capital stock of a railroad company, "as fully as an individual;" and the court held, that as an individual, by agreement with the company, could have given his bond for subscription, so could the city. The language of the act, under which these bonds were issued, did not authorize the counties to subscribe "as fully as an individual;" it simply authorized counties to use the internal improvement fund, belonging to the county, in payment of the stock subscribed. In other words, the act of January, 1855, did not authorize the county court, of Chicot county, to use the credit *of the county* in payment of subscriptions to the capital stock of a railroad company; it simply authorized the county court to subscribe the proceeds of a specific fund. If the object of this proceeding was to obtain an order from the county court directing the commissioner of internal improvement to pay the bonds and accrued interest thereon, out of the money in his hands, it ought to have so stated. An allowance of this claim by the county court, as a just and valid claim against *the county*, is beyond the scope and power of that body. The county court is authorized to audit and settle claims against the county; but, in the exercise of this power, they must confine themselves to the allowance of such claims as the county *had authority to contract.*

The power to subscribe the internal improvement fund of a county, to the capital stock of a railroad company, does not carry with it the power to make the county responsible in her political character.

The judgment of the circuit court is affirmed.

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CHICOT COUNTY v. TILGHMAN, EX'RX

COUNTY COURT—*With what powers vested.*—The county court is vested, by law, with power to "audit, settle and direct the payment of all claims against the county."

APPEAL FROM.—Appeal from the decision of the county court, in allowing or rejecting a demand against the county, lies only by the party or parties interested in the rejection or allowance, and not by citizens who are not interested.

Appeal from the County Court of Chicot County.

Garland & Nash, for appellant.

The Supreme Court has appellate jurisdiction over the final orders and judgments of the county court, unless in cases where the appeal is given to the circuit court. See *Code, p. 23, sections 15 and 16.*

The appellate jurisdiction of the circuit court, over the orders and judgments of the county courts, does not embrace a case like this. See *Code, p. 25, sec. 19.*

English, Gantt & English and Reynolds, for appellee.

Neither under the Constitution of 1836, nor 1864, would an appeal lie directly from the county court, to the Supreme Court. The circuit courts had appellate jurisdiction from all orders or judgments of the county court, etc., etc. *Gould's Digest, sec. 15, chap. 49, p. 318; also sec, 16.* See *Code Civil Practice, chap. 1, sec. 15*, referring to exceptions in *sec. 16.* See also *sec. 19, chap. 2 Code.*

The mere omission of the Code to provide for an appeal to the circuit court in such cases, does not operate as a repeal of statutes in force, allowing such appeals.

McCLURE, C. J.

It appears from the record in this case, that Mrs. Tilghman, as executrix of Lloyd Tilghman, deceased, presented an ac-

count, for allowance, against the county of Chicot. The account was for the allowance of the principal and interest upon a certain bond that read as follows:

"No.——— STATE OF ARKANSAS.

Bond of the county of Chicot, issued by an order of the county court, at the April adjourned term, 1860, for $1000.

The county of Chicot acknowledges to be indebted to the Mississippi, Ouachita and Red River railroad company, in the sum of one thousand dollars, which sum the said county of Chicot promises to pay to the order of said railroad company, five years after date, with interest thereon, at the rate of eight per cent. per annum, payable annually.

In witness whereof, etc.

(Signed.) A. H. DAVIS, *Judge.* [SEAL.]

(Signed:) B. F. STEPHENSON, *Clerk.*"

The claim was allowed and the county clerk directed to draw a warrant on the county treasurer for $1,760, it being the principal and interest due on said bond. During the pendency of the claim before the county court, the county attorney made some motions and filed a demurrer, all of which were overruled, and exceptions taken. The court then adjourned for two weeks, after the expiration of which time it met, when the county attorney, on behalf of *himself and other citizens* of the county of Chicot, prayed an appeal, which the county court rejected. Application was then made to the clerk of this court for an appeal and supersedeas, which was granted.

Section seven, of chapter 49, of Gould's Digest, (317,) in speaking of the powers of the county court, says, the court shall have the following powers: * * * "to audit, settle, and direct the payment of all demands against the county." The 16th section of the same chapter provides that "appeals shall be granted from all orders or judgments of the county court, making allowances; or refusing to make allowance to any individual or individuals, made in the county court."

These provisions of the law are in force, and by them this

case must be determined. As has been seen, the county court was vested, by law, with the power to "audit, settle, and direct the payment of all demands against the county." From the judgment of the county court in auditing, settling and directing the payment of demands against the county, an appeal is given; but this appeal only extends to such persons as may have an interest in the claim, and who feel aggrieved by the allowance or rejection of their demand; it has no reference to the citizens of a county who are not interested in the allowance of the claim. The idea of a county appealing from the allowance of a claim made by its county court, is simply ridiculous. The county court represents the county. An individual presenting a claim against the county, if the county court should only allow a part of his demand, or should reject it altogether, has the right of appeal; but should the county court allow a larger claim than a half dozen tax payers might think politic, such an allowance does not authorize them, nor confer on them the right to use the name of the county and appeal the cause to this or any other court, especially, in a case, where the county court has shown that it did not desire the case appealed.

Inasmuch as no appeal would lie in this case, *directly* to this court, either at the instance of the county court itself or volunteer appellants, it is hereby ordered that the appeal and supersdeas, granted by the clerk of this court, be set aside, and the cause is ordered to be stricken from the docket.

CHICOT COUNTY *v.* TILGHMAN, EX'RX.

Appeal from the County Court of Chicot County.

Garland & Nash, for appellant.

English, Gantt & English, and Reynolds, for appellees.

The opinion of the court in the case of *Chicot County v. Tilghman, ex'rx.*, decided at the present term, settles the question in this case.

HAYNES, ADM'R. *v.* WELLS.

FERRY FRANCHISE—A ferry franchise is a grant from the State, and it cannot be created by parties and made transferrable and descendable in fee, or absolutely, as individual property, separate and apart from the land.

TO WHOM LIMITED—The right of a ferry license is limited, by statute, to the owner or party rightfully in possession of the land on the river, and is regulated by the proper authorities for the public good.

JURISDICTION OF COUNTY COURT—*In matters of*—Whether the establishment of a ferry is for the public convenience, except where inhibited by statute, is a question for the proper county court, and its decision is absolutely binding upon every one, unless exceptions be taken and the judgment reversed or set aside.

Appeal from Perry Circuit Court.

HON. W. N. MAY, Circuit Judge.

Garland & Nash, for appellants.

It is clear that Wells' attempt to carry on the ferry, was in direct violation of law. *Gould's Dig chap. 70, sec. 1, et seq.*, and it is perfectly evident that this ferry franchise in Haynes, or his estate, was property which the courts would protect. See *Brearley v. Norris, 22 Ark. 514; 18 Ib. 19; 20 Ib. 561; Ib. 573.* But the case of *Conway v. Taylor, Excrs. 1 Black (U. S.) Reps. 603, et seq.*, settles all questions here for Haynes; and this case, with the authorities there cited, show that an injunction was the only adequate remedy Haynes had by which to protect his rights here. *2 Eden on Injunctions, by Waterman, 271-2 and notes.*

Clark & Williams, for appellee.

There is no franchise in this State separate from the ownership of lands. *Cloyes v. Keatts, 18 Ark. 19.* See also, *Gould's Dig. chap. 70, sec. 2*, as revised by the act of April 6, 1869; see *Acts 1869, p. 119.* A ferry right is a franchise belonging to

the sovereign power; see *Day v. Stetson, 8 Greenlf. 365; 15 Pickering, 243; Alrey v. Harris, 5 Johns. 175; People v. Babcock, 11 Wend. 586;* and no one can establish a ferry without permission of the sovereign power. *Stark v. McGowen, 1 Nott & M. 387; Zane v. Zane, 2 Virginia cases 13.*

GREGG, J.

The appellant brought his bill in equity, in the Conway circuit court, to enjoin the appellee from running a ferry, on the Arkansas river, at Lewisburg. He alleges that Thomas Haynes, in his life time, owned the exclusive right of way and privilege of a ferry landing; that such privilege, on each bank of the river, had been conveyed to him by the owners of the soil; that he had been licensed by the proper authorities to exercise such privilege, etc., and that he and his legal representatives had so exercised it, exclusively, for over seven years, up to the time when the defendant set up a rival ferry, which was within less than one mile of his ferry; that complainant was no party to defendant's application for license, when the same was granted to keep and run such rival ferry; that said defendant claimed to be the owner of the soil at the landings of his ferry, but that at the time he purchased said lands, he knew the ferry privilege, as aforesaid, properly belonged to the complainant, and he prays that the defendant be enjoined and restrained from keeping such ferry.

The defendant responded that Thomas Haynes, in his lifetime, had no valid or legal right to keep, use or control such ferry privilege; he admits that Haynes run a ferry for several years, but alleges that the landing was on the real estate of the defendant, and that Haynes and his legal representatives were tenants of his, and that they paid him an annual renting for that privilege; he denies that he ever had undisputed possession. He admits that Haynes and Gray, who claimed the lands, conveyed to Thomas Haynes a right of way to a ferry

landing, but says that they had no ferry rights that they could convey; that a right of way or ferry privilege, could not carry with it a ferry franchise against the owner of the lands, and that he owns the lands and has a license procured, over the resistance of complainant and his counsel, from the proper authorities, and that by virtue of his ownership of the lands adjoining the river, and his license, he is rightfully exercising such ferry privilege; and he submits, by way of demurrer, that there is no equity in complainant's bill; that he has shown no title, etc.

Replications were entered and the case set for hearing; depositions were taken, and at the May term, 1870, the case was heard upon the bill, answers, replications, exhibits and depositions.

The court found in favor of the defendant and dismissed the bill for want of equity, and decreed costs against the complainant, from which he appealed to this court.

The complainant showed that certain owners of the lands conveyed to his intestate a right of way and ferry privilege, but shows no conveyance of the soil or any interest therein.

The conveyances seem to have been made upon the supposition that the ferry franchise was individual property that would descend or might be transferred without regard to the claims of the State, or any right in the lands.

Our statute declares that "Every person owning the land fronting on any public navigable stream, shall be entitled to the privilege of keeping a public ferry over or across such navigable stream," etc. *Sec. 2, of chap. 70, Gould's Digest.*

Section 7, of the same chapter provides, that any one, wishing to procure a license, shall show that he is lawfully in the possession of such land, etc. On this point, see *16 B. Monroe, 699.*

The bill of complaint makes no averment of any right, possessory or otherwise, in the lands on either bank of the river. The statute limits the right of a ferry license to an owner or some one rightfully in possession of the lands, and it was not

in the power of the parties to create a ferry franchise, an incorporal hereditament, transferable and descendable, separate and apart from the real estate, wherewith it was allowed. *Cloys v. Keatts, 18 Ark. 19; Conway v. Taylor's Ex'rs. 1 Black. 603*, and cases there referred to.

The statute law, as found in the chapter above referred to, inhibits the granting of a ferry license to run a ferry within one mile of an established ferry, except at or near cities or towns, where the public convenience may require it.

The bill in this case shows that the license herein complained of, was to carry on a ferry at the town of Lewisburg; whether or not a second ferry created at the town of Lewisburg is for the public convenience, is a question to be determined by the proper county court, and when so determined by such court, it is absolutely binding upon every one, unless exceptions had been taken to that decision and the judgment of that court set aside. *Lindsey v. Lindley, 20 Ark. 573.*

We are of opinion that a ferry franchise cannot be held and conveyed as individual property, absolute and separate from the real estate; such franchise is a grant from the State and has not been made to pass any title absolutely, or in fee, to any private parties, and the same is subject to regulation by the proper authorities for the public good; and a privilege of a grant to individuals, under the statute, is to those owning, or rightfully possessed of lands on the river.

Finding no error, the decree of the court below is affirmed.

REYNOLDS *v.* CRAYCRAFT, *assignee of Walker.*

PRACTICE.---Where there is no judgment on the finding, there is nothing to appeal from.

Appeal from Chicot Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Garland & Nash, for appellant.

Watkins & Rose, for appellee.

This cause comes here from Chicot county. It appears that the cause was submitted to the court, sitting as a jury, upon an agreed state of facts. The court found for the appellee. Reynolds appealed to the Supreme Court. The finding of the court, as has been stated, was for the appellee. There was no judgment on the finding; this being true, there is nothing to appeal from.

The cause will be dismissed.

CITIZENS' BANK OF LOUISIANA *v.* WALKER.

INJUNCTION---*Dissolution of.*---The dissolution of a temporary injunction, before a hearing on complaint and answer, is not such a final order as that an appeal will lie from it.

Appeal from Chicot Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Garland & Nash, for appellant.

The dissolving of the injunction was not an interlocutory

order in this case; it was a final order, as the injunction was all and everything in the case, and in such case an appeal will lie. *25 Ark., 420*, and cases cited; *6 Leigh. (Va.), 196–7; Paige 18; 2 Daniel Ch. Pr., 1192–9.*

Rice & Benjamin, for appellee.

This court has no jurisdiction in appellate cases, only upon a final judgment or decree. An order to dissolve an injunction is not a final order, judgment or decree, and cannot be appealed from until the case is finally decided. See *Rodman v. Fortner, admr., etc., 2 Met., (Ky.) 325; also Herndon v. Higgs, 15 Ark, 389; Johnson v. Alexander, 6 Ark., 302.*

McCLURE, C. J.

This cause comes here from Chicot county. The appellants filed their complaint in the Chicot circuit court setting up some irregularities in the levying of a school tax, and asked that Walker, the collector, be restrained from collecting said tax, "until the final hearing of the cause," and that, upon the final hearing, the injunction be made perpetual.

The appellants applied to two justices of the peace, and a temporary injunction was obtained restraining the appellee from attempting to collect said district school tax, until further ordered by the circuit court.

At the April term of the circuit court, the appellee answered the complaint of the appellants, and filed a motion to dissolve the injunction, granted by the two justices of the peace, on the ground "that justices of the peace do not possess the power or jurisdiction to grant an injunction in actions originally brought in the circuit court."

The order of the court, on this motion, is as follows: "Ordered that the motion to dissolve the injunction be sustained." To which order and ruling of the court the plaintiff excepte and appealed to court.

As will be observed, there was no hearing of this case on

its merits, or upon the complaint and answer. The hearing was upon a motion to dissolve an injunction, granted by two justices of the peace. The appellant urges that this is a final order, and may be appealed from. We do not assent to any such proposition. There has been no hearing on the complaint and answer; nor is there any judgment against the appellant. Whether the tax was legally or illegally levied (and it is only on the disposition of this question that this case will be disposed of, on its merits), has not been adjudicated or determined by the court below. That issue is yet pending in the circuit court; when it is disposed of, the determination of the court, at that time, can be reviewed here, in a proper manner.

If the appellant had desired a reinstatement of the temporary injunction, until the case was disposed of on its merits, the ingenuity that obtained an injunction from the justices of the peace, ought certainly have found the remedy provided by *sections 321 and 322.*

The motion to dismiss is sustained, and this cause will be stricken from the docket.

MAGNESS *v.* WALKER.

EVIDENCE—*Admissibility of wife*—The exclusion of the wife, when offered as a witness for the husband, at common law, was upon the ground of her interest in the subject matter, and when offered as a witness against the husband, on the ground of public policy; but our Constitution has made great innovations, upon the common law rule, respecting the exclusion on account of *interest*; admitting all parties in interest to testify.

WHEN WIFE COMPETENT.—Where the wife was agent for the husband in the making of the contract, she is competent to testify when called by the husband.

Appeal from Independence Circuit Court.

HON. ELISHA BAXTER, Circuit Judge.

Watkins & Rose, for appellant.

We submit: 1. That where the wife is the agent of the husband, acting in his absence, then from the necessity of the case, the wife is competent. *Town v. Lampshire, 37 Vt. 52. Littlefield v. Rice, 10 Metc. 287; Stanton v. Day, 378; 1 Gr. Ev. sec. 334, n. 1; Owen v. McCawley, 36 Barb. 55*; and our Constitution removes all incompetency on account of the witness being either a party to the record or a party in interest. *Art. 7, sec. 22.*

2. That wherever the husband is made competent, there the wife becomes competent also. *Ill. Cent. R. R. Co. v. Taylor, 24 Ill, 323; Mariam v. Hartford R.R. Co. 20 Conn. 363; Lockhart v Leeker, 36 Miss. 68.*

3. That confidential communications are excluded, unless at least, both husband and wife consent to their admission. *Rup v. Steamboat War Eagle, 14 Iowa, 376; Birdsell v. Dunn, 16 Wis. 225; Blake v. Graves, 18 Iowa, 312; Jordan v. Henderson, 19 ib. 565. See also generally Walker's Am. Law, 240; Ill. Cent. R. R. v. Taylor, 24 Ill. 323; Same v. Copland, ib. 335.*

GREGG, J.

The appellant brought suit for two hundred dollars, for rents; a trial was had before a justice of the peace, and he recovered $150. Walker appealed to the circuit court, where a trial was had *de novo*, and he recovered judgment for $6, against Magness, upon his set off, which had been filed in the court below; from which judgment Magness appealed to this court.

During the progress of this trial, various exceptions were taken to the rulings of the court, all of which were properly preserved and are presented to this court.

The only question not heretofore sufficiently settled by this court, relates to the admissibility of the wife of the appellant, as a witness for him, and of her declarations or admissions made before the trial.

The appellant proved that he was absent in the State of Texas, in 1864, and until in August 1865, and that, during his absence, his wife acted as his agent in renting the farm, etc., and that she rented certain lands to the appellee. He then offered to introduce his wife as a witness, and to prove the contract made between her, as his agent, and the appellee, to which the appellee objected and the court sustained his objection and refused to allow her to testify.

During the progress of the trial the appellee introduced his brother, John Walker, by whom he offered to prove the admissions or statements of the wife of Magness, made to him, after the making of the contract, and before the trial, and in the absence of both of the parties; to the making of which proof, the appellant objected, but the court overruled his objections and allowed the witness to testify as to what Mrs. Magness told him were the terms of the agreement between her and the appellee, to which also exception was taken.

The rule of the common law, as to the admissibility of testimony, has been, by legislative enactment, in many of the States, modified or changed, and no greater, in allowing parties in interest to testify, has been made than that in our own State, where we have a constitutional provision, that, "in the courts of this State there shall be no exclusion of any witness in civil actions, because he is a party to, or interested in the issue to be tried." This not only goes to the length of some of the State statutes of allowing parties to suits to testify, but also provides that no interest shall disqualify. In the case of *Merryman v. Hartford & New Haven, R. R. Co.*, the Supreme Court of Connecticut say: "We are of opinion that a just construction of the 141st section of the act for the regulation of civil actions, the wife of the plaintiff was a competent witness in his behalf. It was the express object of that section,

to remove the common law disqualification of persons, as witnesses, in all civil suits, by reason of their having an interest in the event of the same. In legal contemplation, the husband and wife are one person; their interests are therefore identical. This is the ground of their exclusion, by the common law, as witnesses for each other." And after discussing the ground of the exclusion of the wife upon public policy, etc., they declare the doctrine as above stated, that "interest is the true ground upon which such exclusion has heretofore been maintained." *20 Conn. 363.*

The present Chief Justice of Illinois, in delivering the opinion of the court in the case of *The People, ex use, etc. v. Randolph et al., 24 Ill., 324*, says: "We think the general rule is, that a wife can be a witness in all cases in which the husband could be a witness."

In New York, Ohio, and, perhaps, some of the other States, the provisions of their Codes are different from the rule in this State, and declare a disability to exist because of the marriage relation of the parties; in some of them, a provision that the husband, interested in the suit, may waive objections, etc , and upon such statute, the courts, of course, rule differently from what would be the decision upon a law such as ours. See *Ross v. Steamboat War Eagle, 14 Iowa, 374.* But, even in most of the decisions, the common law rule is announced that the wife is excluded from being a witness against her husband, because of the relation existing between them; and she is prohibited from testifying in his favor, because their interest is identical, and by that rule, under the strong and explicit language of our law, she would certainly be competent to testify in his favor, wherein all disqualification, arising upon interest, is removed, and we are not wanting for authority holding that the testimony in many cases depends upon the election of the husband and wife, as to whether or not they will waive such privilege. See *Birdsell v. Dunn, 16 Wis., 239; Littlefield v. Rice, 10 Metcalf, 287; Pellry v. Wellesley, 3; C. and P., 558*, and cases in those referred to.

There is another well established rule of practice prevailing, even at common law, that in various cases, parties in interest and otherwise disqualified, out of the necessity of the case, are allowed to testify; for instance, as to the loss of a written instrument, the contents of a lost trunk, the hand writing of certain book entries, etc., and some extend this rule to cases of agencies, etc. *1 Greenl. on Ev., sec. 416; Martin v. Howell, 1 Stevn., 647; Ware v. Bennett, 18 Tenn., 749.*

And the general rule, as laid down by Judge BRUCE, does not seem to be seriously controverted anywhere, that in cases wherein the plaintiff himself is competent, he may also introduce his wife to establish like facts.

In the case of *Birdsell v. Dunn, 16 Wis., 238*, the Supreme Court of that State say: "A *feme covert* may act as the agent or attorney of her own husband, and, as such, with his consent, bind him with her contract, or other act;" and they refer to *Story on Agency, 57.* "When she acts as such agent, in any department or business, the husband is also bound by her declarations and admissions in relation to matters done under her direction, and they may be given in evidence against him. If the mere declarations of the wife, without oath, are admissible in such a case, it seems difficult to perceive upon what principle her testimony, upon oath, if properly tendered, to the same facts is to be excluded." * * * * *

"The competency of agents to prove acts done within the scope of their agency, was well established at common law, notwithstanding many more had an interest in their acts, respecting which they were called to testify. This exception to the general rule had its foundation in public convenience and necessity." *1 Greenleaf on Ev., sec. 416; Martin v. Howell, 1 Stev. 647; Denison v. Cooper, 3 Wis., 30; Matthews v. Hayden, 2 Esp., 509.*"

After reciting several cases of exceptions to general rules, for the admissibility of evidence, this court says: "It is apparent, from this brief examination of decisions, that the rules of the common law, excluding witnesses, either on the ground

of interest or public policy, are, by no means, inflexible. We are of opinion, especially since the enactment of the statute removing the disabilities of parties, that the case of a wife, acting as the agent of her husband, should constitute an exception, as to all business transacted by her within the scope of her employment; and, therefore, that the testimony of Mrs. Dunn, the wife of the defendant, should have been received to that extent."

We think it quite clear, from an examination of the common law authorities, that the exclusion of the wife, when offered as a witness on the part of her husband, was based upon the ground of interest; that what was beneficial to the husband was likewise profitable to her; that they were identical. When the wife was offered as a witness against the husband, then the grounds of public policy and the peace and quiet of families were assumed as sufficient cause for her exclusion. Under this rule, when by legislative enactment all suitors and *all parties* in interest are rendered competent, it seems to us the wife is not incompetent, when called by the husband.

In the case before the court, the wife was the agent on the part of the husband, who was absent, in the State of Texas, when the contract of writing was made between his wife and the appellee; the husband could necessarily know nothing personally of the contract.

The court permitted the appellee to be sworn and examined as a witness for himself, who gave, in detail, his version of the contract; and then the court excluded the agent and wife of the appellant from testifying, and thereby destroyed all mutuality of rights in the evidence of interested parties, a result certainly never contemplated by those who enacted the law; and we hold, not sustained by the weight of authority, or the recent decisions of the courts.

The further ruling of the court below, in this case, exhibits the error into which it had fallen. That court allowed John Walker, the appellee's brother, to give in evidence casual con-

versations had with the wife of the appellant, long subsequent to the contract. Now, will it be insisted by any one, that all the wife's loose and careless remarks, made at various times, and in the absence of both of the parties, are competent to be introduced as evidence, when her solemn oath cannot be heard in the presence of the parties and the court? To assume such, would present strange reasoning for the discovery of truth. If such was the law, it would not only fail in justice and reason, but would border on absurdity.

Then, without attempting to decide all questions that may arise as to the competency of the wife as a witness against, as well as for, her husband, we hold, that in this case, where she acted as agent for her husband, and, in his absence, entered into a contract of writing with the appellee, she was competent, when called as a witness by her husband, to testify in reference to such contract, and the court below erred in excluding her; and for that error, the judgment of that court is reversed, this cause remanded that a new trial may be had according to law and not inconsistent with this opinion.

GILES, ADM'R. *v.* WRIGHT.

EVIDENCE---*Competency of administrators, etc.*---It was not the design of Art. VII, sec. 22, of the State Constitution, to exclude, *absolutely*, the testimony of the parties therein mentioned, respecting all matters in controversy between them; but *only* in respect to those transactions that were strictly *personal*, and where, in the nature of the case, the privilege of testifying could not be reciprocal and of mutual advantage.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Garland & Nash, for appellant.

While the court may require a party in interest, where the evidence is nearly or equally balanced, or in some other instances, to testify, yet we submit that, in this case, Wright not having been required by the court to testify, it was error in the court to permit him to do so. See, *Howland* will case, reported in the July No. 1870, *American Law Review, p. 656, et seq.*

Farr & Fletcher, and E. W. & Dick. Gantt, for appellee.

It is contended by counsel of appellant, that the circuit court erred in permitting Wright, who was plaintiff, to testifiy. The Constitution does not prohibit the party who sues an administrator from testifying as to transactions with the intestate, unless called by the opposite party or required by the court to testify. See *Constitution of Arkansas, Article 7, sec. 22.* If the court erred in permitting Wright to testify, yet, if there was other sufficient evidence, that error is not a sufficient cause for the reversal of the judgment. *Walker v. Walker, 7 Ark., Rep., 543; Davies v. Gibson, 2 Ark. Rep., 115; Payne v. Britton 10, Ark. Rep. 54; Sumpter v. Gains, 19 Ark. 96.*

HARRISON, J.

Weldon E. Wright, the appellee in this court, appealed to the Pulaski circuit court from a judgment of the probate court refusing to allow a demand exhibited by him against the estate of Albert W. Webb, deceased, where, upon trial anew, he recovered judgment; and the administrator, Josiah M. Giles, appealed to this court.

The defense, opposed by the administrator, was, that the claim had been settled in a former trial between the intestate and the claimant; and he proved that the intestate brought an action of debt against the claimant in the Pulaski circuit court, to which defendant appeared and filed a plea of set-off,

and with it a bill of particulars, containing, besides others, the same items as those of his demand; that the plea was, after issue had been taken to it, withdrawn, and a settlement was had between the parties; a part of the set-off claimed was admitted against the debt and judgment entered, by consent, in favor of the plaintiff for the residue. The claimant was then, against the objection of the administrator, permitted to give evidence in relation to the settlement, and testified that only a part of the matters of his set-off were submitted in it, and that those for which he was then contending, had not been taken into consideration and were not adjudicated in the case.

The only question for our consideration is, as to the admission of the testimony of the claimant.

By a constitutional provision, Art., VII, sec. 22, there can be no exclusion of any witness, in this State, because he is a party to the action, or is interested in the issue to be tried; but it is provided, that, "in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any *transactions with*, or statements to, the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court."

It is plain that it is not the design to exclude the testimony of such parties, as to all matters in controversy, in which the testator, intestate or ward, had been interested, or in any manner connected with, but only in relation to strictly personal transactions, or such as were directly and personally with him, and where in the nature of the case, the privilege of testifying could not be reciprocal and of mutual advantage. As the testimony of the claimant did not relate to a transaction of this character, there was no error in its admission and the judgment of the court below must be affirmed.

KING & ACKMEYER *v.* CITY OF LITTLE ROCK.

PRACTICE—*Bills of exceptions*—Where there is no bill of exceptions taken—no motion for a new trial, an agreed statement of facts constitutes no part of the record, unless made so by bill of exceptions.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Howard & Reeve, and Garland & Nash, for appellants.

W. I. Warwick, for appellee.

MCCLURE, C. J.

King and Ackmeyer were charged, before the police court of the city of Little Rock, with violating one of its ordinances, and found guilty and fined ten dollars and costs, from which judgment they took an appeal to the circuit court, where the same fine was again imposed.

No bill of exceptions was taken; neither was there a motion for a new trial, and King and Ackmeyer appealed, and the record says, excepted to the judgment and rulings of the court below. An agreed statement of facts, constitutes no part of a record, unless made so by bill of exceptions or the order of the court. To hear this case under such circumstances, would be to assume original jurisdiction of the case, and the subject matter, coming within the rule laid down in the case of *Ashley v. Stoddard*, as this case clearly does, we can do nothing but affirm the judgment.

STATE, EX REL. *v.* MCDIARMID.

PRACTICE—*Rule to show cause*—Rule to show cause against particular relief sought, is obtained, on motion, *ex-parte*, and the time for the party to answer is governed entirely by the circumstances surrounding the case, and is left within the sound discretion of the court granting the same.

Motion for Writ of Quo Warranto.

Montgomery, Attorney General, *Wilshire & Coblentz, and Warwick*, for plaintiff.

Yonley, E. W. Gantt and Benjamin & Barnes, for defendant.

Quo Warranto.

BENNETT, J.

On the 31st day of May, 1871, the attorney general presented his relation, in this court, against George W. McDiarmid, and, in the name of the State, asks the consideration of the court, as to matters and things therein alleged, and that a writ of *quo warranto* be awarded against said McDiarmid.

On the 5th day of June, 1871, on the motion of the attorney general, a rule issued against the defendant, returnable upon the 12th day of June, 1871, to show cause why said information should not be filed, and a writ of *quo warranto* issue against him.

On the 12th day of June, defendant, without entering personal appearance, filed a plea in abatement, and says he is not bound to notice or answer this proceeding during the present term of this court, but is, by law, entitled to have time granted him until the first day of the next regular term of this court.

The only question presented by the plea is, whether a person, against whom a rule has been issued, is entitled to the same time for answering, as in other proceedings; we think not.

A rule to show cause, against the particular relief sought, is

obtained on motion, *ex-parte*; the time for the party to answer is governed by the circumstances surrounding the case, and is left within the sound discretion of the court granting the same. It is merely to give him an opportunity to show, if he can, such a state of facts, that, at least, he has, *prima facia*, violated no law, nor that the further process of the court should issue against him. His appearance to answer a rule does not necessarily determine any right, but gives the tribunal, which issues it, some facts upon which to say whether he shall be required to further answer its mandates.

Seeing no cause to sustain the plea the same is hereby overruled. The matters and things alleged in the relation, being deemed sufficient, the writ of quo warranto will issue.

GREGG; J., dissenting says:

I am still of the opinion that where there is no demand for a superintending control over another court, that some inferior tribunal of the State ought to issue these original writs.

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FITCH v. MCDIARMID.

MANDAMUS—In this country the writ of *mandamus* is not a writ of *right*—it is derived by grant from the government, through the Constitution or legislative enactments; the issuing or withholding it, is within the judicial discretion of the court.

WHEN GOVERNED BY COMMON LAW RULES.—When the power has been granted in general terms to a court, it is governed by the common law rules as to when it is proper to be issued.

OFFICE OF THE WRIT.—The purpose of the writ is *not* to establish legal rights or to inquire into the titles to offices, but to enforce the performance of a duty.

WHAT A PARTY MUST SHOW.—A party, to be entitled to the writ, must show by his petition, that he has a clear *legal right* to the subject matter and that he has *no other* adequate remedy.

The question of the original jurisdiction of this court in cases of *mandamus* and *quo warranto* is settled—it is *res-adjudicata.*

Petition for Mandamus.

Wilshire & Coblentz, Garland & Nash, Warwick & Montgomery, for petitioner.

This court can issue, hear, and determine writs of *mandamus* in all cases in which its jurisdiction may be invoked for that purpose. See *Price & Barton v. Page, treasurer, 25 Ark. 527.* We submit that the matters stated in the petition are sufficient to maintain the cause, in law, and that *mandamus* is the only proper remedy in this case, and not *quo warranto*, as insisted by the defendant. There is no other specific legal remedy *that is complete. Chap. 135, Gould's Digest*, does not afford a complete remedy or means of obtaining the ends sought by the proceedings. The doctrine is well supported by the authorities that, though there be another remedy, if it be not equally *convenient* and *efficacious*, the court will grant *mandamus.* See *2 Moore & Scott (Eng.) Rep. 80; 11 Adolph. & Ellis, 82; 3 Berry & Davidson (Eng.) Rep. 123; 2 Queen's Bench, (Eng.) Rep. 64; 12 Adolph & Ellis, 530; 6 ib. 355; 3 H. & M. Va. Rep. p. 1; Tap. on Mandamus, 19.* The American authorities alike support the posi-

tion. See *25 Ills. 325*; also, *2 Pick. 397: 3 Mass. 287; 21 Pick. 148, 151.*

T. D. W. Yonley, E. W. Gantt and Benjamin & Barnes, for defendant.

We submit that this court has no jurisdiction to issue the writ of *mandamus* in local or county matters, as is asked by the petition. *State v. Ashley et al., 1 Ark., 309;* and cited and approved again in *1 Ark., 335*, in *State v. Ashley; Price & Barton v. Page, 25 Ark., 533.* Also, in the case of *The State v. Johnson*, this court again cited and approved of *The State v. Ashley*, as setting forth the true doctrine.

The petition does not allege sufficient facts to entitle the plaintiff to the relief prayed for. *Mandamus* will not issue when the petitioner has another adequate remedy. See *People v. Stephens, 5 Hill, 616; People v. Trustees of Brooklyn, 1 Wend., 318; E. Nelson, ex-parte, 1 Cowen, 417; Reading v. Commonwealth, 11 Penn., State R., (1 Jones) 196; Kentucky v. Dennison, 24 How., U. S., 66; James v. Commissioners of Berks county, 13 Penn., State R., (1 Harris) 72; Goings v. Mills, 1 Ark., 11; Webb v. Hanger, ib. 121; Trapnall, ex-parte, 6 Ark., 9; Williamson, ex-parte, 8 Ark., 424.* Plaintiff had a specific and complete remedy under the Civil Code. See *secs. 525, 509, 530. Mandamus* is not the remedy to settle the title to an office. *Quo warranto* is the only remedy, and if the plaintiff has any remedy at all in this case, *quo warranto* is the proper one; the question involved being the title to office. *Bonner v. State, 7 Geo., 473; State v Auditor, 36 Missouri, 70; People v. Corporation of New York, 3 Johns. cases, 79; 6 Iredell 155; 5 Stew. & Port., 40; 1 Ala. R., 688; 3 Johns. cases 79; and note to People v. Richardson, 4 Cowen, 100.*

BENNETT, J.

The petitioner represents that, under and in pursuance of

the provisions of an act of the General Assembly of the State of Arkansas, approved March 16, 1871, he was appointed circuit clerk of Pulaski county, and that he qualified on the 18th day of March, 1871, and that, under and by virtue of said act, he is made recorder of said county of Pulaski.

The petitioner also represents that, prior to the passage of the act of the General Assembly, aforesaid, the defendant, George W. McDiarmid, was county clerk of Pulaski county, and, prior to the passage of said act, as such county clerk, was ex-officio recorder of said county; but the petitioner submits that, from and after the passage and approval of the above mentioned act, and the appointment, commission and qualification of the petitioner, the said George W. McDiarmid ceased to be recorder of said county; and the petitioner says he is the legal and proper recorder, and, as such, entitled to all the books, papers, records, etc., of said office. The petitioner further represents that the books, etc., belonging to said office, were, at the time of his appointment, etc., and now are in the possession of defendant.

The petitioner also represents that, soon after his appointment as said circuit clerk, he applied for and demanded of defendant the books and all other property belonging to said office of recorder, and has, several times since, demanded of him the delivery of said property, but the defendant has, at all times, neglected and refused to give them up.

Under this state of facts, he prays for a writ of *mandamus*.

To this petition the defendant demurs, for the following causes:

First. That, while the defendant admits the jurisdiction of this court to issue writs of *mandamus*, in all matters pertaining to the State at large, he denies the jurisdiction of this court to issue writs of *mandamus* in local and county matters, as is asked for in this case.

Second. That the petitioner, if entitled to any relief, has mistaken his remedy; that he, having admitted in his petition that the defendant is in possession of said records, by virtue

of and under color of office, to wit: county clerk, his remedy is *quo warranto*, and not *mandamus*.

Third. That the petitioner does not allege facts sufficient to entitle him to the relief prayed for.

Fourth. That so much of the act of the Legislature, approved March, 1871, as pretends to make the petitioner recorder of the county, by virtue of his office as circuit clerk, is contrary to the constitution of the State and the United States.

The first cause alleged for demurrer raises the question of the jurisdiction of this court to issue the writ in this case, the subject matter not relating to the State at large, but being local, etc.

Section 4, article 7, of the present constitution, says: "The Supreme Court shall have power to issue writs of error, *supersedeas*, *certiorari*, *habeas corpus*, *mandamus*, *quo warranto*, and other remedial writs, and to hear and determine the same."

In the case of *Price & Barton v. Page, Treasurer, 25 Ark., 527*, this court distinctly and unmistakably announced its authority to issue writs of *mandamus*, and hear and determine the same, in all cases in which its jurisdiction might be invoked for that purpose.

In a later case, *The State of Arkansas v. Johnson*, this court has enunciated the same doctrine. The question of the original jurisdiction of this court over writs of *mandamus* and *quo warranto* may be considered as settled. It is *res-adjudicata*.

The defendant, for a further ground of demurrer, states that the plaintiff has mistaken his remedy. We confess that this question is not to be solved so easily.

A writ of *mandamus*, at common law, was a command, issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or, at least, supposes to be consonant to right and justice. *2 Blackstone Com., 110.*

In England it is denominated a prerogative writ, and is a writ of right, and lies where there is a right to execute an office, perform a service or exercise a franchise; and where a person is wrongfully kept out of possession and dispossessed of such right and has no other specific legal remedy.

But in America the authority to issue the writ of mandamus does not exist as a prerogative power of the courts, but is derived by grant, from the government, through the constitution or legislative enactments. And where the power has been granted in general terms to a court, it is to be governed by the common law rules, as to when it is proper to be issued. *Kentucky v. Denison*, *24*, *How. 66*.

With us it is not a writ of right. Courts have the power to issue, or withhold it, according to their discretion. But this discretion is not an arbitrary one, it is a judicial discretion.

We have said that the issuance of this writ is to be governed by common law rules. Let us for a moment turn back to old time judges and see what they have said in relation to it.

Lord MANSFIELD, *Ch. J.*, *in Rex v. Barker*, *3 Burr.*, *1265*, says: "It was introduced to prevent disorder from a failure of justice and defeat of parties. Wherefore it ought to be used on all occasions, where the law has established no specific remedy, and where in justice and good government there ought to be one." If there be a *right*, and no other specific remedy, this should not be denied. The same principles are declared by Lord ELLENBOROUGH in *Rex. v. Archbishop of Canterberry*, *8*, *East. 219*. In the case of *Rex. v. Williams 1 Burr. 402*, the court says: "It is a common remedy for restoring persons to corporate offices, of which they are unjustly deprived, the title to the office having been before determined by proceeding by quo warranto."

In a review of all the English cases at our command, in which this writ has been brought into requisition, the courts have seemed to consider that the office must be of such a character, that the person seeking the possession of the same has such a vested and permanent interest in it as that the court

can render the operation of the writ of mandamus effective towards restitution, the title to which there can be no dispute.

As to the rule in America, Judge RICHARDSON, in the case of *Williams v. the Judge of the Cooper Court of Common Pleas, 20 Mo., 225*, says: "It is a general rule that a mandamus will not issue, unless the party seeking it has a clear right and no other specific legal remedy."

In the case of *The Board of Trustees of Franklin Township, County of Ripley, v. State, 11 Ind., 205*, the court say: "Mandamus is proper only where some legal right has been refused or violated."

Judge BREESE, in the case of the *School Inspectors of Peoria v. The people ex rel., Grove, 20 Ill., 525*, says: "The petition must show a clear legal right to the remedy asked. This writ is of such a nature that courts will grant it only in an extraordinary case where otherwise there would be a failure of justice." In the case of *The People v. Thompson, 25 Barbour, 76* HARRIS, *J.*, says: "The invariable test by which the right of a party, applying for a mandamus, is determined, is to inquire, first, whether he has a clear legal right; and if he has, then, secondly, whether there is any other equitable remedy to which he can resort to enforce his right; if there is, he can not have a mandamus. The writ only belongs to such as have legal rights to enforce and find themselves without some other appropriate remedy."

The positions assumed, as above quoted, are amply supported by abundant authority. See *Bac. Abr. tit. Mand., 527; 3 Blacks. Com. 110; The People v. Sup. of Albany, 12 Johns. 414; Hull v. Sup. of Onedia, 19 ib., 260, Nelson, ex parte 1 Cowen, 423; Goings v. Mills, 1 Ark., 11; Taylor v. Governor ib. 21; Webb v. Hanger, 16 ib., 121; Trapnall ex parte, 6 Ark., 9; Williamson ex parte, 8 Ark. 424.*

Upon the strength of the foregoing authorities, emanating, as they have, from such eminent jurists, we have no hesitation in announcing that, before a person can obtain the writ of man-

damus, he must first present such a case, or show that he has a *clear, legal right* to the subject matter of his petition. Second, that he has no other adequate remedy. Tested by these rules, how does the case at bar stand? The petitioner sets up that McDiarmid was elected county clerk of Pulaski county, in 1868; that by virtue of being county clerk he has been recorder of the county, and claims to be recorder of the county now, by virtue of his being county clerk. The petitioner, Fitch, says, that he has been appointed circuit clerk, under an act of the General Assembly of Arkansas, approved March, 1871, and by virtue of his being circuit clerk, he claims to be recorder of the county. Here the defendant is in possession of the office of recorder under color of office, to say the least, and the plaintiff claims the office. The petitioner admits that the defendant is in possession of the records and books, by virtue of his being county clerk, which office, before the late enactment, gave him a clear legal right to such possession; he also says that, by virtue of being county clerk, he, the defendant, still claims to be recorder, and refuses to surrender the books, etc. Do not the facts, as stated by the plaintiff, plainly show that this application is made to settle the title to the office? Is mandamus the proper remedy for that purpose? In the case of *The People v. Corporation of New York, 3 Johnson's cases, page 79*, the court say: "When the office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person. The proper remedy, in the first instance, is by an information in the nature of a quo warranto, by which the right of the parties may be tried."

"A *mandamus* will not be issued to admit a person to an office while another is in, under color of right."

"A conflict of title to the office being presented, cannot be determined by *mandamus*; it must be by direct proceeding in the nature of a *quo warranto*." *State ex rel. Jackson v. State Auditor, 36 Mo. 70.*

Chief Justice RUFFIN, in the case of *Doughty, ex parte*, held

that if a person thinks himself elected to an office, instead of the one pronounced by the proper officers to have been duly elected, his remedy, if he has one, is by a writ of *quo warranto*. See *6 Iredell, 155*.

The case of the *People v. Stevens, 5 Hill, 616*, is exactly in point. When the petitioner claimed to be clerk of Brooklyn, and applied for a *mandamus* to have the books and papers turned over to him, the court refused the writ and held that it was only trying the title to the office, and that must be done by *quo warranto*, or an information in the nature of *quo warranto*. The court refused to try it on *mandamus*.

BRUNSON, J., says: "The right to the books and papers is altogether subordinate to the main question; neither party claiming possession, even on the ground that he is clerk. * * * The relator should first establish his title to the office, by a direct proceeding for that purpose, and then his right to the books and papers would follow as a matter of course."

Defendant, in the case at bar, as appears by petition, was, in 1868, elected to the office of county clerk, by virtue of which office he was recorder. He is in the possession of the books and papers appertaining to the office, and is exercising the duties thereof under a *prima facia* title. He is in office by *color of right*. Petitioner, it is true, claims he is the officer *de facto*; but his right has not been fully resolved into a "clear legal title." If this inquiry had been made and a judgment of ouster obtained, vacating the defendant's claim or title to the office, and the legality of petitioner's appointment to the office been established by the final judgment of a court of competent jurisdiction, and he had a clear right to exercise the duties thereof and enjoy its emoluments, then, upon the refusal of defendant to permit him to receive into his custody and possession the books and papers pertaining to the office, he would, in our judgment, be entitled to a *mandamus*. The proper office of the writ is to enforce the performance of a duty, not to inquire into titles to office or establish legal rights.

Has the defendant no other specific legal remedy?

In our judgment, the petitioner has another specific and much more appropriate remedy to try the validity of his title to the office, which the defendant is exercising—which is by *quo warranto*. In *The State v. Deliesseline, 1 McCord, 52*, it was held that an information, in the nature of a *quo warranto*, may be filed against an officer who holds a commission under the State. In *The State ex rel. Meade v. Dunn, 1 Minor, Ala. Rep. 46*, the court held that a *mandamus* would not lie on behalf of one claiming an office, when another held the commission and was in the exercise of the duties of the office—*quo warranto* was the proper remedy.

The writ of *quo warranto* is a correlative writ, and proposes an inquiry into the authority by which an individual exercises an office or franchise. These writs operate on the individual, and it is the only one under which a judgment of ouster can be rendered.

There may be other remedies under our statutes, which are within the reach of the petitioner, of which we do not propose to speak at this time; nor is it necessary for us to notice the fourth ground of demurrer, in as much as the petitioner has not placed himself within the above rules, viz: has not shown, upon the face of his petition, that "he has a clear right to the subject matter, and that he has no other adequate remedy."

The demurrer is sustained and petition dismissed.

Gregg, J., dissenting, says:

I do not differ with the majority of the court in their conclusions of law, as above announced, but I dissent from them in assuming original jurisdiction in this case.

NEAL, ET AL. *v.* SINGLETON.

JOINT PARTIES—*When not served*—Where several are jointly sued, some of whom are not served, judgment against those served, will not be reversed on that account; and those defendants, not served, cannot prosecute the appeal.

ERRORS—*Motion to correct*—Premature trial is a clerical misprision under the Code of Civil Practice, and neither it or any other error, that might be corrected on motion, will be heard here, unless such motion was made in the court below and overruled.

"DEFENDANTS."—*How construed.*—Where the judgment is against the *defendants*, the word "*defendants*," will be construed and regarded to mean the defendants who appeared or were served.

EXCESSIVE DAMAGES—*When not considered.*—Where the verdict is responsive to the issue and the judgment in accordance with the verdict, and no motion for a new trial made, exceptions to the evidence or ruling of the court taken, the question of excessive damages will not be considered.

Appeal from Desha Circuit Court.

HON. JOHN E. BENNETT, Circuit Judge.

J. C. Palmer, for appellants.

Pindalls, for appellee.

McCLURE, C. J.

The appellants were the owners of the steamboat "*Richmond*," and were jointly sued, by the appellee, as common carriers, for damages sustained by the refusal of the appellants to land him at the end of his journey, when a passenger on their boat. The declaration, in addition to the usual counts, also alleges special damages. Service was had on J. Stutt Neal and John S. Woolfolk. At the October term, A. D. 1868, J. Stutt Neal appeared and filed a plea to the jurisdiction of the court, which was overruled. J. Stutt Neal and Woolfolk then filed their plea in bar and the appellee entered his *similiter*, in short upon the record. At the same time an *alias* summons was

ordered against Rube E. Neal, and the cause was continued. On the 9th of March, 1869, the sheriff returned the alias summons, endorsed as follows: "I served the within writ, on the within named Rube E. Neal, on the 9th of March, 1869, by delivering to his clerk, on the steamboat "*Indiana*," his place of abode, a true copy of the same, at the county of Desha, Arkansas."

On the 4th of February, 1869, the appellants asked and obtained leave to take depositions; and again, on the 2d of April, leave was granted to appellants to take depositions. In the different pleas filed, and in the notice to take depositions, both before and after the service on Rube E. Neal, one Thompson signs himself as attorney for "J. Stutt Neal."

The depositions of certain persons were taken, and leave was given to file and open the same. The appellee made a motion to suppress the depositions of the two Blackburns for the following reasons:

First. That there is no notice filed with said depositions.

Second. That the plaintiff (appellee) had no notice of the taking of said depositions, as required by law.

Third. Because said depositions are not properly certified.

Fourth. Because the notice to take said depositions was not legally served upon him.

What disposition was made of this motion, by the court, does not appear from the record. Upon the same day, upon which the motion to suppress the depositions was filed, the record shows, that "the parties, by their attorneys, appeared and declared themselves ready for trial." A jury was impaneled, and they found for the appellee and assessed his damages at twenty-two hundred and fifty dollars. The appellee, on leave of the court, entered a *remittitur*, as to seven hundred and fifty dollars, and thereupon the court rendered judgment against the defendants for fifteen hundred dollars. No exceptions were taken in the court below, as to any of its proceedings, nor was there any motion for a new trial, and under this state of facts, the case comes here by appeal.

The first point urged, by the appellants, is, that there is no service on Rube E. Neal, nor any entry of his appearance. The only service that could be made, under the Code, save that by publication, was by delivering or offering to deliver to the appellants a copy of the summons, or by the appellant acknowledging service by endorsement on the summons. (*Code, secs. 66 and 68.*) The return of the sheriff discloses the fact that Rube E. Neal was not summoned in any manner known to the law at that time. But does this fact invalidate the judgment as to the other two defendants? or is it any ground for the reversal of the judgment? Section 886, of the Civil Code, declares that "a judgment or final order shall not be reversed (by the Supreme Court) for an error which can be corrected on motion in the inferior courts, until such motion has been made there and overruled." The cause seems to have been prematurely tried; but section 569, of the Code says: "A misprision of the clerk shall not be a ground for an appeal, until the same has been presented and acted upon in the circuit court;" and the Code, in defining what constitutes a "misprision of the clerk," says: "Rendering judgment before the action stood for trial, shall be deemed a clerical misprision." (*Sec. 570.*) If J. Stutt Neal and Woolfolk had desired to vacate the judgment, because it was rendered before the action regularly stood for trial, they ought to have made the motion, within the first three days of the succeeding term, (*Sec. 572,*) in the circuit court; failing in this, they will not now be allowed to complain of their own negligence in that respect.

The next question arising is, can Rube E. Neal be heard as to any matter appearing in this record? We are of opinion that the right to relief by appeal, from a final judgment, exists only in favor of the parties whose substantial rights have been prejudiced by the judgment appealed from. (*3 Met. 72.*) We have already said that Rube E. Neal was not legally summoned before the court; it follows therefore, that there is no legal judgment, and there can be no legal judgment rendered against him by the court below. This being true, his "substantial rights"

are not prejudiced by the judgment, and it follows, that he cannot prosecute this appeal.

Having determined that the premature trial of this cause is a matter that neither J. Stutt Neal, Woolfolk, or Rube E. Neal can complain of *now*, we will see if the premature trial of the cause invalidates the judgment as to J. Stutt Neal and Woolfolk. In the case of *Clark et al. v. Finnell et al.* (*16 B. Mon. 334*,) a judgment was rendered, as in this case, against the "defendants." It appeared in that case, as in this, that no service had been had as to one of the defendants, nor was there any appearance; and in construing the effect of such a judgment, the Supreme Court of Kentucky held, that "the word 'defendants' must be understood to apply to those defendants *only*, who either appeared or were served with process," and it refused to reverse a judgment upon such grounds.

The appellants were sued, as the owners of a steamboat, for not landing a passenger at his proper landing. In the case of *Kountz v. S. Brown et al.*, *16 B. Mass.*, *585*, suit was brought against the owners of a steamboat for damage done to a wharf-boat. Service was had on but one of the owners, and a judgment was rendered against the "defendants," and the court held that "the judgment must be regarded as a judgment against the party served," although it was, in terms, against the "defendants," in the plural; and in speaking of the right to appeal, the court said, "the judgment being in legal estimation, a judgment against Kountz only, if right against him, it must stand, and he is the *only* appellant." In the case of *Walker et al. v. Martin*, *17*, *B. Mon.*, (*188*,) which was a case where some of the defendants had been served and others had not, and judgment rendered against the "defendants," the court said: "although the judgment is against the 'defendants,' without discrimination, it is to be understood as a judgment against those 'defendants' only, who were "served with process," and the court continued by saying: "it is no available objection to the judgment, that no notice is taken of the defendants who were not served with process and no express

disposition made of the case as to them." When it is taken into consideration that the Supreme Court of Kentucky was construing the language of a Code, from which ours was copied literally, upon this point, we may regard these cases as settling that point.

The second question raised is, that the cause was tried without disposing of the issue, on the motion to suppress depositions. This court will not reverse the judgment of the circuit court, except for errors, to the prejudice of the party appealing, (*sec. 879.*) Whether the depositions were in reality suppressed, or whether their suppression would have prejudiced the appellants, this court has no means of determining, as no exceptions were made at the time of the trial, nor was there a motion for a new trial. If the party was prejudiced he must make it appear of record. Unless this be done, we shall presume in favor of the regularity of the proceedings of the circuit court.

The third objection is, that the damages are unwarranted and excessive.

The verdict rendered is responsive to the issue and the judment is in accordance with the verdict. This question can not be reviewed in this court, upon the record presented. The record does not show that any declaration of the law, made by the court below, was excepted to, or that illegal evidence was admitted, or that any legal evidence was excluded; in short, the record does not attempt to show any evidence that was submitted to the jury; the appellants made no motion to set aside the verdict, nor did they ask a new trial, neither did they take a bill of exceptions. To make a long story short, there is nothing in the record that would warrant a reversal.

Let the judgment be affirmed.

BENNETT, J., being disqualified, did not sit in this case.

HON. W. W. WILSHIRE, Special Supreme Judge.

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MERRICK v. BRITTON.

NEW TRIALS—*What must appear.*—To entitle a party to a new trial, on the ground of *surprise*, it must clearly appear that he has used proper diligence in the preparation of the trial, and that he is wholly free from negligence, and that without the interposition of the court, injustice would be done.

WHEN ADDRESSED TO DISCRETION OF COURTS.—A motion for a new trial, on the ground that the witness swore contrary to expectation on the trial, is addressed to the discretion of the court, and will not be granted, unless the party show that he has used proper diligence by taking the precaution to converse with the witness beforehand.

WAIVER OF.—Where a party, for any good cause, is unprepared to go to trial, and fails by motion to postpone or continue, to show the fact to the court, at the proper time, he waives his want of preparation, and all right to afterwards object.

NEWLY DISCOVERED EVIDENCE—*What affidavit must show.*—To entitle a party to a new trial, on the ground of newly discovered evidence, the affidavit must show, *first;* the names of witnesses whose testimony has been discovered, and the facts expected to be established by them. *Second.* Facts and circumstances sufficient to prove that the applicant has used due diligence in preparing his case for trial. *Third.* That the facts and circumstances, newly discovered, have came to his knowledge since the trial, and are such, as if adduced on the trial, would have been competent to prove the issue, and would probably have changed the issue. *Fourth.* That the evidence is not cumulative.

TRESPASS—*What plaintiff must show.*—In trespass the plaintiff must show that he has either the actual or constructive possession of the property sued for.

DECEASED PERSONS—*Estates in custody of law.*—Upon the death of a person his estate passes into the custody of the law, to be administered for the benefit of creditors.

Appeal from Hempstead Circuit Court.

HON. JOHN T. BEARDEN, Circuit Judge.

J. R. Eakin, for appellant.

We submit that the affidavit for a new trial contains all the essential requisites as laid down in the cases cited in *Rose's Digest, p. 563.*

Gallagher, Newton & Hempstead, for appellee.

We submit, that motions for a new trial, on the ground of newly discovered evidence, are addressed to the sound discretion of the court, and the motion, in this instance, was not sufficient. *Ballard v. Noaks, 2 Ark., 45; Olmsted v. Hill, 2 ib., 346; Robins v. Fowler, 2 ib., 133; Bourland v. Skimnee, 11 Ark., (6 Eng.) 671; Holeman v. State, 13 Ark., 105; Pleasant v. State, 13 Ark., 360; Binley v. State, 15 Ark., 395; White v. State, 17 Ark., 404; Dunnahoe v. Williams, 24 Ark., 266.* The suppression of a portion of the depositions of Charles and Sheppard was no ground for a new trial. *Haynes v. Tunstall, 5 Ark., 580.* As to the question of surprise, see *Nelson v. Walters, 18 Ark., 570; Cokes v. State, 20 Ark., 62.*

Under the provisions of our probate system, upon the death of a person, whether solvent or insolvent, the estate passes into the custody of the law, to be administered for the benefit of creditors. *Slocomb v. Blackburn, 18 Ark., 318; Bach v. Cook, 21 Ark., 273; Barasein v. Odum, 17 Ark., 129.*

BENNETT, J.

The appellant instituted, in the Hempstead circuit court, his action of tresspass against the appellee, wherein he alleged that the appellee had taken, seized and carried away certain cotton in the seed, the property of the appellant, of weight unknown, but sufficient to make eighteen bales of ginned cotton, of five hundred pounds each, and of the value of $2,500, and converted the same to his own use.

Appellee pleaded not guilty; a trial was had; verdict for the defendant; new trial was moved; motion overruled; appeal to this court.

The plaintiff proved that, in 1865, one Walker died leaving upon his plantation a lot of seed cotton, in the possession of his widow. Some time after the death of Walker, in August,

1865, plaintiff came to the plantation, having a paper which, he claimed, entitled him to the cotton. He then rode around the place and marked certain pens of cotton as his own, to be taken possession of under the obligation, all of which was assented to by Mrs. Walker, the widow of Walker. In September one Jackson L. Britt came and took the cotton away.

The plaintiff then proved, by E. W. Gantt, that, in January, 1866, he obtained from the plaintiff a written instrument, purporting to be a sale of cotton from James M. Walker to A. Block, or bearer; but he could not authenticate the same by identifying the handwriting of Walker. The plaintiff then endeavored to prove the same by witness Eakin, but this witness stated that he was not acquainted with Walker's handwriting, but he had in his possession an instrument purporting to have been executed by Walker.

The plaintiff proved by Britt, that he (Britt) was acting for defendant, and that he took the cotton by virtue of a writ of replevin; or, at least, was told that the sheriff had such a writ, and it was by his orders he hauled the cotton away. The witness also testified that he had bought and paid for the cotton of Mr. Walker, previous to his death. When he purchased the cotton it was to remain where it was until it should be ginned and baled, ready for delivery when called for. He sampled the cotton in the log house at the time he made the purchase. Plaintiff also introduced a notice to the defendant, asserting his claim to the cotton. Plaintiff then offered to prove that there had been no administration on Walker's estate until some time in the fall of 1865. Also, that it was owing, in a great measure, to the general attention of the father of Mrs. Walker that the personal property was saved. This, together with the testimony of Gantt and Eakin, was not allowed to go to the jury by the court. To this ruling, the plaintiff objected at the time. The defendant introduced no evidence.

The plaintiff asked of the court certain instructions, which

were all given, with the exception of a portion of the third and all of the fifth.

The third instruction asked for, is as follows: "To constitute such a sale of the cotton as would vest the title and right to specific possession in the defendant, the cotton must have been not only sold to him by the owner, but actually or constructively delivered, or the cotton so separated and distinguished from the mass of other property as to leave nothing to be done to identify it." That portion not given by the court, is as follows: "that the cotton so separated and distinguished from the mass of other property as to leave nothing to be done to identify it."

The fifth instruction is as follows: "If the jury believe, from the evidence, that the cotton was sold to Britt by Walker, in his life time, and the money paid, but that part of the same remained mixed, in the seed, with other cotton of the vendor, and was neither separated nor ginned, nor the amount to be taken out accurately ascertained, the contract of sale was not complete as to so much of the cotton as remained mixed with the other, and no right to possession accrued from the same to said Britt."

To the refusal of the court to give the above instruction, the plaintiff excepted. The defendant asked the court to instruct the jury as follows:

"*First.* If the jury believe, from the evidence, that J. S. Britt, in the life time of James M. Walker, purchased from him a certain amount of cotton in the seed, to the amount of 18 bales of lint cotton, and the said James M. Walker told him to take the same out of the house, in the evidence mentioned and in case the same did not contain such quantity, then to take the deficit from any of the six adjoining pens mentioned, in the evidence, and that said J. S. Britt afterwards sold said cotton to said defendant, and as his agent, afterwards took the amount of cotton, to the extent of 32,400 pounds, from said designated pens, and that the same is the cotton in controversy, and that after the said sale to J. S. Britt, the said Mary Walker,

as widow to James M. Walker, designated and set apart this cotton, as a part fulfillment of a previous sale of a large amount of cotton, without any designation or setting apart of the same by James M. Walker to Block, or the firm of Block & Co., and which was by him or them partly assigned to plaintiff, they must find for defendant—inasmuch as said Mary Walker had no right, by the fact of her continued residence upon the plantation of James M. Walker, after his decease, to designate and set apart any cotton belonging to his estate, as a completing or carrying out of any contract made by said James M. Walker in his life time."

"*Second.* That if the jury believed, from the evidence, that James M. Walker did sell to Block, or Block & Co., a large quantity of cotton, and that afterwards, he or they assigned a portion thereof, in writing, to said plaintiff, and that, after the decease of said Walker, the said Mary Walker designated and set apart a certain amount of cotton, including the cotton in controversy, as an execution of said contract, they must find for the defendant, so far as said written contract is concerned, there being no legal or sufficient proof of the terms of said contract, the written contract itself being the best evidence of its import and effect."

"*Third.* That if the jury believe, from the evidence, that J. S. Britt purchased from James M. Walker, in his life time, the amount of cotton in controversy, who designated the house and adjoining pens, in the evidence mentioned, as the place from which said cotton in controversy was to be taken, and the said cotton was taken therefrom, and, after said sale, said J. S. Britt sold said cotton to said defendant, and afterwards, as his agent, took the same, and prior to said taking, Mrs. Walker, after the death of James M. Walker, had previously set apart said cotton as a part performance of a sale of cotton made by James M. Walker, to Block, or Block & Co. without desingnating or setting apart the same, they must find for the defendant; the said Mary Walker having no right or authority to

make such designation, or setting apart said cotton, for the purpose aforesaid."

The above instructions were given against the objection of the plaintiff. The first reason assigned in the motion for a new trial was, that the plaintiff, upon the trial, was taken by surprise, in not being able to prove and authenticate a paper writing, said to have been a bill of sale of the cotton in question, by James M. Walker, in his life-time, to one Block, or Block & Bros.

Second. Because the court, against the objection of the plaintiff, excluded, from the jury, all the testimony of witnesses Gantt and Eakin, which went to prove the existence of an instrument purporting to have been a sale of cotton and executed by Walker to Block & Co.

Third. Because the court, against the objection of plaintiff, excluded the testimony of witness Shepherd, which went to prove that no administrator was appointed, upon the estate of Walker, until the fall of 1865, and that if no one had taken personal supervision of the place, the personal property would have been lost or destroyed; and that Mrs. Walker could not have gotten the negroes to take due care of anything had she tried; and the evidence, concerning the conversation held between the plaintiff and Mrs. Walker, regarding the contract and delivery of said cotton.

Fourth. Because the court, against the objection of the plaintiff, gave the first, second and third instructions asked for by the defendant.

Which motion was overruled.

As to the first reason assigned by the plaintiff, why he should have a new trial, viz.: surprise, we have to say, that the preliminaries of a trial are arranged on purpose that the litigants, being apprised beforehand of the nature of the proceedings, may come fully prepared.

The party bringing the action, is of course, presumed, fore he commences, to be properly cognizant of the nature his claim, and every step necessary to establish it. He knows

what he will be required to prove in order to make out his case, and he ought, also, to know the name of every witness upon whom he relies, and what each can testify. He can, moreover, anticipate the probable defense and prepare to meet it. He chooses his own time to prosecute, elects his remedy, and decides, of his own free will and choice, upon what he deems the best course to be pursued. Being the aggressor, he is presumed to be ready for the emergency. We find in *Graham and Waterman, on new trials, vol. 3, p. 876*, the following words: "For either party to allege surprise as a ground for a new trial, is unlooked for, and not regarded with favor. The facilities for information and preparation are so extensive, there can ordinarily be no excuse and no reason to complain from such a source. In a majority of cases, it is a cover and apology for unpardonable heedlessness, rather than an application that merits relief. When, however, it is a clear case of surprise, and the party complaining is wholly free from negligence, so that, without the interposition of the court, injustice would be done, a new trial would be granted." "Surprise," says Chief Justice EWING, in the case of *Mathews v. Allen, 6 Halstead, p. 242*, "although in some cases, justly the cause of granting a new trial, is always admitted with great caution. When it is occasioned by an act of the adverse party, or by circumstances out of the knowledge, and beyond the control of the party injured by it, he has been some times relieved, but in no instance where he might have been fully informed by the exercise of ordinary diligence, or when it was induced by his own oversight, forgetfulness or neglect."

The surprise complained of in the case at bar, is, that the plaintiff thought he could authenticate the paper writing, purporting to be a bill of sale, by a certain writing; but, when called to the stand, he could not identify the hand writing of the party executing the same; in fact, witness said he did not know the hand writing when he saw it. This witness was never interrogated in relation to the matter, before he was brought upon the stand, by the plaintiff; but he seems to have

relied entirely upon a presumption that he knew the facts, which it was desirable to adduce.

In this case there is not the least pretense, that the most careless man could have been surprised at. By the plaintiff's own showing, he exercised *no diligence* whatever, but it was induced entirely by his own oversight, forgetfulness and neglect. In the case of *Nelson v. Waters, 18 Ark. 570*, Chief Justice ENGLISH says: "Motions for a new trial on the ground of surprise, because the party's witness, swore, upon the trial, contrary to his expectation, are addressed to the sound discretion of the court, and should not be granted, unless the party shows proper diligence on his part to prevent surprise, by taking the precaution to converse with the witness before trial."

That a party came to a trial unprepared to make out his case or establish his defense, has not even the appearance of a valid excuse. It is true, that sometimes no amount of diligence or effort will suffice to arrange all the details and procure every thing needful for the trial. But injury need not for that reason be sustained. Courts are extremely indulgent and liberal in granting continuances, and they are seldom or never appealed to in vain in proper cases. It is therefore incumbent upon a party, if for any good cause he finds himself unprepared to go on, to state the circumstances to the court and move a postponement of his case. If he fails to do so, he waives his want of preparation, and all right after to object.

In the case at bar, no motion for continuance was made, no examination of witness previous to his being put upon the stand—no inquiry made where the instrument, upon which the very substratum of the suit was founded, was, or in whose possession it might be found, or whether he could prove its existence or not, or if found, whether it could be authenticated.

But plaintiff claims that the cause was unexpectedly called, in advance of the time at which it was usual to take up trials of civil cases. If a party complaining has shown a want of diligence in attending and watching his cause, so that his default is referable to his own inattention rather than to genuine

surprise, his application will be denied. To entitle the party to relief, there must be merits; and the surprise, on this ground, must be such as care and prudence could not provide against. See *Thompson et al. v. Williams, 7 Smedes & Marshall, 275.*

Plaintiff introduced the affidavit of Thomas H. Simms, who says he is acquainted with the hand writing of Walker, deceased, and by whom, it is alleged, he can substantiate the bill of sale from Walker to Brock. "In order to entitle a party to a new trial on the ground of newly discovered evidence, the affidavit in the case must show, *First.* The names of witnesses whose testimony has been discovered; and the facts expected to be established by them. *Second.* Facts and circumstances sufficient to prove that the applicant has used due diligence in preparing his case for trial. *Third.* That the facts and circumstances, newly discovered, have come to his knowledge since the trial, and are such, as if adduced on the trial, would have been competent to prove the issue, and would probably have changed the issue. *Fourth.* That the evidence is not cumulative." See *Burns v. Wise, 2 Ark. 33; Robins v. Fowler, 2 Ark. 133; Olmstead v. Hill, 2 Ark. 346; Bourland v Skinner, 11 Ark. 671.*

The affidavit wholly fails to show any clear facts or circumstances, showing the plaintiff had used any due diligence on his part—but on the contrary, it is hard to conceive of a case, wherein greater negligence or carelessness has been displayed by a party asking the intervention of a court for relief.

The action of the court in excluding the testimony of Gantt and Eakin, we think was right and proper. They were introduced to prove and authenticate a bill of sale from Walker to Block, for the cotton in controversy; they knew nothing of the matter, nor did they know the hand writing of Walker. Under such circumstances, what they did testify to could have had no weight with the jury. The same may be said in relation to the exclusion of certain portions of the testimony of Shepherd, in relation to there being no administrator of Walker's estate, the personal supervision of the place, what Mrs.

Walker could not do with the negroes; and conversations had between plaintiff and Mrs. Walker, in relation to the cotton.

To maintain an action of trespass, the plaintiff must show that *he* has actual or constructive possession of the property sued for. The defendant is not put to his justification until such fact is established. There is ample time for him to contest it. See *1 Chitty on Pleading, 169; Parson v. Dickinson, 11 Pick, 382; Putnam v. Wyley, 8 Johns. R. 432; Hyatt v. Wood, 4 Johns. 151; Gauche v. Mayer, 27 Ill. 135; Rout v. Chandler, 10 Wend. 110; Hume v. Tuft, 6 Blackf. 136.*

There is no proof that the plaintiff ever had possession of the cotton, either actual or constructive. He does not claim that Walker ever delivered him the cotton before his death, or that it ever was in his possession at that time; and Mrs. Walker, merely designating certain cotton in certain pens, on the plantation of her deceased husband, as the property of the plaintiff, did not give him the property, either general or qualified; but it continued to remain as the property of the estate, and in possession of the law, or of whomsoever should be appointed by the probate court. Under the provisions of our probate system, upon the death of a person, whether he be solvent or insolvent, his estate passes into the custody of the law, to be administered for the benefit of creditors and heirs, *Barasien v. Odum, 17 Ark., 122; Rust, Ex'r v. Worthington, 17 Ark., 129; Slocomb v. Blackburn, 18 Ark., 318; Bach v. Coon, 21 Ark., 272.*

Whether the cotton was taken by the defendant or plaintiff, the same was in possession of the law; and whether either of them took it, if taken wrongfully, he or they could only be proceeded against by the proper person appointed by the probate court.

We see no error in giving the instructions asked for by defendant, in their general application, and, finding no error, the judgment will be affirmed.

26 506
73 495

WAKEFIELD *v.* JOHNSON, *Adm'r*.

VENDOR'S LIEN—*What assignee must allege.*—The assignee of a note, which is a lien upon land, must allege in his bill, to inforce the lien, the agreement between the vendor and vendee, and unless he does, he will not be heard in a court of equity.

On title bond to convey, on the payment of the residue of the purchase money, an assignment of the note carries with it the lien; and the assignee, to avail himself of the vendor's lien, must allege in his bill the considerations of the title bond; as, also, whether any other notes, which are liens, remain unpaid; so the holders thereof should be made parties before tendering a deed.

TENDER OF PURCHASE MONEY.—Where vendor wants the purchase money, the deed should be tendered before filing a bill; and where vendee wants a deed, the purchase money should be tendered before filing a bill.

PURCHASE MONEY—*Failure to pay, not a forfeiture.*—The mere fact that money is due, and upaid, does not create a forfeiture, nor is such neglect regarded, in equity, as a *default.*

DEED AND TENDER OF PAYMENT.—The payment of the purchase money, and the execution of the deed, are acts that are to be *simultaneously* done, and not in the order they happen to be stated in the title bond.

Appeal from Arkansas Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Garland & Nash, for appellant.

Watkins & Rose, for appellee.

MCCLURE, C. J.

It seems, from the record, that one Hewitt purchased certain lands of one Thomisson, in Arkansas county. For a portion of the purchase money, it seems that Hewitt executed his note to Thomisson. One of these notes passed into the hands of John A. Wakefield, the appellant, who filed his bill, in the Arkansas circuit court, to inforce a vendor's lien. The bill alleges the death of Hewitt; the appointment of Johnson, the appellee, as administrator, and that he, Wakefield, is the legal owner of the note; that no portion of the five hundred

dollars has been paid; that Hewitt and his legal representatives are, and have been, in possession of the lands ever since the purchase; that Thomisson is, and has, at all times, been ready to make deed to said lands, to said Hewitt, his heirs, etc., upon payment of said sum of five hundred dollars, with the interest due thereon; that Thomisson never tendered, to said heirs and legal representatives of said Hewitt, a good and sufficient deed, with general warranty, etc.

The *inference* to be drawn from the allegations, is, that the title to the property is yet in Thomisson, and yet, but for the allegation, that Thomisson is lawfully seized of the lands, that he has good right to convey the same, and that said land is free from all incumbrances, there is nothing in the bill to show that the title is in Thomisson; nor does the bill allege the execution of a title bond, or any agreement to convey at any time, nor do the terms of the sale appear from the bill.

The bill was filed on the 20th of March, 1869, but no deed was filed with the bill. On the 29th of April following, a demurrer was filed to the bill, on the ground that no deed had been tendered before the suit was brought. On the 3d of May, following, a deed was filed. The court sustained the demurrer, and dismissed the bill, and Wakefield appealed to this court.

If the agreement between Thomisson and Hewitt was, that the title should remain in Thomisson until the payment of the notes, this agreement should have been alleged by Wakefield. While it is true, as a general rule, that it is incumbent on the vendee to show a waiver of the lien, we understand that the assignee of a note, which is a lien upon land, must aver the agreement between the vendor and vendee, and failing in this, the doors to a court of equity would be closed on him. Where a sale of land is made, and a title bond is given to convey on the payment of residue of the purchase money, and the vendor of the property assigns one of the notes, it carries with it the lien; but, if the assignee desires to take advantage of the vendor's lien thus assigned, he must allege the considerations of the bond; and if this be so, where there is a bond, we do not

see why the relation between the vendor, vendee and assignee should not be set forth with the same certainty, in cases where there was a simple agreement to convey.

The bill nowhere alleges the original amount for which the property sold, but does allege that "a large portion of the purchase money for said tract of land was to be paid at a future day, after the sale." Whether the other notes have been paid off, does not appear from the bill; and, we think, this fact should appear, for if there were other notes due and unpaid, the holders thereof should have been made parties before tendering a deed. Whether the deed should have been tendered before the filing of a bill, is a question that the courts of this country are not unanimous upon. After a review of the holding of the courts that most nearly assimilate to that of our own, upon the assignment of the vendor's lien, we are of the opinion that the deed ought to have been tendered before the filing of the bill. The case of *Klyse v. Brayles* (*37 Miss., 524*), is very similar to the case at bar. The allegation in the bill, in that case, is very similar to the allegation now in the bill before us. It was, "that the complainant was ready and willing, and has been at all times, and now is, to make title upon the payment of the purchase money." In that case, the defendant demurred to the bill, on the ground "that the complainant had not made or tendered to defendant a deed to the land, and demanded the purchase money so as to put the defendant in default, before filing said bill." This demurrer was sustained in the court below, and the cause went to the Supreme Court of Mississippi, and that court said: "The question is, are the vendees in default in making payment? The answer is, they *are not* until a tender of performance by another party."

We think the plain common sense view of this question is, where the vendee desires a deed, that, before he files his bill, he should make a tender of the money due, and that in case where the vendor wants the purchase money due, he should make out and tender a deed and demand the money. Time, in a title bond, is not, in a court of equity, regarded as the

essence of the contract. The mere fact that the money is due, and has not been paid, does not create a forfeiture, nor is such neglect regarded by a court of equity as a *default*. Ordinarily, a title bond recites that the deed is to be made upon the payment of the purchase money due. This language does not constitute a condition precedent. The payment of the purchase money and the execution of the deed are acts that are to be done *simultaneously*, and not in the order they happen to be stated. A tender of the deed, *before suit*, puts the vendee in default; a tender of payment, before suit, by the vendee, puts the vendor in default. To open the doors of a court of equity to litigants to come in and say, "I will make a deed if A. B. will pay the purchase money," or to allow a vendee to come into a court of equity and say, "I have the money and want my deed," before either of them has offered to perform, would be to say that the province of a court of equity, in such cases, is to play the part of a commissioner of deeds.

If a party comes into a court of equity and says his purchase money is due, and that he has tendered a deed to the opposite party, or if a vendee comes in and says he has made a tender of the purchase money and demanded a deed, here is something tangible; but until some such thing has been done, the time of the court is unnecessarily consumed. The court did not err in sustaining the demurrer; but the bill ought to have been dismissed without prejudice, and with this modification, the decree is affirmed.

WILLIS, ET AL. *v.* JOHNSON, ADMR. ET AL.

Appeal from Arkansas Circuit Court.

McCLURE, C. J.

The doctrine laid down in the case of Wakefield *v.* Johnson, settles the law of this case.

The decree is affirmed.

HAYS, ET AL. *Ex-parte.*

MANDAMUS—*Statute superseded by Code.*—Chapter 88, Gould's Digest is no longer in force, being superseded by chapter IV, of the Civil Code.

WHEN AND FOR WHAT WILL LIE.—*Mandamus* never lies to control judicial discretion, it only lies to compel the performance of a public duty, and only then when there is no other legal remedy.

PURPOSE OF WRIT OF—The writ cannot be used to establish a right, but may be used to enforce a right after it is once established.

Petition for Mandamus.

Garland & Nash, for petitioners.

McCLURE, C. J.

This is an application, to this court, for a *mandamus* against the Hon. HENRY B. MORSE, judge of the circuit court of Chicot county, to compel him to grant an injunction restraining the collector and treasurer of Chicot county from receiving certain scrip.

Hays and others prepared what may be called a complaint in equity, with a prayer for a perpetual injunction, as to certain parties therein named, and presented the same to Judge MORSE, at chambers, and asked for a restraining order or temporary injunction, against the parties named, until the cause could be heard on its merits. Judge MORSE refused to grant the temporary restraining order, and an application is now made, to this court, for a *mandamus* to compel him to grant it. The question now arises, "Will this court award a *mandamus* under such circumstances?" We emphatically say, no! Before the adoption of the Code, under the provisions of section six, of chapter 88, of Gould's Digest, a *mandamus* was authorized to be issued against a circuit judge or a circuit court, that refused to grant an injunction, by any judge of this court, or by the court itself; but chapter 88 of Gould's Digest, is no longer in force, it being superseded by chapter IV, of the Civil Code. *Mandamus* never lies to control judicial discretion; it only lies to compel the performance of a public duty, and only then, when there is no other legal remedy. *Mandamus* cannot be used to *establish* a right; but may be used to *enforce* a right after it is once established. It will lie to compel a judge or other person to perform a duty enjoined by law; but will not be used to control the discretion of a judge or other officer vested with discretion. To illustrate, it will lie to make a judge hold a court at the time prescribed by law, but will not direct what the judge shall do, when his court is once opened. The reason for this is, that when the court is once opened and it proceeds to act, that its action can be corrected by a writ of error, or appeal; and it is a general rule, that *mandamus* will not lie where the matter complained of can be corrected by a writ of error or by appeal.

Under chapter 88, of Gould's Digest, "the circuit court, in term time, or any judge thereof, in vacation," was the only power in the State that could grant an injunction, but it is not so now. A probate judge, a circuit judge, or a Judge of the Supreme Court, are authorized to grant an injunction,

when it appears from the complaint that the plaintiff is entitled to the relief demanded. In the case now before us, it appears that the circuit court judge is of opinion that the complainant is not entitled to the relief demanded, upon the showing made by the complainant. This refusal does not leave the party remediless under the Code, as it did under chapter 88, of Gould's Digest, because, after the probate judge of the county, and the judge of the circuit, has refused, there are five Supreme Judges, any one of whom have the power to grant an injunction until the cause is heard on its merits. These things being true, it will at once become apparent to the most casual observer, that the party now asking for a *mandamus* is not without a remedy. This point being conceded, this cause comes within that general rule which declares that *mandamus* will not lie where there is another remedy. It may be asked what the applicant for an injunction can do, if the probate judge, circuit judge, and the Supreme Judges all refuse to grant the temporary restraining order. The reply is, that the provision of the Code furnishes ample remedy in such a case, as was furnished by chapter 88, of Gould's Digest, for if no one of the Supreme Judges would grant the temporary restraining order, it is not at all likely they would award a *mandamus* to a circuit judge, to compel him to do it.

Mandamus is denied.

MARSHALL, ADM'R. *v.* SLOAN, ET AL.

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j80 179

CREDITORS—*How payments applied.*—Where a party owes a person two different sums of indebtedness, and money is paid by the debtor, without instructions as to which debt the payment is to be applied in extinguishment of, the creditor may apply it to either.

INSTRUCTION—*When improperly given.*—An instruction, though unobjectionable in itself, is improperly given where there is no evidence to warrant it.

SURETY—*A personal defense not available to principal.*—The defense that a person signs a note as surety, is a personal defense and one that the principal of a note can not set up.

Appeal from Randolph Circuit Court.

HON. ELISHA BAXTER, Circuit Judge.

Watkins & Rose, for appellant.

The court erred in permitting the witnesses to prove that a part of the defendants were sureties. Parol evidence was not admissible to vary the written contract. *Trowbridge v. Sanger, 4 Ark., 179; Bertrand v. Byrd, 5 ib., 651; Field v. Watkins, ib., 672; Miller v. Hemphill, 9 ib., 489; Black v. Bowman, ib., 501; Scott v. Henry, 13 ib., 125; Jordan v. Ferril, ib., 593; Hensely v. Brodie, 16 ib., 519; Borden v. Peay, 20 ib., 293; Richardson v. Comestock, 21 ib., 69.*

The second instruction given by the court was abstract, and should have been refused. *State Bank v. Williams, 6 Ark., 161; State Bank v. Hubbard 8, ib., 186; Johnson v. Ashly, 7 ib., 470; Stanton v, State, 13 ib., 318; Collier v. State. ib., 676; Owen v. Chandler, 16 ib., 651; Morton v. Scull, 23 ib., 289.*

As the defendant, at the time of the payment, made no appropriation of it, the plaintiff had the right to apply to any debt due him: *2 Parsons Cont., 141.* Could the plaintiff have applied the payments to the debts due him as administrator? *Fairchild v. Holly, 10 Cowen., 175; Johnson v. Boone. 2 Harring, 172; Sneed v. Wiester 2 A. K., Marsh, 277.*

Garland & Nash, for appellees.

We submit: *First.* A principal could not make a new contract so as to bind his security, without his, security's, consent.

Second. In paying debts to a creditor by a debtor, the creditor was bound to apply the payments on those debts where there were securities.

Third. And in making a new arrangement or contract, if part payment was made under that contract, the statute of frauds did not apply. We think these propositions well sustained by the law. *See 1st: 2 Vesey, 540; 6 Ark., 317; 15 Gray (Mass.) 173; 7 Hill, (N. Y.) 116; 2nd: Burge on Suretyship, 123, et seq.; 3d: Rose's Dig. p. 365, (Title Fraud, Statute of,) sec. 3; 1 Parsons Cont. 6, et seq.; ib., 46, et seq.; 2, ib., 10–12.*

McCLURE, C. J.

On the 8th of February, 1866, H. C. Sloan, William B. Janes, A. Oakes, George Wells and Joseph J. Wyatt, executed and delivered to C. J. Marshall, as administrator of the estate of William B. Marshall, deceased, their joint note for "nine hundred and eighty-nine dollars, in Louisiana bank money, and if not paid within thirty days, the amount was to be eight hundred and thirty-two dollars and seventy-five cents "in Confederate currency," at the rate of ten per cent. per annum "until paid."

Marshall, as administrator, brought suit against Henry C. Sloan, William B. Janes, Alfred Oakes, and Joseph J. Wyatt, but does not say anything about George Wells. Whether service was had on any of the defendants, does not appear from the record. At the October term, 1869, Henry C. Sloan, one of the defendants, filed an answer, in which he says: "that he and Janes (another defendant) executed the note sued on, as principals, with Oakes, Wyatt, and Wells as sureties. That one Freeman, on behalf of Sloan, satisfied and contented said Marshall of said debt, by delivering to him a large amount of goods, wares and merchandise, and a large amount of bills,

bonds and book accounts, which the plaintiff then and there accepted, in full accord and satisfaction of said debt; that in March of 1867, Janes, one of the defendants, paid to the order of Marshall, eight hundred dollars, which the said Janes applied to the payment of said debt, as far as the same would extend, which amount should be credited on said note of that date. To this answer, Marshall filed a demurrer, setting up:

First. That the answer of Henry C. Sloan does not aver accord and satisfaction to plaintiff *as administrator.*

Second. The answer sets up payments to plaintiff, *in his individual capacity*, and not as *administrator.*

Third. The answer is double, in this, that it sets up two separate causes of defense in bar.

Oakes, one of the defendants, entered his appearance and leave was given to amend. Whether an amended answer was ever filed, is a fact of which the record, in this case, leaves us in blissful ignorance. The next thing happening in chronological order, as appears by the record, is, that "the parties announced themselves ready for trial." A jury was impaneled and it found for the defendants, and the court rendered a judgment accordingly. The appellant made a motion for a new trial upon the following grounds:

First. The court erred in instructing the jury.

Second. The court erred in refusing to instruct the jury, on the motion of the plaintiff, on the effect of the statute of frauds upon collateral promises to answer for the debt or default of another.

Third. The court permitted improper evidence to go to the jury.

Fourth. The verdict of the jury is contrary to the evidence and the instructions of the court.

Fifth. The court erred in permitting the defendants to show to whom the consideration of the bond, sued on, went, and for what purpose the defendants used the money, by parol testimony.

The motion for a new trial was overruled, and the plaintiff

excepted and appealed to this court. The trouble about this case is, in the absence of the amended answer, to know what defense was attempted to be set up in the answer, on which, it is presumed, the parties went to trial. The different co-partnerships, founded between Janes and his confederates and the plaintiff, seem to have not only confused the record, but confused the parties, as to their liability. From what can be gathered from this transcript, it appears that Sloan and Janes were in partnership, selling dry goods, groceries, etc., and desiring more capital, they, together with Oakes, Wells and Wyatt, gave to Marshall the note sued on in this case, which is a joint note. Sloan sold his interest in the business to one Freeman, who verbally assumed the payment of one-half of the outstanding indebtedness of the firm of Sloan & Janes, a part of which consisted of the note now sued on. Shortly afterward Marshall, the appellant, and Wyatt, one of the appellees, purchased the interest of Freeman, and they agreed to pay one-half of the firm debts owing by the firm of Freeman & Janes, a portion of which was the note now in suit, and the firm was known as Janes & Co. Continuing in partnership some time, Marshall, the appellant, sold his one-fourth interest to Janes & Wyatt, his former partners, for three hundred and fifty dollars, and the firm was thereafter known by the name of Janes & Wyatt, and it agreed to assume the payment of the outstanding indebtedness of the firm of Janes & Co., a part of which consisted of the note now in controversy. It seems, after this last sale was consummated, that the partnership affairs were not thoroughly understood, and a friend of all the parties was chosen to make settlement for them, which was agreed to, and formed the basis of the co-partnership between Janes & Wyatt. King, the man who made the settlement, says that Marshall was charged with $\$59\frac{55}{100}$, and with the further sum of $800, on the firm books of Janes & Co. in making the settlement, and that, when the firm books were balanced, there was a balance due Marshall of between one and five hundred dollars. Marshall swears that the exact amount due him in the settle-

ment was $425. King further states that the note, in controversy, was not taken into consideration by him in the settlement he made for the firm of Janes & Co.

The first instruction given by the court was, "that the burthen of proof is on the defendants to show that the debt is satisfied, and the jury will find according to the preponderance of the testimony in the case." There is no evidence in the bill of exceptions showing any satisfaction of the debt. The testimony of the defendants is, that sometime after Marshall had drawn the $800 from the firm, that they wanted him to apply the amount on the note held by him, as administrator, and that Marshall told them he would not do it, and that the amount had been appplied on account, and when King made the settlement for them, they assented, by silence and acquiescence, to the credit being applied on the partnership transaction. It is a well settled principle of the law, that if one party owes another two different sums of indebtedness, and money is paid by the debtor without instruction as to which debt the payment shall be applied to the extinguishment of, the creditor may apply it, as to him seems best, and this is just what Marshall did, and to which these defendants assented when they allowed Marshall to be charged in the settlement of the partnership accounts with the money they now contend should have been applied to the payment of the note sued on. The second instruction would, perhaps, be unobjectionable, if there was any proof upon which it could be based, but there is no evidence in the bill of exceptions that would warrant the giving of any such instruction. The third instruction, like the second, although good enough in the abstract, has no application to the facts proven, and coming from the court upon a pre-supposed state of facts, no doubt had a tendency to lead the jury into the belief that the court regarded the state of affairs to be proven, that the instructions refer to. The fourth instruction is: "If the jury find that the firm of Wyattt & Co., paid money to the plaintiff, on his order, it will

be presumed the payment was made on a precedent debt, unless the contrary be shown, and such a payment cannot be applied to an indebtedness subsequently accruing, when the rights of other parties would be prejudiced thereby." No such instruction as this ought ever to have been given. *First*, because it was shown, by the admission of the defendants, that the amount drawn from the firm of Janes, Wyatt & Co., was, by the consent of the defendant, charged to the appellant in the settlement of the partnership account. *Second*, because in the absence of instruction, at the time of the payment of the money, the creditor had the right to elect where he would credit it, and, *third*, because the appellant could make no application of the money that "would prejudice the rights of other parties," if he had desired to. We have said that the note sued on was a joint note. The object of the fourth instruction was, to give the jury to understand that Oakes, Wells and Wyatt had a right, as sureties, to have the money of the co-partnership of Janes, Wyatt & Co., applied to the payment of a debt which they might become responsible for. In the first place the record does not show that either Oakes, Wells or Wyatt sought any advantage, or made any defense on the ground of being sureties. In fact neither of them answered. The defense that a person signs a note as surety, is a *personal* defense, and one that the principal in a note cannot set up. If Sloan, who is the only one of the defendants who answers at all, tendered any issue of this sort, it was an immaterial issue, for he admits that he signed as principal. For these reasons, we say, that the giving of the fourth instruction was clearly erroneous. There is no objection to the giving of the fifth and last instruction.

The judgment is reversed, and the cause remanded to be proceeded in according to law and not inconsistent with this opinion.

HENRY & CO. v. GIBSON & HELMER.

BILLS OF EXCEPTION.—Where the bill of exceptions fails to show that appellant objected to the ruling of the court in refusing to give instructions asked by him, and fails to set out the instructions asked for by appellee, but sets out the declarations of law made by the court, without showing at whose instance they were made, the judgment will be affirmed.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Gallagher, Newton & Hempstead, for appellant.

B. S. Johnson, for appellees.

McCLURE, C. J.

It appears from the record that one W. A. Powell became the guest, or lodger, of Henry & Co., who were keepers of a hotel, at the city of Little Rock. During Powell's stay in the city, his bill run up to sixty-five dollars, and he gave Henry & Co., a draft on Gibson & Helmer, for the amount of his bill, which was sent to them, at Louisville, and protested for non-payment.

It also appears that Gibson & Helmer are dealers in, and manufacturers of safes, and that Powell, during the time he contracted the board-bill, was soliciting orders for the sale of safes manufactured by the defendants. After the protest of the draft, drawn by Powell, on the defendants, Henry & Co. commenced a suit by attachment against Gibson & Helmer, for the board-bill of Powell, before a justice of the peace, and one J. P. Jones, as debtor of the defendants, was garnisheed. At the hearing, before the justice of the peace, the appellants obtained judgment against the defendants for $65 00 and costs, and also against Jones, who was garnisheed.

From this judgment Gibson & Helmer appealed to the circuit

court of Pulaski county. At the hearing, in the circuit court, the cause was submitted to the court, sitting as a jury, and it found for the appellees. A motion for a new trial was made on the following grounds:

First. Because the verdict and finding of the judge, sitting as a jury, are contrary to the evidence.

Second. Because the verdict and findings of the judge, sitting as a jury, are contrary to law.

Third. Because the court refused to declare the law of the case, as asked for by the plaintiffs.

Fourth. Because the court found the law of the case, as asked for by the defendants.

The motion for a new trial was overruled. The bill of exceptions, in this case, sets out the evidence and the instructions asked by the appellants, but does not show that the appellants excepted to the refusal of the court to declare the law, as asked by the appellants. Nor is this the only defect. The declarations of law, asked by the appellants, are set out at length, but the declarations of law, asked by the defendants, are not set out in the bill of exceptions at all; nor does it appear that the appellants excepted to any declaration of law asked by the appellees. The bill of exceptions sets forth a declaration of law, made by the court; whether at the instance of the appellees or appellants, we are unable to determine; nor was there any exceptions made to the declaration made by the court.

The judgment is affirmed.

SCOTT *v.* THE STATE.

26 521
81 333

ORAL AND WRITTEN TESTIMONY—*How made of record.*—Neither oral or written testimony constitute any part of the record, unless it is made so by order of the court, by agreement of the parties, by demurrer, by oyer by bill of exceptions or by special verdict.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Rice & Benjamin, Gallagher, Newton & Hempstead, and Howard and R. S. Gantt, for appellant.

Montgomery, Attorney General, for appellee.

MCCLURE, C. J.

The only difference between this case and that of the *State v. Henry et al.*, is that the counsel for the appellants, and the attorney general, have filed an agreement whereby this court is granted permission to consider the record as containing the following facts:

First. "That the appellant sold liquor in quantities less than one quart, in the city of Little Rock, in the county of Pulaski, and State of Arkansas, and that he had not procured from the county court a license for the sale of the same."

Second. "That said record may also be considered as containing the annexed certified copy of the order of the county court establishing said license, which was omitted from said transcript."

This agreement relates solely to the evidence adduced at the trial, and is not an agreement to perfect the record, although it proposes to be such. Neither oral or written testimony constitute any part of the record, unless it is made so by order of the court, by agreement of the parties, by demurrer, by oyer, by bill of exceptions, or by special verdict." *Lenox v. Pike*, 2

Ark. 214; Berry v. Singer, 10 Ark 491; Dillard v. Parker, 25 Ark. 507.

This record contains the finding of the indictment, the indictment, the waiver of arraignment, a plea of not guilty, the waiver of a jury and a consent to submit the cause to the court, sitting as a jury. The record then continues by saying, "and the court, having heard the evidence adduced, and the argument of counsel, overrules the defendant's demurrer and assesses a fine of twenty dollars against said defendant. It is therefore considered," etc. To which ruling the defendant excepted and prayed an appeal to the Supreme Court.

It appears, from the closing portion of the record, that a demurrer was overruled, but whether the demurrer related to the indictment, or to the evidence adduced at the trial, we have no means of ascertaining, as we are unable to find a copy of the demurrer in the transcript; nor does it appear that a demurrer was filed, save, as is incidentally recited in the finding of the court. If this demurrer was actually filed and it related to the evidence, it would at once perform the office of a bill of exceptions, if properly framed; but in its absence, we are unable to tell what its mission was, if it ever had one. A demurrer to evidence must be to the *whole* evidence; whether this agreement, filed by the attorneys of the appellant and the attorney general, contains *all* the evidence, we are not able to determine; nor does it so state. If we should consider this agreement as containing all the evidence, this judgment would have to be reversed, because it no where appears that the selling of the liquors without license, took place *before* the finding of the indictment. We are not at liberty to presume that the statement filed contains *all* the evidence, where the effect would be to procure a reversal of the judgment. If we were to hear this cause upon an agreed statement of facts, or to try the case *de novo*, as seems to be the desire of counsel, grave questions might arise as to the validity of a judgment rendered, by this court, under such circumstances. We sit here to hear and determine causes of this character on appeal, or writ of error,

and such would not be the functions of this court, if we heard it upon an agreed statement of facts. For the reasons given in the case of *Henry et al. v. The State*, the judgment will be affirmed.

HENRY, ET AL. *v.* THE STATE.

CONSTITUTIONAL LAW.—Chapter 169, of Gould's Digest, regulating taverns, groceries and dram shops, is not repealed by section seventeen, of article X, of the Constitution of the State—nor is it in conflict with section five of article X.

WHAT ACTS CONTINUED IN FORCE.—All laws continued in force, by virtue of section sixteen, of article XV, of the Constitution, are as valid as though re-enacted by the General Assembly.

POWER TO LICENSE—*License not a tax, etc.*—The Legislature may pass any law not inhibited by the Constitution, and a law requiring an amount or sum of money to be paid for a license to sell spirituous liquors, is not a *tax* in the sense used in section five, of article X, of the Constitution.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Rice & Benjamin, *Gallagher*, *Newton & Hempstead*, *Howard and R. S. Gantt*, for appellant.

Montgomery, Attorney General, for appellee.

MCCLURE, C. J.

It appears from the record that James A. Henry, John Kinkead and William S. Davis were indicted for keeping grocery without license. At the trial the accused waived a jury, and

the cause was submitted to the court for trial. Plea, not guilty. The appellants were found guilty and a fine of twenty dollars imposed, whereupon the appellants excepted and prayed an appeal to this court. No exceptions were taken to the evidence, nor was there a motion for a new trial.

The only point urged in this case, that is not urged in *Scott v. The State*, is that the appellants were *inn-keepers*, and not *grocery keepers*. In the absence of a bill of exceptions, it is impossible for us to determine, whether the evidence adduced at the trial showed that the appellants were grocery keepers or inn-keepers. We shall therefore presume that inasmuch as the court found these parties guilty of keeping a grocery without license, and the counsel not thinking enough of the point to save the proof upon it, by bill of exceptions, or otherwise, that there was proof to sustain the finding. The other points argued in this case are similar to those urged in the case of *Scott v: The State*, and what may be said in this, will be equally applicable to that. It is urged that chapter 169, of Gould's Digest, which regulates taverns, groceries and dram-shops, is repealed by section seventeen, of article ten, of the Constitution of the State. The section alluded to reads as follows: "The General Assembly shall tax all privileges, pursuits and occupations, that are of no real use to society. All others shall be exempt, and the amount thus raised shall be paid into the treasury." How this section repeals chapter 169, of Gould's Digest, we are unable to determine.

Before the adoption of the present Constitution, the Legislature imposed a license and a tax upon the privilege, pursuit or occupation of retailing spirituous liquors in less quantities than a quart. The only change made by reason of the adoption of section seventeen, of article X, is, that of an inhibition, as against the power of the Legislature. It is an universal rule that the Legislature may pass any law which the Constitution does not inhibit. Counsel for the appellants seem to be infatuated with the idea that, because chapter 169, of Gould's Digest, was passed before the adoption of the present Constitu-

tion, that it is not in force. All laws in force, before the adoption of the Constitution, were continued in force by section sixteen, of article XV, of the present Constitution, not in conflict with its terms. The whole argument is based upon the supposition that the right to license and tax a grocery-keeper is derived expressly from the present Constitution, and that it did not exist before; in other words, that something new in the history of government had been invented. It is admitted, tacitly, by counsel for the appellants, that the General Assembly has the power, under the present Constitution, to impose such a tax as is imposed by chapter 169, of Gould's Digest, in relation to grocery keepers and dram sellers; but it is urged because no *new* enactment was indulged in by the Legislature, that the old law is a nullity. Such is not the fact. The laws continued in force by the Constitution itself, are as valid as though re-enacted by the General Assembly.

These parties are not indicted for keeping a grocery without paying a *tax*; they are indicted for keeping a grocery without *license*. That the legislature has the right and power to require this class of persons to take out a license before engaging in business, we have no doubt. It is said that chapter 169, of Gould's Digest, is in conflict with section five, article X, which declares: "No *tax* shall be levied except in pursuance of law, etc." A demand of $100, or any other amount of money, for a license to sell spiritous liquors, is not tax in the sense used in section five, of article X, and has never been so regarded in any State of the Union.

As a defective record, this transcript has few equals and no superiors. There is no one point argued in the briefs, that has any application to the case made by the record, but as counsel seem to have been preparing a case to elicit the opinion of the court upon the constitutionality of the 169th chapter of Gould's Digest, we have intimated pretty plainly what it would be, on a record presenting that question.

The judgment is affirmed.

PRAIRIE COUNTY v. BANCROFT.

APPEALS—*What necessary.*—Where no exceptions are taken to any decision or ruling of the court, no motion for a new trial, nor any bill of exceptions, or other steps to bring the evidence before this court, there is nothing presented for the action of the court.

Appeal from Prairie Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Wassell & Moore, and Garland, for appellant.

English, Gantt & English, for appellee.

GREGG, J.

It appears from the transcript that appellee presented an account for printing, against Prairie county. The county court, upon consideration, rejected his claim and adjudged that it be disallowed. Bancroft appealed to the circuit court. By consent of the attorneys, for the parties, the case was then taken up and submitted to the court sitting as a jury; then follows a detailed statement of the facts found by the court, and upon which judgment was rendered, in favor of the appellee, for $842, and an order that the same be certified to the county court of Prairie county, etc. No exceptions were taken to any decision or ruling of the court; the court was not asked to declare the law upon the facts; there was no motion for a new trial, nor was there any bill of exceptions or other steps taken to bring the evidence before this court for review, and hence, under the repeated decisions of this court, there are no questions presented here for the action of this court. *Chester Ashley v. C. Stoddard, jr., & Co.*, at the present term of this court; *Eason v. Fisher, 1 Ark., 90; McDaniel v. Tait, 5 Ark., 309; Massey v. Gardenhire, 12 Ark., 638; Johnson v. Rutherford, 23, Ark., 24; Peterson v. Gresham, 25 Ark., 380*, and other cases.

The judgment of the court below is affirmed.

SMITH & BRO. *v.* VAN GILDER, ADM'R.

COMMISSIONERS OF OTHER STATES.—Commissioners, appointed by the Governor for other States, under chapter 32, Gould's Digest, are officers of this State, and affidavits taken and certified by them, properly authenticated under the seal of their office, are to receive full faith and credit. Section 109, chapter 4, Gould's Digest, respecting the authentication of claims against the estates of deceased persons, was intended to apply to affidavits made before officers of other States, and not to commissioners of this State, appointed, and residing in other States.

AUTHENTICATION OF CLAIMS.—An affidavit, in the usual statutory form, to a note given by a firm, to the effect that nothing has been paid upon it, though not alleging that the amount was due from the estate of a deceased member of the firm, is a sufficient legal authentication as against the estate of the deceased member.

PROBATE COURT—*Appeals from, to be tried de novo.*—The practice, on appeals from the decisions of the probate courts, has been changed by the Civil Code of Practice. Under the Code, all cases appealed from the probate to the circuit courts are to be tried anew, as if no judgment had been rendered.

CODE OF PRACTICE—*to govern.*—When the case was tried in the probate court before, and in the circuit court *after* the Code of Practice went into full operation, the court should be governed in the determination of the case by the Code of Practice.

RETROSPECTIVE ACTS—*when void.*—Legislative acts, retrospective in their character, are not void, unless they conflict with some constitutional provision or interfere in some respect with vested rights.

Appeal from Ashley Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Watkins & Rose, for appellants.

That the affidavit was properly authenticated and sufficient. *See Kauman v. Stone, 25 Ark.*

We submit that there should have been a trial *de novo* in the circuit court. *See sec. 20 of the Code; also sec. 830*, which provides, that on appeals from *probate courts* (*see sec. 806*,) the action shall be *tried anew.*" See also *Gould's Dig., p. 138, sec. 201; Grimes v. Bush, 16 Ark., 649.*

J. W. Van Gilder, for appellee.

The affidavit is fatally defective, in that it does not authenticate the claim *against the estate of the deceased.*

The note was signed "E B. Kittrell & Co." The affidavit is to the effect "that nothing had been paid or delivered toward the satisfaction of the above demand, and that the sum above demanded is justly due."

This certainly can not be considered as authenticating a claim against the estate of D. L. Evans. It could just as well have been presented for allowance to the administrator of any other estate within the State of Arkansas. And by section 103, of chapter 4, of the Digest, the administrator is prohibited from paying or *allowing* any debt demanded as due from the deceased without it is properly authenticated. It is true the affidavit is partly in the general form presented by section 102. But that is only intended as a general form, and the affidavit must vary to suit the circumstances of each case. *Beirne & Burnside v. Imboden, 14 Ark., 244; 16 Ark., 32.*

The claim must be authenticated *against the estate of the deceased. Chapter 4, sections 99, 102, 103, 107 and 108.* And not a general authentication that would apply to any estate. *7 Ark., 78; 14 Ark., 237; 14 Ark., 246; 21 Ark., 519.*

SEARLE, J.

This suit was brought, by the appellants, who were plaintiffs below, against W. E. Kittrell, as administrator of the estate of D. L. Evans deceased. Kittrell, during the progress of the suit, resigned as such administrator, and J. W. Van Gilder was appointed in his place. The action was commenced by filing, in the probate court, the note sued on, signed by B. F. Kittrell & Co., to which was attached an affidavit, taken before a commissioner of deeds for the State of Arkansas, residing in the State of Louisiana, to the effect, "that nothing had been paid or allowed toward the above demand, and that the sum above demanded is justly due." Before filing in the office of

the clerk, the note had been presented to the administrator, who disallowed it, waiving copy and service.

On the trial in the probate court the defendant objected to the introduction of the note as evidence, because the claim was not authenticated as required by law, which objection was sustained by the court. The plaintiffs also offered to read depositions to prove that D. S. Evans, defendant intestate, was a member of the firm of E. B. Kittrell & Co, which was also objected to, and the objection sustained by the court. Judgment was rendered against the plaintiffs, and they appealed to the circuit court. The plaintiffs asked in that court a trial *de novo*, which was refused, to which refusal they excepted. The court upon the examination of the record and bill of exceptions found no error, and affirmed the judgment of the probate court, from which plaintiffs appealed to this court.

These questions are presented for our consideration in this case:

First, Was the affidavit appended to the note properly taken, and legally sufficient?

Second, Did the circuit court err in sustaining the ruling of the probate court, in excluding the evidence, which the plaintiffs offered, to prove that D. S. Evans was a member of the firm of Kittrell & Co., when the note was executed by the firm?

Third, Did the court err in refusing to try the case *de novo*?

Fourth, As to whether the affidavit was properly authenticated, and its legal sufficiency?

It is contended that the affidavit was not properly authenticated, because there was no certificate of a clerk of some court of record, under his official seal, superadded, bearing testimony to the official character of the commissioner, in accordance with section 109, chapter 4, Gould's Digest. This objection is not tenable, because the statute, authorizing the appointment of commissioners (chapter 32, Gould's Digest,) and prescribing their duties and powers, provides, among other things, that all affidavits taken and certified by them, "shall be as effectual, in

law, to all intents and purposes, as if done and certified by a justice of the peace or other authorized officer within this State." And it is provided by the statute of depositions (sec. 16, chap. 55, Gould's Digest,) that no authentication of the official character of any judge, justice of the peace, or other judicial officer, shall be necessary, when a deposition shall be taken before any such officer within the State. And this rule, we presume, applies equally to all oaths administered and affidavits taken, as to depositions, and for the same reason. By the same section last above mentioned, depositions, taken out of the State, by judges and justices of the peace, shall be authenticated by a certificate of a clerk of some court of record under his official seal. These general rules, as laid down by the statutes, are founded in the most substantial reasons. The design of the law is simply to afford evidence of the proper making and subscribing of oaths and affidavits. And when the authentication, which is such evidence, fulfills this design, this should be sufficient for the courts. Courts cannot take judicial notice *immediately* of the official character of officers of other States. Such notice must necessarily be *mediate*, that is, through and by the solemn sanction and attestation of a public seal. But it is entirely otherwise as to officers of our own State. Such the courts are bound to take judicial notice of, immediately, and any mediate authentication, as by a clerk under the seal of his office, would be quite superfluous. Likewise, they must take judicial notice of their acts, when performed within the scope of their duties, and in a legal manner. These general rules, of the statutes, apply equally to commissioners residing abroad. They are nothing more nor less than officers of this State. Like judges and justices of the peace at home, they are appointed by authority of this State. They take and subscribe an oath of office, which, together with their signature, and the impression of the seal of their office, is filed in the office of secretary of State, of this State. The courts of this State are bound to take judicial notice of their official character and their acts, required of them by the laws

of this State, properly authenticated under the seal of this office, are to receive full faith and credit. The acts therefore of such functionaries, notwithstanding they reside beyond the State, are thus placed upon a par, as to their authenticity, with similar acts performed by officers of this State, residing within her limits. And such has clearly been the ruling of this court heretofore, as declared in *Johnson v. Cook, use etc., 12 Ark. 680; Stone, ad'mr. v. Kaufman & Co., 25 Ark. 188; Kaufman & Co., v. Stone, ad'mr. 25 Ark. 342.* In the latter case, this court said: "the record of the appointment of Graham (who was commissioner in the State of Louisiana,) by the Governor, is a matter of which the courts of this State must take judicial notice. The certificate and official seal of the commissioner, was all the evidence of official character that parties litigant were bound to furnish." Section 109, above referred to, relating to the authentication of claims against the estates of deceased persons, and upon which the defendant seems so much to rely, provides that, "an affidavit taken out of the State, if the official character of the person taking it shall appear from the certificate of a clerk of any court of record under his official seal, shall be received." This, doubtless, relates to officers of other States and not to commissioners appointed by authority of this State, for the latter, as we have seen, are virtually officers of this State; and we are helped to this conclusion by this same section, when it declares that, "any judge, justice of the peace or notary public of this State, have power to take the affidavit required by this act to authenticate any claim against the estate of a deceased person." As we have seen, commissioners, in this State, stand in the same relation, in this matter, as do those officers. It is further contended that the affidavit is legally insufficient, because it does not authenticate the claim expressly against Evans or his estate. The note was executed by Kittrell & Co. The affidavit was to the effect that nothing had been paid upon it. It was in the usual statutory form, but did not allege the amount was due from Evans' estate. Is this an authentication as against the estate of

Evans? Kittrell & Co., were liable upon the note. If Evans belonged to the firm, he was liable, and at his death, his estate became liable. But the plaintiffs allege that he was a member of the firm, and they presented their claim, before bringing their action, to the administrator, and he disallowed it. It really seems to us that the authentication was legally sufficient, when we consider the presentation and demand, the allegation that the deceased was a member of the firm, and the offer of plaintiffs to prove it. For, if the authentication had expressly indicated that the debt was due from Evans, or from his estate, there would have been the same necessity on the part of the plaintiffs to prove that Evans belonged to the firm of Kittrell & Co., as there is in its present form. Nor can we see that the authentication so made, would fix the indebtedness with more certainty than it does, or place the administrator in a better condition to resist the claim if unjust.

The second question is, did the probate court err in refusing to permit the plaintiffs to prove that the deceased was a member of the firm, when the note was executed? This question is virtually answered by our observations upon the legal sufficiency of the affidavit. For certainly, if the affidavit was sufficient, the plaintiffs had a right to prove their allegation, that Evans was a member of the firm, in order to fix his liability upon the note.

The third question is, as to whether the circuit court erred in refusing to try the case *de novo?* This might be considered as being answered by what we have already said. For if the probate court erred as to matters of law and fact, it was the duty of the circuit court to try the case *de novo.* But we are disposed to consider this question further, upon general principles, relating to practice. Under the old system of practice, before the Code of Practice went into operation, it was incumbent upon the circuit court, when it was of opinion that the probate court erred in relation to any material matter of law or fact, to try the matter *de novo. Sec. 210, chap. 4, Gould's Digest; Grimes ad'mr v. Bush. 16 Ark, 649.* When the circuit

court discovered no error, it simply affirmed the judgment. When the decision of the probate court involved merely a question of law and its judgment was reversed, the circuit court remanded the cause to the probate court, that a trial might be there had upon the merits. *Dempsy v. Fenno, 16 Ark. 491.* But the practice, in these matters, has been very much changed by the Civil Code of Practice. It appears from sections 19 and 20, of the Code, that the appellate jurisdiction, of the circuit courts, shall extend to errors of facts, as well as errors of law, in the orders and judgments of probate and certain other courts.

It is further provided, in section 830, that appeals shall be docketed and stand for trial, as actions by proceedings at law, and that the actions shall be tried anew, as if no judgment had been rendered. And, by sections 796 and 806, it would seem that the provisions of section 830 are applicable to circuit courts, upon appeals from probate courts, as well as from all other courts, inferior to circuit courts. There can be no doubt, we think, that all cases, by appeal from probate to circuit courts, are to be tried anew, as if no judgment had been rendered. The case before us was determined in the circuit court since the Code went fully into operation. But we are unable to determine whether it was tried in the probate court before, or since, as the date upon the transcript is left blank; if since, there could be no doubt that the circuit court committed an error in not trying the case anew, whatever may have been its opinions as to errors in the trials by the probate court. But presuming that the case was tried in the probate court before the Code went into operation, by which practice, the old or the new, should the circuit court have been governed in the determination of the case? We think that this question is directly and fully answered by section 1, Act 83, of the Acts of 1869, where it is declared that, "after the first of June," when the Code went fully into operation, "the Code of Practice *shall* regulate the practice and *all proceedings* in the courts of this State, as therein provided." This is certainly as binding upon

circuit courts as language could make it. It is true, in this case, the Act makes the Code of Practice retroactive, and it may be contended that the appellee is prejudiced in his rights by having his case determined under a different law of procedure than that under which the suit was instituted. But this position is untenable, for it is well settled, as a *general rule*, that a right to a particular remedy is a part of the right itself. But this case cannot be brought within the exceptions. Legislative Acts, which are retrospective in their character, are not void, unless they conflict with some constitutional provision, or interfere in some respect with vested rights. See *Smith et al v. Bryan, 34 Ill's. 377. Rosier v. Hale, et al 10 Iowa 486. Halloway v. Sherman, 12 Iowa, 283. McCormick v. Rusch, 15 Iowa 131. Rockwell v. Hubbells, adm'r. 2 Douglass, (Mich.) 200. Lord v. Chadbourne, 42 Maine, 441.*

The Act, above referred to, is not in conflict with any constitutional provision, nor does it interfere in any respect with vested rights. It therefore ought to be obeyed. It is mandatory, and therefore must be obeyed.

We are of opinion, therefore, that the circuit court erred in not trying the case anew. For this and other errors, the judgment is reversed, and the cause remanded, with instructions to the court below, to try it anew upon its merits.

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TRAMMELL *v.* THE STATE.

MURDER—*Verdict should find the degree.*—In an indictment for *murder*, a verdict of conviction, which does not find the degree of murder, is so fatally defective that no judgment can be entered upon it.

Appeal from Ouachita Circuit Court.

HON. G. W. MCCOWN, Circuit Judge.

R. C. Newton, for appellant.

M. W. Benjamin, and *Thos. Marcum*, for appellee.

HARRISON, J.

Albert Trammel was tried, in the Ouachita circuit court, for the murder of Caroline Trammell. The jury found him guilty, but failed to find the degree of murder, and he was, upon the verdict, sentenced to be hanged.

The record in this case is manifestly very imperfect. Copied in the transcript is what, though very informally and inartistically drawn, was, perhaps, intended for a bill of exceptions, purporting to set out a motion for a new trial, and exception, by the defendant, to the overruling of the same; but which does not appear to have been filed, or in any manner made part of the record. But we held in *Thompson v. The State*, and *Allen v. The State*, decided at the last term, after a full examination of the authorities, that a verdict of guilty upon an indictment for murder, which does not declare the degree, is so defective that no judgment can be pronounced upon it. As we said in the former of these cases, the statute, establishing degrees in murder, did not create any new offense, or change the defination of murder, as it was understood at common law, but only mitigated the punishment, when not committed under certain circumstances of great atrocity, and that an indictment for murder, in the common form, does not charge murder in the first degree. And we think there can be no doubt that, if the murder were charged to have been committed by lying in wait, or in the attempt to commit arson, or any other of the felonies enumerated in the statute, though the proof should fail as to such fact, the accused might, nevertheless, be convicted of murder in the first degree, if committed by any kind of willful, deliberate, malicious and pre-meditated killing, the means and manner of which are sufficiently set forth and described in the indictment.

The judgment is reversed and the cause remanded to the court below, with instructions to put the accused again upon trial, and to proceed according to law.

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Steck v. Mahar.

Appeals—*Motions for new trial, etc.*—On an issue and trial of fact by a jury, *or the court*, a motion for a new trial is essential to correct the errors growing out of the *evidence* or *instructions*, before an appeal can be entertained by this court; but where the errors do not grow out of the *evidence* or *instructions*, but are apparent from the record, without the intervention of a bill of exceptions, there is no necessity for the motion, and the cause, in such a case, can be brought to this court without the motion having been made.

Where the errors complained of do not appear of record, save by the intervention of a bill of exceptions, a motion for a new trial must be made before an appeal will lie to this court, and the appeal will not then lie, if the error can be corrected in the court below, until the motion has been made and overruled in the circuit court.

Appeal from Jefferson Circuit Court.

Hon. Henry B. Morse, Circuit Judge.

J. A. Williams and Montgomery & Warwick, for appellant.

Garland & Nash, for appellee.

McClure, C. J.

This action appears to have been commenced under section 525, of the Civil Code, which provides that a proceeding at

law may be instituted against a party who usurps an office, by the party entitled thereto.

The appellee, who was the plaintiff in the court below, alleges, in his complaint, that he was legally appointed and commissioned as constable of Vaugine township, Jefferson county, by the Governor of the State, and that he has given bond and qualified as such, and is entitled to said office of constable, and the fees thereof. That one Jacob S. Steck has usurped said office, and is exercising the duties thereof without authority of law, and has received fees pertaining to said office, amounting to $1,000, and concludes by asking that said Steck be removed from said office, and that he, the plaintiff, have judgment for the fees received by said Steck, as constable.

Steck, as a response and exhibit, as appears from the record, simply filed his commission as constable. The cause was submitted to the court, sitting as a jury, and the court found for the appellee, and that Steck was an usurper, and rendered a judgment against him for $100 00, as damages. To which ruling and finding of the court Steck excepted, and asked time to prepare his bill of exceptions.

The bill of exceptions recites that the only evidence offered by the appellee was his commission, and that the only evidence offered by the appellant, was his commission. No declarations of law seem to have been asked by either party; nor does it appear that the court made any declaration of law; nor was there a motion for a new trial. Under this state of facts, the defendant, in the court below appealed, on an issue and trial of fact, by a jury, *or the court.* A motion for a new trial is essential to correct the errors growing out of the *evidence* or *instructions*, before an appeal can be entertained by this court. Where the error complained of does not relate to errors growing out of the *evidence* or *instructions*, but are apparent from the record, without the intervention of a bill of exceptions, there is no necessity for making a motion for a new trial, and the cause, in such a case, can be brought to this court without making the motion; but in cases where the error complained

of does not appear of record, save by the intervention of a bill of exceptions, a motion for a new trial must be made before appeal will lie to this court; and the appeal will not lie in the case last supposed, if the error complained of can be corrected in the manner provided in section 571, of the Civil Code, until the motion has been made in the circuit court, and there overruled, (*Sec. 886.*)

In the case at bar, it appears there was an issue and trial of fact by the court below; not only an issue and trial, but a finding that Mahar was, and is the legal constable of Vaugine township, and that Steck is an usurper of said office, and not entitled to discharge the duties thereof, and of right, has no claim thereto. A judgment of ouster followed this finding. There is no error in the *judgment*, if the finding of the court, sitting as a jury, is correct. Whether the court erred as to the finding of *facts*, we have no means of ascertaining, nor would it be proper for us to take the matter under consideration, in the present attitude of the case. Counsel for the appellant urge that the bill of exceptions is defective in not showing the evidence, or in any manner identifying it. It is unnecessary to say any thing about the exceptions, as the record itself cannot be considered by the court.

The appeal is dismissed.

GREGG, J., dissenting, says:

In this case an action was brought, under the Code, to determine the right to the office of constable in Vaugine township, Jefferson county.

The suit seems to have been regularly brought; the parties appeared in the circuit court and, by consent, went to trial before the court, sitting as a jury; both introduced evidence; the court found for the appellee, and rendered judgment, ousting the appellant from the office, etc. He excepted to the finding and judgment; tendered his bill of exceptions, which was made part of the record, and prayed an appeal to this court, which was granted.

In our opinion, this brings the case properly before this court for affirmance or reversal.

If the appellant has failed to show error in the court below, the judgment should be affirmed.

If a motion for a new trial must be made in that court, before this court can consider any alleged error growing out of the evidence or instructions of the court, a party appealing without such motion, loses any advantage that he otherwise would have had upon a review of the evidence or instructions, and if the record shows no error outside of such exceptions, the record should at once be affirmed.

A litigant often takes all the necessary steps to bring his case properly before the court for determination, and wholly fails to show any error in the record; his appeal is not, therefore, dismissed, but the judgment affirmed.

When an appeal is granted the whole record comes before the court. Suppose assumpsit should be brought upon an alleged promise to pay one thousand dollars for the murder of ten black men, and the defendant should set up that the plaintiff was to murder fifteen for that sum, and having killed but ten no right of action had accrued, and should a trial be had, finding and judgment for $1,000 for the plaintiff, a bill of exceptions taken, setting out the evidence, a motion in arrest of judgment, and an appeal to this court, but no motion for a new trial, would this court, for that reason, not look to the other errors and illegalities upon the face of the record, and reverse without considering the evidence or instructions?

The errors of law appearing *de hors*, the evidence and instructions should be corrected. For want of the motion the appellant simply loses the benefit of his objections and exceptions, wherein such motion is required, and if there is no other error, as in the case under consideration, the judgment should be affirmed. If additional error appears it should be reversed. And if this court refuses to consider the record, simply because there was a bill of exceptions to the admission of evidence, and no motion for a new trial, then it can never discover

whether there were other errors or not. If this court does go into the record to find whether or not such other errors exist, then it should, by its judgment, announce that there is or is not error; that is, affirm or reverse.

It certainly cannot be earnestly contended that errors made to appear upon the record, by demurrer or otherwise, entirely disconnected with the evidence or instructions, cannot be corrected, because a litigant has set out a bill of exceptions, and made no motion for a new trial. The fact of losing the benefit of his exceptions, in these particulars, does not forfeit his right to have other errors considered, and if the court considers the record at all, to see if other errors are apparent, how is the world to know its conclusions, if the fact is not announced by affirming or reversing the judgment?

We hold that the judgment should have been affirmed.

RINGO v. BROOKS.

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STATUTE OF LIMITATIONS—*What will suspend.*—To suspend the statute of limitations or to remove the bar, when it once attaches, there must be an acknowledgment of the debt or a promise to pay it. If it be an acknowledgment simply, it must be express and to the effect that the debt is due at the time. If it be a promise, that also must be express and pre-supposes an acknowledgment.

The acknowledgment or promise must clearly identify the debt; must identify it with such certainty as will determine its character and the amount due; it must be made to a party in interest, to the person to whom the debt is due, or one authorized to act for him, and *with the intent to pay it at the time.*

Where there is no priority between the parties, a promise or acknowledgment will not suspend the statute.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Ringo, Garland & Nash, for appellant.

This suit was brought under the *14th section of "An Act, defining the jurisdiction of Justices of the Peace,"* approved December 16, 1868, and was properly brought in the name of Ringo, the party in interest, if brought at all under the law then in force.

The repeal of that portion of the act under which the suit was brought, by the *Act of April 12, 1869*, did not invalidate the proceedings, but continued and made effectual the same, the same as though there had been no repeal. *See Act, 12 April, 1869; also secs. 794–95 of Code; also sections 25 and 30 of Code.* Hence, we submit that the court erred in sustaining the demurrer to the plaintiff's replication to the statute of limitations.

Rice & Benjamin, for appellee.

Brooks had the right to pay all of the firm debts by pleading the statute of limitations, if that was or would have been a good bar to the debt, if the firm had not entered into such covenant. *See Gould's Digest, page 753, and sec ions 22 and 23. See Woody, et al v. State Bank, 12 Ark. 780. Grant v. Ashley 12 Ark. 762.*

SEARLE, J.

This was an action, brought before a justice of the peace, by the appellant against the appellee, on the 3d of February, 1869, for the recovery of money alleged to be due, for the use and occupation of his certain farm by appellee, during the year 1865. The action was upon an account against one Hanger and Brooks, the appellee herein, for two hundred and forty dollars; but brought against Brooks alone, by virtue of a certain agreement, the nature of which will appear further on. The

complaint alleges that the said Hanger and Brooks, as partners, cultivated plaintiff's farm during the year 1865; that afterwards, upon the dissolution of the partnership and the adjustment of the business thereof, the said parties, as between themselves and said Brooks, had not paid the money due for the use and occupation of the plaintiff's farm, the same being one of the debts so agreed to be paid by the said Brooks.

Defendants answered that the cause of action had accrued more than three years before the commencement of the action, whereby the action was barred.

The plaintiff replied, that since the accruing of his cause of action, to wit: On the 22d of May 1867, the defendant agreed in writing, by his attorney, in fact, to pay all the debts of said partnership. He further replied that, within three years after the cause of action accrued, he instituted suit thereupon, in the Pulaski circuit court, against the said Hanger and one Rogers, and prosecuted the same to judgment against Hanger, but dismissed as to Rogers, he having bankrupted, and that he commenced this suit within one year next after the termination of said suit. To said replications the defendant demurred. The demurrer was sustained and judgment rendered against plaintiff for costs, from which judgment plaintiff appealed to the Pulaski circuit court. The case was heard on the same pleadings in the circuit court, demurrer sustained, judgment against plaintiff, and he appealed to this court.

The only questions to be considered, are questions of law; the demurrer admitting the facts of the replications as therein pleaded. We have therefore only to consider as to whether the agreement of the appellee, Brooks, by his agent, or the action against Hanger and Rogers had the legal effect to suspend the operation of the statute of limitation as to this cause of action. We will first consider the agreement. It was entered into by Brook's agent, whose duty it seems to have been to transact his business, generally, in his absence. It evidenced an assumption of all the debts and obligations of the partnership, the plaintiff's debt being one of them. Are these facts,

under the law, sufficient to constitute an acknowledgment of the debt, or a promise to pay it.

The authorities, in relation to questions growing out of the statutes of limitation, are somewhat conflicting. The statutes themselves are a meagre outline of the law. The rules relative to their construction and application are numerous. Let us endeavor to ascertain such as may be applicable to the case at bar, following the hitherto pretty strict construction given to these statutes by this court. To suspend the operation of the statute of limitation against a debt, or to remove the bar, when it once attaches by limitation, there must be an acknowledgment of the debt or a promise to pay it. If it be an acknowledgment simply, it must be express and to the effect that the debt is due at the time. If it be a promise, that also must be express and pre-supposes an acknowledgment. The acknowledgment or promise must clearly identify the debt; must identify it with such certainty as will determine its character and the amount due. *Ringgold and Hynson v. Dunn, 8 Ark. 499; State Bank v. Alston, 9 Ark. 455; Brown v. State Bank, 10 Ark. 135; Bebee v. Block, 12 Ark. 768; Grant v. Ashley, 12 Ark. 764; Cook v. Martin, 29 Cowen, 65; Buckingham v. Smith, 23 Con. 455.* Like all other acknowledgments and promises, having legal force and sanction, they must be made to a party in interest; to the person to whom the debt is due, or one authorized to act for him, and with the *intent at the time to pay it. Roscoe and wife v. Hale et al., 7 Grey (Mass.) 275; Wakeman v. Shuman, 5 Selden (N. Y.) 91; Clark v. Maguire's ad'mr. (35 Penn.) 260; Kenner v. Krull and wife, 19 Ill. 190.* When so made, within the rules above indicated, the law presumes that the party making them, have assumed anew their obligations, if the statutes have not attached the bar; but if the bar has already attached, the law presumes a new undertaking, and yet the assumption anew of the obligation, or the new undertaking, as the case may be, has reference alone to the statute bar, and cannot be made the foundation of the action. Let us apply the above rules to the case under consideration. The agreement was replied to suspend the opera-

tion of the statute. Had it such effect? The agreement was entered into by Rogers, as agent for Brooks, with Hanger, Brooks' former partner. It obligated Brooks to pay all debts due from the partnership of Hanger & Brooks; but it nowhere or in any manner specified or pointed out plaintiff's debt. This was certainly necessary to bring the agreement within the rules above indicated, and to give it the character of an acknowledgment of, or promise to pay the debt, to make it legally binding upon Brooks. But what makes the agreement still more worthless, if possible, as an acknowledgment of or promise to pay Ringo's claim, was, that it was entered into with a stranger and not with the plaintiff or his agent. It was, therefore, in no respect an acknowledgment or promise, within the law, and would not have the effect to prevent the running of the statute against plaintiff's account.

We will next consider the effect of the action as pleaded in plaintiff's second replication.

It appears that Hanger and Rogers had formed a partnership to cultivate plaintiff's farm in 1865. After commencing work thereon, Rogers quit the partnership and Brooks took his place, and the business was carried on during the rest of the year by Hanger and Brooks. The action was instituted against Hanger and Rogers, the latter, not as an agent of Brooks, but in his individual capacity, and was dismissed upon the suggestion of his bankruptcy. It appears, also, that it was commenced after the dissolution of the partnership of Hanger and Brooks. So far then as *this* action is concerned, *that* action is to be considered as against Hanger alone. The inquiry suggested is, did that action suspend the running of the statute, as against plaintiff's claim against Brooks? We are clearly of opinion that it did not, for there was no privity between Brooks and Hanger in that suit, and therefore there could be no privity between Brooks and Ringo. Brooks being not a party to it, the judgment against Hanger in no respect renewed Brooks' obligation to satisfy Ringo's claim.

Finding no error in the judgment of the court below, the same is affirmed.

PENN, ET AL. *v.* TOLLISON.

CONSTITUTIONAL LAW.—The people of a State have a right to alter or reform the government in the manner provided by the organic law, so long as they do not ignore or deny allegiance to the national government, or invade the provisions of the Constitution of the United States.

CONSTITUTION OF 1836—*Not destroyed by Convention of 1861.*—While there was no act of violation, nor was there any thing revolutionary in the assembling of the convention, which met at Little Rock, on the 4th of March, 1861, in pursuance of the act of January 15, 1861, yet the attempt by that body, by the passage of the ordinance of secession, to repeal the "act of acceptance" of the compact, to absolve the citizens of the State from their allegiance to the United States; the adoption of the Constitution of the "Confederate States;" the appropriation of the public domain and other property, and the adoption of a new Constitution, did not destroy the State government of 1836; and all such action on the part of the Convention was null and void, for the want of power.

The people, in their sovereign capacity, did not authorize the Convention to establish a new government; it was assembled for no such purpose; the act assembling it conferred no such power, and they were not authorized to make a new Constitution.

The convention might have had power to adjourn from day to day, but the President had no power to convene it at will, and as a Convention, it was *functus officio*, when it adjourned on the 10th of March, and all its acts, subsequent to that time, were absolutely null and void, and without authority or sanction on the part of the people.

The people are as much bound to their allegiance by the Constitution of the United States, as their servants, and the moment the Convention attempted to abjure its allegiance, it became revolutionary, and all its subsequent acts nullities, even with the sanction of the people.

Conquest and occupation by a foreign foe, can, alone, excuse or suspend a citizen of the State from allegiance to the United States.

States have no existence, politically, outside of and independently of the Constitution of the United States, and it rests with Congress to declare what government is established in a State and they must recognize it.

The Convention was not in the exercise of rightful inherent powers, and the government formed or attempted to be formed, was not a *de facto* government.

There is no such thing as a *de facto* State, known to the Constitution of the United States.

To constitute a *de facto* officer, there must be a rightful government.

This court does not regard a service made in 1861, by a Confederate court, as valid, and a decree rendered thereon is a nullity.

Appeal from Crittenden Circuit Court.

HON. L. H. MANGUM, Special Judge.

Watkins & Rose, for appellants.

The infant appellant, Littleton Penn, was never properly notified of the original bill. The orders of publication were insufficient, as they neither showed what the lands were, nor what charge was sought to be enforced against them. *See Brodie v. Skelton, 11 Ark., 120; Clark v. Strong, 13 ib., 491; Suffold v. Suffold, 14, ib , 408.* However, these orders, such as they were, do not appear to have been published.

The plaintiff then endeavored to get service under the provisions of *sections 17, 18, ch. 28, Gould's Digest. See, leave granted by the court to serve in this manner, transcript, p. 74, and affidavit of such service, p. 254; and see also recitals of decree thereupon, tr. p. 29.*

These recitals, more the creation of the clerk than of the court, in a general way it may be said, would in no event be of service. *Brodie v. Skelton, 11 Ark., 120; Murphy v. Williams, 1 ib. 376; Kimball v. Merrick, 20 ib. 12.*

To make a good service under this statute it must appear:

First. That the copy of the bill and notice of the commencement of the suit was delivered to each defendant.

Second. That the service should be made (1) outside of the State of Arkansas, and (2) within the limits of the United States.

Third. It must be made forty days before the term at which the defendant is required to appear.

The service was made on the 5th April, and the court was held on the 14th of May. *See tr. pp. 255 and 75.* One of the days ought to be excluded. *Vandenberg v. Van Rensallaer, 6 Paige, 147; Jackson v. Valkenburgh, 8 Cowen, 260.*

The only notification, then, defendants ever had of the pendency of the supplemental bill, which spoke of a new and ex-

tensive field of litigation, was by an order of publication made at the September term, 1861, pending the rebellion. Will the court hold this to be good, or null and void to all intents and purposes? If the latter, then the infant appellant was never in court on the case made by the supplemental bill. Of course it was necessary for the plaintiff to ge service on all the parties on the supplemental bill before they could proceed at all. *3 Daniel's Ch'y Pl. and Pr. 1680.* Even if this publication were good as to the proceedings on the supplemental bill, there having been no proper service in the case made by the original bill, the decree rendered on that bill must be reversed. The appearance for the infant, by a guardian *ad litem* was nugatory, if the infant had not been properly served with process. See *James v. James, 4 Paige Ch'y, 119; Walker v. Hallett, 1 Ala. N. S. 379; Johnston v. Hainsworth, 6 Ala., 443; Daniel v. Hennegan, 5 J. J. M. 48.; Graham v. Sublett, 6 ib., 44. See also Gould's Dig., sec. 6. chap. 28; sec. 43, ch. 133; Clark v. Gilmer, 28 Ala., 265; Rutherford v. Richardson, 1 Sneed, 609; 18 B. Mon. 558; 9 Ind., 132, 181.*

English, Gantt & English and Pike & Adams, for appellee.

The original decree is not now before the court, but if the court could look back, and inquire into its regularity, the supposed errors urged against it are imaginary.

It is objected that the original decree was rendered against Littleton Penn, a minor, without his being properly served with process.

He was served with a copy of the bill, and notice of the commencement of the suit, in accordance with *sec. 17, chap. 28, Gould's Dig., 221;* and the service was proven by affidavit, as provided by *sec. 18*, of the same *chapter*. (*Transcript, p. 254.*)

But, say the counsel for the appellants, this service was only *thirty-nine* days before the commencement of the term at which the party was required to appear, and not forty days, as provided by the statute.

The service was upon the 5th of April, 1855. The appearance term commenced on the 14th May, 1855. (*Transcript, p. 75.*) Had a decree by default have been rendered at the appearance term, on this service, it might have been irregular for want of full time. But no decree was rendered at that term. On the contrary, Redman was appointed a guardian *ad litem*, for Littleton Penn; and, on his request *thirty* days was given him to file his answer. (*Transcript, p. 79–80*) Redman having failed to answer, was removed, and Moore appointed guardian, etc., who filed an answer for the infant, denying the allegations of the bill, May 21, 1856. (*Transcript, p. 36,*) and the cause heard, and the original decree rendered not until the May term, 1856, more than a year after Littleton Penn was served with process.

But we will not further discuss the regularity of the original decree, from which there was no appeal, and which is not now before the court.

Against the regularity of the decree rendered finally on the supplemental bill, answers, etc., and from which this appeal was granted, it is urged:

That the only notice which the appellants had of the filing of the supplemental bill was an order of publication made at September term, 1861, and it is suggested that this order of publication was void, because the *rebellion* was then going on!

It was, perhaps, not necessary to give the defendants below notice of the filing of the supplemental bill. They had prosecuted their appeal, obtained a reversal of the decree confirming the sale, the mandate of this court was sent down and filed, and they were in court, and bound to take notice of any steps taken in this cause. See *Digest, chap. 28, sec. 55; Trustees R. E. Bank v. Bozeman et al.; 15 Ark., 321.*

But, grant that notice of the filing of the supplemental bill was necessary, the joint and several answer of all the defendants, including Littleton Penn, to the supplemental bill, was filed on the 9th November, 1861. (*Transcript. p. 172, 183.*) And this was a waiver of notice, if none had been given.

Moreover, the separate answer of Littleton Penn, by his guardian, *ad litem*, to the supplemental bill, was filed. (*Transcript, p. 198–9–208.*)

Notice of the filing of the supplemental bill was given to Littleton Penn, by order of publication, made it is true in September, 1861, and proof of publication was filed at November term, 1861, and during the *rebellion.* (*Transcript, p. 205, 206;*) and because a rebellion was then going on, the counsel for appellants gravely suggest that this order of publication was a nullity, etc.

As far as our research has extended, Mr. JUSTICE BARTLETT, in *Filkins v. Hawkins*, is the only American or English judge who has decided that the ordinary judicial proceedings of the courts, made during a rebellion, but in no way in aid of it, were void, and the opinion of that learned judge was reversed by this court.

Surely, this order of publication was not in *aid of the rebellion*, but a simple incident occurring in the ordinary administration of justice, necessary to peace and good order, and valid, according to the opinion of Mr. CHIEF JUSTICE CHASE, in *Texas v. White, 7 Wallace Rep., 733;* and so the Supreme Court of the United States held, in *White v. Cannon, 6 Wallace, 443*, that a judgment rendered by the Supreme Court of Louisiana, during the rebellion, was not void, but valid.

MCCLURE, C. J.

This cause was before this court, at the October term, 1859, but the question then involved, is not at all similar to the one now presented. From an examination of the case, before presented, it appears that Mrs. Tollison filed her bill to enforce a vendor's lien against certain lands in Crittenden county. In June, of 1856, she obtained a decree for $8,603 66, and the Planters' Bank of Tennessee, a decree for $2,811 65, and the lands described in the bill were ordered sold, for cash, to satisfy these decrees.

On the first of September, 1856, the lands were offered for

sale, and Mrs. Tollison became the purchaser. The master and commissioner made his report of sale at the November term of 1856. To the report the defendant filed exceptions and moved the court to set aside the sale. The exceptions were overruled and the sale confirmed. To the *over-ruling* of the *exceptions*, and the confirmation of the sale, the defendant excepted and appealed to this court. This court reversed the decree of *confirmation*, set aside the sale and ordered the property sold.

On remanding the cause, Mrs. Tollison filed a supplemental bill, in which she sets up the proceedings in the original decree, the sale, that it was set aside, and that since the rendition of the original decree, she has been compelled to pay $2,678 43 to the Receiver of the Real Estate Bank, in satisfaction of a prior lien, that the Penns were bound to discharge, and which she was compelled to pay to prevent a sale of the lands; that she has paid $601 36 taxes on said land, which she asks may be decreed to be a lien against said lands. To this bill she makes Benjamin W. Ellis, the administrator of James D. Penn, deceased, a party, and also the following named persons: Benjamin W. Williamson, Martha O. Penn, Littleton Penn (an infant) Josiah Deloach, Olive Deloach (his wife), James Penn, and the Planters' Bank of Tennessee. At the September term, 1861, service was had on Littleton Penn (an infant) by publication, and the cause was set down for hearing at the next term.

The late rebellion seems to have interrupted the administration of justice in the courts, and as appears by the record, no further proceedings were had in the case until after the 27th day of August, 1866. The cause was tried by a special judge, and it was decreed that the complainant recover of the defendants the sum of $8,605 66, with interest thereon from the date of the rendition of the original decree, and the further sum of $1,339 87, and in default of payment within ninety days, that the commissioner sell the same to the highest bidder, etc. The Hon. J. J. Clendennin granted an appeal and supersedeas, and thus the case now stands in this court.

The counsel for the appellants raise many questions, not

only to the decree rendered on the supplemental bill, but as to the decree rendered on the original bill. We will first consider the point urged against the decree upon the supplemental bill. Notice of the pending of the supplemental bill was made by an order of publication, at the September term, 1861, on Littleton Penn, a minor, *during the rebellion*, and proof of publication was filed at the November term, 1861.

Counsel for the appellants ask, "will the court hold this service good, or null and void to all intents and purposes? If the latter, then the infant appellant was never in court on the case made by the supplemental bill." This question involves the validity of service, and the authority of courts acting in this State from March 4, 1861, to March 13, 1865. The counsel for the appellee say, that the question of the validity of service and the authority of the courts in this State, in September, of 1861, and during the rebellion, is settled by the case of *Hawkins v. Filkins, 24 Ark. 286.*

Since the decision of the case of *Hawkins v. Filkins, 24 Ark., 286*, the people of the State of Arkansas have framed and adopted a Constitution, the phraseology of which is not exactly the same as the provision existing at the time, and construed by the court alluded to, and for this reason the question is not *res adjudicata*, as counsel intimate.

The Constitution of 1864 declared that, "*all* the action of the State of Arkansas, under the authority of the Convention that assembled at Little Rock, on the 4th of March, 1861, its ordinances or its Constitution, whether legislative, executive, judicial or military, 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 acts of justices of the peace, or other officers, in their authority to administer oaths, or to take and certify acknowledgments of writing or in the solemnization of marriage." This language, we say, received construction in the case of *Hawkins v. Filkins, 24 Ark., 286*, but the language of the Constitution we are called upon to con-

strue, cannot be made to conform to the course of reasoning laid down in that case. The material difference, in the two Constitutions, consists of the difference of the provisos. In the Constitution of 1864, the proviso is, that the ordinance "shall not be so construed as to affect the *rights of individuals.*" This language, it is admitted, is not very definite as to just what "rights of individuals" were intended to be protected. But not so, as to the Constitution of 1868. It provides that the ordinance "shall not be so construed as to affect the rights of *private* individuals, *arising under contracts between the parties.*"

The rule laid down in the case of *Hawkins v. Filkins, 24 Ark., 286*, is, "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." This rule will be strictly adhered to in the case now before us.

In construing the provisions in the Constitution of 1864, the court said, in the case of *Hawkins v. Filkins, 24 Ark., 286*, the "rights of individuals," sought to be preserved, extended to and included the right to sue and pursue all the remedies known to the law for the enforcement of civil rights, and protected, and was intended to protect rights acquired by the action of courts organized under the Constitution of 1861. Keeping this decision in view, now let us turn to the proviso in the Constitution of 1868, and see if the construction placed on the proviso in the Constitution of 1864, can be reconciled with the language used in the Constitution of 1868, and if it cannot, then we must seek for the "*intention* of the Convention" according to the ordinary meaning of the language used.

The Constitution of 1868 declares that the only "rights" sought to be protected, are such as grew out of "*contracts between the parties,*" and that all other action of the legislative, executive, judicial or military arm of the State government, save acts changing county boundaries, county seats, acts of justices of the peace in administering oaths, certifying the acknowledgment of deeds or the solemnization of marriages,

is absolutely null and void. The mere fact that the Convention of 1868, in framing the Constitution, did not follow the exact language used in the proviso of the Constitution of 1864, is, to our minds, a circumstance going to show that they did not acquiesce in the construction placed on that clause of the Constitution of 1864, by the court in the case of *Hawkins v. Filkins*, (*24 Ark.*, *286*,) and the use of the word "*private*," before individuals, and the additional words "*arising under contracts between the parties*," after the word individual, to our minds, is conclusive that they were inserted for some purpose, and that purpose was, to limit the "rights" protected to "private individuals," and to declare the entire political action of the State, under the Constitution, null and void.

One of the questions propounded by the court in *Hawkins v. Filkins*, (*24 Ark.*, *286*,) is, "did the passage of the ordinance of secession, and the revolutionary action of the State, destroy the State government of 1836, or make invalid the acts of her civil government (of 1861)." Precisely the same question that arose in that case, is presented in the case now under consideration.

The thirteen colonies that framed and adopted the articles of confederation, signed at Philadelphia, on the 9th of July, 1778, entered into "a league of friendship with each other for their common defense, the security of their liberties and their general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade or any other pretense whatever," (*Art. 3*, *Art. of Confederation.*) Under the articles of confederation, each State had the sole power of regulating its form of government, and it was supposed to have had power sufficient to keep down all internal dissensions. On the 25th of May, 1787, a Convention of deputies, from twelve of the colonies that composed the government formed under the articles of confederation, assembled at Philadelphia, and framed what is now known as the Constitution of the United States. The Constitution thus framed, was adopted by the people of

the colonies, and is unlike the articles of confederation in many respects, a few of which may be mentioned: *First.* It declares that "the *people* of the United States, in order to form *a more perfect union*, establish justice, *insure domestic tranquility*, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and posterity, do ordain and establish this Constitution for the United States." There are two things noticeable between the preamble to the Constitution of the United States and the articles of confederation, to which we shall direct attention; the first of which is, that the "*people*," and not the *colonies*, were to form the new government. The second and additional object was "*to secure domestic tranquility*," a thing not embraced within the original articles of association or confederation. In the first instance the object seems to have been to abolish the government formed by the *colonies*, and in its stead, rear a government formed by the "*people*." In the second, the object seems to have been to provide a means, not then provided, to "secure domestic tranquility" in the different States by the use of the strong arm of the new government."

Second. It declares that "no State shall enter into any treaty, alliance or confederation."

Third. It is made treason to levy war against the United States, or to adhere to its enemies, or to give them aid and comfort.

Fourth. It declares that "the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature, or of the executive (where the Legislature cannot be convened) against domestic violence."

Fifth. It declares that the "Constitution and the laws of the United States, made in pursuance thereof * * * shall be the supreme law of the land, and the *judges* in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Sixth. It declares that "members of the several State leg-

islatures, and all executive and *judicial officers*, both of the United States *and the several States*, shall be bound by oath or affirmation, to support the Constitution" of the United States.

There are many other differences that might be mentioned, but enough have already been stated to show that another form of government was intended to be created, and that the object was to create a nation or government of delegated powers, by the people.

We will now pass on to the year 1803, the time at which the United States acquired the territory from France, out of which Arkansas is formed. From this point we will pass along to the year 1819, when we find Congress providing a territorial government for the territory that now composes the State of Arkansas, and from that date, until June, of 1836, when we find that the Congress of the United States admitted Arkansas as a "new State" into the Union. In the act of admission, the assent of the State of Arkansas was irrevocably required and given, that "without the consent of the United States, the State should never interfere in the primary disposal of the soil within the same, by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers of the United States."

We have recited these facts and circumstances for the purpose of showing that the State of Arkansas, admitted into the Union in June, 1836, became a member of the Federal Union, and subject to all the restrictions imposed upon the other States of the Union.

The public records of the political branch of the government of the United States, in all political questions, binds the judiciary thereof, and we know of no reason why the same rule ought not to be applicable to the judiciary of a State. By the public records of the State of Arkansas, we find that the State, admitted in June, of 1836, continued to live and exist as "a State, republican in form," from the time of its admission until the year 1861.

On the 15th of January, 1861, the Legislature of the State of Arkansas passed "an act to provide for a State Convention." The eighth section of said act provides, "That upon the organization of said Convention, it shall take into consideration *the condition of political affairs*, and determine what course the State of Arkansas shall take *in the present political crisis.*" It will be borne in mind that the object of the Convention, thus provided for, was not to make a new Constitution, but "to take into consideration *the condition of political affairs*, and determine what course the State of Arkansas should take *in the present political crisis.*"

The Convention, provided for, assembled at Little Rock on the 4th of March, 1861, and was composed of delegates elected by the people. In calling this Convention there was no act of violation, nor was there any thing revolutionary in its assembling; for the people of a State have the right to alter or reform the government, in the manner provided by the organic law, so long as they do not ignore or deny allegiance to the national government or invade the provisions of the Constitution of the United States. Whether the Convention, assembled at Little Rock on the 4th of March, 1861, kept within these limits remains to be seen.

The Constitution of 1836 was ordained and established "for the government of the State of Arkansas." It distributed certain powers among various departments, giving to one department executive power, to another legislative power, and to another judicial power, and pointed out the means by which the persons should be chosen to execute and exercise the powers of the several departments. The national government recognized the heads of these departments and their subordinates, as constituting the executive, the legislative and judicial power of the political State of Arkansas. In short, the Constitution of 1836, created a political State, and the functions thereof were exercised by the persons designated to exercise the power conferred. The State thus created, owed allegiance to the national government, that could only be revoked by successful

revolution. With this allegiance kept constantly in view, we will now turn our attention to the records of the Convention.

By an examination of the records of that body, we find that on the third day of the Convention, A. C. Spain, had his credentials, as a Commissioner from the State of South Carolina, presented to the Convention. With his credentials, was presented a certified copy of an ordinance, "To dissolve the union between the State of South Carolina and other States united with her under the compact entitled, the Constitution of the United States of America." Mr. Spain, also, presented a copy of a "Declaration of the immediate causes which induce and justify the secession of South Carolina from the Federal Union." This gentleman was, thereupon, invited to a seat within the bar of the Convention. D. P. Hill had his credentials, as a Commissioner from the State of Georgia, presented to the Convention. Among other documents submitted by him to the Convention, are certain resolutions adopted by the people of Georgia, "as to the right and duties of Georgia to secede from the Union, and her policy after doing so, toward certain other States." Mr. Hill also submitted a copy of a resolution or ordinance adopted by the State of Georgia, "to dissolve the union between the State of Georgia and other States, once united with her under a compact of government, entitled the Constitution of the United States of America." This gentleman was also invited to take a seat within the bar of the Convention. On the 16th of March, 1861, W. S. Oldham presented to the Convention his appointment as a Commissioner of the "Confederate States," signed by Mr. Davis. This gentleman was also invited to take a seat within the bar of the Convention.

These things are mentioned at this point, for the purpose of directing attention to the class of men invited within the bar of the Convention, and reference is made to the documents presented, and the cause represented, for the purpose of keeping before the mind, the fact, this Convention was representing the sovereignty of the State; that it was charged with deter-

mining what course the State of Arkansas should take in the then political crisis. With these things kept well in view, we will continue to trace the action of the Convention.

On the 6th of May, 1861, the Convention passed "An ordinance to dissolve the union now existing between the State of Arkansas and the other States united with her, under the compact entitled, the Constitution of the United States of America." This ordinance repeals, or rather attempts to repeal, the provisions of the "act of acceptance," of the compact, made between the Legislature of Arkansas and the United States, on the 18th of October, 1836. It also declares, that "the citizens of the State of Arkansas are absolved from all allegiance to the United States, and that the State of Arkansas is in the possession and exercise of all the rights and sovereignty which appertain to a free and independent State." On the 10th of May, 1861, the Convention, by ordinance, pledged the allegiance of the State of Arkansas to the "Confederate States of America," and adopted the Constitution of the Confederate States, that had been accepted and adopted by South Carolina, Georgia, Flordia, Alabama, Mississippi, Louisiana and Texas.

On the 11th of May, 1861, the Convention passed "an ordinance appropriating the domain, public lands, and other property, which belonged to the United States government, in this State, on the 6th of May, 1861," to the State of Arkansas. This ordinance declares, "That the domain, public lands, and other property, which belonged to, and vested in the government of the United States, situate in this State, on the 6th of May, 1861, be and the same are hereby appropriated to the State of Arkansas, as the domain, public lands, and property of said State, to be hereafter disposed of, applied and appropriated, as the other domain, public lands, and property of this State, hereby declaring that all the rights, title and claim which heretofore vested in said government of the United States, of, in and to said domain, public lands and other property, now vests and belongs to the State of Arkansas, subject to be disposed of as hereafter

may be provided by the General Assembly of the State of Arkansas." This action, to some extent, may be regarded as an attempt, "to interfere with the primary disposal of the soil of the United States," and in violation of the ordinance and acceptance of compact, "of October 18, 1836, whereby the State of Arkansas, freely accepted, ratified and *irrevocably confirmed* the compact of union between herself and the United States." Persons convicted of crime, in the courts of the United States, and confined in the penitentiary of the State, were authorized to be pardoned by the Governor of the State, by the ordinance of said Convention; the ordinary revenue of the State was appropriated with a lavish hand, to arm men to swell the ranks of the Confederate army, and the drama closed by the *adoption of a Constitution* which recognized no allegiance, on the part of the people of Arkansas, toward the government of the United States. All of this did not destroy the State government made by the people of the State of Arkansas in 1836, and it may well be said, that the action of the Convention, up to this point, was void for want of power. It may be asked what action did destroy the Government of 1836, if it was not done by the acts enumerated?

We have said that the closing act of the drama, enacted by the Constitutional Convention of 1861, was the adoption of a Constitution which recognized no allegiance, on the part of the people of the State of Arkansas, to the government of the United States. The officers of the State government of 1836, from the highest to the lowest, by an ordinance of the Convention, were required to, and did take an oath "to support the Constitution framed by the Convention of 1861, and all ordinances and resolutions passed or adopted by the Convention, and true allegiance to bear to the State of Arkansas (of 1861) and to the Confederate States of America." By the 8th Section of Article VIII, "all officers, civil and military, holding commissions under authority of the Constitution of 1836, were continued in the same offices under the Constitution of 1861." Thus the State government created by the Constitution of 1836,

was deprived of all vitality; the members of the legislature, the executive and judicial officers, who were bound by oath or affirmation, "to support the Constitution of the United States and of the State of Arkansas," (of 1836) ceased to do so, and entered upon similar duties under the Constitution of 1861, and transferred their national allegiance to the Confederate States.

The court, in *Hawkins v. Filkins, 24 Ark. 286*, says, "there was no change in this State government; that the ordinance of secession neither added to, nor detracted from the Constitution, and that it was not intended by the Convention to destroy the State government." We think we have shown that there *was* "a change in the State government," when all the officers abandoned and deserted their respective positions, from a State known to the Union, and entered upon similar duties under the provisions of a Constitution which was in antagonism to the Constitution of the United States; and having shown this, let us see if it be true that "the Constitution did not intend to destroy the State government?" It is true that the Convention did not intend to destroy *all* State government, but it did intend to destroy the State government and Constitution made in 1836. Without destroying it, the friends and advocates of secession had no means whereby the Confederate States could be aided in their struggle, save by entering into open rebellion. Without destroying the State government of 1836, the President of the United States could have called upon the executive for troops. When the army of the United States subdued the rebellion, in the State of Arkansas, in all the State of Arkansas there was no person who ever claimed to belong to the State government of 1836, or who claimed to be an officer of the same. When the federal arms had restored peace, within the borders of the State, they found the Constitution of 1836 and that of 1861. That of 1861 was hostile to the federal government, and because it was formed in aid of the rebellion, could not be recognized. They then involuntarily turned to the Constitution of 1836, and found it like the engine whose

motive power is gone, a perfect, but dormant instrument. The executive, who stood at the head of that department, and his many subordinates could nowhere be found. The legislative branch of the government had ceased to exist by reason of the limitation placed upon the term of office, and the judicial branch of the government, from the highest to the lowest, was without a representative. Here was the Constitution of 1836, and the people who framed and adopted it, but there was no officer or person clothed with the legal power of filling the vacancies in the several departments, or who was authorized, either by the Constitution or laws of the State, to call an election, and yet we are told that the State government was not destroyed, in the State of Arkansas, by reason of the rebellious acts we have mentioned. We are told that the State may have a form of government at variance with and antagonistic to the federal government and still be a State in the Union. We are told that that clause of the Constitution of the United States, which requires the legislative, executive and judicial officers of a State to support the Constitution of the United States, is not binding upon those officers, and that they may discharge their respective duties at a time and during a period in which they have ignored allegiance to the United States, and at a time when they have sworn allegiance to a government at war and hostile to the government of the United States. We do not believe in any such dogmas. The idea that the people of a State may, at their pleasure, set up a form of government inimical and hostile to the government of the United States, and that all its acts, not in conflict with the express provisions of the Constitution of the United States, during the period it has been incubating treason, are legal, valid or binding, is a heresy that should not emanate from the highest judi cial tribunal of a State.

In the case of *The State v. Williams*, the question was discussed whether or not the office of attorney general did not become vacant when Williams left the Confederate lines and took the oath of allegiance to the United States government.

The judiciary that decided and discussed this question recognized the Constitution of 1861 as the fountain from which they drew judicial power. They regarded the Constitution of 1836, and the government formed under it, as one of the things of the past, and if it had been intimated to that court that they were *de facto* judges, under the government formed by the Constitution of 1836, they would have treated the intimation with scorn. We are not quoting the case of *The State v. Williams*, for the purpose of endorsing the doctrine or dicta therein enunciated, but for the purpose of showing that the highest judicial tribunal, created by the Constitution of 1861, did not claim or pretend that the action of the State of Arkansas, in either a legislative, executive or judicial character, did not depend for its validity on the fact that the act, complained of, was not in conflict with the Constitution of the United States.

It appears from the opinion of Judge PIKE, that Williams sought and obtained the office of attorney general; that he held and exercised the duties of the office for sometime, and afterwards came within the federal lines and took the oath of allegiance. A proceeding, by *quo warranto*, was brought before the Supreme Court, and Judge PIKE, speaking for himself and Judges ENGLISH and COMPTON, said: "The mere taking the oath of allegiance to the United States, without more, was an abandonment of any office under the Confederate States, or under the lawful government of the State. It was the desertion of a post of duty, infinitely worse than desertion by a soldier of his colors and going over to the enemy to turn his bullets against the bosoms of his former comrades." Now it is submitted, that if the mere taking of an oath of allegiance, by one who was an officer under the Constitution and government formed in 1861, to support the Constitution of the United States, *eo instanti*, rendered that office vacant, that an oath of allegiance taken to support the Constitution of the Confederate States vacated all the offices recognized by the Constition and laws of 1836. We cannot conceive of any condition of

affairs that would authorize us to tolerate the acts of persons, as legal, who, claimed to exercise judicial functions, who, in the exercise of these functions, were sworn to disregard the Constitution of the United States, or who had solemnly sworn they would not recognize it as the supreme law of the land; and such was the attitude in which the officers of the State government, formed by the Constitution of 1861, were placed.

In *Hawkins v. Filkins*, the learned judge lays down the doctrine, that "even in time of civil war, government and law remain absolute necessities," and that without these, "the whole people of the State would be left without law and without government; that life, liberty and property, would be left to the mercy of brutal violence, and to the mercy of those who can only be restrained from violence by law." Before the passage of the Constitution of 1861, the people of the State of Arkansas had a government that, in time of civil war, would have furnished protection to life, liberty and property. For a period of twenty five years the Constitution of 1836 had furnished her citizens with all the protection of life, liberty and property that they desired or required. The government in existence, prior to March 4, 1861, was as capable of furnishing protection to the citizen, during a period of civil war, as the government formed under the Constitutions of Ohio, Indiana and Illinois.

If there had been no civil government existing in Arkansas, prior to 1861, it might, with some plausibility, be argued that some kind of State government was necessary, and that, under such circumstances, the acts of that government ought to be sustained, in order to preserve the rights of the citizens of the States, but such a theory cannot be argued, because there was a good and valid State government in existence when the Convention of 1861 assembled. The government, formed by the Constitution of 1861, was not a *necessity*. On the contrary, the object of its framers was to render the government, formed thereunder, an instrument, by which a dissolution of the Union could be brought about, and on the ruins of which might be

builded a government, whose highest ambition was the perpetuation of African slavery. It is admitted, in *Hawkins v. Filkins*, that the people of Arkansas owed allegiance to the United States to the extent of her delegated powers, for national purposes, but it is insisted that this allegiance ceased, the moment the laws, which protected the citizen, were suspended. Waiving, for the present, all argument on the question as to whether the people of Arkansas could suspend the laws, and afterwards plead their own wrong in bar to the allegiance they owed the United States, we will now proceed to inquire what power Arkansas delegated to the general government, when she was admitted into the Union. Section ten, of Article one (*Con. U. S.*) says: "No State shall enter into any treaty, alliance or confederation." Here we have the mandatory and prohibitory command of the Constitution, prohibiting just what was attempted to be done by the framers of the Constitution of 1861. The ordinance of secession was passed on the 6th day of May, 1861, and the Constitution of 1861 was adopted by the Convention on the 1st day of June, of that year. At the time the Convention passed the ordinance of secession there was no "civil war" in Arkansas, nor was there at the time the Convention adopted the Constitution of June 1861. So far as the public records of the country are concerned, and it is by these we must be guided, there is nothing showing that Arkansas was in a state of civil war or rebellion until August 16th, 1861, at which time the President issued his proclamation of the fact. These things go to establish the fact that the ordinance of secession, and the creation of a new government under another Constitution, were not political acts intended to provide the people of Arkansas with a civil government, during a period of civil war; but on the other hand, they point with unerring certainty to the fact, that these acts were intended to precipitate the people into revolution, and place the sovereignty of the State into the hands of men, who would use it to destroy a government they all had taken a solemn oath to support and defend.

This brings us to another view of this question. Judge STORY says: (*Story on the Constitution, vol. 1, page 243.*) "*The people*, and the *people only*, in their original sovereign capacity, have a right to change their form of government." Now the question arises: "Did the people, in their original sovereign capacity, in any manner, accept the government, formed by the Constitution of 1861?" It will be borne in mind that the sole object of calling the Convention of 1861 was, to "take into consideration the condition of political affairs, and determine what course the State of Arkansas shall take in the present political crisis." The question, as to whether the Convention should be called, was submitted to the people, and it appears that a majority of the legal voters, voting, favored the call. This being true, there was unquestioned authority for the assembling of the Convention, for, to use the language of Judge STORY, "the people, in their original sovereign capacity" had authorized it. But did the people, "in their original sovereign capacity" authorize the establishment of a new State government? We think not. The Convention was authorized, and when assembled, had power only to do two things—first, to "take into consideration the condition of political affairs," and second, "to determine what course the State of Arkansas should take in the then political crisis." The first meeting of the Convention was on the 4th of March, 1861, and it adjourned, on the 21st of the same month, to meet on the 19th of August, 1861. On the day before the Convention adjourned, it passed a resolution or ordinance, providing for the taking of the sense of the electors of the State, on the question of "co-operation" or "secession." Whether the President of the Convention and the friends of secession feared the result of the election about to be held, does not appear from the proceedings of the Convention. But it does appear that the President of the Convention, on his own motion, re-assembled the Convention before any expression of the people could be obtained, and advised and encouraged the passage of the ordinance of secession. The Convention was re-assembled on the 6th of May,

1861, and the ordinance of secession was passed by four o'clock P. M. of the same day. The next step of the Convention was to provide the sinews of war, to be used, in the language of Judge PIKE, "against the bosoms of their former comrades." This action of the Convention, we say, was not the action of the people of the State of Arkansas in their "original sovereign capacity," nor were they bound by it in any respect. Before the ordinance passed, Mr. Dinsmore attempted to get an amendment to it, allowing the people to vote upon the acceptance or rejection of the same, but the amendment was tabled by a vote of 54 to 15. Such action as this evinces the fact, that the members of the Convention no longer desired to consult the will of the people, else why re-assemble the Convention before they could he heard from, and afterwards refuse to allow them the privilege of approving or disapproving the ordinance of secession?

But waiving the question of secession, we will now turn our attention to the subsequent acts of the Convention in making a *new* Constitution. Who authorized this Convention to make a *new* Constitution and put it in operation? The people did not do it; the only power the people clothed the members of the Convention with was, that of taking into consideration the condition of political affairs and determining what action the State of Arkansas should take. This grant of power is not and was not broad enough to authorize the members of the Constutional Convention, of 1861, to make a new government, and make the officers of the old government accept positions under the new.

The Topeka Constitution could not be upheld, because it was called at a time when there was a territorial government in existence in the territory, by a mass Convention of citizens. The Lecompton Constitution could not be upheld, although authorized by the territorial Legislature, because Congress had not passed an enabling act for that purpose. Dorr and his followers, in Rhode Island, attempted to set up a new government, the authority to call the Convention to frame the Con

stitution of which, was derived from the people at a mass Convention. The old authority refused to give up, and the whole thing ended by Dorr being sent to the penitentiary for life. Judge WALKER says, in *Hawkins v. Filkins*, that "no government contested with the State (that is, with the State government of 1861), her right to administer the laws under such government." This is true, but it does not establish the fact, that it was a legal State government. If every officer of the present State government should, on to-morrow, take an oath to support the Constitution of 1836, or 1864, and at once conform their action to either one of these Constitutions, and use the strong arm of the military to compel an acquiescence therein, on the part of the people, would such action make the Constitution of 1864, or 1836, binding on the people? We say, no; and yet this is just what was done by the officers known to the Constitution of 1836. The Convention framed a Constitution which never received the sanction or approval of the people. The officers, elected under the Constitution of 1836, qualified and entered upon the discharge of the duties prescribed by the Constitution of 1861. The strong arm of the military power, of the new government, compelled obedience to the then existing state of things, and yet it is claimed that the government, thus formed, was not only a government *de facto*, but a government *de jure*. If it be true, as enunciated in the great American Bill of Rights, that all just governments derive their powers from the consent of the governed, and if it be true, as Judge STORY declares, "That the *people*, and *the people only*, in their original sovereign capacity, have the right to change their form of government," then it at once becomes clear to the dullest intellect, that there was no government *de jure*, in Arkansas, from the 4th day of March, 1861, to —— 1865.

Immediately after the passage of the ordinance of secession, the Convention arrogated to themselves, by usurpation, all the powers of government. Before the ordinance was passed the executive department of the government refused to

issue a proclamation to fill a vacancy from one of the counties of the State, on the ground that it was not made his duty to do so by any law of the land. The position of the Governor, at that time, shows that it was his opinion that the Convention had no legitimate powers; that its duty was to "take into consideration the condition of political affairs and determine what course the State of Arkansas" should take in the then existing political crisis; that after they had determined this, that the sense of the people should be taken as to the approval or disapproval of the action of the Convention. Gov. Rector, when called upon to issue a proclamation for the election of another delegate, says, "that he perceives no authority under the Constitution or laws of this State, by which he is authorized to issue a proclamation for the election of a delegate to the Convention on any other day than on the 18th of February last, which duty he has performed; that the act makes no provision for a second election." He concludes his argument on this point by saying, "that a proclamation issued by me, without law, requiring a subordinate officer to do an act which the people have not authorized to be performed, would trench on their reserved rights, and savor strongly of usurpation." That he did not regard the Convention as having any law-making power, may be inferred from the following. He asks, "Can the Convention empower the Governor to perform a ministerial act?" and in response to the question he says, "I think not, under our present system."

In speaking of the power of Conventions, called for a specific purpose, and the Convention which assembled here in 1861 comes under that class, Judge O'NEALL, of South Carolina says; (*2 Hill, 223*) "A Convention, assembling *under the Constitution*, is only the people, *for the purposes for which it assembles*, and if they exceed those purposes their act *is void*, unless it is submitted to the people and affirmed by them." Tried by this rule, the creation of a State government, by the Convention of 1861, was void for want of authority, as no power was conferred upon the Convention to make a Constitution, much less

to make a Constitution and affirm it without the consent of the people. Judge O'NEALL continues by saying, "It is true, the Legislature cannot limit the Convention; but if the people elect them for the purpose of doing a specific act, or duty, pointed out by the act of the Legislature, the act would define their powers. For the people elect in reference to that and nothing else." Judge SHAW, (*6 Cush. 373*,) speaking for himself and Judges PUTNAM, WILDE and MORTON, in response to a question submitted to the Supreme Court of Massachusetts, by the House of Representatives, entertains the same opinion as that delivered by the Supreme Court of South Carolina. The question submitted to the court is as follows: "Whether, if the Legislature should submit to the people to vote upon the expediency of having a Convention of delegates of the people for the purpose of revising or altering the Constitution of the commonwealth, in any specified part of the same, and a majority of the people voting thereon, should decide in favor thereof, could such Convention, holden in pursuance thereof, act upon and propose to the people amendments in other parts of the Constitution not so specified?"

In response to this question, the Supreme Court of Massachusetts unanimously say: "Considering that the Constitution has vested *no authority* in the *legislature*, in its ordinary action, to provide, by law, for submitting to the people the expediency of calling a Convention of delegates *for the purpose of revising or altering the Constitution*, it is difficult to give an opinion upon the question, what would be the power of such a Convention, if assembled. If, however, the people should, by the terms of their vote, decide to call a Convention, to consider the expediency of altering the Constitution in some particular part thereof, we are of opinion that such delegates would derive their *whole authority* and commission *from such vote*, and upon general principles, governing the delegation of power and authority, they would have *no right*, under such vote, to act upon and propose amendments in other parts of the Constitution, *not so specified*."

The people of Massachusetts, and those of South Carolina, for many years, have been regarded as representing the extreme views of each section of the Union, on political and governmental questions; yet the highest legal tribunals, of those States, agree in saying that constitutional conventions have no power to *create* governments; that their province is to frame the organic law, and submit it to the people for ratification or rejection. The Constitution of Arkansas, like that of Massachusetts, provided the mode and manner of *amending* the Constitution of the State, but it nowhere authorized the legislature to *call a Constitutional Convention.* The question as to whether the Constitution of Massachusetts could be amended, altered or changed in *any other manner* than that pointed out *by the Constitution itself*, was also submitted to the Supreme Court of that State, and in response to the question, the court said: "Considering that previous to 1820, no mode was provided by the Constitution for its own amendment, that no other power for that purpose, than in the mode alluded to, is anywhere given in the Constitution, by implication or otherwise, and that the mode provided thereby appears to have been carefully considered, and the power of altering the Constitution cautiously restrained and guarded, we think a strong implication arises against the existence of any other power, under the Constitution, for the same purpose." These authorities all go to show that there is a limitation on the power of a Constitutional Convention. The notion has been common, among even well informed men, that the Constitutional Convention, when legally assembled, is *above all law*; that "they are a law unto themselves." The origin of this misconception may be traced to ignorance of the history of constitutional governments. The right, of even the people to change their form of government, is limited, in this country, to the form prescribed in the organic law. The entire people of a State, in mass convention assembled, have no more right or authority to overthrow a constitutional form of government than ten of them have.

In the State of Rhode Island, a majority of the people of the State undertook to create an organic law and establish a new government without taking any legal course to obtain the sense of the people on the subject. The action, of this majority, was pronounced revolutionary and void, and the strong arm of the federal government was placed at the disposal of the authorities representing the old government. In speaking of the power of the Convention of 1861, Governor Rector says: "I hold the act passed, calling the people together, as merely suggestive and directory in its nature; that a majority of the people themselves, or through delegates, chosen at their will, could assemble in convention and pass upon the future status of their government, relatively considering the formation of new governments or the preservation of old ones." A committee, who were displeased with the action of the Governor, in a report made to the Convention, makes use of the following language: "A convention of the people is supreme over all the departments of government; that all officers are but servants of the people, and that the people (that is a constitutional convention) have a right to require of them, the performance of any duties within their appropriate and designated spheres of action."

From the authorities we have quoted, it will at once be seen that the concessions of the Governor admitted the supremacy of the Convention to act outside of and independent of the executive of the State, and from the report of the committee, and the subsequent action of the Convention, we find that they were as ready to make the usurpations as the executive was to acquiesce in them. The advocates of the theory that a State Convention, when assembled, may exercise powers amounting to absolute sovereignty; that the convention, when assembled, may exercise the duties and prerogatives of the executive, legislative and judicial departments of the government, is of modern origin. In the early history of the country we find no traces of any such dogmas or heresies. The earliest traces we have been able to find of the doctrine that a Constitutional

Convention represented the supreme power of the State, in all its departments, and that it could control their action, is found in the New York Convention of 1821. It prevailed in a very mild form in the Virginia Convention in 1829, but under the treatment of men like John Randolph, the disease readily yielded to the general practice prescribed by the framers of the Constitution of the United States. In 1836 the infection made its appearance in the Constitutional Convention of Pennsylvania, but its race was extremely short. In 1847, a Mr. Petus carried the infection into the Constitutional Convention of Illinois, and he enunciated the broad doctrine of Louis XIV, that "we are the State." In 1849, it broke out in the Constitutional Convention of Kentucky, and in 1853, in that of Massachusetts under the leadership of B. F. Butler. In 1860 and 1861 the infection assumed its most malignant character, and swept like an angel of death over Arkansas, Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida and Texas. Such force, fraud, usurpation, and treachery on the part of the servants of the people, as those of the ten Southern States witnessed in 1860 and 1861, was never beheld by a civilized world. Fear and consternation were depicted on the countenance of the bravest, and the lawlessness that follows all acts of tyrants and usurpers, hushed for a time, the voice of the people, but silence and acquiesence, thus obtained, cannot be appealed to as evidence to this court of the existence of either a *de facto or de jure* government

In Louisiana the Constitutional Convention of 1844 undertook to fill the vacancies in the office of parish and district judges. In 1862, the Constitutional Convention of Illinois mooted the question of ejecting officers of the State government who had been regularly elected or appointed. The Constitutional Convention of Louisiana *instructed* the proper officers to raise the salary of the teachers of public schools, but in the instance named, the authority of the convention to do these acts, was not recognized by the State governments. In Missouri a Constitutional Convention legislated two judges

out of office, and authorized the *Governor* to fill the vacancies, thus created, by appointment. A learned writer on this subject, in speaking of the action of that Convention, and as to the validity of such action, says: "It was not the first time, in history, that a party, having, morally and politically the better case, had the worst of the argument;" thus admitting that the exigency of the rebellion may have furnished an excuse for their action, but that the exercise of the power was without precedent; *Jamison 313.* These authorities all go towards showing that Constitutional Conventions are not possessed of the extraordinary powers that belong to the people "in their original sovereign capacity."

It has been stated that the Convention assembled on the 4th day of March, 1861, and that it adjourned on the 21st of the same month, to meet on the 19th of August following. While it may be conceded that the Convention possessed the power of adjournment from day to day, or to a definite day that would better suit their convenience, it does not follow that it had the power of conferring on the President of the Convention the power to re-convene the Convention, if in his discretion "an exigency should arise requiring the same." For if this doctrine be conceded, the Convention would have the power to perpetuate itself for all time to come, if the President thereof should be of the opinion that such an emergency had arisen. The Convention, as we have seen, was called for the purpose of "taking into consideration the condition of political affairs, and to determine what course the State of Arkansas should take in the then existing political crisis." This delegation of power, by the people, did not authorize the Convention to provide for its own perpetuation, or authorize its re-assembling, or any of the revolutionary acts that followed by reason of the action of the Convention. The whole tenor of the act authorizing the Convention, shows conclusively, that the Convention was little else than an advisory board; that its action was not to be final and absolute, and it must have been so considered, by the members thereof, or they would not have

submitted the question of "co-operation" or "secession," to the people. We are of opinion that the Convention was *functus officio*, as a Convention, when it adjourned on the 21st of March, and that all its acts subsequent to that date are also utterly null and void, and without authority or sanction on the part of the people. If it be conceded that a constitutional Convention may adjourn, subject to a call of the President, then the power of perpetuation is conceded. The concession of such a power, as this, would place it in the power of one man to convene the constitutional Convention at any time. It is true that the power was only granted to re-assemble the Convention at any time before the 19th of August, but if it be conceded that the Convention had the power to limit the discretion of the President of the Convention until the 19th of August, it is a concession that the Convention has the power to adjourn subject to the call of the President, at any time, and if this point be yielded, it is an admission that the people have created a body whose power and continuance in office is only limited by their individual views of right and wrong. This court will not indulge in any construction of power that would or might be fraught with so many dangers to the stability of the government, or the peace of society.

The Supreme Court of the United States, in the case of the *United States v. Reynes*, (*9 How'd 153*), in speaking of *de facto* governments and their acts, say: "It may safely be said that claims founded upon acts of a government *de facto*, must be sustained, if it all, by the nature and character of such acts themselves, as proceeding from the exercise of the *inherent* and *rightful* powers of an independent government." Judged by this rule, was the State government, inaugurated by the constitutional Convention of 1861, a *de facto* government? The solution of this question involves an answer to another, and it is: Did the State of Arkansas, by the terms of her admission, as one of the States of the United States, reserve to herself the power of assuming the "inherent and rightful powers of an independent government" at her pleasure? We all know she

did not, therefore a mere statement of the proposition furnishes an answer to the absurd proposition laid down in *Hawkins v. Filkins.* Continuing, the court, say: "They (such governments) cannot be supported, if shown to have originated *in violation of its own compacts, and in derogation of rights it had expressly conceded to others.*" We think we have shown that the State government, inaugurated and set on foot by the constitutional Convention, of 1861, was not only in violation of the compact entered into when Arkansas was admitted as a State into the Union, but in "derogation of the rights it had expressly conceded to others." When the Convention assembled, Arkansas was a State in the Union, recognizing the Constitution of the United States as the supreme law of the land. Had the Convention continued to recognize the Constitution of the United States, as the supreme law of the land, and created a government in harmony therewith, which had not received the sanction of the people, their acquiescence might, with some degree of propriety, have been claimed as a sufficient recognition to have entitled it to recognition as a government *de facto.* The moment the Constitutional Convention attempted to abjure allegiance to the Constitution of the United States, or attempted to dissolve the allegiance the citizen owed to the national government, that moment it became a revolutionary body, that had outlived its usefulness, and all its subsequent acts were nullities, even with the sanction of the people; for the people, themselves, are as much bound by the provisions of the Constitution of the United States as are their servants. The Supreme Court of the United States in *Luther v. Borden,* (*7 How'd. 40*), say: "It rests with *Congress* to decide *what* government is the established one in a State; that as the United States guarantees to each State a republican form of government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not."

Article VI, of the Constitution of the United States, declares that the Constitution and laws of the United States, made in

pursuance thereof, shall be the supreme law of the land, and the judges, in every State, shall be bound thereby. It now becomes a pertinent inquiry: Has Congress decided upon the validity of the State government attempted to be established, in this State, by the members of the Constitutional Convention of 1861? If it has, then we are bound by our oaths and the Constitution of the United States, as construed by the Supreme Court, to recognize the action of Congress as final. By the provisions of an act of Congress, passed March 2, 1867, "To provide for the more efficient government of the rebel States," it is declared that "no legal State government" exists in the State of Arkansas. At the time of this declaration there was a kind of provisional government existing in this State, subject to and under the control of the military power of the United States government. The government that had been in existence, previous to the establishment of the provisional government, disappeared like the morning dew before the rays of a genial sun.

The mere introduction of federal troops, into the State of Ohio, Indiana or Illinois, made no change in the officers of the State government; nor did the Governors and Judges of those States flee at the approach of the emblem of American liberty. If the persons who exercised executive and judicial functions, within the State of Arkansas, were the officers of a *de facto* or *de jure* government they had nothing to fear from the United States forces. The mission of the United States troops, in the State of Arkansas, was to overthrow the political power of the State that had been organized into armies under the Constitution of 1861, and that of the Confederate States; this done and the labor of the army was at an end.

Officers could be found who said they belonged to the executive and judicial departments of the State of Arkansas, *under the Confederate States government;* but none were found who claimed to belong to the executive or judicial branches of the State of Arkansas, as it existed under the Constitution of the United States. We do not mean to be understood as saying

that Arkansas, territorially, ceased to be a State in the Union, but that the individuals who represented the political sovereignty of that State betrayed and deserted the high trust reposed in them, and, as a result of the betrayal, the sovereignty of the State ceased to be exercised, and, as a matter of course, vested in the people to be again called forth and exercised under such exactments as Congress, in its discretion, may have deemed prudent to "guarantee a republican form of government."

States have no existence, politically, outside of and independent of the Constitution of the United States. If a State exercises political power, it must be as a State of the Union; it cannot set up its independence, furnish men and means to destroy the national government, and when the retributive hand of justice seizes hold of her to bring it back, say, take my empty treasury, my despoiled fields and desolate homes, but respect the adjudications of my tribunals, and those acts of my government not in violation of the national Constitution. The litigants, in the courts of the State of Arkansas, had the right, in all questions involving a construction of the Constitution or laws of the United States, to go before the Supreme Court of the United States. The humblest citizen in the land had the right to sue and be sued in a court where the judge had taken an oath to support and defend the Constitution of the United States, and who would bow to its command. While it is true that the people of the State, create such courts, as to them shall seem meet, it is equally true that a citizen of the State is also a citizen of the United States, and, as such citizen, has a right to demand that that legal channel, to the Supreme Court of the United States, shall not be dammed with enactments on the statutes of his own State that forces him into the Confederate States Supreme Court. We are told in *Hawkins v. Filkins*, "that for the time being, no allegiance was due from the citizens of Arkansas 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, where there is no protection or sovereignty, there could be no claim to obedience," and the case of the *United States v. Hayward* (*2 Gall. 485*,) is cited to sustain this doctrine. Now let us examine the Castine case. Castine, it appears, was a port of entry within and belonging to the United States, and was taken possession of by British troops, and so held, until after a treaty of peace between England and the United States. During the time Castine was so held by British troops, articles of merchandise were landed under such regulations as the British authorities chose to impose. After the treaty of peace had been signed, the United States took possession of the port of Castine. The authorities found, of course, a considerable quantity of merchandise that had been imported in violation of the revenue laws of the United States. An information was filed against one hundred and forty nine packages, for an alleged illegal importation, and a man, by the name of Hayward, claimed the goods and set up, in effect, that Castine was under the control of the British, by conquest, at the time of the importation, and, in point of fact, was not a port of entry of the United States in the sense used in the law. Judge STORY, in disposing of the case says: "By the conquest and occupation of Castine, that territory passed under the allegiance and sovereignty of the enemy * * * and the laws of the United States could no longer be rightfully enforced, or be obligatory on the inhabitants; that where there is no protection or sovereignty, there can be no claim to obedience." An attempt is made to show an analogy between the citizens of the State of Arkansas and the citizens of Massachusetts, by citing the language of Judge STORY, "that where there is no protection, there can be no claim to obedience." In our opinion, there is a vast difference between the citizens of Arkansas, during the rebellion, and the citizens of Castine during the time it was held by British troops. In the first place, England was a nation, and so recognized by the civilized

world; neither Arkansas or the Confederate States were. In the second place, a foreign foe compelled obedience to their mandates at the port of Castine; while in the State of Arkansas there was no enemy to the United States, save her own citizens, who attempted or were attempting, to resist the government of the United States. If it be conceded that the State of Arkansas or the Confederate States, was a government of the same dignity and character as the government of England, and that the conquering power owed no allegiance to the United States, then the conquered citizens, for the time being, would be excused from their allegiance to the United States. But this is not the fact; every man in the State of Arkansas, and every soldier in the Confederate army owed allegiance to the United States that could not be changed by simply donning a suit of gray. In our opinion, nothing but conquest and occupation, *by a foreign foe*, can ever, for one moment, excuse or suspend a citizen, of a State, from his allegiance to the United States.

The misconception that arose in the mind of the court, in the case of *Hawkins v. Filkins*, was, in assuming that the citizens of the United States could remain within its territory, and at the same time be alien enemies; and were further in error, by supposing that an unsuccessful revolution or rebellion ever reaches the dignity of being called a government. Successful rebellions found new governments; but the organizations, no matter by what name the rebellious party may call them, which may have been used by a defeated rebellious organization, fall with their cause, and are only evidence of what the government would *have been* if success had crowned their efforts. If, in 1861, the officers of the entire executive, legislative and judicial departments had resigned, rather than be parties to furnishing troops to suppress the rebellion, and other parties had seized upon the offices by virtue of a selection as such, at a mass meeting, and had administered the laws of Arkansas, as one of the States of the Union, the acts of the officers, so far as the rights of third persons are concerned,

would have been regarded as the work of an officer, *de facto*, and would have been supported on the ground that they were administering the laws of a rightful government. But in the case now before us, not only the government under which these proceedings were had was unlawful, but the officers, who were to execute its laws, had taken a solemn oath to support and sustain the unlawful government.

A *de facto* officer of an illegal and unlawful government is an anomoly that can only exist in absurdity. We have said that the government, put in operation under and by authority of the constitutional Convention of 1861, was not a government founded on the consent of the people. When the authority of the United States government was re-established within and over the territory composing the State of Arkansas, the people, for the first time, were allowed to express their approval or disapproval of the action of their servants who assembled at Little Rock on the 4th of March, 1861, and again on the 6th of May following, and instead of indorsing and approving the action of the Convention of 1861, they expressly repudiate and disclaim all fellowship therewith. They commenced the reorganization of their State government by declaring that "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 the 4th of March, 1861, was, and is null and void; and is not now and never has been binding and obligatory on the people." We are told in *Hawkins v. Filkins*, "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 that of 1836 void." Here, again, the analogy sought to be drawn is not good. The Constitution and government, created by the Constitution of 1836, came into existence by and with the consent of the people; while the government created by the Constitu-

tion of 1861 never received the approval or assent of any portion of the people. If the constitutional Convention of 1861 had undertaken to have rendered invalid the entire action of the State of Arkansas under the Constitution of 1836, it would not only have exceeded its legitimate powers, but the power of the Federal government would have interposed and said: "Stay your hands; you are attempting to destroy and render nugatory the legal action of the lawful government of the State of Arkansas, one of the States of the United States." To say that the Convention of 1861 possessed the same powers as the Convention of 1864, or that of 1868, is to say that an illegal and unlawful body, (for they became such the moment they exceeded their powers), possesses the same inherent powers that belong to legal and lawful assemblages.

When the Conventions of 1864 and 1868 repudiated the action of the Convention of 1861, they in no manner interfered with the action or acts of a legal State government. While it may be claimed that the Convention of 1861 was legally assembled and for a lawful purpose, this fact furnishes no reason why its illegal acts should be placed on the same footing with the action of Conventions whose acts have received the sanction of the people and the approval of the Congress of the United States. There is no such thing as a *de facto* State known to the Constitution of the United States. The only States known to the Constitution of the United States are States *de jure;* and to be a State *de jure*, its relations with the Federal government must be in perfect harmony, and the government formed by the Constitution of 1861, for the State of Arkansas, was not such a State, in any sense of the word.

Judge CHASE, in *Thorington v. Smith*, (*8 Wall. 9*), speaks of a description of government as *de facto*, "the distinguishing characteristics of which are, that its existence is maintained by active military power within the territory, and against the authority of an established and lawful government;" and the case of Castine is referred to as an illustration of that class of government. We submit that the illustration is a very unhap-

py one, as the English government, while at Castine, was not laboring for the purpose of establishing any species of government within the territory of the United States. The sole ground upon which the citizens of Castine were, for the time-being, absolved from their allegiance to the United States, was, because the government of the United States was unable to protect its own citizens against the power of a *foreign foe*; but in this case, neither the army of a foreign foe, nor the army of any recognized government prevented the citizen from continuing his allegiance. Writers, on the law of nations and international law, speak of *de facto* governments; but the sense in which the word is used by them has not, and cannot have any application to the State governments known to the Constitution of the United States. The different States of the Union, or rather the people of the different States of the Union, constitute one nation; they are an entirety; therefore we say that there can be no such thing as a *de facto* government of the United States and a *de jure* government of the United States existing at one and the same time, and such would be the result of any admission that characterizes the organization, known as the "Confederate States," as a government *de facto*. That it had *force*, no one will deny; and so have mobs; but force is not the criterion or standard by which right and wrong are measured.

Judge WALKER says: "All associations of people, when numerous, must, of necessity, have government; that civilized christian people are not, because of war, remitted back to a state of barbarism." As a general rule, the proposition is true; but when the rebellious districts are subdued, the law of the land, and not the law of the rebellion, is what every citizen of the United States has a right to demand. The government formed by the Convention of 1861, was formed in aid of the rebellion; its judiciary was created for the purpose of adjudicating, not on the rights of citizens of the United States, but of the Confederate States. Here, then, was a court created for the purpose of adjudicating upon the rights of those

friendly to the rebellion, and which were closed as to the loyal citizens of the State and United States. If it be conceded that the people of Arkansas had a *right* to rebel, and destroy the State government of one of the States of the United States, then it follows that the courts, created in aid of the rebellion, are valid courts, and their adjudications entitled to respect; but not otherwise. VATTELL says: "whoever takes up arms without a *lawful* cause, can absolutely have *no right* whatever—that every act of hostility, he commits, is an act of injustice—that he is chargeable with all the evils; all the horrors of the war; all the effusion of blood; the desolation of families; the rapine; the acts of violence; the ravages; the conflagrations—that they are all his works and crimes." Whether Arkansas, or her people, had suffered such wrongs, neglects, and outrages, at the hands of the Federal government, as, in the eyes of civilized nations, gave her the *right* to cast off her allegiance, is not properly a judicial question, and will not be discussed here. If VATTELL'S view is correct, it follows, naturally, that the authority of rebels to create courts depends entirely upon the fact whether the wrongs suffered were of such a character as could only be redressed by a resort to arms.

Judge PIKE, in the case of *The State v. Williams*, in speaking of the allegiance of the citizen says: "Where a free white male citizen, who has arrived at years of discretion, voluntarily takes the oath in question (the oath of allegiance) he cannot justify or excuse himself by any plea of duress; it is an overt act of treason; that the citizen cannot even claim imminent danger of immediate death as an excuse for his desertion of his country."

It is submitted, if the law is correctly laid down by Judge PIKE, that if "imminent danger" of immediate death is no excuse for the desertion of the Confederate cause, that the rule is, and was equally applicable to the citizen of Arkansas as a citizen of the United States. All writers agree that the allegiance of the citizen is due to his government. They all agree that when the citizen becomes a member of organized society,

he surrenders certain powers to what is called the government; that this surrender of power implies, and requires obedience to the government of his own creation. Allegiance is neither a privilege nor an immunity, it, on the contrary, is the duty the citizen owes to his government; and all writers and commentators agree that the citizen cannot be absolved from his allegiance through *his own* revolutionary acts. In a monarchial form of government, allegiance is due to the sovereign, be he prince, potentate or king. In a republican form of government, it is due, not to the person of the officers who, for the time being, are administering the government, but to the government itself.

The government, inaugurated under the provisions of the Constitution of 1864, was provisional, and the Congress of the United States never recognized it in any other light. It sprang into existence under the fostering care of the military arm of the government of the United States, and, but for its protection, the miasma of treason, then floating in the political atmosphere, would have sent it to an early grave instead of poisoning its life blood, as it afterwards did. In 1867, Congress, in looking over the States lately in rebellion, found the provisional governments in a languishing and dying condition. The miasma, arising from the debris of the rebellion, had slowly, but surely done its work. The legislative and judicial departments of the government were again filled by the same men, who, less than six years before, had been instrumental in destroying the political existence of the State, who, like so many upas trees, were exuding into the atmosphere, around the executive, a poison that was fast paralyzing all his efforts to make a loyal State of Arkansas. When Congress beheld this state of affairs, under that clause of the Constitution requiring the United States to guarantee to each State a republican form of government, it commenced the work of reconstruction.

Under the provisions of the acts thus passed, with the presence of United States troops as a disinfectant, the body poli-

tic once more began to breathe with some show of vitality. Once more a Constitutional Convention assembled and framed an organic law for the State; it was submitted to the qualified electors and ratified; and we, to-day, derive our sole power to sit here by reason of that instrument. Another provision of that Constitution declares: "That all the action of the State of Arkansas, under the authority of the Convention which assembled at Little Rock, on the 4th day of March, 1861, of its ordinances, or its Constitution, whether legislative, executive, *judicial* or military, was, and is, hereby declared null and void." We are now asked whether this court will regard the service made in 1861, by a Confederate court, as good? If this court was the legal successor of the courts organized under the Constitution of 1861, we would feel inclined to uphold the action of the inferior court, if its action was regular in other respects, but it is not. This court is a lineal descendant of the legal and lawful State government that was in existence under the provisions of the Constitution of 1836. The Constitution of 1868, and that of 1836, sprang from the same sovereignty, while the Constitution of 1861 simply sprang into being through usurpation and treachery of men who betrayed the trust reposed in them by their constituents. The courts, that existed under the Constitutions of 1836 and 1868, were created by the people; the courts, existing under the Constitution of 1861, were the creatures of the individuals who composed the Convention; the former from the sovereignty, and the latter from usurpation and violence.

These things being true, we do not conceive that Littleton Penn was bound to appear in the Crittenden court, even if the service had been that prescribed by the statute in force prior to March 4, 1861. It may be conceded that the court, which rendered the final decree, was a valid court; but if no valid service had been obtained before the rendition of the decree, its decree is a nullity. There are some irregularities urged against the original decree. We will remark that the original decree is not properly before this court. The case comes here

on the record of the proceedings had on the supplemental bill. If counsel desire to avail themselves of the irregularities alluded to, it must be done in a direct proceeding for that purpose.

The decree of the court below is reversed, and the cause remanded.

HARRISON, J. dissenting.

THOMPSON v. MANKIN.

CONSTITUTIONAL LAW.—A State government not in the United States and in obedience to her Constitution, is not, as a law making power, a part of the United States government, and there is no law, State or National, by which that government, when she conquers her opposers, is bound to recognize as valid the public or political action of any such State while engaged in rebellion against the national Constitution and laws.

If the lawful government of the United States, or of a State, through the proper political departments, do not recognize the validity of the acts of such rebel State, the courts of the regular State government have no authority to hold the public acts and proceedings of a State, so in opposition to the Constitution and laws of the United States, valid and binding between individuals.

The force and effect of all acts of the courts of a State in rebellion depends upon the recognition of the conquering power.

The recognition of the civil government must be decided by the political department of the government to which the courts belong, and when so decided, are to be considered *res adjudicata*.

The government recognized by the President of the United States, whether foreign or domestic, is the one acknowledged by the courts.

The governments, established by the States in rebellion, were never recognized by the government of the United States as the legal State governments.

The according of belligerent rights, to a State in rebellion, does not constitute a government *de facto*.

CONFEDERATE COURTS—*Service by, not binding.*—Service made, during the rebellion, by a Confederate Court is not binding upon the party to appear, and any decree or judgment rendered thereon is a nullity.

Error to Arkansas Circuit Court.

HON. WILLIAM M. HARRISON, Circuit Judge.

Clark, Williams & Martin, for appellant.

Bell & Carlton, for appellee.

GREGG, J.

In this case it appears that Joseph Maxwell, as clerk of Arkansas circuit court, on the 17th day of August, 1861, issued a writ of summons against the plaintiff in error, which, on the 3d of October following, was read to him by Henry Stephens, as sheriff, and it required him to appear at the circuit court of said county in November, 1861, to answer the complaint of said Mankin. Then follows an opening order of the circuit court of said county, on the 13th of October, 1865, and a judgment against Thompson by default.

The only question presented, is, whether or not Thompson, upon these proceedings, was compelled to appear in the circuit court of that county in October, 1865, and answer at the suit of Mankin. But this, as did the case of *Penn v. Tollison*, involves the regularity and validity of proceedings had in the fall of 1861. Counsel submit, if they were valid, the judgment is good, otherwise, it is reversable for want of service.

Since the suppression of the rebellion much has been said, and some very elaborate and learned opinions have been written upon the statutes of this State during the insurrection. After much delay and anxious consideration, I cannot consent to some of those very ably written arguments and opinions. Courts take judicial notice of important facts in the history of a State, and thus we know that on the 6th of May, 1861, a Convention, of the delegates of the people of this State, passed an ordinance of secession and attempted to withdraw the State from the Federal Union, and to sever her citizens from all allegiance to the government; and thereafter formed an alliance

with certain other States, then in rebellion, against the government, and with them, by armed force, resisted the authority of that government until 1865, overcome by superior power, they were compelled to submit to her mandates. This we also know by the public acts of Congress and proclamations of the President, as well as by the acts of our State Convention and legislature. By the act of Congress of July 13th, and the proclamation of the President of August 16, 1861, this, among other States, was declared in rebellion against the United States government, and that the laws thereof could not be enforced within our limits; other acts of Congress, and proclamations show the continuance of the rebellion, and when it ceased; so that we must know that the acts of Maxwell and Stephens, above referred to, were within the rebellion, and had such power and force only as the rebellious authority could give them.

It has been urged that when resistance to lawful authority has been made, by a sufficient number and such means, that those, engaged in re-establishing order, must recognize the insurgents as enemies at war; must accord to them belligerent rights, when subdued; all their acts, not directly in aid of war with the proper government, must be regarded as valid and binding; in other words, that a rebellion of such magnitude as to be considered a civil war, gives to those, engaged in such rebellion, all the civil power and authority of a regular, valid, recognized government during the existence of the insurrection, and that the civil acts of such rebellious authority must be taken and considered settled law by the courts of the legitimate government. This we are not prepared to concede. The magnitude of the resistance, the force of numbers, may require belligerent rights, but these are war rights—they are rights existing for the sake of humanity, and to soften the rigors of war, which are always harsh enough, and not to settle individual titles to property.

When war exists, the belligerents may capture or destroy the property of each other, and each, if not right, by power

may enforce laws, or rules, as to property, as well as persons, within their own lines of occupation; but such laws, or rules, are considered nowhere binding upon the opposing army, and if the citizens are brought within the lines of the opposing forces, there is no power or law, by which they can demand of the advancing army to observe the laws laid down by the receding forces, and it is wholly at their option whether or not they will regard the laws or rules enforced by the former army; and we are of opinion that any civil organizations, rules or forms of government, adopted by those supporting the rebel cause, within its lines, and protected by its power, though adopted in the form of civil law, must depend upon a like principle—must depend upon recognition and assent.

We are not aware of any principle, in international law, that compels a conquering power to observe all the property rights in the conquered territory. Wisdom and natural justice may dictate such a policy; yet we hold that there may be a marked difference between true policy and absolute rights, and even in policy there may be a difference; there may be a respect due the laws and customs of an established and recognized government among civilized powers, even when such government is conquered, and destined to be forever extinct, that cannot be claimed for the enactments of mere combinations of persons or communities in opposition to their government, and without authority recognized by it, or by other existing governments. If an individual acquires a property right under the laws and regulations of a properly organized and existing government, a government known and recognized as one among the nations of the earth, he can, with great force and reason, insist that such right be respected by any succeeding power that may acquire dominion over him, and to divest such rights might well be considered a harsh use of conquering power, rather than an observance of those rules of natural justice prevailing among civilized nations; but if a member of a lawless mob, overruning a small district of country, when dispersed and driven to obedience by legitimate authority, sets

up a claim to property, by a right under the rules or laws of the insurrectionary party, it would not be recognized by any one. And so, in all cases, the demand for the protection of such alleged property rights is more or less just in proportion as the power, that attempted to confer such right, was or was not proper governmental authority; and these conditions, which are addressed mainly to the political departments of the established government, should certainly have a controlling influence over it; and we maintain that the recognition of a civil government, so far as the courts are concerned, must be decided by the political departments of that government to which the courts belong; and when so determined, the question is *res adjudicata* with her courts, and taking the question thus settled, they must determine rights of litigants by the rules of law applicable in such cases.

In the case of *Sutton vs. Bordan*, the Supreme Court of the United States said: "That it rested with the political power to decide whether the charter government had been displaced or not, and when that decision was made, the judicial department would be bound to take notice of it as the permanent law of the state, without the aid of oral evidence, or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power, and that the charter government was the lawful and established government of the State, during the period in contest, and that those who were in arms against it were insurgents, and were liable to punishment. * * *

"In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice; and this principle has been applied, by the Act of Congress, to the sovereign States of the Union. * * * * *

"No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abol-

ishing an old government and establishing a new one in its place, is a question to be settled by the political power, and when that power has decided, the courts are bound to take notice of its decisions and to follow it."

According to the doctrine announced in these extracts, can this court recognize the acts of any power, claiming to be a government, as valid, if the political departments of our government declare that no valid government did then and there exist?

The Supreme Court of Tennessee, in the case of *Wright & Cantrell v. Overall*, after urging that the court has no power to recognize a government not acknowledged by the political departments, say: "No rights or protection can accrue to individuals under Confederate laws; they were enacted without lawful authority and against the policy, laws and Constitution of the United States, and the courts of the country are bound to treat them as if they never had been promulgated; *2 Cold., 344.*" The same court, in case of *Thornburg v. Harris, 8 Cold., 168*, say: "The according of belligerant rights to the insurgents, did not constitute them a government *de facto*, nor vest in them any of the rights of sovereignty which would authorize them to issue a currency that can be recognized, as legal, by the courts sitting under the authority of the regular government, nor can the courts recognize any of the acts of the insurgents in their organization as a civil government. The question rests with the political power of the government; so long as that power withholds its recognition, the courts of the country cannot lend their aid to enforce any contract growing out of the organization of the so-called Confederate States."

In the case of *Ray v. Thompson, 43 Ala., 454*, the Supreme Court of that State say: "It is known to the court, as a part of the judicial history of the State, that the court, in which this judgment was rendered, constituted a portion of one of the departments of a government established in hostility to the Constitution of the United States. It has been settled that the acts of the legislature of such a government are invalid.

* * * If this is admitted, and it seems it cannot be denied, it cannot well be considered, how the judgments of the courts of such a government can be better or more valid than its laws."

And in this discussion we must not lose sight of the fact, that writers upon international law, in commenting upon the rights of communities or individuals, as they should be respected by a conquering government, address themselves to the military and political departments of that government, and declare what is the duty of the government, and not what is the authority and power of the courts belonging to the government. They cannot, and do not attempt to lay down any arbitrary rules, as law, by which the courts must be governed, without regard to what the political departments announce as the fundamental law of the State. The rights of citizens depend upon the sovereign will of the States, and not upon any rule of courts to be adopted contrary to such will, and those outside of a government, who are brought under that government by the conquering power of arms, come in with *no vested* rights, except such as have been recognized by the conquering power, or secured by treaty, or which may afterwards be conceded to them by those in authority.

Nor must we lose sight of the difference between what a sovereign ought to do, and usually does do, and what he has the power to do, when by the powers of war he subdues his enemies. Does any one doubt that in case of a civil war, when the insurgents are compelled to submit, that the government, although their numbers might be considerable, might not declare them traitors and subject to punishment as such? Had Great Britian seen fit to execute all the conquered Fenians, she might have incurred the censure of civilized people, but would any one here question her national right to do so? How many said Maxamillian's life and property should not be forfeited to Mexico, yet who denied her lawful power to kill him, or appealed from her decision when she did so? And upon an unconditional surrender of a rebellion, can any one question the power of the government to confiscate a part or the whole

of the insurgents' property, or impose other restrictions or limitations upon them? In a republican government we may condemn such policy, but the propriety of doing and the power to do are different; and we are trying to demonstrate what is a right of war or governmental power in such case, and to direct the minds of counsel and parties to the distinction between what a government may do and ought to do, and what the courts of such government have authority to do.

While the political departments, the sovereignty of a nation, have a large discretion and vast power over the rights and property of her subjects and her conquered enemies, the courts of that government are hedged in by rigid rules; not only bound by the sovereign will of the people, but they must obey every legislative command that does not clearly violate the established fundamental principles of the government. Courts then, instead of launching out upon a broad, philosophical and moral discretion as to natural justice and right between man and man, can only go to the wall thrown around them by political action. The discretion of courts is but an oath bound obedience to the declared will of the political departments or their governments; hence our principal labor is to ascertain what acts express the authoritative sovereign or legislative will of our State or general government, and it seems to us not difficult to determine whether or not our political departments of government recognize authoriiy in Arkansas to make laws, hold courts, etc., while in rebellion. The proclamations and commands of the President, the acts and resolutions of Congress, as well as the acts of the State herself, declare that, during the rebellion, she had no valid legal government; that she was at war with the government, and in opposition to the national Constitution; and upon the close of the rebellion the political departments of the State government not only refused to recognize the validity and binding force of the acts of the revolting State of Arkansas, but they expressly and in the most emphatic terms, and in a

solemn ordinance of the Convention, declared that: "The action of the Convention of the State of Arkansas, which assembled in the city of Little Rock, on the 4th day of March, A. D. 1861, *was and is null* and *void*, all the action of the State of Arkansas, under the authority of said Convention, of its *ordinances*, or its *Constitution*, *whether legislative*, executive, *judicial* or military, was and is hereby declared null and void," etc., etc. But we will not quote at greater length, or go into the history of this Convention, because our Chief Justice, in the case of *Penn v. Tollison*, decided at the present term, has treated this matter at considerable length.

We desire now to elaborate but the two propositions: *First*, that a State government, not in the Union of the United States, and in obedience to her Constitution, is not, as a law making power, a part of the United States government, and that there is no law, State or national, by which that government, when she conquers her opposers, is bound to recognize as valid the public or political action of any such State while engaged in rebellion against the national Constitution and laws. *Secondly*, That if the lawful government of the United States, or of a State, through the proper political departments, do not recognize the validity of the acts of such rebel State, the courts of the regular State government have no authority to hold the public acts and proceedings of a State, so in opposition to the Constitution and laws of the United States, valid and binding between individuals.

In the case of *Scott, et al. v. Jones*, *5 Howard*, *377–8*, which was upon a writ of error to the Supreme Court of the State of Michigan, to reverse a judgment of ejectment in that State court, it was alleged that the statute, under which one of the parties claimed, was enacted by a legislature convened before the State was admitted into the Union. The Supreme Court of the United States say: "Such conduct, by such bodies, if not situated within the territory of the Union, would be a foreign affair, and not within the cognizance of any of the departments of the government, unless so interfering with its

rights as to call for the political exercise of the executive or legislative authority over our foreign relations."

"Again, such conduct by bodies situated within our limits, unless by States duly admitted into the Union, would have to be reached either by the power of the Union to put down insurrection or by the ordinary penal laws of the State or territories within which these bodies, unlawfully organized, are situated and acting. While in that condition their measures are not examinable at all by a writ of error to this court, as not being statutes by a State or member of the Union. It follows, then, that a statute passed by a political body, before its admission into the Union, seems either not to be one under the cognizance of the Union, or its judicial tribunals, by means of *sec. 25*, of the *Judiciary Act*, unless re-enacted or adopted after becoming a State. The question of their competency is not, however, thus made a closed one, but may be discussed before the proper political tribunals."

In an earlier paragraph the court say: "Hence, two things must unite in order to justify it (the jurisdiction); there must be an act of solemnity and importance, such as a statute, and that statute must be by a State, a member of the Union and a public body, owing obedience and conformity to its Constitution and laws." This latter clause clearly lays down the proposition that the courts of the United States will not recognize the statutes of any legislative body, unless that body is of a State *in the Union*, OWING OBEDIENCE and CONFORMITY TO ITS CONSTITUTION and LAWS. They hold that a statute passed by a legislature, in a territory, cannot be considered as an act of the State, unless re-enacted or adopted after it becomes a State.

This distinguished and learned tribunal, in those earlier days, when the minds of the people had not been inflamed by the passions of war, say the question, as to the competency of such a legislature, is *not a closed one, but may be discussed before the proper political tribunals;* thus, beyond question, settling that whatever of law or rights may have existed, by reason of the action of a territory or State, not a member of the Union, *in*

obedience to *her Constitution*, is a matter to be addressed to and decided upon by the political, and not the judicial departments of the government; and whether that political determination was judicious, was wise, as it has appeared to be in most of the territories, or unwise, and influenced by passion, as has been alleged in some of the late rebel States, it is, nevertheless a settled proposition for the judiciary, and right or wrong, politic or impolitic, the credit or responsibility is upon that department to which the Supreme Court of the United States says it properly belongs.

It has been urged that the statutes, acts of courts, and other proceedings of rebel authorities, in this State, must be held valid because they were formal, and there was an actual existing government. Something more is necessary. Michigan had framed and adopted a constitution, her legislature had been duly elected and returned, her laws were in due form, and approved by her governor, acting under her constitution; there was no rebellion there, and no attempt or intention to do violence or wrong to any proper authority; but, under the United States Constitution, there had been no act of Congress recognizing their authority or enabling them to form a State government, and because of this mere oversight by her territorial authorities, the Supreme Court, in effect, say their acts must be held void. They would not even assume jurisdiction, because she had not political jurisdiction, in accordance with the Constitution.

What would the Supreme Court *then* have said of a State like Arkansas, acting in direct and palpable violation of the Constitution of the United States, and exerting every power in her command to destroy that Government? If possible, the answer is made more strikingly plain, when the political departments have declared that the action of this State, during the rebellion, shall be held null and void. If their language had been less explicit and definite, while the debates and proceedings of the Convention of 1868, and the individual views of its members, are so fresh in our minds, we could not doubt

as to what was their intention and purpose; and whether or not their action and policy was expedient and just, is not a question for the court to decide. They did intend, and by language unambiguous did enact that all action under the Constitution of 1861, or of the ordinances of that Convention, whether legislative, executive, judicial, or military, was and is null and declared void. This embraces the officers of the Arkansas circuit court. They were qualified under an ordinance of that Convention, and acting under that Constitution; their acts have not been recognized as valid, and by the Constitution of 1868 they were declared void; and, while we are sworn to support that Constitution, we cannot hold such acts valid and binding upon litigants who have in no way given assent thereto.

In conclusion, we repeat the propositions assumed: when a people engaged in war are subdued, by force of arms, their property rights must depend upon their terms of peace, or upon recognition of their laws or rights by the conquerors, and if such recognition is had, it must come from the political departments of the conquering State or Nation. If the political departments refuse to recognize as valid the former laws of the conquered people, the courts of the established government cannot hold them valid and binding. In the matter under consideration, the Confederates were engaged in war, with laws among themselves, but which laws were not acknowledged by any other power; they were subdued by force of arms, and surrendered to the United States without condition or reservation, and consequently took the risk of all the deprivations the war power, or triumphant government, might impose, and that government refused to recognize as valid any of their laws, or public acts, and the State, in her sovereign capacity, by a solemn ordinance declared that the acts of the departments of the State, during the rebellion, shall be held void, and the courts are bound by the ordinances of the Convention of 1868, and other proper acts of the political departments of the government.

Therefore, the pretended service of a summons, in this case, being under and by virtue of the authority, ordinances and laws of 1861, was invalid, and not binding upon the defendant below. The judgment is, therefore, reversed; and, as he has appeared to the action, by prosecuting this writ of error, the cause is remanded to the court below, with instructions to allow him to plead to the action therein, and to proceed to judgment.

Harrison, J., being disqualified, did not sit in this case.

Hon. John Whytock, Special Supreme Judge.

Timms v. Grace.

Judgment by Confederate Court void.—A judgment rendered by a court held in this State, after the passage of the ordinance of secession, is *coram non judice* and absolutely void.

Petition for Certiorari.

Watkins & Rose, for petitioner.

English, Gantt & English, for defendant.

Bennett, J.

On the 31st day of July, 1868, petitioner filed in this court his petition, praying that *certiorari*, with a supersedeas, issue to the Desha circuit court, to bring up a pretended judgment of that court, rendered on the 28th day of October, 1861, and which that court was endeavoring to enforce in defiance of law, and that the same might be quashed.

The writ and supersedeas was allowed by the Chief Justice. On the 14th of December, 1868, the defendant filed a motion to vacate supersedeas and dismiss certiorari.

The petition and the transcript, sent up, show that the judgment, which is sought to be quashed, was rendered at the October term, A. D., 1861, of a court said to be held in Desha county, after the passage of the ordinance of secession.

Article 1, section 25, of the State Constitution says: "The action of the Convention of the State of Arkansas, which assembled in the city of Little Rock, on the first day of March, A. D., one thousand eight hundred and sixty-one, was and is null and void. All the action of the State of Arkansas under the authority of said Convention, of its ordinances or its Constitution, whether legislative, executive, judicial, or military, was and is hereby null and void."

The views of this court as to the validity and powers of courts organized after the passage of the ordinance of secession, and the effect of the above provision of the Constitution, have been presented at this term of the court, in the cases of *Penn v. Tollison*, *and Thompson v. Mankin.*

The judgment, now before us, coming under the principles decided in these cases, the same is *coram non judice* and absolutely void, and therefore will be quashed and supersedeas made perpetual.

HARRISON, J. being disqualified, did not sit in this case.

HON. JOHN WHYTOCK, special Supreme Judge.

EVANS *v* PARROTT, *administrator et al.*

BILLS OF REVIEW.—Decrees in Chancery are reviewed on *two* grounds only: For error of law apparent upon the face of the decree, without further examination of matter of fact; and new matters arising after the decree.

ERROR APPARENT.—By error apparent upon the face of the decree, is to be understood, that it so appears, by a comparison of the decree with the bill, answer and other proceedings.

WHEN NOT ALLOWED.—Where complainants' bill charges such facts as entitle him to relief, and no facts are recited in the decree, as established, there is nothing in the decree or the record upon which error can be predicated, or out of which it could possibly arise, as a foundation for a bill of review.

WHEN PERMITTED—*new matter, etc.*—To authorize a bill of review for new matter, it is required to be "new matter or evidence, which hath come to light after the decree, and *could not possibly be had or used* at the time when the decree passed."

Appeal from St. Francis Circuit Court.

HON. WILLIAM STORY, Circuit Judge.

Brown & Lyles, for appellant.

We submit that it is not necessary to obtain leave of the court, before a bill of review for error of law apparent on the face of the decree, is filed. *Sec 405, Story's Com. Eq. (4 ed.)*

"It may be brought upon error of law appearing in the body of the decree itself. A bill of this nature may be brought *without* the leave of the court previously given." *Willford Ch'y Pl'd (6th Ed) 102*, and note citing, *Webb v. Pell, 1 Page's Ch. R. 564; Edmondson v. Manley's heirs, 4 J. J. Marsh, 500; Blight v. McIlvay 4 Monroe, 145.*

"A bill of review, brought to review a decree for error apparent on the face thereof, may be filed without the leave of the court." *Daniels Ch. Pr. *1729.* If a bill of review is filed without leave in a case requiring it, it may be dismissed on motion. *Carrol v. Parram, 1 Bland, 125.*

Watkins & Rose, for appellees.

The granting of a review is not a matter of right, but of sound discretion in the Chancellor. *Hughes v. Jones, 2 Md. Chy. Dec. 289; Pfelz v. Pfelz, 1 Ib 455; Hargroves v. Lewis, 7 Geo, 110; P. & M. Bank v. Dundus, 10 Ala. 661; Massie v. Graham, 3 McLean, 41; St. Eq. Pl. sec. 417.* As to the newly discovered evidence the bill could not be filed without the previous leave of the court. *Webb v. Pell, 1 Paige, 564; Lansing v. Albany, Ins. Co. Hopk. 102; Kenon v. Williamson, 1 Hay. 350; Caller v. Shields, 2 Stew. & Port. 417; Burch v. Scott, 1 Gill & J. 393.* The newly discovered evidence must be of some new fact not before put in issue, and not merely correlative. *Respass v. McClanahan, Hard. (Ky.) 346; Lawson v. Moore, 1 Texas, 22; Vaughan v. Ham, 6 B. Mon. 338; Tharp v. Cotten, 7 Ib 636; Caller v. Shields, 2 Stew. & Port, 417.* Any error of law or of judgment not palpable on the face of the decree and of the pleadings in the cause, could have been corrected by appeal, but not by bill of review. On bill of review the court will not examine the evidence on which the decree was based. *Garrett v. Moss, 22 Ill. 363; Laum v. Stingley, 3 Clarke (Iowa) 514; Winchester v. Winchester, 1 Head, 466; Eaton v. Dickinson, 3 Sneed, 401; Foy v. Foy, 25 Miss. 207.*

HARRISON, J.

The appellant exhibited his bill of complaint in the St. Francis circuit court, against the administrator and heirs of James P. Nimmo, deceased, and George B. Hotchkiss, in which he set up a vendor's lien, reserved in the deed of conveyance, upon a tract of land of which the said James P. Nimmo died seized, purchased by him from one George W. Seaborn, the guardian of the said George B. Hotchkiss, then a minor, and a right to be subrogated for the vendor thereto, on account of having, as the security of said Nimmo, whose estate was insolvent, paid the obligations given for a portion of the purchase money, and praying a forclosure of the lien for his

benefit. The deed, together with the record of it, was alleged to have been destroyed by the burning of the recorder's office.

The administrator answered and admitted all the allegations of the bill except that in relation to the reservation of the lien, which he denied to be true, and the heirs, who were infants, answered by their guardians *ad litem*, and denied any knowledge or information of the matters contained in the bill and called for proof. George B. Hotchkiss did not answer or make any defense. Replications were filed to the answers, and upon the hearing the court dismissed the bill for want of equity.

To review and reverse the decree the plaintiff filed this complaint, which assigns as grounds therefor, *First:* That the sale created a lien upon the land for the unpaid purchase money, which the guardian could not waive or release, and the complainant, as the security of the purchaser, paying the obligations, it was apparent upon the record that he was entitled to be subrogated to the right of the lein, and to the relief he prayed, and that the court manifestly erred in dismissing his bill. *Secondly*: That the complainant's solicitor omitted to prove, which he could have done had he propounded the question, by the said George B Hotchkiss, whose deposition was read upon the hearing, that a lien was reserved in the deed, which omission was not observed until at the hearing, and that since the making of the decree he had discovered that he could prove the fact also by the said George W. Seaborn, and also learned that he himself was a competent witness.

The administrator demurred to the complaint as showing no ground for review, and upon argument the demurrer was allowed and the complaint dismissed.

There are but two cases in which the decree of a court of equity may be reviewed, and these, as settled by the first of the ordinances in chancery of Lord BACON, respecting bills of review, never since departed from, are: error of law appearing upon the face of the decree, without further examination of matters of fact, and new matter arising after the decree.

In England, the decree recites the substance of the proceedings, and the facts on which it is founded, but in this country, the bill, answer, and other pleadings constitute the record, and there can be no necessity for embodying the substance of them in the decree. We are, therefore, to understand by error of law appearing upon the face of the decree, that it so appears by a comparison of the decree with the bill, answer, and other proceedings. It is the established doctrine that the error apparent upon the decree must arise out of the facts admitted by the pleadings, or recited in the decree as settled, declared or allowed by the court; and there is a marked distinction between such error and error in the decree. "The latter description," says Lord ELDON, "does not apply to a merely erroneous judgment; and this is a point of essential importance; as if I am to hear this cause upon the ground that the judgment is wrong, though there is no error apparent, the consequence is, that in every instance a bill of review may be filed; and the question, whether the cause is well decided, will be argued in that shape; not whether the decree is right or wrong on the face of it. The cases of error apparent, found in the books, are of this sort; an infant not having a day in court to show cause, etc., not merely an erroneous judgment." *Perry v. Phelps, 17 Ves., jr. 178.*

None of the allegations of the bill were so admitted in the pleadings as to dispense with proof of them. The heirs admitted nothing, nor were they, being infants, capable of making admissions that would bind their interests.

Then, if the complainant's bill charged such facts as entitled him to relief, a question not before us, nor considered by us, as proof was required, and no facts are recited in the decree as established, there was nothing in the decree or the record upon which error might be predicated, or out of which it could possibly arise as a foundation for a bill of review. The other ground assigned is equally untenable. No new fact, or evidence, which might not have been known by the use of ordinary diligence, is alleged to have been discovered, and the

omission to prove, upon the examination of a witness, a material fact directly in issue, which could have been done, if he had been interrogated in respect to it, or neglect to procure the testimony of other persons who were most likely to know it, to the same fact, when not prevented by causes or circumstances beyond the parties control, certainly can be no ground for a review of a decree.

To authorize a bill of review for new matter, the ordinance, before referred to, requires it to be "new matter, or evidence which hath come to light after the decree, and *could not possibly be had or used* at the time when the decree passed." A bill of review for such cause cannot be brought as a matter of course, but application for leave to file it must be made to the court, and such leave will not be given unless it clearly appears to be within the rule established by the ordinance.

Decree affirmed.

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HIGHTOWER, *et al v.* NUBER.

FRAUDULENT DEED.—Bad faith and unconscionable acts can have no allowance or favor in a court of equity, and in a bill charging the execution and procurement of a deed under such circumstances—the strength of mental capacity of the parties, the circumstances surrounding them, their relationship etc., make up the grounds upon which the court can find the real influences that produced the conveyance.

When relieved against, etc.—If the evidence adduced, or the circumstances surrounding the procurement of the conveyance, show that the party, in whose favor the conveyance is made, possessed an undue advantage over the grantor, and in person, or by agent, exercised an improper influence over such one and to the advantage of the grantee, it is an act against conscience, and within the cognizance of a court of equity and will be relieved against.

Appeal from Sebastian Circuit Court.

HON. E. D. HAM, Circuit Judge.

Fishback, Clark & Williams, and *Yonley*, for appellants.

The denial in the answer of appellant threw the burthen of proof upon the appellee; *Greenl. Ev. 332, Sec. 260.* The presumption of law is in favor of soundness of mind; *2d Kent, 562.* Mere mental imbecility is not sufficient, there must be a total loss of the reasoning faculties, to avoid a deed or contract; *2d Kent, 564; Barribean v. Brant, 17 How., 43; 21 Curtis, 354.* Nor will inadequacy of consideration avoid a deed; *Ib.* A voluntary or fraudulent, and even voidable deed, may become good by matter *ex post facto; 4 Kent, 511; Buckle v. Mitchell, 18 Vesey, 110.* Fraud is never presumed, but must be proven; *9 Ark., 482; Hempstead v. Johnson, 18 Ark. 124.*

Walker & Du Val, for appellee:

No principle is better established, in courts of equity, than that a conveyance or contract will be set aside whenever it has been obtained through undue influence over a person greatly under the power of another, if there is inadequacy of price, or clear ground of inference that a confidence reposed has been abused, or an advantage has been taken of incompetency, weakness of understanding or clouded or enfeebled faculties. *Harding v. Handy, 11 Wheat U S. S. Ct. R. 104, 125; Taylor v. Taylor, 8 How., 183; Wheeler v. Smith, 3 Cowan, 539, 572; McCraw v. Davis, 2 Iredell Eqt. 618; Slocumb and Wife v. Marshall el al, 2 Wash. C. C. Rep. 397; Kennedy's heirs and executors v. Kennedy's heirs, 2 Ala. 574, 606; Hall v. Perkins 3, Wend 626, 631.* As to relief of grantor in equity, in case of fraudulent deeds, see *Jackson v. King, 4 Cowan, 207, 220; Butler et al v. Haskell, 4 Dessaussure, S. C. R. 652, 684; Warren v. Daniels et al, 1 Woodbury & Minot 92, 103.* The question of undue influence is for the chancellor to decide; *Griffith v. Robins, 3 Madd. 191; Dent v. Bennett, My. & Cr. 273; Harvey v. Mount, 8 Beav 439.*

GREGG, J.

In November, 1869, the appellee commenced his suit, in equity, in the Sebastian circuit court against the appellants, Joseph S. C. Roland and his wife Josephine, to cancel a deed by him made to the defendant, Mary Jane Hightower, under which she claimed title to lot 7, in block 7, in the city of Fort Smith, and to have possession thereof delivered to him; alleging that said Rolands were in actual possession as tenants under the Hightowers, and that the deed, executed to said Mary Jane, was obtained through fraud and deception, and without any consideration. That from long and severe affliction he had become greatly depressed in body and mind, insomuch, that he was incapable of transacting any business, and through undue influence of those who were his confidential advisers, and of his own want of capacity, said deed was procurred.

The Rolands made no response to the plaintiff's complaint.

The Hightowers separately answered and admitted that the plaintiff was quite old and had been afflicted for many years, and that he was propped up in a sick bed at the time he executed the deed; that the consideration expressed in the deed in reality never did pass, except temporarily, and the lot and houses thereon were a gift to the said Mary Jane. But they repeatedly and positively denied that the plaintiff's mental faculties were impaired, and they averred that he was fully sane and well; knew all that he was doing at the time he executed the deed; that plaintiff was a foreigner and had no heirs in this government, and that he was greatly attached to the said Mary Jane because of her kind offices to him, and like favors from her mother's family, and for that cause he gave her the property and executed the deed. Issues were made up and both parties took depositions.

Swift, a justice of the peace, testified that at the instance of W. M. Hightower, he went to Nuber's house and took the acknowledgment of the deed. Plaintiff was supposed to be between 50 and 60 years old; had been in feeble health, and

was then propped up in a sick bed; that plaintiff responded, "the deed was all right," and made the usual acknowledgment and said he was old and sick and would die soon and wanted some one to take care of him. Mrs. Hightower presented the deed, Sparks filled up some blanks, and he and her brother, Henry Miller, witnessed the deed. Nothing said as to whether the deed was a gift or sale, but Mrs. Mary J. Hightower handed plaintiff a $500 bill. He did not then appear to be in danger of immediate death, and witness considered his mental condition not then such as to render him incapable of making a deed, and the property conveyed was worth from $3,000 to $4,000.

This witness was asked, if, at the bringing of this suit, he did not tell William Walker, esq., that when he took the acknowledgment of the deed, he thought the plaintiff was in no condition to make a deed; said he made no such statement that he could recollect of. Walker testified, orally, before the court, that he did then make such statement.

Sparks testified that he *happened* to go to Hightower's that evening, and Hightower asked him to go with his wife, as she was going out; they went to plaintiff's, found him set up in bed; could not say if he was supported by some one; that he was about 60 years old and was feeble, and for several years he "had made motions like a man in bad health;" saw nothing to indicate incapacity to make a deed; that he signed, acknowledged and delivered the deed, and received from Mrs. Hightower a $500 bill; that the plaintiff and the Miller family (of which Mrs. Hightower had been a member) were very intimate, and he had heard plaintiff say, Mary Jane, (alluding to Mrs. Hightower,) was to have what he had, or something to that effect, but never heard him speak of the deed after it was made.

Henry Miller testified that he was the brother of Mrs. Hightower; that he attested the deed; that plaintiff gave the numbers and signed and acknowledged the deed; that plaintiff, at the time, was perfectly rational; that he told Mary Jane where to get the original deed, which she yet has, and he re-

ceived from her a $500 bill; that in a few days he rented the premises from Hightowers and boarded and provided for Nuber, while there, etc.

Humphreys testified that W. H. Hightower employed him to prepare the deed in question; that Hightower, as the agent of Nuber, had employed him, as an attorney, to appear for Nuber in a suit of slander against him, and that he advised Hightower that the lot should be transferred to an innocent purchaser for a valuable consideration, to avoid a judgment, if any should be recovered against Nuber; and he also prepared a lease of the premises from Hightowers to Roland.

Gerrard testified that in July or August, of 1869, plaintiff told him he had sold his house for $500 to Hightower; afterwards they had some words, and heard plaintiff tell W. H. Hightower he would have his house back.

Clifford testified that, within six months, plaintiff told him he had conveyed his lot to Mrs. Hightower, and that he was sick and out of his head when he did so.

Mrs. Roland and Vail testified that when they made application to rent, in 1869, the plaintiff told them Hightower had control of that matter, and they would have to rent from him.

Harrison testified that he waited on Nuber, and he was very sick, or pretended to be so, when the deed was made, and he said "Mary Jane, I always intended this for you," but he did not know what he did with the deed when signed.

Doctor Spring testified that in October, 1868, plaintiff was very feeble and confined to his bed; he did not recollect of any evidences of unsound mind at that time; he was very peevish and fretful, and on several occasions threatened to go and throw himself into the river to get out of the way; that he supposed him to be 65 years old, and at times he was very nervous.

Doctor Dunlap testified that for three years he had occasionally attended the plaintiff; that he had a number of severe attacks and was liable to die at any time; the effect of the attacks was great physical prostration, and he manifested the

usual peevishness; not palsied or extremely nervous, but his nervous condition corresponded with his general physical prostration; the mind would not be strong and vigorous as one in health; it would, in some degree, partake of his physical prostration, differing in different persons, etc.

McDonald testified that he was in the room, at plaintiff's, when Swift came to take the acknowledgment of the deed; that plaintiff was in a critical condition, likely to die, and witness was emphatically of the opinion that plaintiff was not then in a condition to transact important business of any description. A few days after he asked plaintiff if he was satisfied with the transaction, and he replied he did not know, and supposing plaintiff did not wish to talk of the matter, the subject was at once stopped; some time after this plaintiff told witness he had heard Hightower claimed to have bought his house and lot for $500, and to take care of him, and "he was a good take care to let him set and freeze, and he did not intend such conveyance should stand," and asked witness to employ Bill Walker and Ben Duval for him, which witness did.

Nuber, himself, testified that he was 66 years old and that he had no recollection of ever before seeing that deed; that he never received one dollar for the place; that no $500 bill was ever paid him, etc.; in substance, same as stated in his complaint.

Mary Jane Hightower testified to all the material allegations in her answer; that she did not know the $500 was to be given back until she and plaintiff were left alone in the room, when he handed it back and told her he made her a present of that, etc.

It is alleged in the bill of complaint that William H. Hightower was a brother mason, and a confidential friend, and that he had done kindness to plaintiff, and that he had agreed to act as the agent of plaintiff, and to rent his house and collect rents for him upon his receiving written authority so to do, etc.

And the defendant William H. Hightower, in his answer says, "it is true, as stated by the plaintiff, that at the time

stated in the petition, he was a brother mason and a confidential friend and adviser of said plaintiff; and that it is also true that he frequently accompanied by his wife, and more frequently when not accompanied by her, for many years visited the plaintiff and extended to him every office of kindness and sympathy in his power, but he denies any speculations as to who should be the object of his bounty." He denies that he agreed to support the plaintiff during his life-time, but says that it was agreed that part of the rents were to be set apart to his support.

Several witnesses in addition to the above were examined and it may be sufficient to say, that it satisfactorily appears that the plaintiff has resided in Fort Smith near 30 years, and a large portion of that time his health has been bad; that he is a foreigner without any relatives in this government; that he is a bachelor 65 or 66 years old; that he is subject to many severe attacks of sickness, very feeble, nervous and peevish; that the house and lot in question is worth near $4000 00, and was all the property he owned; that at the time the deed was made he was in a critical condition, very sick and weak, and liable to die at any time; that defendants, Hightowers, were then among his most intimate friends, associates and confidential advisers.

But whether or not at that time his mental faculties were so impaired as to deprive him of that sound discretion necessary to protect his own interests, or render him incompetent to bind himself by deed, is not alike understood by the witnesses.

The counsel on both sides, in the court below, seemed fully impressed with the importance of developing the mental capacity, or incapacity of the complainant at the date of executing the deed, but the counsel for the plaintiff, in this court, more frequently allude to his mental imbecility as a circumstance to evidence fraud and imposition upon him, than as a disqualification on his part to execute such transfer had he been properly advised and fully protected in what he did.

And in a court of equity, where bad faith and unconsciona-

ble acts can have no allowance or favor, the strength of mental capacity of the parties, the circumstances surrounding them, their relationship, etc., make up the grounds upon which the court can find the real influences that produced the conveyance. And when it is discovered that the party, in whose favor the conveyance is made, possessed an undue advantage over the grantor, and in person, or by agent, exercised an improper influence over such one, and to the advantage of the grantee, it is an act against conscience and within the cognizance of a court of equity.

Without enumerating all the facts in this case, and referring to the great number of authorities in support of the position assumed, suffice it to say, that this grantor was in his dotage, with body and mind greatly enfeebled by long and severe sickness; he was without relatives who, by nature, would have been bound to kindly overlook his declining years. It would have been but unnatural for him to have lingered and died in his solitude without some confidential friend with whom he could communicate, and upon whom he could call for advice, and the defendants were the choice of this grantor, and any of their kind offices had a right to his gratitude, and the respect of all good people; but as above intimated, if such acts were done in the interests of the performers, and to gain an advantage over the recipient, they become vicious and inequitable.

Just before the making of the deed, the defendants made visits, furnished many comforts and luxuries, and in addition, it seems, intoxicating drinks. William Hightower was chosen agent and confidential adviser; was depended upon to employ his counsel and guard his business interests; and at a time when the plaintiff was, at least, in a critical state of health, when, as the physician testified, he was liable to die at any time, when so feeble that he had to be raised and propped in his bed, and his mind so weak as to cause witnesses much to differ whether or not he knew the act he was doing—a deed was produced by the grantee, and he was caused to sign and acknowledge it.

This might be claimed as well, if the conveyance had been reasonable to the grantee and just to the grantor, but the case shows a palpable want in this; the house and lot in question was his only earthly possessions; divest him of this and he became a pauper; he had not the physical ability to call from door to door and ask a beggar's support—would any man of discretion and sane mind have thus reduced himself to entire dependence, and that not in the country of his birth, or within the knowledge of his kindred? It is true it was attempted to be proved that the defendants, Hightowers, were supporting him, but, upon oath, they both declare they were under no obligations to do so. And when we examine the deed we find no provision whatever for his maintenance, and it would be unreasonable to think or hold that this old man, whose frugal life had secured him about $4000,00 worth of property, in this, his day of greatest need, would, without consideration of kinship or value, convey to another every dollar he was worth.

We might refer, in detail, to the particular situation and mental condition of the plaintiff, the peculiar circumstances under which such marked attention was given him by the defendants, the intimations of a want of that full attention after the deed was executed, the delivery of $500,00 in the presence of the witnesses as a pretended consideration, when none in fact was given, the admission of the defendants that they were attempting to practice a legal fraud, etc., but it is unnecessary. The whole substance of this transaction shows a want of capacity or undue influence, and a court of equity cannot sustain it, and out of many authorities we refer to *Kennedy's heirs, et al. v. Kennedys et al. 2 Ala., 574; Hall v. Perkins, 3 Wend, 626; Whelan v. Whelan, 3 Cowen, 539; Taylor v. Taylor, 8 How. U. S., 183; Whelan v. Smith et al. 9 ib. 55; Harding v. Harding, 11 Wheat, 106; Jackson et al. v. King, 4 Cowen, 207.*

The court below found one hundred and eighty dollars against the appellants jointly for so much rents and profits by them received for the use of the house and lot, from the date of the deed up to the date of the decree; but the counsel for the

appellee, in this court, waive all claim for rents and profits, and consent that so much of the decree of the court below as relates thereto may be reversed, we therefore express no opinion as to whether that portion of the decree of the court below was correct or not, but will modify the same as agreed by counsel, and with that modification the decree of the court below is affirmed.

McMILLEN, *et al*, *v.* SMITH, *et al.*

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MANDAMUS—*Will not control judicial discretion.*—The issuing of an injunction is not an act ministerial in its character only, but one of judicial discretion, and mandamus never lies to control that discretion.

Petition for Mandamus.

Witherspoon and Garland & Nash, for petitioners.

Montgomery & Warwick, for respondents.

HARRINGTON, Special Chief Justice.

The plaintiffs, claiming to be the school board of directors for the single school district of Arkadelphia, in Clark county, petitioned the Hon. E. J. SEARLE, as judge of the Clark circuit court, praying an injunction restraining the defendants, as the acting school board of directors for said single school district of Arkadelphia, from paying out or otherwise disposing of moneys in the hands of the treasurer of said county, and belonging to the aforesaid school district of Arkadelphia, which application was refused, and they now apply to this court for mandamus against the said judge of the Clark circuit court, to compel him to grant the injunction as prayed for in said petition.

The issuing of an injunction is not an act ministerial in its character only, but one of judicial discretion, and the only question involved in this case is fully discussed and decided in *Hays, ex parte* of the present term, in which it was held: That mandamus never lies to control judicial discretion. *See opinion in Hays, ex-parte; also 6 Howard 92; 5 Iowa, 380; and 13 Peters 279, 404.*

Mandamus is denied.

SEARLE, J. being disqualified, did not sit in this case.

HON. S. R. HARRINGTON, special Supreme Judge.

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NEVILLE v. THE STATE.

CRIMINAL LAW.—A verdict of conviction in a case of murder, which does not find the degree of murder, is so fatally defective that no judgment can be entered upon it.

Appeal from Phillips Circuit Court.

HON. JOHN E. BENNETT, Circuit Judge.

Garland & Nash, for appellants.

Montgomery, Attorney General, for appellee.

HARRINGTON, Special J.

The appellant was tried in the court below for the murder of Sandy Nash. The jury returned a verdict of "guilty as charged in the indictment." The defendant moved for a new trial and presented, in support thereof, exceptions to the verdict, also exceptions to the instructions and rulings of the court and to the evidence, but his motion was overruled and he was sentenced to be hanged. Many of the causes assigned for a new

trial are unimportant, and need not be considered by this court in reviewing the case; but the language of the verdict "guilty as charged in the indictment," is too general to guide the court to the penalty which the law inflicts. Murder is recognized by the statute as a greater or less crime, according to the circumstances under which it may be committed, and is classed into the first and second degrees, and different punishment provided for each degree. It is therefore just as necessary that the jury should find the degree in which the defendant is guilty of murder, as it is that they should find whether or not he is guilty of the murder. And this court has held in *Thompson v. The State:* "That a verdict of conviction in a case of murder, which does not find the degree of murder, is so fatally defective that no judgment can be entered upon it." See *Thompson v. The State*, and *Allen v. The State*, decided at December term, 1870, and authorities there cited. Also, *Trammell v. The State*, decided at the present term.

The judgment of the court below is reversed and the cause remanded to it with instructions to arrest the judgment and grant a new trial.

PATTON v. COBB.

Where neither the evidence nor the instructions of the court, in the trial below, are saved by bill of exceptions, or any exceptions are taken to any of the proceedings of the court in the case, there is nothing before this court to determine.

Appeal from Pulaski Circuit Court.

HON. JOHN WHYTOCK, Circuit Judge.

Garland & Nash, for appellant.

Howard & Reeve, for appellee.

SEARLE, J.

This action was brought to the September term, A. D. 1869, of the Pulaski circuit court, by the appellee against the appellant, upon an account for services rendered as clerk, etc. Appellant answered and filed a set-off, which exceeded appellee's claim by ten dollars. The cause was tried by a jury, who found for the plaintiff. Defendant moved for a new trial, which was overruled. Thereupon, defendant appealed to this court. This is all we have of this case. Neither the evidence nor the instructions of the court, in the trial by the court below, were saved by bill of exceptions; nor does it appear that any exceptions were taken to any of the proceedings of that court in the case. There is nothing before us therefore to determine.

This being the case, let the judgment be affirmed.

SHEPPARD v. THOMAS.

ESTATES UPON CONDITION.—*Precedent and subsequent*—Where an estate is conveyed upon a condition *precedent*, the condition must be performed before the estate will pass, but when the condition is *subsequent*, the estate passes at the execution and delivery of the deed.

Whether a condition is *precedent* or *subsequent*, depends upon the intent of the parties creating the same, and not upon the technical words used.

The retention of *title* and the reservation of a "lien" upon the same property is inconsietent with, and at variance with the ordinary transactions of mankind.

Where the words, employed in the reservation of an equitable right, amount to no more than a mere assertion of what the law is, such words are mere surplusage.

Where the lien reserved is *personal*, the assignment of the notes, given for the purchase money, does not carry with it the lien without words to that effect in the deed.

The vendee should show a waiver of the lien of the vendor, otherwise its retention will be presumed.

Appeal from Jefferson Circuit Court.

HON. W. M. HARRISON, Circuit Judge.

Watkins & Rose, for appellant.

The notes, which are the foundation of the claim in this case, were not negotiable by the law merchant, because, *first*, they were under seal; *Walker v. Johnson, 13 Ark., 527. Second*, they were not for the payment of a certain sum of *money, absolutely and unconditionally; Story on Notes, sec. 1.* A promise, which may be discharged in anything else but *current money*, is not negotiable, because a negotiable instrument by the commercial law is not a mere promise to pay, but is considered as the absolute representative of money, which will be delivered at the time the note falls due; *Ib. secs. 18, 19.* Had they been negotiable instruments, however, the rights of the parties would not be changed in this case; because, the notes being assigned after they had fallen due, the assignee took them

when they were under suspicion, and only holds them subject to all the equities existing between the antecedent parties; *Ib. sec. 190; Bertrand v. Barkman, 13 Ark., 150.* The note in *Bertrand v. Barkman*, was payable in Louisiana, and the case was decided strictly in accordance with the principles of commercial law. No reference was made to our statute of assignments. In this case the notes, being under seal, could not be transferred at all except by that statute. Past due, under seal, the commercial law and the statutory rule in this case harmonize. If there is any principle of law cemented by continual inculcation it is, "that the assignee of a note or bond, under our statute, takes it at his peril, and with the risk of any latent equity that the maker could set up in any suit as against the payee or obligee." *Walker v. Johnson, 13 Ark., 522; Worthington v. Curd, 22 ib., 278.*

Upon the merits of this case we beg leave to submit the following considerations:

I. The decree is too broad.

It was the express agreement between the parties; the sale was made and the purchase accepted on the stipulation expressed, that the vendor would look *only* to the property sold for payment.

This is not only the clear intent, and is so stated in the deed, but it further expressly *exempts* all other property of Sheppard from liability in respect of this contract.

It is a settled rule that the decree must conform to the allegations in the pleadings as well as the proofs in the cause; *7 Wheat., 522; 12 Leigh, 69.*

A decree cannot be made to extend beyond the scope of the bill; *3 Ala. 718; 3 J. J. Marsh., 544.*

In the case at bar, the complainant does not ask for execution beyond the property sold. Nevertheless the decree in the cause gives it.

A complainant cannot obtain a decree for more than he has asked for in his bill; *9 Cranch 19.*

The relief must be within the general scope of the bill; *6 Wend. 63.*

And consistent with the prayer thereof; *1 Edw. Ch., 654.*

Under a prayer for general relief, no relief can be granted inconsistent with the special relief prayed; *4 Desau, 330; 1 John. C. R., 111.*

II. There having been already paid by Mr. Sheppard, on account of said purchase, an amount greatly exceeding the value of the negroes and their increase; and these and the title to them having been lost, it is inequitable and unjust, after such loss, and under the circumstances of this case, and of the warranty of the same, not to allow an abatement therefor in favor of Sheppard, in a proceeding which is in effect for specific performance of the *whole* contract on the part of the vendee, while the vendor is acknowledged to be able to perform only a part of his agreement!

One of the conditions of the sale, namely, the warranty of the negroes to be slaves for life, having failed, without fault of Sheppard, to this extent there is a failure of consideration, the amount of which, in this proceeding by the vendors or their assignee seeking, in effect, a specific performance, Sheppard is entitled to recoup.

In Hemphill v. Miller, 16 Ark., 272, specific performance was refused because, among other reasons, it had been rendered impossible by the act of the government.

It is a universal rule in equity that he who asks a specific performance must be in condition to perform himself. *Morgan v. Morgan, 2 Wheat., 290; 27 Ala., 184.*

Specific performance will not be decreed though the contract be valid at law, if it appear harsh or unjust. *1 Ired. Ch., 299.*

A court of chancery will not decree a specific performance where it would operate unjustly on the defendant. *1 Ala., N. S., 458.*

Whether a specific performance will be decreed must depend upon the equity and justice of all the circumstances of the case; and there may be cases where the contract is perfectly

valid and the consideration sufficient, and yet not such as will justify a decree for specific performance. *2 Wats, 148.*

Decree for specific performance will not be made where from a change of circumstances the performance would be attended with peculiar hardship to the defendant. *3 Har. & McHen., 324.*

Nor unless performance can be fairly and conscienciously required at the time. *1 Har. & J., 301.*

A decree for specific performance is not a matter of strict right on proof of the agreement. A defendant may show that to require such performance would be inequitable—or that the bargain was hard, unequal or oppressive, and would operate in a different manner from what was contemplated by the parties when they executed it. *6 Met., 346.*

Chancery will often refuse to enforce a contract which it would also refuse to annul, and leave the parties to their remedy at law. *11 Pet., 229.*

In this aspect of this case and considering that the proceeding is not on any *implied lien*, but on the lien expressly reserved in the contract, it would seem, that chancery might well decline any action in the premises, and leave the parties to a court of law.

See *6 Johns. Chy., 222*, and cases cited in the opinion of the chancellor, particularly *2 Bro. P. C., 415*, where a bill was dismissed on the ground of the great inequality of the agreement to pay £9,200 for that which was not worth £1,000 at the time of performance. And the case of *Faine v. Brown*, cited in *Ramsdem v. Hylton, 2 Ves. Sr., 304*, where the *hardship alone of losing half the purchase money*, if carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave them to law.

An application for the enforcement of a vendor's equitable lien is like the application for the performance of a contract, which equity never grants whenever it would be violative of the principles of morality or justice, although according to the technical rules of law the contract would be valid. *5 Md. 152.*

In cases of inequality of obligation the parties will be left to their remedy at law. *1 Md. Chy. Decis, 13.*

If one of the parties is not bound, or is not able to perform, he cannot call on a court of equity to compel performance by the opposite party. *Id., 345.*

The court will never compel specific performance when looking at the circumstances of the case on both sides it is apparent that injustice would thereby be done. *18 Barb., 350; 9 Ohio, (N. S.) 511.*

A court of equity will not permit a vendor to assert rights of which he cannot conscientiously avail himself. *26 Mis., 250.*

The assignee of a contract, if he seeks performance, must show a performance of all the stipulations which the assignor was bound to perform, to entitle him to it. *2 Johns. Cas., 438; 7 Paige, 301.*

Equity will never, at the instance of a vendor, compel the purchaser to receive a partial execution of the contract. *3 A. K. Marsh., 268.*

III. The slaves were a part of the whole property to which the vendors had agreed they would *alone* look for security and payment. This part having been lost, the security and means of payment must be considered gone *pro tanto; (23 Geo., 237;)* and with this loss went, as we now submit, that portion of the debt represented by the value of the slaves, and secured to the vendee by the warranty.

Under the contract, the parties vendor cannot step outside of the property sold to enforce any portion of this debt; they are estopped from such a course by the terms of the contract deliberately made, and clearly expressed in the deed. And now, Sheppard having already paid more than the value of the property that remains, we further submit that in no event can complainants go beyond that; and in equity and good conscience the consideration having failed as to entire value of the slaves, there should have been no decree against him.

There is another aspect of this case, viz: that by the terms

of the bargain there was to be no conveyance of title until full payment of the notes given for the purchase: "*when and whereupon* this deed shall become absolute and in fee simple."

As the legal title remained in Payne, no lien could arise in this case save that stipulated for, in and according to the contract. It is this express lien that the complainant can litigate for, and he has no grounds of suit, and can have none on an *implied lien.*

It was a mere agreement to convey, and, as the vendor retained the legal title there is no lien to enforce in this case; *7 S. & R., 64.* It must be wholly on the terms of the contract; and the complainant stands here in the attitude of a suitor for specific performance, acknowledging his own inability to perform on his part, yet asking that Sheppard shall not only fully perform his agreement but that complainant may have as against him, advantages and payments not stipulated for in the contract!

It is submitted that the courts cannot make any other contract for these parties than that which they have made for themselves, and that in case of the non-payment of the notes, (to put the case in the strongest aspect for the complainant,) he could only re-possess himself of the property, and that as between the parties to this suit, the legal title to the land being in others, it was error to decree a sale.

There is also another aspect of this case arising out of the recent change in the law of this State as applicable to a portion of the property constituting a part of the consideration of this agreement, viz: forty-six slaves, valued at between fifty and sixty thousand dollars, and as to which, and to that extent, in any event, the decree must be reformed. *Constitution of Arkansas, art. 14, sec. 14.*

Bell & Carlton, for appellee.

On behalf of appellee, we beg leave to submit the following considerations:

It is urged by appellant in assigning errors, in this case, that

the decree rendered for complainant is for the entire amount of the debt, damage and interest against the appellant *in personam*, and a lien upon his property and estate generally, and liable to be enforced by process of execution, and contend that by the terms and stipulations of the contract, the decree could only have been in the nature of a decree *in rem*, foreclosing and condemning to be sold the lands for the payment and satisfaction of any residue of the purchase money, appearing to remain unpaid.

We think in this assignment of errors appellant has mistaken the law.

The complainant's right to sue in this case, it will be observed, is by virtue of an *assignment* to him of three writings obligatory executed by appellant to James B. Payne and Elizabeth H. Robinson, for certain amounts of money, made payable at the Citizens' Bank, in the city of New Orleans, Louisiana, in money or New York exchange. There is no uncertainty or contingency in the three writings obligatory, either with regard to event, or with regard to the fund out of which the sums of money, specified in the writings obligatory, are to be made; they are clearly *negotiable* instruments, and the conditions and stipulations of the deed of conveyance from Payne and Robinson to Sheppard, and in which a lien is reserved for the payment of said writings obligatory, cannot affect or destroy that *negotiability*. The rules of law that would govern in bills of exchange and promissory notes apply with equal force in this case, and the idea that the decree ought to have been *in rem*, and the condition in the deed of conveyance, making the payment of the money, specified in the bonds *contingent upon a particular fund* is to govern in this case, is so contrary to what we consider to be the law that will govern, that we scarcely deem it necessary to cite authorities to show the contrary.

A bill or note must *not* be made payable out of a particular fund, for the fund may prove insufficient; *Byles on Bills, p. 165.* It is essential to a bill or note that it be payable in

money only, at all events, *and not out of a particular fund. Atkinson v. Manks, 1 Cow., 691; Cook v. Satterlee, 6 Cow., 108; Waters v. Carleton, 4 Port., 205; Hamilton v. Myrick, 3 Pike, 541; Williamowicz v. Adams, 8 Eng., 12.*

The money must be payable at all events, not dependant upon any contingency, either with regard to event or with regard to the fund out of which payment is to be made, or the parties by or to whom the payment is to be made; *Chitty on Bills, pp. 135, 138.* The same rules are to be found in *Bailey on Bills, p. 21; Story on Promissory Notes, p. 29.*

Any contingency to avoid the writing obligatory, assigned by Payne and Robinson to the complainant, must be apparent on the face of the writings or upon some contemporaneous written memorandum on the same paper. "If not so, whatever may be its effect as a matter of defense between the original parties, it is not deemed to be a part of the instrument, and does not affect, much less invalidate its original character. This is a general rule, and extends to all written contracts." *Story on Promissory Notes, p. 26.*

"Our statute of assignments makes many instruments negotiable which were not so before, but does not purport to change the law merchant as to instruments before assignable—it merely adds to their number." *Buckner v. Real Estate Bank, 5 Ark., p. 536.* We think it clear and beyond question, that the writings obligatory assigned to complainant, and the payment of which he seeks to enforce by his bill, mere negotiable instruments, made so by our statute of assignments, and as such in complainant's hands, as assignee, the condition of the deed of conveyance, that the payment of the sums of money in the bonds was to be made out of a particular fund, is an utterly *null and void condition*, so far as complainant, (the assignee) is concerned.

No question can now arise as to the negotiability of the writings obligatory from appellant's right to pay off the bonds in money or *New York exchange.* This condition of the bonds was for the benefit of the maker, and his failure to avail him-

self of the privilege, when the obligations matured, amounted to a forfeiture of it, and the obligations became absolute and an action of debt for money could be supported upon them. *Gregory v. Bewly, 5 Ark., 320; Dorsey v. Lawrenee, Hardin, 508; Bizzell v. Williams & Blevins, 3 Eng., 140.*

Complainant, as appears from his bill, is the holder of the bonds by virtue of an assignment to him, by the original payees, for value received. He seeks to enforce the payment of his bonds, which he holds as assignee, by a bill to foreclose the lien reserved in the deed of conveyance from Payne and Robinson to appellant. Which lien is in the nature of a mortgage, and nothing more than a collateral security to his bonds. *Easton v. Fisher, 1 Ark., p. 90.* There is nothing to be done or performed, either by Payne and Robinson or complainant, to entitle complainant to bring his suit. No question of specific performance can arise in this case. The deed of conveyance from Payne and Robinson to appellant, so far as the bargain, grant and conveyance of the property sold is concerned, is an *executed one* by Payne and Robinson, and in no sense could it be considered executory as to them.

The reservation of the lien in the deed, it seems to us, will be considered in the same light as though there had been an absolute conveyance, and a separate mortgage back.

It is urged also by appellant's counsel that the decree rendered in this cause, in the court below, is too broad. The authorities referred to in support of this position, we respectfully submit, merely decide that the decree must agree with the pleadings. In other words, that the decree cannot be based upon a fact not put in issue by the pleadings, and are entirely consistent with the decisions of our court, as rendered in the cases of *Maulding v. Scott, 13 Ark., 89; Cook v. Bronaugh, 13 Ark., 188; Fenno v. Coulter, 14 Ark., 45; Ross v. Davis, 17 Ark., 120.*

McCLURE, C. J.

It appears from the record in this case that, on the 25th of January, 1860, Payne and Robinson executed and delivered to James Sheppard a deed that recites:

"That in consideration of the sum of thirty thousand dollars in hand paid, and the further sum of eighty-six thousand, one hundred and forty dollars to be paid us (them) by the said James Sheppard in five equal annual installments * * * * do hereby grant, bargain, sell and convey unto said Sheppard, the following described lands, negroes and personal property, in the county of Jefferson and State of Arkansas."

The deed describes six hundred and twenty acres of land, forty-six negro slaves and other personal property. Following this description are the usual covenants and warranty, as to the lands and slaves.

The deed further recites that it is made upon the condition: "that said Sheppard shall well and truly pay the said sum of $86 140, purchase money, remaining due and unpaid. That said $86 140, remaining due and unpaid as aforesaid, together with the interest and cost, shall be and remain a lien on the lands, slaves and personal property until the same shall be fully paid off and discharged, when and whereupon, *and not before*, this deed shall become absolute and in fee simple forever."

Payne and Robinson further retained the right "to subject the land, slaves and personal property, or any part thereof, to the payment of said sum of $86 140, or any part thereof, as the same may become due and payable," and expressly exempted, "all right, in law or equity, to recover the purchase money or any part thereof from any other lands, negroes or property of the said James Sheppard, but rely entirely on said lien for security and payment."

Sheppard executed his five writings obligatory for $17 288 each, and delivered them to Payne and Robinson. Two of these writings obligatory have been paid off by Sheppard.

The other three, falling due on the 1st of February, 1862–3 and 64, were, on the 1st of September, 1865, assigned to Samuel B. Thomas.

On the 19th of March, 1866, Thomas filed his bill, in the Jefferson county circuit court, setting up the sale by Payne and Robinson to Sheppard, and the assignment of the notes to himself. The relief asked is, for a decree against Sheppard, for said several sums of money and interest that remains unpaid, etc. That complainant's lien be enforced on all the increase of the aforesaid property, and that the aforesaid lands and personal property, that remain, be sold for the payment of complainant's debt, interest and costs, and if not sufficient to satisfy said debt, interest and costs, that the defendant be decreed to pay the amount of money that may have come into his hands for cotton, corn, hay and millet that may have been raised on the lands aforesaid, etc."

Sheppard in his answer admits the execution and delivery of the deed to him by Payne and Robinson; the payment of $30.000, and the execution and delivery of the five writings obligatory, and the assignment of said three writings to Thomas. He further states that in the original bargain and sale, the land was valued at $37.200; that the slaves were estimated and valued at $57.500; that the legal title to said slaves, by a special reservation in the deed, was retained by Payne and Robinson; that since said sale said slaves have been liberated by the act of the government and are now free; that the consideration expressed in said deed, to the amount of $57.500, (the value of the slaves) has wholly failed, and prays that, inasmuch as the legal title to said slaves was held and specifically retained by said Payne and Robinson, on the final hearing of the case he may receive a credit for $57.500, as the value of said negro slaves; that Payne and Robinson cannot now make any title to.

At the hearing a decree was rendered against Sheppard for $66.791 54, debt and interest and declared to be a lien on said lands, in the nature of a mortgage; that Sheppard's equity of

redemption therein be foreclosed and in default of payment on or before 6th of April, 1868, that said lands be sold to satisfy the decree, and in default of payment, that Thomas have execution, as at law, for the residue. From this decree Sheppard appealed to this court.

One of the questions to be determined in this case is: whether the deed executed, by Payne and Robinson, to Sheppard, conveyed *eo instanti*, an absolute estate in fee simple; or whether it conveys an estate upon condition. If the estate is conveyed "upon condition," the question then arises, is the condition precedent or subsequent? If precedent, the estate does not pass until the performance of the condition; if subsequent, the estate passed at the execution and delivery of the deed. Where the condition is precedent, the *grantee* elects whether he will perform; but where the condition is subsequent, the *grantor* elects as to whether he will re-enter the estate or waive the forfeiture, and compel a performance.

All law writers agree that there are no technical words to distinguish a condition precedent from a condition subsequent, and assert that the same words may create either, according to the intent of the person *who creates it. 1 Tenn. Rep. 645; 2 Caine, 252; 11 Vesey, 170.*

Now, if the condition be subsequent or precedent, "according to the intent of the party who creates it," the next inquiry will be to find out the intent of Payne and Robinson. This can only be done by referring to the language employed in the deed.

The deed contains all the formal and apt words of conveyance usually employed in the alienation of real property, and but for the provisos and conditions added thereto, would admit of but one construction.

There are three provisos in the deed; the first of which reads as follows: "*Provided always*, nevertheless, and this deed is made upon the condition that the said James Sheppard shall well and truly pay or cause to be paid the sum of $86,140, purchase money; remaining due and unpaid as aforesaid, with all

the interest that may accrue thereon, according to the tenor and effect of his said five writings obligatory." If this had been the sole proviso in the deed, an estate upon condition is all that would have passed to Sheppard, and, in default of the payment of the $86,140, Payne and Robinson could have re-entered the realty by an action of ejectment; or they could have waived the forfeiture, and taken a judgment at law for the amount due them. This being true, the first proviso amounts to a condition subsequent.

The second proviso is: "that the said sum of $86,140, purchase money, so remaining due and unpaid, as aforesaid, together with all interest and costs that may accrue thereon, shall be and remain a *lien* on all and singular the lands, slaves and personalty, hereinbefore mentioned and described, and also on the increase thereof, and all additions that may be made thereto, until the same shall be fully paid off and discharged." If this proviso stopped at this point, the irresistible inference would be, that inasmuch as the grantors make use of the word "lien," that they intended to convey an absolute estate, subject to no conditions whatever; but it does not stop; it continues, and is concluded by the declaration, that, "when and whereupon and *not before*, this *deed* shall become absolute, and in fee simple forever." The closing language, of the second proviso, seems to declare that the *deed*, itself, shall not become absolute and in fee simple forever, until the payment of the entire purchase money. This declaration is not reconcilable with the retention of a "lien." The retention of *title*, and the reservation of a "lien" upon the same property is inconsistent with and at variance with the ordinary transactions of mankind.

The third proviso declares, in default of payment, or any part thereof, that Payne and Robinson "do hereby waive and relinquish all our right, in law or equity, to recover the same, or any part thereof, of, and from any other lands, negroes, or property of the said James Sheppard, but do hereby expressly exempt the same from all liability for the payment of said purchase money, so remaining due and unpaid, as aforesaid,

and rely entirely on said *lien* for security and payment." Here we have a clearly expressed intention, on the part of Payne and Robinson, that goes to show the vesting of an absolute estate in Sheppard. If such was not their intention, they would hardly have made use of the assertion that they "rely entirely on their said "*lien*" for *security* and *payment*. The assertion that they rely entirely on their "lien" for *security* and *payment*, negatives the idea that they intended to rely upon the retention of *title*, as in the case of a title bond, as a means of enforcing the purchase money.

Taking all the conditions and provisos together, and construing them in *para materia*, we are forced to the conclusion that the deed of Payne and Robinson to Sheppard passed an absolute estate, in fee simple, at the execution and delivery of the deed. The deed was acknowledged and filed for record on the 26th of January, 1860, which may be regarded as the date of the delivery.

This brings us to the consideration of a question that is not without precedent, and that is, was the "equitable lien" that Payne and Robinson retained to *themselves*, transferred to Thomas by the mere assignment of the notes?

This court held in *Shall v. Biscoe et al.*, (*18 Ark. 162*), that "where the widow 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 purchase money."

It is urged that the deed before the court, in *Shall v. Biscoe*, had no words specifically reserving the lien, as there is in this case. This is true. But does the reservation in this instance give to Payne and Robinson, or their assigns, a lien of a higher grade than they would have had if a deed had been executed in which no attempt had been made to retain a lien? If the words employed in the reservation of an equitable right amount to no more than a mere assertion of what the law is, such words are mere surplusage. Payne and Robinson, as vendors, had a lien against the lands sold for the purchase money

without any assertion of the fact in the body of the deed. This being true, can Payne and Robinson, by the mere recital of what the law is, make the vendor's lien assignable to Thomas, by a mere assignment of the note, in the ordinary course of business?

In *Moore & Cail v. Anders*, (*14 Ark.*, *635*,) this court said: "that the equitable lien of the vendor is *personal* to him, and *is not*, unless under some peculiar circumstances, assignable."

Thomas comes into a court of equity and asks that the property described in the deed of Payne and Robinson to Sheppard, be sold to pay his notes. There is no allegation in his bill that he became subrogated to the personal or equitable rights of the vendors, nor is there anything in the bill showing any peculiar equitable circumstances attending the assignment to him. By his bill he stands before this court as a purchaser in the ordinary course of business. He bases his claim to enter a court of equity, on the bare fact that, because a vendor's lien is asserted in the deed, Payne and Robinson assigned that lien to him when they assigned the notes.

The clause in the deed, by which the lien is said to be created, and which Thomas claims was assigned to him by the mere assignment of the notes, reads as follows:

"And we, the said James B. Payne and Elizabeth H. Robinson, herein and hereby reserving and retaining an *equitable lien*, on all and singular the lands, negroes and personal property, with the increase thereof, with the right to subject the same to the payment of said sum of $86,140, purchase money, so remaining due and unpaid as aforesaid or any part thereof; * * in default of payment, or any part thereof, do hereby waive and relinquish all our right in law or equity, to recover the same or any part thereof, from any other lands or negroes of said James Sheppard, but do hereby expressly exempt the same from all liability from the payment of said purchase money, so remaining due and unpaid as aforesaid, and rely entirely on our said lien for security and payment."

It will be observed that the reservation of lien, by the terms

of the deed, is to Payne and Robinson, *personally*, and not to themselves, heirs or *assigns*. At the time of the execution of the deed, the uniform holding of this court was, that the lien of the vendor was personal. The inference to be drawn from this fact is, that if an *assignable* lien was intended to have been created, that words to that effect would have been employed. This court has frequently held that, where a title bond is executed, the assignment of the notes, given for the purchase money, carrys with it the vendor's lien; but this holding is placed upon the ground that *no title* has passed. In the case of a mortgage, it has held that the assignment of the notes, described in the mortgage, gave to the holder the right to come into a court of equity and ask a foreclosure; but this deed is in no manner similar to a mortgage. In a mortgage, the property is conveyed absolutely, to secure the payment of money or other property; or to secure the performance of some act or duty. The deed in this case was executed, not to secure the payment of money, but for the purpose of conveying title. In the case of a *title* bond, and in the case of a mortgage, the *title* remains in the person to whom the money or other property is due; but in this case, the title has passed to the grantee, and the grantor has covenanted to "rely entirely on the said lien for security and payment." The difference is, that in the case of a title bond, or in the case of a mortgage, the creditor relies on a *legal title* for security and payment, and in the case now before us, the creditor relies on his equitable lien for security and payment. The lien given by the mortgage is the act of the debtor; its manner and mode of execution is fixed by the statute of the State, and may be regarded as purely a legal lien. The best evidence that these parties did not intend to create a "lien in the nature of a mortgage," is, that they described the lien retained by them as "an equitable lien." The phrase, "equitable lien," has a well defined and fixed meaning, and includes such liens as are cognizable in a court of equity only. The words descriptive of the lien retained in this case are well known to the law, and if there is one prin-

ciple of the law better settled than another, it is that where a party uses technical language in a deed or other instrument, the law presumes he intended it to be understood in a technical sense.

There are many things that enter into every contract in writing that is not expressed, or if expressed, would be a mere reiteration of what the law is. It is laid down in Broom's Legal Maxims, that "the expression of a clause which the law implies, works nothing," and as an illustration says: "if land be let to two persons for the term of their lives, this creates a joint tenancy; and if the words, "*and the survivor of them*" are added, they will be mere surplusage, because by law, the term would go to the survivor." *Brown's Legal Maxims, 424.*

Judge PARSONS says, "if the parties have provided nothing different, but the very same thing which the law would have implied, that the provision may be regarded as made twice, once by the parties and once by the law. And as one of these is surplusage, that made by the parties is deemed to be so, and hence, is derived the rule of construction, that "the expression of those things which the law implies, works nothing." Under the decisions in this State, for the last twenty years, the expression in a title bond, that the vendor retained or reserved a lien for the purchase money, would have been regarded as a work of superfluity, because the courts of this State had held that the vendor had a lien without any such assertion.

In cases where the vendor had passed title by deed, the holding of this court has been that the vendor retained a lien for the payment of the purchase money. If Payne and Robinson, the vendors, had brought suit on these notes, they could as well have enforced their lien, in the absence of any words retaining an "equitable lien," as they could by their assertion.

If A executes his note and agrees to pay six per centum interest after maturity, the holder takes nothing by reason of the words "six per centum," because the law would have given six per centum interest in the absence of those words, and so

we conceive Payne and Robinson would have had "an equitable lien" without any stipulation.

Now the question arises, can Thomas construe this "equitable lien" into a lien by contract? Unless he can, the lien is not assignable. An "equitable lien," by contract, is to us an unheard of thing. Chancellor Kitty, in *Iglehart v. Armigeo*, (*1 Bland's Chancery, Md.*,) says "an *equitable lien* is an incumbrance on land which *can only be held by the vendor;* that an assignee of the vendor can derive no benefit from such lien, nor can it be assigned like a bond or mortgage."

We have already shown that Payne and Robinson could have as well enforced the vendor's lien, in the absence of the assertion of its retention, as they could have done, if it had not been asserted, and the reason for this is, that the law *implied* the lien. It is an universal rule that the vendee must show a waiver of the lien of the vendor, and that if he fails the law will presume its retention. If this be so, the assertion of the retention of an "equitable lien," was a work of supererogation, which Judge PARSONS says, is mere surplusage, by which the party takes nothing.

This brings the case within the rule laid down in *Shall v. Biscoe*, if the words, retaining the vendor's lien, are to be treated as surplusage. This case stands precisely in the condition that that case was when this court declared, "that a mere assignment of the notes given for the purchase money, does not transfer to the assignee the benefit of the vendor's lien on the land for the purchase money."

This thing, called an "equitable lien," is not a product of this country, it comes to us with the equity practice derived from the mother country. It is a well established rule of the law that, in adopting the laws of another State, the rule of construction adopted in that country should be allowed. In all the English books, we have been unable to find a case, wherein it is asserted, that an "equitable lien" *may be assigned* or that it virtually passed along with the assignment of the bonds given for the purchase money.

The decree of the Jefferson circuit court is reversed and set aside, and the cause is remanded with instruction to dismiss the bill for want of equity.

GREGG, J. and WHYTOCK, (Special J.) dissenting, say:

There are several important questions in this case, the most difficult of which seem to arise upon a construction of the deed from Payne and Robinson to Sheppard, (except detailed descriptions of property, not necessary to a clear understanding and proper construction of the deed), it is as follows, to-wit:

"Know all men by these presents that we, James B. Payne and Elizabeth Robinson, in consideration of the sum of thirty thousand dollars, to us in hand paid by James Sheppard, and of the further sum of eighty-six thousand one hundred and forty dollars to be paid to us by the said James Sheppard, in five equal annual installments, to wit: the sum of seventeen thousand two hundred and twenty-eight dollars on the first day of February, 1862, the like sum of seventeen thousand two hundred and twenty-eight dollars on the first day of February, 1863, the like sum of seventeen thousand two hundred and twenty-eight dollars on the first day of February, 1864, and the residue or like sum of seventeen thousand two hundred and twenty eight dollars on the first day of February, A. D. 1865, all of said installments without interest until maturity, but if not paid at maturity, then to bear interest at the rate of eight per cent per annum from due until paid, payable at the Citizens Bank, in the city of New Orleans, La., in money or New York exchange, with the privilege to the said James Sheppard to pay off the same, or any part thereof, at any time before maturity, at eight per cent per annum discount, by depositing the money or New York exchange for that purpose in said bank to the credit of the said Payne and Robinson, and the certificate of deposit of said bank therefor, shall be evidence of such payment, according to the tenor and effect of the five several writings obligatory of the said James

Sheppard, of even date herewith, now executed and delivered to us, payable as aforesaid, reference being thereto had will more fully appear, do hereby grant, bargain sell and convey, unto the said James Sheppard, the following described lands, negroes and personal property, situate and being in the county of Jefferson and State of Arkansas, to-wit: The east half of the north east quarter of section thirty-one, etc. etc., in Township five south of Range eight west, etc., containing together six hundred and twenty acres, (620) more or less, of land, together with all and singular the privileges and appurtenances thereunto in any wise belonging, the same being and constituting the plantation now occupied and cultivated by us, the said Payne and Robinson, and also the following named negro slaves, forty-six in number, now on said plantation, to-wit: Jack, Floyd, etc. etc., and also the following described personal property, now on said plantation, to-wit: two thousand bushels of corn, five work horses, one saddle horse, seventeen mules, etc., on the place. To have and to hold all and singular the lands, slaves and personal property aforesaid, to the said James Sheppard, his heirs and assigns forever, hereby covenanting with the said James Sheppard, his heirs and assigns, that we the said James Payne and Elizabeth Robinson are lawfully seized in fee of said land, have a good right to sell and convey the same and that we will, our heirs, executors and administrators shall warrant and defend the title thereto against the lawful claims of all persons, and also that said negroes are all slaves for life, and that we will, our heirs, executors and administrators shall warrant and forever defend the title to said negro slaves, and all and singular the personal property aforesaid, unto the said James Sheppard, and his heirs and assigns against the lawful claims and demands of all persons whomsoever, and for the consideration aforesaid, and I, Mary Payne, wife to the said James B. Payne, do hereby release and forever quit claim unto said James Sheppard, his heirs and assigns, all my right, claim, or possibility of dower in or out of the aforementioned premises.

"*Provided always, nevertheless*, And that this deed is made upon the condition, that the said James Sheppard shall well and truly pay, or cause to be paid, the said sum of eighty-six thousand one hundred and forty dollars, purchase money, remaining due and unpaid, as aforesaid, with all interest that may accrue thereon, and according to the tenor and effect of his said several five writings obligatory, therefor, as aforesaid; and furthermore, that the said sum of eighty-six thousand one hundred and forty dollars, purchase money, so remaining due and unpaid, as aforesaid, together with all interest and costs that may accrue thereon, shall be, and remain a lien on all and singular, the lands, slaves and personalty hereinbefore mentioned and described; and also, on the increase thereof, and all additions that may hereafter be made thereto, until the same shall be fully paid off and discharged, when and whereupon, and not before, this deed shall become absolute and in fee simple forever, and we, the said James B. Payne and Elizabeth Robinson, herein and hereby retaining and reserving our equitable lien, and all and singular the lands, slaves and personalty, with the increase thereof, and all additions that may be made hereafter, thereto, as aforesaid, with the right to subject the same, or any part thereof, to the payment of the said sum of eighty-six thousand and one hundred and forty dollars, purchase money, so remaining due and unpaid, as aforesaid, or any part thereof, as the same may fall due and become payable as aforesaid, and in default of the payment thereof, or any part thereof, do hereby waive and relinquish all our rights in law or equity to recover the same or any part thereof, of and from any other lands, negroes or property of the said James Sheppard, but do hereby expressly exempt the same from any liability for the payment of said purchase money, so remaining due and unpaid, as aforesaid, and rely entirely on our said lien, for security and payment thereof, as aforesaid.

In testimony whereof, we, the said James B. Payne, and Mary, his wife, and Elizabeth H. Robinson, have hereunto set

our hands and seals, at the county of Jefferson, in the State of Arkansas, on this, the 25th day of January, A. D. 1860.

JAMES B. PAYNE, (SEAL.)
MARY PAYNE, (SEAL.)
ELIZABETH H. ROBINSON, (SEAL.)

We concur with the majority of the court that this deed does not evidence a mere agreement to convey nor a conditional sale, but upon its face shows a conveyance in fee, to the vendee. *Gullett & Wade v. Lamberton, 6 Ark., 109; Muller v. Ruggs, 25 Cal. 187; Jackson et al. v. Blodgett, 16 Johns. 172; 38 N. H. 218; 36 Maine, 315; 1 Kernon N. Y. 320; Davis v. Tarwater, 15 Ark. 287.*

We are of opinion that this being an equitable proceeding, presents the question as to the validity of contracts made for slave property, but, without argument, we will treat that as settled in the cases of *Dorris v. Grace, 24 Ark., 326; Haskel v. Sevier, 25 Ark., 152; Jackoway, adm'r., v. Denton, 25 Ark., 625, and Pillow v. Pointer's exr's., 26 Ark., 240.*

We concur in the declaration of the court that Payne and Robinson could have enforced a lien against the lands. But we dissent from the holding of the court that Thomas cannot, as such assignee, enforce such lien.

There are two kinds of vendor's liens; a lien by express contract, or by agreement between the parties, and there is an equitable lien arising between the parties, where an absolute conveyance is made and no expression of an intention to reserve a lien is had; this latter lien is purely a creature of the law, and between the parties is enforced in equity, because it is unjust that one should hold the land of another, and not pay the purchase price. This lien is personal between the parties, or their privies, and where innocent parties come in, or the notes pass off in the course of trade into the hands of third parties, such equities no longer exist, and no liens can be enforced.

But where a vendor stipulates for a lien to secure the payment of the purchase price, and gives the proper notice to all

who may be concerned, such lien, then, becomes a security for such purchase, and may be enforced by the vendor, or he may assign it to another, and such holder may enforce it, because all the world having notice of the existence of such lien, there can be no innocent purchaser, and all being notified that the purchase money remains due and unpaid, equity and justice requires that it should be paid before any other incumbrance should attach upon the land, and all subsequent contractors must stipulate to meet such equities; *Terry v. George, 37 Miss.*; *Amory v. Reely, 9 Ind., 490*; *21 Cal. 178.*

And we hold that it is not material whether this lien is reserved by a separate contract as by mortgage, or by an agreement in the deed of conveyance; in the first instance, the vendor parts with the whole title, and then has a right of lien reconveyed to him; in the latter, he parts with all his title except a right of lien, and that he reserves to himself to secure the purchase money, and in either case the property belongs to the vendee; but the vendor has the right to enforce the payment of the purchase price, out of it, before any assignee of the vendee can have a perfect title.

And we hold that, in deeds, as well as in parol contracts, it is wholly immaterial what form of words the parties use, so that the language sufficiently evidences the intention of the parties; from the whole instrument executed, we are to arrive at their meaning, the understanding had between the parties. In the case of *Davis v. Tarwater, 15 Ark., 287;* this court said: "The intent, and not the words, is the essence of every contract. In the construction of deeds we are to consider the entire instrument, and not any particular part of it, and such exposition should be given as that every part of a deed may, if possible, take effect and every word operate."

Courts of equity are not so much, as courts of law, bound by the form of words. Equity seeks for the intention of the contracting parties, and decrees that such intention be carried out; and while there may be finely wrought distinctions between liens secured by mortgage and those otherwise incorporated

into the contract by the parties in purely courts of law, such discriminations do not exist in a court of equity. At law, the mortgagee may claim a legal title, but in equity, the substance of the estate, the body of the thing, is in the mortgagor, and the mortgagee has a mere trusteeship to secure the performance of some acts, or the payment of certain moneys; *Johnson's Exrs. v. Clark, 5 Ark., 335; 4 Kent Com. 135, et seq.* These distinctions should not be lost sight of when, as in this case, we are investigating rights in a court of equity.

Now we repeat that courts of equity look to the actual intention of the contracting parties, and endeavor to carry out that intention, and it is wholly immaterial whether that intention is expressed in one instrument or in more than one, so that by examining the various steps in the agreement, the will of the parties can be known.

In *Blakemore v. Byrneside, 7 Ark., 508*, this court said: "In equity, the character of the conveyance is determined by the clear and certain intention of the parties. A deed absolute on its face and registered as such, will be valid and effectual as a mortgage between the parties, if it were intended by them to be merely a security for a debt." In the case of the *Planters' Bank v. Courtney, 1 S. and M., 40*, wherein the vendor sold a lot of land, gave his notes and stipulated in the deed that the lot was to be bound until both the notes were fully paid and satisfied; the notes had been assigned to the banks after the lots had been sold under execution to Isely, who sold to Henry Courtney, and he, to the defendant; the bill prayed a foreclosure. The answer set up that the original notes had been paid off and canceled, and others, with personal security, taken in satisfaction of the first, etc. The court said *the only question* was, whether the present notes were taken in satisfaction of the lien, not even doubting the propriety of foreclosing the equity of redemption, if the notes had not been satisfied. And, in this case, the notes and lands had both passed out of the hands of the original parties.

In a later case the same court approve of this opinion, and

further declare an indorsement on a deed to constitute a mortgage in equity. *Baldwin et al. v. Jenkins, et al. 23 Miss.*

In Pennsylvania, the policy of the law has always been against equitable liens, and her courts have persistently disallowed them. The Superior Court of that State said: "Equitable liens, though long prevalent in English and some of the American courts of chancery, was never intended to be admitted into Pennsylvania jurisprudence."

But in the case of *Heister v. Green, 48 Penn. S. 101 and 102*, the court of appeals say: "The sum of the authorities is, that though equitable liens are not favored by our law, yet parties may, by clear and express words, in deeds of conveyance, create liens upon lands, either for purchase money or for the performance of collateral conditions," etc.

If these rules be admitted, we then have to examine the deed and find out the intent of the parties. Did they, by this instrument, intend to sell and transfer the lands and personal property, specified in this deed, to Sheppard? It is clear that they did. This question is settled by the whole court. Next, did they intend to reserve a lien, upon this property, to secure the payment of the purchase money? Immediately after the close of that clause in the deed vesting the title in Sheppard and his heirs, they proceed to say, "the deed is made upon the condition that he pay the remainder of the purchase money, and that the said sum of $86,140, together with all interest that may accrue thereon, shall be and remain a *lien* on all and singular the lands, slaves and personal property hereinbefore mentioned," etc. Is this language not clear and explicit? Does it not show the intention of the parties? It does not declare that a lien is reserved to hold Payne and Robinson *harmless*, but the lien is to *secure the payment of all the purchase money and interest*, and upon such full payment the deed is to become absolute. Then follows a clause in which they say, retaining their equitable lien on this property for this sum, they relinquish all rights to collect any part of the amount,

out of any other property of said Sheppard, and they rely entirely on their said lien for security and payment.

Now, if Payne and Robinson did not intend to retain a lien by contract, if it was not intended as a part of the agreement, why should they as often as three times, announce that such lien was retained? In this, we not only have the express language of the grantors that they retain a lien, but another fact showing why they retained it; that is giving the best reason for its retention, that was, they were parting with $86,140 worth of property, and releasing all right to collect anything, except out of the property they were turning over to Sheppard. If it can be made more clear, this certainly gives force to their positive assertion, that they do retain a lien.

Now, it seems to us, the majority of the court commit a mistake, wherein they say: The clause in the deed by which the lien is said to be executed, and which Thomas claims was assigned to him by the mere assignment of the notes reads as follows: "And we the said James B. Payne and Elizabeth Robinson, herein and hereby reserving and retaining our equitable lien on all and singular the lands" etc. etc., "and release all other property" etc. etc. Now this clause, in the deed, is not the clause by which the lien is created and declared. The object of this clause was to release Sheppard from liability, so far as all other property was concerned, and it only contained a reference to the lien, the amount unpaid and the property upon which they relied for payment.

It was the preceding clause that announced that the property was conveyed upon condition that Sheppard should pay all the balance of the purchase money, and that they retained a lien thereon for the amount due, and that upon the payment of that sum and interest, and not before, Sheppard's title should be absolute. This is the clause limiting Sheppard's title, and nothing is said about the lien being equitable; but in this emphatic manner they declare their lien shall exist, and Sheppard's title shall not be absolute and in fee until the payment of all this money. But if the draftsman of the deed had used

terms less appropriate or inappropriate, a court of equity would have reviewed the whole transaction and decreed according to the meaning of the contracting parties, and without hesitating at the use of an improper or inappropriate word. And there is certainly a marked difference between an equitable lien that is created solely by the law, and one created by agreement or contract between the parties. The equitable lien arises out of the relationship between the parties; the peculiar circumstances surrounding them, which show that injustice would be done for one to hold property without compensating the former holder; while a legal lien or lien by contract is where the original owner stipulates that a lien shall exist for the payment of the money or performance of some stipulation, and we hold that it is wholly immaterial whether the lien is by reservation in the deed of conveyance or whether that deed is absolute, and a reconveyance by mortgage as security, and that in equity no distinction is made. Is it not clear, if one has an absolute title to property, he can convey the whole of it, or just such part as he chooses? May he not make a deed to pass title at once, or upon condition, or at a fixed time in the future? May he not fix the title in one and the use or profits in another, or reserve the use of a part thereof to himself, etc. etc? He can sell what he chooses and reserve what he desires, and when he only conveys a legal estate, and retains a right to collect so much purchase money as may be unpaid, that much interest in the estate is as effectively and legally in him as it can be, because he held all interest, and to that extent it has been conveyed away.

But the majority say, Payne and Robinson had a lien upon the land for the payment of the purchase money, without having this reservation in the deed, and therefore, the reservation was surplusage; it was a work of supererogation to insert such clause in the deed, and the deed meant no more with this clause than the law implied without it. Can I not say, with the same force of argument, that there is no use in a vendor taking a deed of mortgage to secure his unpaid purchase

money; that notwithstanding his deed is absolute on its face, equity gives him a lien for that money, and it is a work of supererogation to take a mortgage? Suppose the court should say, without a mortgage an assignee can not enforce payment out of these lands, or an innocent purchaser might get these lands, we repeat the same argument. In this instance, the lien was reserved, not alone to Payne and Robinson, but to secure the payment of the purchase money, in whose hands soever, and the lien was patent upon the face of the deed; and Sheppard could convey to no one who could be an innocent purchaser, because when they looked upon his title, they would see the amount to pay before the title in him was absolute, and when he registered that deed, then the public records gave notice to the world of the amount to be paid before the title in Sheppard was clear; and the deed set out a full description of the notes which were to be paid. Then it seems evident that a lien by contract is preferable to a mere equitable one, and it will be seen by carefully examining this deed that every clause on that subject declares this lien for the *security of the purchase money*, and to say that it is not more than an equitable lien that can reach no further than to Payne and Robinson personally, is a construction we do not sanction.

The majority held that the parties, contracting, must be presumed to use terms, in conveyancing, with an understanding of the law, and the former decisions of our courts. If so, the draftsman of this deed must have known that Payne and Robinson had an equitable lien to secure them, without any reservation in the deed. Knowing that when they inserted in the deed a clause declaring that a lien was reserved until the purchase money and interest was all paid, they necessarily meant more than an equitable lien; they meant a lien that would attach the property until the notes were paid, and if they meant that, this court, in the case of *Davis v. Tarwater*, said their meaning and intention must be carried out by the court of chancery.

In the case of *Heist v. Baker*, *49 Penn. S.*, *13*, where a deed

conveyed the lands in fee with this clause, "under and subject, nevertheless, to the payment of the sum of $932 52, at the decease of the said Elizabeth Gross, unto the above named Anna Eliza," etc., the court said, "The ruling of the learned judge is resisted on the authority of *Heister v. Green, 12 Wright. 96*, but this is the very converse of that case. There was no express charge upon the land, and here there is. Such is our repugnance to implied or constructive liens that we refused to treat a recitation of unpaid purchase money as a lien, though standing in the channel of title, and we desire to be understood as having refused, after great consideration of the subject, but where it is expressly charged, the lien must be supported. It is the distinction between express and implied liens." We allude to this because Pennsylvania, above all other States, opposes implied or equitable liens, yet they uphold a lien expressed on the face of the deed. See *Royer v. McCook, et al., 7 Ala., 318; Anthony v. Smith, 9 Hump. 508; Claner v. Rawlings et al., 9 S. & M. 122.* In the case of *Murray v. Able, 19 Tex. 213*, the Supreme Court say: "Able sues for the use of Mills and Jockusch, on notes given to Able in the purchase of land, and the vendor's lien on the land is expressly reserved in the notes; the court enforced the lien; also, see *McAlpine et al. v. Burnett et al., 19 Tex. 497 and 1 Tex. 326; Haley v. Bennett, 5 Porter, 452; Eskridge v. McClure and Walker, 2 Yerger, 84.* In the case of *Lewis v. Carilland, 21 Cal., 178*, Burlingame executed, to Carilland and Nye, a warranty deed, of which the consideration clause is as follows: "In consideration of the sum of ten thousand dollars, received to their full satisfaction of Charles Carilland and M. E. Nye, both of the same county and State, aforesaid, grantees, to be paid as follows: $4,000 in cash down, and the balance, by the assuming, on the part of the said grantees, the payment of a certain mortgage upon the property hereinafter described, made by the above described Joel Burlingame, on the 7th day of August, 1855, in favor of T. N. E. Lewis, for $6,000."

On the 25th of September, 1857, Carilland and Lewis agreed

to release the mortgage, and Carilland gave two notes and a mortgage, but not for enough to cover the original $6,000 claim; and Lewis gave up the first mortgage, and entered upon the record thereof satisfied by being released. In 1858, Burlingame assigned, by a written instrument to Lewis, any and all right or claims he might have against the parties and the lots, and the Supreme Court held that for this old claim, Lewis could enforce a vendor's lien; the mortgage had been released, but the original deed showed upon its face that part of the purchase money had not been paid.

Stratton v. Gold, 40 Miss. 778, is a case exactly in point, in which that Supreme Court says: "Here the lien is retained in the very deed which conveyed title to the vendee, which must necessarily be recorded, and of which every purchaser must take notice; and for all the reasons upon which equitable rights in such cases are founded, it appears to differ in no substantial respect from a technical mortgage. It contained the express contract of the parties, and was shown in such a way that all persons were bound to take notice of it. In principle, and as to the substantial rights of the parties, it does not differ from a technical mortgage, and in case of such a mortgage, it is held that a legal transfer of the note secured is an assignment of the mortgage," etc.

We cannot quote all that is applicable, because the whole opinion is a strong argument in favor of the views we entertain, and the judgment directly against the majority of this court.

In the case of *Bowen v. Gilman, 4 Wheat. 290*, which grew out of a sale and deed of lands, from the Georgia land company to the New England land company, Chief Justice MARSHALL, in delivering the opinion of the Supreme Court of the United States, said: "In examining this question, the nature of the contract, the motives of the New England and Mississippi companies, and their acts are all to be considered. * * * * In the original agreement an express stipulation is made that the property shall remain liable for the first payment, but the

separate securities shall be taken for the residue of the purchase money. The deed itself remains an escrow until the first payment shall be made, and is then to be delivered as the deed of the parties, after which the vendor's consent to rely on the several notes of the respective purchasers; this is *equivalent to a mortgage of the premises, to secure the first payment*, and a consent to rely on the several notes of the purchasers for the residue of the purchase money. The express contract that the lien shall be retained to a specified extent, is equivalent to a waiver of that lien to any greater extent."

The Supreme Court of Kentucky holds that a recitation in a deed that the purchase money has not been paid, or that it is to be paid in a certain manner, is constructive notice of the lien, and that the lands, in the hands of one holding under the vendee, are subject to the original lien, and that such subsequent holder cannot be an innocent purchaser, because he is bound to take notice of the recitation in the deed to his vendor, and that affects him with notice. *Honore v. Bakewell et al. 6 B. Mon. 67*; *Thornton, v. Knox, etc., Ib. 74; Woodward v. Woodward, 7 B. Mon. 116.* For these reasons we have not concurred with the majority.

CAMPBELL *v.* DOOLING.

APPEALS—*Practice on*—Where the record before this court shows nothing but the judgment, and no error is pointed out in the proceedings, this court is bound to presume in favor of the action of the court below.

Appeal from Carroll Circuit Court.

HON. ELIAS HARRELL, Circuit Judge.

Garland & Nash, for appellees.

GREGG, J.

The transcript shows that at the November term, 1866, of the Carroll circuit court, the appellee recovered judgment against the appellant upon an appeal from the judgment of a justice of the peace.

The record states that the appellant interposed his plea of the statute of limitations, and that replication was entered thereto, and upon trial, the court found for the appellee fifty-five dollars debt, and thirty-two dollars and twenty-nine cents damages, for which judgment was rendered. The record then recites that the appellant filed his bill of exceptions; his affidavit for an appeal, and entered into recognizance. This is, in substance, the whole record here. There is no motion for a new trial; there is no bill of exceptions in the record; there is no copy of the account, note or bond on which the suit was founded or of any pleading showing the nature of the suit. The case has been in this court since the 9th of February, 1869, and no steps have been taken to bring any of these matters before this court.

As there is nothing before us, but the judgment, indicating the nature of the suit, and no error pointed out in any of the proceedings, we are bound to presume in favor of the action of the court below.

The judgment is affirmed.

M. AND L. R. R. R. COMPANY v. WOODRUFF.

CHANCERY PRACTICE—*When remedy at law, etc.*—Where the record shows that complainant has an ample and complete remedy at law, the bill should be dismissed for want of equity.

Appeal from Pulaski Chancery Court.

HON. T. D. W. YONLEY, Chancellor.

Clark & Williams, for appellant.

GREGG, J.

On the 11th of April, 1859, the appellee executed to the appellant a sealed instrument whereby he bound himself, his heirs, etc., within sixty days after the completion of a continuous line of railroad from White river to Little Rock, to convey to said company a right of way of one hundred feet in width over his tract of 2070 acres of land, near Little Rock, and over any lands he had in Prairie and Pulaski counties, outside of the city of Little Rock, and such additional width as might be necessary for said road, where deep cuts or fillings might be necessary; and also fifteen acres on the north bank of the Arkansas river, below and opposite Little Rock, and next to the river, to be selected by the company for depot purposes, and not to be sold or leased for warehouses or stores, or for any other use or purpose whatever, and reserving the right of ferriage, and in case of a forfeiture of the company's charter, the lands to revert; the company to pay all taxes and to signify their acceptance of the lands upon such terms, which was done; and, by mutual consent, the description of the lands, so selected, was indorsed upon the obligation, and the instrument so indorsed was, by the appellee, on the 15th of January, 1861, duly acknowledged, and on the 19th filed for record in Pulaski county.

The bill charges that the company took possession of the lands under said covenant, and that they still hold the same;

that the company, in 1861 or 1862, built a temporary shed or depot on the fifteen acre piece of land, and so far pretended to comply with their covenant; that the appellee made such covenant in consideration of the advantages he could derive from having a railroad depot within his lands, and that he had laid out his adjoining lands into town lots, with streets, etc., so the same could be leased or sold profitably, and also because a depot so located would secure the transportation of freight and passengers over his ferry, and he could not then be rivaled by an opposition ferry located four or five hundred yards above his; that a village of two hundred inhabitants soon sprung up on appellee's lands, adjacent to said depot, but of temporary buildings, such as the uncertainty of existing war would allow; that such buildings were erected without the consent of the appellee, and only fit for the existing emergency, and were never of any profit to him, but they evidenced that better structures would have taken their places in times of peace; that the frail and temporary depot buildings, placed on said donated lands, had long since been removed, and that no depot buildings remained thereon; that various other buildings, for various purposes, have been erected, on said donated lands, by the consent of the company, and that a warehouse was erected by the United States government on other lands of appellee, near said fifteen acre tract, which has been purchased by the company, and is still used by them as a store house for government freight; that they have inclosed within their depot grounds about one half acre of land belonging to the appellee, and that they are using the same without any right; that said company purchased buildings, which had been erected by the government, about one-half mile above the lands so donated, and have established a depot there for the receipt of freight and passengers, and that they have abandoned the depot on the lands so donated to them, and that they have diverted the transportation of freight and passengers from the appellee's ferry; that Argenta, another village, has been built up near said last depot, and that many of the

houses on appellee's lands, adjacent to the former depot, have been removed or torn down, and that his lands are now worth no more and probably not as much as if such depot had never been established, and that the advantages which were contemplated, and which were the consideration for said covenant, have been lost and wholly denied to him; and he prayed that the instrument in writing be cancelled, and the possession of all of said lands (except such as were granted for a right of way) be restored to him, and that the company may be required to remove their buildings off of said lands, and that his title be quieted, etc.

Robertson, the president of the railroad company, answered. He admitted the title to the land, the making of the contract and the location of the first depot as charged in the bill. He denied that they held out inducements of profit, etc., and responded that the written instruments, referred to, constituted the only agreements. He denied the removal of the depot from the donated lands, and avers that the government built thereon, and that such buildings are still used for a depot and other legitimate railroad purposes. He admits that the government extended the railroad about a half mile up the river and there built another depot, not on appellee's lands, and that the company had to pay for these buildings, and that such buildings are still used for a depot; he denies that the company caused to be built houses, on the donated lands, for other than railroad purposes; but says the government did build many, and the company had to account to the government for them, and that they have temporarily allowed them used until some disposition can be made of them, and that such houses are of great value, and to decree the lands to appellee would give them to him without consideration, and would be unjust. And he alleges that the company has the right to maintain a depot a half mile above the donated lands, or any other depots they may desire, and they submit there is a want of equity in the bill, and asks the benefit of a demurrer upon the hearing.

On the 12th of July, 1869, the cause was heard upon bill,

answer, exhibits and depositions, and the court found for the appellee and all the material allegations in the bill; decreed that the obligation be canceled, and the possession of the lands restored to the appellee; that a writ issue requiring the sheriff to put him into possession of the lands and all tenements thereon, including the lands not donated, but enclosed for depot purposes, and that the company pay all costs; from which decree this appeal is prosecuted.

It is evident, from the record, that the appellee intended to transfer the fifteen acres of land upon the condition that a depot should be located thereon, and the advantages of such depot location was the consideration upon which he covenanted to make title. But so far as we can learn from this record, there has been no conveyance of title by the appellee to the railroad company, and if they have failed to comply with their agreement, by which he has suffered loss, or been deprived of the benefits contemplated, we see no reason why he may not re-enter, and again possess himself of the lands, and if those in possession dispute his right of entry, his remedy at law is ample and complete. He shows in his bill that he is the legal owner of the lands; then, if others are wrongfully in possession, ejectment is clearly his remedy. It is true, he says, that he agreed to convey these lands (except one half acre) upon condition; but he has made no deed of conveyance and alleges that the appellants have not complied with the conditions of the bond or covenant between them, and therefore that they are not entitled to a deed or to the possession of the lands; if this be true, as alleged by the appellee, we see no cause for his coming into a court of equity; and, upon the hearing, the court should have sustained the appellant's demurrer to the bill, and for this error, the decree of the court of chancery is reversed and set aside, and a decree will be entered in this court, dismissing appellant's bill for want of equity, and assessing all costs against him.

ASHLEY v. STODDARD, JR. & CO.

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BILLS OF EXCEPTIONS—*Requisites of.*—A bill of exceptions should contain those things excepted to, "which do not appear of record, and which arise in the course of the trial."

AGREED STATEMENT.—The filing of a written statement of agreed facts does not thereby become a part of the record, unless made so by order of court, or a bill of exceptions.

Where the record contains the declarations of law made by the court, but not the facts they were applied to, it will be presumed the court below decided correctly.

Appeal from Jefferson Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Watkins & Rose, for appellant.

Bell & Carlton, English, Gantt & English, for appellees.

MCCLURE, C. J.

The record, in this case, shows that the cause was submitted to the court, sitting as a jury, upon an agreed statement of facts. The appellant and the appellees, each, asked the court to make certain declarations of law as being applicable to the facts presented. The court declared the law to be as asked by the defendants, and rendered judgment accordingly. The appellant excepted to the declaration of law; took his bill of exceptions and appealed to this court.

The bill of exceptions contains the declarations of law asked by both parties; but does not contain or recite the facts upon which the court declared the law. Now the question arises, is there any thing before this court by which it can review the decision of the court below?

The object of a bill of exceptions is to put upon the record all the facts touching the decisions of the court, respecting questions of law, which do not appear on the record, and

which arise in the course of a trial, to the end, that when the case is afterwards removed to the supervisory court, the bill of exceptions may be taken into consideration and there finally decided.

This being the sole object of a bill of exceptions, it becomes necessary to inquire what it should contain. By the definition we have given above, it should contain those things excepted to, "which do not appear of record, and which arise in the course of trial."

In *Lenox v. Pike*, *2 Ark.*, *14;* it was held that instructions, *not copied into the bill of exceptions*, formed no part of the record. In *Pirani v. Borden*, *5 Ark.*, *89*, it was held that the bond in a replevin suit was no part of the record unless made so by a bill of exceptions. In *Cox v. Garven*, *6 Ark.*, *431*, it was held that a bond for costs constituted no part of the record unless made so by a bill of exceptions. In *Sawyers v. Lathrop*, *9 Ark.*, *68*, and in *Berry v. Singer*, *10 Ark.*, *489*, it was held that a memorandum signed by the judge is no part of the record. In the *R. E. Bank v. Rawdon*, *5 Ark.*, *558*, this court held that, where the case was tried in the court below, on a written statement of facts made out and agreed to by the parties, this court would revise any erroneous finding of the court below; but in that case the bill of exceptions contained the agreed statement of facts together with declarations of law asked, and the only question was: whether a motion for a new trial would have to be asked and refused *before* coming to this court, and the court held that they would entertain the case on error, although no motion for a new trial had been asked. But this holding, on the latter point, was overruled in *State Bank v. Conway*, *13 Ark.*, *344*, and several cases since. In the case of *Lawson v. Hayden*, *13 Ark.*, *316*, the case, in the court below, was submitted upon an agreed statement of facts, signed by counsel, and marked "filed" by the clerk, just as was done in the case at bar, and the question arose whether the mere filing the paper, containing the agreed statement of facts, made it a part of the record, and the court

held that it did not, and affirmed the judgment of the court below because the facts, enumerated by the agreement, were not set forth *in the bill of exceptions*, or properly made a part of the record by order of court. Among the papers, found in the record, is what purports to be an agreed statement of facts, but whether it is a copy of the same used in the court below, we are at a loss to determine. If it had been incorporated into the bill of exceptions, or if it had been made a part of the record by order of the court, in any manner that would render its identification beyond question, we then would have been enabled to judge whether the law was correctly or incorrectly applied to the facts.

Where it is intended by a bill of exceptions to show an erroneous ruling of the law in the inferior court, the facts proven or admitted must be set forth in the bill of exceptions, or at least so much thereof as will show the applicability of the testimony to the declarations of law asked.

We have seen by the case of *Lawson v. Hayden, 13 Ark., 316*, that the filing of a written statement of agreed facts does not thereby become a part of the record, unless made so by order of the court or a bill of exceptions. Neither of these modes have been pursued in this case, and the result is that we have the declarations of law before us, but are not advised what fact they were applied to. It is our duty to presume, under such a state of circumstances, that the circuit court decided correctly. It is the duty of the party who complains of error to present it to this court. It has not been done in this instance.

Let the judgment be affirmed.

Jackson v. Giles, Adm'r.

Appeals—*When damages awarded on, etc.*—Where, upon examination of the record, no error in the proceedings is found, but the appeal appears to have been prosecuted for delay, the judgment will be affirmed and damages awarded.

Appeal from Pulaski Chancery Court.

Hon. T. D. W. Yonley, Chancellor.

Rice & Benjamin, for appellant.

Wassell & Moore, for appellee.

Bennett, J.

The appellee, as administrator of J. A. Hutchings, deceased, filed a bill to enforce a vendor's lien on lot No. 4, in block or square No. 114, west of the Quapaw line in the city of Little Rock.

It appears from the bill, answer and exhibits, that James A. Hutchings, on the sixth day of April, A. D. 1866, bargained and sold to the defendant, Nancy Jackson, lot No. 4, in block or square No. 114, west of the Quapaw line, in the city of Little Rock, Arkansas, for the sum and price of five hundred dollars, for which sum the said defendant, Nancy Jackson and Brutus Jackson, (the latter since deceased), executed their writing obligatory of that date, payable three months after the date thereof. It also appears that the said James A. Hutchings afterwards departed this life, and the complainant, Josiah M. Giles, was duly appointed administrator.

The answer of defendants, Jackson, while admitting the above facts, alleges that the lot was bought with the distinct understanding that it was to be paid for by them in labor; that said James A. Hutchings, when he sold the lot, was an old and feeble man, and without any family to take care of him. That Nancy Jackson had for a long time taken care of

him, boarded him and nursed him, and that said Hutchings desired her to continue to do so during his life time, and that she did do so, and said labor performed and services rendered and money loaned and advanced amounted in all to ($581 66,) five hundred and eighty-one dollars and sixty-six cents, and for more particularity they file a bill of particulars as part of their answer.

On the 21st day of February, 1870, a decree was rendered against the appellants for the sum of five hundred dollars, principal debt, and one hundred and five dollars interest, less the sum of one hundred and thirty-five dollars, leaving a balance due on said writing obligatory of four hundred and sixty-nine dollars and thirty-four cents, and decreed that the said sum of money was a valid and prior lien upon said lot, with the usual time for payment, or lot to be sold.

From this decree an appeal was taken and supersedeas issued March 3, 1870.

There are no intricate or even disputed questions of law to decide in the case, simply the asking of the court to enforce a vendor's lien.

It is simply a question of facts and they are few and simple. Did the defendant really pay the note by labor and money? The defendants, to support the allegations in their answer, introduced several witnesses. Kate Sewell testifies that Mr. Hutchings told the defendant, Nancy Jackson, he would pay her fifty dollars per month to board him and his waiting boy, but could not tell how long they boarded with her but thinks it was about five months. This witness also says Hutchings said to her that he owed Mrs. Nancy Jackson one hundred dollars, but this conversation was before the purchase of the property.

John Thomas also testifies to the fact that Mr. Hutchings told him he was to pay fifty dollars for board, and that he boarded with Mrs. Jackson, the defendant, some five or six months. Lucy Wood testified that Hutchings commenced

boarding at Mrs. Jackson's, the defendant, in March of the year in which he died, and remained until his death.

On the part of the plaintiff, Mr. J. A. Henry testifies that during the year in which Mr. Hutchings died, he was keeping the Anthony House, in Little Rock, and that Mr. Hutchings obtained his meals at his house at all times when he was able to be out of his room; at other times he did not know where he did get them. Marcus Dotter testified that Mr. Hutchings for five or six months before his death, had a room on Markham street, and that he boarded most of the time at the Anthony House. Jacob Hawkins testified that Mr. Hutchings occupied rooms belonging to him from 1865, until the time of his death in 1866. Mr. Hutchings told him he had sold to defendant, Nancy Jackson, the lot and she was to cook for him for the interest on the same.

From these facts, the Chancellor found that the defendants were entitled to a credit upon the note for the sum of one hundred and thirty-five dollars, and rendered a decree in favor of complainants for four hundred and sixty-nine dollars and thirty-four cents. After a careful examination of the record, before us, we can find nothing upon which, in the slightest degree, we would be warranted in reversing the decree, but on the contrary, we think the case clearly comes within section 882, of the Code of Practice, where an appeal has only been obtained for the purposes of delay.

The decree is affirmed with ten per centum damages.

HALLIBURTON *et al.*, *v.* SUMNER.

APPEALS—*Motion to dismiss, etc.*—Where the record shows the appeal was regularly taken, this is what gives this court jurisdiction to examine the case upon its merits, and a motion to *peremptorily* dismiss for want of jurisdiction of the subject-matter in the court below, will not be entertained, but will be considered on examination of the merits of the case.

Appeal from Arkansas Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Garland & Nash, for appellants.

Bell & Carlton, for appellee.

BENNETT, J.

This cause is now before us on a motion to dismiss the appeal for want of jurisdiction in the court below.

It appears by the transcript of the record, that William H. Halliburton and William A. Sample, brought an action of unlawful detainer against Jacob B. Sumner, in the circuit court of Arkansas county.

The issue joined in the cause below was submitted to a jury, who found for the defendant; the circuit court rendered judgment of possession in favor of the defendant and against the plaintiffs for costs and they appealed.

The appellee comes into this court and moves to dismiss the appeal for want of jurisdiction in the court below. This is what gives this court the jurisdiction to examine the case upon its merits. The question of the jurisdiction of the court below, as to the original matter in controversy, would be one that would properly come before us in the examination of the cause; if upon such an examination it was found that the court rendering the judgment had no jurisdiction, the proceedings would be declared null and void. But a motion to peremptorily dismiss the case from the docket of this court because the court below had no jurisdiction, cannot be entertained.

The appeal, being regular, the case must be heard on its merits. Motion to dismiss overruled.

Booker v. Robbins & Page.

Illegal Consideration—A plea that the *consideration* of a note sued on was a horse, bought by the maker for the *Confederate service*, with the knowledge of the payee, is a *good* defense, to a suit thereon, by the payee.

Mis-joinder of parties, etc.—Where the assignor of a note is improperly joined with the assignee in a suit upon the note, and judgment is rendered in his favor, jointly with the assignee, although the judgment as to him is erroneous, yet if no motion be made in the court below to correct the error, it will be no ground for reversal in this court, and will be considered as waived.

Appeal from Hempstead Circuit Court.

Hon. George W. McCown, Circuit Judge.

Garland & Nash, for appellant.

E. W. & D. Gantt, for appellees.

Harrison, J.

This was a suit, by James B. Robbins and James R. Page, against Thomas J. Booker, upon a promissory note executed by the latter to the said Robbins, payable to him or bearer, and assigned by delivery to the said Page. The defendant, in his answer, set up three defenses: *First.* That the consideration of the note was a horse, purchased, as Robbins, when he sold him, knew, for the military service of the Confederate States. *Secondly.* That the consideration, for which the note was assigned to Page, was Confederate money. *Thirdly.* That the money called for in the note, was, in the contemplation and meaning of the parties, Confederate money and not the lawful money of the United States.

The court sustained a demurrer to the entire answer, and upon that, and in respect to the defenses, just mentioned, the only questions in the case arise.

The first defense is directly within the decisions in *Tatum et al. v. Kelley, 25 Ark., 209: McMurty v. Ramsey, admr., Ib. 350, and Portis et al. v. Green, Ib. 376*; and the demurrer, as to it, should therefore have been overruled. The illegality of the consideration for the assignment of the note to Page, alleged as the second, was a matter of no consequence or concern to the defendant, for his contract was prior, as a matter of course, to the assignment, and was not in any wise affected by the turpitude in it, and there can be no doubt that Page, by the assignment, which was a contract fully executed, and which no court would therefore lend its aid to set aside, because of such illegality, become the legal owner thereof.

And, as to the third, the cases of *Roane v. Green & Wilson, 24 Ark., 210, and Leach v. Smith and wife, 25 Ark., 246*, are conclusive against its validity.

We are unable to conceive why Robbins was joined as a plaintiff in the suit, as the assignment divested him of all interest in the note; but although it was erroneous to render a judgment in his favor, jointly with Page, yet, inasmuch as such error might have been corrected on motion in the court below, but no such motion was made, it is according to section 886, of the Code of Practice, no ground for reversal in this court, and must be considered as waived; *Oldham v. Brannan, 2 Met., 302.* For the error, however, in sustaining the demurrer to the first defense in the answer, which presented a good bar to the action, the judgment of the court below must be reversed and the cause remanded.

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WARD v. CARLTON ET AL.

ATTACHMENTS—*Truth of affidavit may be questioned*—Under the act of March 7, 1867, the defendant, in attachment, may show at any time before judgment, that the original affidavit is not true, and when this fact is established, the cumulative remedy of attachment falls to the ground, and the cost of seeking it belongs to the plaintiff.

BILLS OF EXCEPTIONS, ETC—*When not necessary.*—Where all the rulings, complained of, appear of record, as fully as though a bill of exceptions had been taken, neither a bill of exceptions nor a motion for a new trial is necessary.

Appeal from Chicot Circuit Court.

HON. HENRY B. MORSE, Circuit Judge.

Garland & Nash, for appellant.

The point involved here is apparent on the record, and no bill of exceptions is needed to put it there. *5 Ark., 700; 25 Ib. 503; 2 Bush. (Ky.) 580.*

We submit that the defendant, after giving bond to dissolve the attachment, was estopped from pleading against the affidavit. He could only plead matters that went to the merits of the case and not preliminary matters or matters in abatement. *Didier v. Galloway, 3 Ark. 501; Delano v. Kennedy, 5 Ib. 457; Shields v. Barden, 6 Ib. 459; Heard & Co., v. Lawry, 5 Ib. 522;* see particularly, a case in point, *Morrison v. Alphin, 23 Ark. 136.*

Bell & Carlton, for appellees.

There was no bill of exceptions, *and no motion for a new trial* in the court below, upon any ruling, judgment or order in the attachment suit, and such being the case, error, if any, will not be considered here. *Code, sec. 886.*

The defendant, before the Code of Practice, could appear and

defend the attachment, after giving bond. See *Childress v. Fowler, 4 Eng. 159.* The bond, by the defendant, in this case, was given before the Code went into effect.

The provisions of the Code, 234 and 242, authorize the giving of a bond by the defendant or party in possession, to hold attached property, and dissolve attachments. We submit that these provisions do not destroy defendant's right to defend the attachment.

McCLURE, C. J.

This was a suit by attachment, commenced by Robert J. Ward, against Isaac H. Hilliard, on the 25th of November, 1867, who, pending the suit died, and the same was revived in the name of Carlton, the administrator. The sheriff executed the writ of attachment by seizing certain property; but failed to have the same appraised, as required by the act of March 7, 1867, regulating attachments.

The defendant, on the 14th of December, 1867, executed a bond, which was approved by the court, in double the amount of the plaintiff's claim, whereupon, the record says, the attachment was "*dissolved.*"

On the 21st of October, 1869, the appellee moved the court to quash the return of the sheriff on the ground that at the time the attachment was levied, no appraisement of the property seized was made, as the statute directs. Upon the hearing of this motion the court ordered "that the sheriff's return, on said writ of attachment, be, and the same is hereby quashed, and said attachment dissolved, and that this suit proceed as at law."

On the day last mentioned, the defendant, by a sworn plea, as provided by the eleventh section of the act of March, 1867, put in issue the truth of the affidavit for attachment, and moved the court for a dissolution of the attachment. The plaintiff, instead of adducing other evidence in support of his affidavit, as was his privilege under the act of March 7th, 1867,

demurred, in short, upon the record, to the plea filed by the defendant. The court overruled the demurrer; dissolved the attachment, and ordered a writ of inquiry to assess the damages of the defendant, by reason of the wrongful suing out of the attachment. The plaintiff electing to stand on his demurrer, excepted to the ruling of the court and appealed.

The appellant says the question involved and presented by this appeal is, "Could the defendant below, *after* giving bond to dissolve the attachment, appear and plead against the affidavit on which the attachment issued?" The appellee urges that the record fails to show a bill of exceptions; that no motion was made for a new trial; that there is no final judgment to appeal from, and that the record presents no question to this court for solution.

The act of March 7, 1867, gave to the defendant the right to put in issue the truth of the affidavit on which the attachment issued. This, the law declares, "shall have the effect to dissolve such attachment, unless the affidavit of the plaintiff shall be supported by other sufficient evidence; and when any attachment is dissolved, on the trial of any such issue, the plaintiff shall pay all costs of such attachment up to that time." The plaintiff, as has been stated, made no attempt to support his affidavit by other proof, but filed a demurrer to the plea. This demurrer admits the plea of the defendant, and the plaintiff urges on the court that the giving of the bond precludes all inquiry into the truthfulness of the affidavit.

If it be admitted that the defendant, after giving bond, cannot question the truthfulness of the original affidavit, the result is that the plaintiff, by his perjury, is allowed to hold the principal and his sureties for the amount of his judgment; for the condition of the bond under the act of March 7, 1867, is, "that he will pay and abide the judgment of the court; and if judgment be rendered against the principal, it shall also be against the securities on his bond, jointly with him, at the same time." Attachment is a cumulative remedy for the collection of debt, and its object is to save to the creditor the

assets of the debtor, to the end that the same shall not be disposed of as will allow the debtor to reap the fruit of his own ingenuity, and place his effects beyond the reach of an execution. When the defendant bonds the property, the plaintiff looks not to the *property attached*, but to the *bond*, for a satisfaction of any judgment he may obtain. The object of the eleventh section, of the act of March, 1867, was to allow the fact to be determined whether the plaintiff was entitled to the cumulative remedy of attachment for the purpose of securing his debt. Before the enactment of this law, the allegations of the affidavit could not be put in issue. The individual who did not hesitate to falsify the truth, under the provisions of the old law, was furnished with a more efficient remedy for the collection of his debt than the man who was not willing to perjure himself. To obviate a discrimination of this kind, the act of March 7, 1867, was passed, and the debtor allowed to show that, though poor, he was not fraudulently conveying his property for the purpose of hindering and delaying the payment of his debts, or doing any other disreputable act. The exigencies of the debtor are very often of such a character that it would be ruinous to him to be deprived of the use of his personal property. Take, for instance, the planter at that period when the crop is being put into the ground; his property is attached by an unscrupulous creditor who knows that his debtor must bond the property or suffer ruin, (as the time for planting will have passed before a court meets to hear his cause), and now, because he does bond his property and attempt to save himself from ruin, the plaintiff sets up that this act of itself precludes the defendant from questioning the truth of the affidavit. If this theory be correct, the debtor is as much at the mercy of an unscrupulous creditor, since the passage of the act of March 7, 1867, as he was before its enactment. We think the object of the law was to remedy just such hardships, and we shall not indulge in a construction which would establish all the rigor of the old law. In our opinion, the defendant may show at any time, before judgment, that the

original affidavit is not true; and when this fact is established, the cumulative remedy of attachment falls to the ground, and the cost of seeking it belongs not to the defendant but to the plaintiff.

The view we have taken of this case renders it unnecessary for us to treat at length of the questions raised by the defendants. The question presented is not one of *evidence*, but of *law*. All the rulings complained of appear as fully as though a bill of exceptions had been taken; in short a bill of exceptions could not present a single point that does not appear of record. Where such is the case, a bill of exceptions is not necessary; nor is it necessary to make a motion for a new trial. The object of this suit was *to collect the amount due from Hilliard to Ward*, and not to ascertain whether the truth of the affidavit could be put in issue *after the defendant in attachment had given bond*. There is no final judgment between the parties upon the instrument on which the suit is founded. Whether Hilliard owes Ward anything is still at issue in the court below, and this question must be settled in favor of one or the other before there is a "final judgment" to appeal from, as none but *final judgments* can be heard in this court on appeal.

The appeal is dismissed, and the cause remanded.

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ADMINISTRATION.

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2. AUTHENTICATION OF CLAIMS.—Verification of claims against the estate of a deceased person, by one cognizant of the facts, under act of March 5, 1867, or by agent or attorney, under act of March 13, 1867, is sufficient—and these acts are not in conflict with each other. *Mason v. Bull, Ellis & Co.* 164.
3. PURCHASERS AT SALE, NOT TRESPASSERS.—Although the sale is invalid and void, without an order of court for that purpose, yet the purchaser, having gone into possession by consent of the administrator, is not a trespasser or wrongfully in possession, and could not be subject to a suit unless he refused to surrender upon demand. *Burgauer, adm'r. v. Laird.* 256.

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2. CONSTRUCTION OF CODE.—Under section 8, Code of Civil Practice, it is competent for the court to substitute a several for a joint cause of action—make changes of parties—insert allegations necessary to a full and fair investigation of the merits, and no objections to such amendments will avail a litigant, unless such changes have misled a party to his prejudice, and not then, unless the party misled show to the court in what respect he has been misled or prejudiced. *King v. Caldwell*, 405.

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1. WHEN, AS TO MATTERS WITHIN KNOWLEDGE.—Where the defendant answers as to matters within his own knowledge, and the answer is directly responsive to the allegations of the bill, it requires two witnesses, or one witness with corroborating circumstances, to overturn the answer. *Barclay, Ex'r., et al. v. Dawson, Adm'r*, 417.

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2. JURISDICTION—*Prohibition.*—Where there is no final judgment, no appeal will lie. Prohibition is the only remedy before determination, where courts are proceeding without jurisdiction. *Hanger & Co. v. Keating, Adm'r.*, 51.

3. WHAT NECESSARY FOR.—To entitle a party to an appeal to this court, there must have been a final decree rendered for or against him in the circuit court. *Foley, et al. v. Whitaker, Ex'r.*, 95.

4. PRACTICE ON, FROM JUSTICES' COURTS.—Upon appeal from a justice of the peace, the circuit court does not review the case as upon error, but tries it anew as if no judgment had been rendered, and no appeal can be taken except from the judgment. *Tuohy & Green v. Rector*, 315.

5. HOW PROSECUTED.—Under the Code of Civil Practice, to give this court jurisdiction on appeal, the record should disclose the fact, either that a motion was made for an appeal during the term at which the

final order or judgment was rendered, or that a *formal* application was made to the clerk of the Supreme Court, in term time or vacation, for an appeal and the granting of the same by him. *Sykes v. Lafferry*, 414.

6. WHAT REQUISITE FOR.—*Appeals* only lie from the final orders or judgments of the circuit court, and only from such final orders or judgments as cannot be corrected, on motion, in the court below, and not then, until the question has been submitted to and overruled by the inferior court. *Palmer v. McChesney*, 452.

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9. SAME.—Where no exceptions are taken to any decision or ruling of the court, no motion for a new trial, nor any bill of exceptions or other steps to bring the evidence before this court, there is nothing presented for the action of the court. *Prairie County v. Bancroft*, 526.

10. MOTIONS FOR NEW TRIAL, ETC.—On an issue and trial of fact by a jury, *or the court*, a motion for a new trial is essential to correct the errors growing out of the *evidence* or *instructions*, before an appeal can be entertained by this court; but where the errors do not grow out of the *evidence* or *instructions*, but are apparent from the record, without the intervention of a bill of exceptions, there is no necessity for the motion, and the cause, in such a case, can be brought to this court without the motion having been made. *Steck v. Mahar*, 536.

11. SAME.—Where the errors complained of do not appear of record, save by the intervention of a bill of exceptions, a motion for a new trial must be made before an appeal will lie to this court, and the appeal will not then lie, if the error can be corrected in the court below, until the motion has been made and overruled in the circuit court. *Ib.*

12. PRACTICE ON—Where the record before this court shows nothing but the judgment, and no error is pointed out in the proceedings, this court is bound to presume in favor of the action of the court below. *Campbell v. Dooling*, 647.

13. WHEN DAMAGES AWARDED ON, ETC.—Where, upon examination of the record, no error in the proceedings is found, but the appeal appears to have been prosecuted for delay, the judgment will be affirmed and damages awarded. *Jackson v. Giles, Adm'r.*, 656.

14. MOTION TO DISMISS, ETC.—Where the record shows the appeal was regularly taken, this is what gives this court jurisdiction to examine the case upon its merits, and a motion to *peremptorily* dismiss for want of jurisdiction of the subject matter, in the court below, will not be enter-

tained, but will be considered on examination of the merits of the case. *Halliburton, et al. v. Sumner*, 659.

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3. Priority of—A sale of lands under a junior attachment does not release the lien of a prior attachment, and the money arising from such sale is not to be applied in payment of the prior attachment. *Hanauer & Co. v. Casey, adm'r.*, 352.

4. Application of Purchase Money.—If lands be sold at the same time under both executions, and the levy of the prior attachment thereby discharged, then the money arising therefrom, or so much thereof, should be applied in payment of the judgment under the prior attachment. *Ib.*

5. TRUTH OF AFFIDAVIT MAY BE QUESTIONED.—Under the act of March 7, 1867, the defendant, in attachment, may show, at any time before judgment, that the original affidavit is not true, and when this fact is established, the cumulative remedy of attachment falls to the ground, and the cost of seeking it belongs to the plaintiff. *Ward v. Carlton et al.* 662.

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1. ASSIGNMENT, WHEN NOT VALID.—No assignment of property by a bankrupt after the filing of his petition is valid. *Johnson v. Geisrieter*, 44.

2. SURETY—WHEN BARRED.—It is competent for a surety, before he has made payment, to prove up his contingent liability on an application for a discharge in bankruptcy, and if he does not so prove up he is barred, by the certificate of discharge, from further action against the bankrupt. *Lipscomb v. Grace*, 231.

BILLS OF EXCEPTION.

1. WHAT SHOULD SHOW.—Where the bill of exceptions fails to show that appellant objected to the ruling of the court in refusing to give instructions asked by him, and fails to set out the instructions asked for by appellee, but sets out the declarations of law made by the court, without showing at whose instance they were made, the judgment will be affirmed.—*Henry & Co., v. Gibson & Helmer*, 519.

2. REQUISITES OF.—A bill of exceptions should contain those things excepted to, "which do not appear of record, and which arise in the course of the trial." *Ashley v. Stoddard Jr. & Co.* 653.

3. WHEN NOT NECESSARY.—Where all the rulings, complained of, appear of record as fully as though a bill of exceptions had been taken, neither a bill of exceptions nor a motion for a new trial is necessary. *Ward v. Carlton et al.*, 662.

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BILLS OF REVIEW.

1. WHEN ALLOWED.—Decrees in Chancery are reviewed on *two* grounds only: For error of law apparent upon the face of the decree, without further examination of matter of fact; and new matters arising after the decree. *Evans v. Parrott, admr.*, 600.

2. WHEN NOT ALLOWED.—Where complainants' bill charges such facts as entitle him to relief, and no facts are recited in the decree as established,

there is nothing in the decree or the record upon which error can be predicated, or out of which it could possibly arise as a foundation for a bill of review. *Ib.*

3. WHEN PERMITED—NEW MATTER, ETC.—To authorize a bill of review for new matter, it is required to be "new matter or evidence, which hath come to light after the decree, and *could not possibly be had or used* at the time when the decree passed." *Ib.*

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CLAIMS AGAINST ESTATES.

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1. COMMISSIONERS OF OTHER STATES.—Commissioners, appointed by the Governor, for other States, under chapter 32, Gould's Digest, are officers of this State, and affidavits taken and certified by them, properly authenticated under the seal of their office, are to receive full faith and credit. Section 109, chapter 4, Gould's Digest, respecting the authentication of claims against the estates of deceased persons, was intended to apply to affidavits made before officers of other States, and not to commissioners of this State appointed and residing in other States. *Smith & Bro., v. Van Gilder, admr.*, 527.

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2. ACT MARCH 5, 1867, UNCONSTITUTIONAL.—The act of March 5th, 1867, known as the Confederate money act, being unconstitutional, no benefit is derived from it, and a court of equity can grant no relief under it. *Green & Wilson v. Roane & Bell*, 15.

3. CONTRACTS BASED UPON, ILLEGAL AND VOID.—Contracts based upon Confederate money are *illegal* and *void*. *King v. Carnall*, 36.

4. SAME.—In a contract, the consideration of which was Confederate notes, it is immaterial whether the party first agreed to pay money for such notes, or to pay property for them, and then executed a promissory note for the property, the consideration, which was the basis of the promise, being Confederate notes, was illegal, null and void. *George v. Terry*. 160.

5. SAME.—A contract, the consideration of which was Confederate money, is illegal and void. *Waymack v. Heilman et al.*, 449.

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2. CONTRACTS FOR SALE OF SLAVES.—Section 14, article 15, of the present Constitution, relating to contracts for the sale or purchase of slaves, is repugnant to section 10, article 1, of the National Constitution, relating to the obligation of contracts and is therefore *unconstitutional* and *void*. *Sevier, admr. et al. v. Haskell, ad.* 133.

3. STATUTORY OFFICES.—The office of assessor is a statutory office, and the Legislature has absolute control over all statutory offices and may abolish them at pleasure, and in doing so, no vested right is invaded. *Robinson v. White*, 139.

4. CONSTRUCTION OF STATUTES.—The act of July 23, 1868, providing for the appointment of the officers contemplated by section 2, of article 10, and the change thereby made, is not in conflict with that clause of the Constitution that declares that the "*term* of *all officers, elected* or *appointed* under the provisions of this Constitution, shall expire on the first day of January, 1873, unless herein otherwise provided." *Ib.*

5. SLAVE CONTRACTS.—The clause in the State Constitution that "all contracts for the sale or purchase of slaves are null and void, and no court in this State shall take cognizance of any suit founded on such contracts," etc., is in violation of the Federal Constitution. *Pillow v. Brown & Childress, Exrs.* 240.

6. BILL OF RIGHTS.—The provisions of the bill of rights, contained in the Constitution of this State, differ from those of most, if not all the other States. It was the intention of the framers of the present Constitution to place a limitation on the legislative branch of the government, and to inhibit it from enacting any law imposing penalties on persons who had once been acquitted by a jury for the same offense; but this does not deprive the prisoner of his common law rights. *Lee v. The State,* 260.

7. SCHEDULE TO CONSTITUTION—*Construction of.*—That clause of the schedule to the Constitution (sec. 10), requiring all officers to qualify "within fifteen days after they shall have been duly notified of their election or appointment," is mandatory, and, for the purpose designed, has all the force and effect of a provision of the Constitution, and is to be construed by the same rules. *State v. Johnson,* 281.

8. SAME.—The command, and the use of the word "shall," in the schedule, denotes command, that the officer shall qualify within fifteen days after having been duly notified of his election, and is nothing more nor less than a grant to qualify within that time. *Ib.*

9. CONSTRUCTION OF CONSTITUTION.—Where the Constitution designates, in express and explicit terms, the precise time when a fundamental act shall be done, and is *utterly silent* as to the performance at any other time, it cannot be done at any other time. *Ib.*

10. COMPETENCY OF ADMINISTRATORS TO TESTIFY, ETC.—It was not the design of Art. VII, sec. 22, of the State Constitution, to exclude, *absolutely,* the testimony of the parties, therein mentioned, respecting all matters in controversy between them; but *only* in respect to those transactions that were strictly *personal,* and where, in the nature of the case, the privilege of testifying could not be reciprocal and of mutual advantage. *Giles, admr. v. Wright,* 476.

11. RETROSPECTIVE ACTS—*when void.*—Legislative acts, retrospective in their character, are not void unless they conflict with some constitutional provision or interfere in some respect with vested rights. *Smith & Bro. v. Van Gilder, admr.,* 527.

12. POWER OF THE PEOPLE, ETC.—The people of a State have a right to alter or reform the government in the manner provided by the organic law, so long as they do not ignore or deny allegiance to the national government, or invade the provisions of the Constitution of the United States. *Penn et al. v. Tollison,* 545.

13. CONSTITUTION OF 1836—*Not destroyed by Convention of 1861.*—While there was no act of violation, nor was there any thing revolutionary in the assembling of the convention which met at Little Rock, on the 4th of March, 1861, in pursuance of the act of January 15, 1861, yet the attempt by that body, by the passage of the ordinance of secession, to repeal the "act of acceptance" of the compact; to absolve the citizens of the State from their allegiance to the United States; the adoption of the Constitution of the "Confederate States;" the appropriation of the public domain and other property, and the adoption of a new Constitution, did not destroy the State government of 1836; and all such action on the part of the Convention was null and void, for the want of power. *Ib.*

14. POWER OF CONVENTION OF 1861.—The people, in their sovereign capacity, did not authorize the Convention to establish a new government; it was assembled for no such purpose; the act assembling it conferred no such power, and they were not authorized to make a new Constitution. *Ib.*

15. SAME.—The Convention might have had power to adjourn from day to day, but the President had no power to convene it at will, and, as a Convention, it was *functus officio* when it adjourned on the 10th of March, and all its acts, subsequent to that time, were absolutely null and void, and without authority or sanction on the part of the people. *Ib.*

16. SAME.—The people are as much bound to their allegiance by the Constitution of the United States as their servants, and the moment the Convention attempted to abjure its allegiance, it became revolutionary, and all its subsequent acts nullities, even with the sanction of the people. *Ib.*

17. SAME.—The Convention was not in the exercise of rightful inherent powers, and the government formed or attempted to be formed, was not a *de facto* government. *Ib.*

18. SERVICE BY CONFEDERATE COURT.—This court does not regard a service made in 1861, by a Confederate court, as valid, and a decree rendered thereon is a nullity. *Ib.*

19. STATE GOVERNMENTS.—A State government not in the United States and in obedience to her Constitution, is not, as a law making power, a part of the United States government, and there is no law, State or National, by which that government, when she conquers her opposers, is bound to recognize as valid the public or political action of any such State while engaged in rebellion against the national Constitution and laws. *Thompson v. Mankin,* 586.

20. SAME.—*Political departments must recognize.*—If the lawful government of the United States, or of a State, through the proper political departments, do not recognize the validity of the acts of such rebel State, the courts of the regular State government have no authority

to hold the public acts and proceedings of a State, so in opposition to the Constitution and laws of the United States, valid and binding between individuals. *Ib.*

21. SAME.—The recognition of the civil government must be decided by the political department of the government to which the courts belong, and when so decided, are to be considered *res adjudicata.—Ib.*

22. CONFEDERATE COURTS—*Service by, not binding.*—Service made, during the rebellion, by a Confederate Court is not binding upon the party to appear, and any decree or judgment rendered thereon is a nullity. *Ib.*

23. JUDGMENT BY CONFEDERATE COURT VOID.—A judgment rendered by a court held in this State, after the passage of the ordinance of secession, is *coram non judice* and absolutely void. *Timms v. Grace*, 598.

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2. SAME.—The effect of the third section of the act of March, 1843, was not put in to extend the act of 1818, to land on the south side of the Arkansas river, as of its time of passage, but simply as of the time of the passage of the act of March 1843, and rights vested under it, as against the government only from and after that date. *Ib.*

3. SAME.—*Cherokee—pre-emption claims.*—Cherokee pre-emption claims could not be located on the four sections of land, including the Hot Springs as their center, after the passage of the act of April, 1832. *Ib.*

4. SAME.—*New Madrid certificates.*—A location of a certificate, under the New Madrid Acts, is the actual survey of the land and a return of the plat by the surveyor to the recorder of land titles, and its approval on the part of the government, and until such survey, return and approval, the title remains in the government, nor was this changed by the act of April 29th 1816. *Ib.*

5. CODE CRIMINAL PRACTICE.—Section 178, Code of Criminal Practice, does not authorize the court to dismiss a valid indictment, after arraignment, plea and impaneling of the jury, so as to hold the accused for trial on another indictment for the same offense. *Lee v. The State*, 260.

6. CONFEDERATE MONEY ACT.—The act, approved March 5th, 1867, known as the Confederate money act, is unconstitutional. *Hastings v. White, et al.*, 308.

7. STAMP ACT CONSTRUED.—While Congress has the power to prescribe evidence, and especially what shall be instruments of evidence in the Federal courts, it is powerless to prescribe them for State courts, and the

act of Congress of June 30, 1864, known as the "*stamp act,*" is not to be so construed. *Bumpass & Hicks v. Taggart* 398.

8. STATUTE SUPERSEDED BY CODE.—Chapter 88, Gould's Digest, is no longer in force, being superseded by chapter IV, of the Civil Code. *Hays, et al., ex parte,* 510.

9. CHAPTER 169, GOULD'S DIGEST—*How construed.*—Chapter 169, of Gould's Digest, regulating taverns, groceries and dram shops, is not repealed by section seventeen, of article X, of the Constitution of the State—nor is it in conflict with section five of article X. *Henry, et al. v. The State,* 523.

10. WHAT ACTS CONTINUED IN FORCE BY CONSTITUTION.—All laws continued in force, by virtue of section sixteen, of article XV, of the Constitution, are as valid as though re-enacted by the General Assembly. *Ib.*

11. POWER TO LICENSE—*License not a tax, etc.*—The Legislature may pass any law not inhibited by the Constitution, and a law requiring an amount or sum of money to be paid for a license to sell spirituous liquors, is not a *tax* in the sense used in section five, of article X, of the Constitution. *Ib.*

12. SECTION 116, CIVIL CODE CONSTRUED.—The several pleas or defenses that may be set up in an answer, under paragraphs *three* and *four, section 116, Code of Practice,* stand each upon its own merits, and a demurrer may be sustained as to some and overruled as to others. *Pugh v. Harbison,* 162.

See *Attachments,* 1, 5; *Amendments,* 2; *Administration,* 2; *Appeals,* 5; *Commissioner of Deeds,* 1; *Constitutional Law,* 3, 4, 11; *Counties,* 4; *Dower,* 1, 2; *Indian Lands,* 1, 2; *Indictments,* 2; *Judges,* 1; *Mandamus,* 4; *Pardon and Amnesty,* 6; *Probate Court,* 1, 3; *Public Lands,* 1, 3; *Practice,* 31, 33; *Registrars,* 1; *Statute of Limitations,* 1, 2, 3; *Verdicts,* 1.

CONTINUANCES.

1. WITHIN THE DISCRETION OF COURT.—Continuances in criminal, as well as in civil cases, as a general proposition, are within the sound discretion of the court, and its refusal to grant a continuance is never ground for a new trial, unless it clearly appears to have been an abuse of such discretion, and manifestly operates as a denial of justice. *Thompson v. The State,* 323.

CONTRACTS AND AGREEMENTS.

1. WHAT REQUIRED OF CONTRACTING PARTIES.—The law requires contracting parties to be vigilant and to exercise due caution, and if the means of information are alike accessible to both, so that with ordinary prudence and diligence the parties might respectively rely upon their own judgments, they must be presumed to have done so. *Wilson v. Strayhorn,* 28.

2. CONTEMPORANEOUS STIPULATIONS—*Construction of.*—Where a transaction is evidenced by two papers, the connection between which is established by their contents, without any necessity of referring to other matter to connect them together, they will be taken as one entire agreement. *Pillow v. Brown and Childress*, 240.

3. WHEN LAW RELIEVES FROM PENALTY.—Where a person agrees to do an act, which is neither *malum in se* nor *malum prohibitum*, at the time of entering into the agreement, and is prevented from doing the act, by the law, it excuses him from all penalties that would otherwise arise from his omission. *Ib.*

4. WHEN VOID FROM THREATS OR DURESS.—To render a contract void, because of threats or menaces, it is necessary that the threats and circumstances should be of a character to excite the reasonable apprehensions of a man or person of ordinary courage, and the promise, contract or statement, should be made under the influence of such threats or menace. *Bosley v. Shanner*, 280.

5. RECISION OF.—Contracts, ordinarily, can only be rescinded by mutual consent of the parties and cannot, in general, be rescinded in *toto by one. Gatlin & Gibson v. Wilcox*, 309.

6. SAME.—The infringement or partial failure of performance by one party to a contract, for which there may be a compensation in damages, does not authorize a recision or put an end to a contract. *Ib.*

7. FRAUDULENT CONTRACTS BINDING ON PARTIES THERETO.—All executed contracts tainted with fraud, are binding upon the immediate parties. *Noble, et al. v. Noble*, 317.

8. WHEN VOID AS TO GENERAL CREDITORS.—A secret, voluntary conveyance made by an embarrassed creditor to another creditor in *preference*, is fraudulent and void as to general creditors, to that extent, but is binding on the parties thereto, and a court of equity will not relieve either party to such conveyance. *Ib.*

9. LEX-LOCI.—While the law of the place of the contract interprets and construes it—the law of the place where it is put in suit, determines all questions as to the manner in which the same may be enforced. *Laird v. Hodges*, 356.

10. WHEN IMPLIED.—Where a party accepts the beneficial results of another's services, the law implies a previous request and a subsequent promise. *Ford v. Ward*, 360.

See *Confederate money*, 1, 3, 4, 5; *Constitutional Law*, 2, 5; *Illegal Consideration*, 1; *Partnerships*, 3; *Sales*, 2; *Usury*, 2.

CONVEYANCES.

See *Deeds; Fraudulent Conveyances; Lien*, 2.

CORPORATIONS.

1. QUASI CORPORATIONS.—*Powers of.*—Counties may be termed *quasi corporations;* the assumption of their corporate powers conferred and duties imposed, are wholly involuntary; they possess no power, incur no obligations, except specially conferred by statute. *Granger and wife v. Pulaski County*, 37.

2. LIABILITY OF.—A private action will not lie, at the suit of a party injured, against a *quasi* corporation, resulting from non-performance by its officers of a corporate duty, unless given by statute. *Ib.*

3. POWERS OF.—Under the general incorporation act, cities and towns have authority to lay out, open, grade and keep in good repair the streets of a city or town, and a suit will not lie, at the instance of an individual, for damages resulting from injuries to private property from the lawful exercise of this authority by the incorporation, where there has been no negligence, want of care or skill in its exercise. *Simmons v. City of Camden*, 276.

See *Counties*, 1, 2, 3.

COSTS.

See *Practice*, 18.

COUNTIES.

1. POWERS OF—*How construed.*—Counties are political corporations, and, as such, their powers are strictly construed. *English & Wilshire v. Chicot County*, 454.

2. SAME.—The power to audit and settle claims for or against a county, must be confined to such claims as the county had authority to contract. *Ib.*

3. SAME.—The power to subscribe the internal improvement fund of a county, to the capital stock of a railroad company, does not carry with it the power to make the county responsible in her political character. *Ib.*

4. SAME.—The act of January, 25, 1855, authorizing counties, "*having or controlling* internal improvement funds or credits granted to it by the State," to subscribe to the capital stock of any valid, duly authorized railroad company, did not authorize the counties to issue bonds of the counties in payment thereof, which, by any possibility would have to be paid by the tax payers of the county. *Ib.*

See *Corporations*, 2; *County Court*, 1.

COUNTY COURT.

1. WITH WHAT POWERS VESTED.—The county court is vested, by law, with power to "audit, settle and direct the payment of all claims against the county." *Chicot County v. Tilghman, Ex'r.*, 461.

See *Appeals*, 7; *Ferries*, 3.

COUNTY CLERKS.

1. DUTY OF.—It is the duty of the county clerk to make out and return to the office of secretary of State an abstract of the whole number of votes cast at an election, according to the returns on file, in the clerk's office, for each candidate. *Howard, et al. v. McDiarmid*, 100.

2. POWERS OF.—The clerk cannot decide the legality, nor can he question the validity of the appointment of judges. *Ib.*

3. SAME.—Regularity is to be presumed in favor of the returns of elections by judges appointed in the manner prescribed by law, and if there be a question respecting the regularity, the clerk has no authority to decide it. *Ib.*

COURTS.

1. DISCRETION OF.—In preliminary steps of a trial, a proper discretion may be exercised by any of the courts of original jurisdiction, which, if not grossly abused, will not be considered here. *McKenzie v. The State*, 334.

2. SAME.—When, by constitutional or legislative authority, discretionary power is conferred upon a court, its exercise is a judicial act, and cannot be controlled by a superior or appellate court on appeal, unless it has been grossly abused. *Fleming v. Johnson, et al.*, 421.

See *Constitutional Law*, 18, 21, 22, 23; *Practice*, 14, 36; *States*, 3; *States in Rebellion*, 1.

CREDITORS.

1. PREFERENCE OF—If acting in *good faith*, a debtor may pay or secure one creditor in preference to another. *Cox v. Fraley*, 20.

2. The mere *allegation* of a general creditor that he owns a valid claim will not authorize him to go into a court of equity to prevent other creditors, who have been more vigilant than himself, in recovering against a failing firm. *Ib.*

3. HOW PAYMENTS APPLIED—Where a party owes a person two different sums of indebtedness, and money is paid by the debtor, without instructions as to which debt the payment is to be applied in extinguishment of, the creditor may apply it to either. *Marshall, adm'r v. Sloan et al.*, 513.

CRIMINAL LAW.

1. ILLEGAL CO-HABITATION.—An indictment for illegal co-habitation, should charge the parties to be of different sexes, and that they co-habited as husband and wife. The statutes of this State do not prohibit *persons* from co-habiting together, nor is such an offense at common law. *State v. Dunn*, 34.

2. JEOPARDY OF LIFE AND LIMB.—The principle that a person cannot be twice placed in jeopardy of life or limb for the same offense, and embraced in the Constitutions of most of the States and the Union, is borrowed from the common law, and the decisions are not uniform as to the time when the jeopardy attaches. *Lee v. The State*, 260.

3. SANITY—*Burden of proof.*—The legal presumption is in favor of sanity, and the killing not being denied, but assumed to be excusable, the burden of proof is upon the accused, and if he fail, by sufficient evidence, to change the presumption raised against him by the killing, the jury being the judges of the weight of the testimony, the case would be legally adjudged against him. *McKenzie v. The State*, 334.

See *Construction of Statutes*, 5. *Indictments*, 1, 2. *Instructions*, 1. *Jeopardy*, 1, 2. *Jurisdiction*, 3, 4. *Murder*, 1. *Practice*, 15, 16. *Verdicts*, 1, 2, 3, 4, 5, 6, 7, 8.

DAMAGES.

1. EXCESSIVE—*When not considered.*—Where the verdict is responsive to the issue and the judgment in accordance with the verdict, and no motion for a new trial made, exceptions to the evidence or ruling of the court taken, the question of excessive damages will not be considered. *Neal et al. v. Singleton*, 491.

See *Appeals*, 13.

DEBTORS.

See *Creditors*, 3.

DEEDS.

1. CONSTRUCTION OF.—Where two clauses in a deed are so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected. *Tubbs et al. v. Gatewood et al.*, 128.

2. SAME.—In the common understanding and acceptation of their meaning, the words "signed and sealed," in the certificate of acknowledgment, is an equivalent expression for "signed, sealed and delivered," or "executed." *Ib.*

3. SAME.—The words "without undue influence or compulsion of her husband," in the certificate of acknowledgment of a married woman, in their common acceptation, are equivalent to the expression of her "own free will, without undue influence or compulsion of her husband." *Ib.*

4. ACKNOWLEDGMENT.—A substantial compliance with its requirements, in the acknowledgment of a deed, will dispense with a literal conformity with the statute. *Ib.*

See *Estates upon Condition*, 1, 2. *Fraudulent Conveyances*, 3, 4, 5. *Sheriff's Deeds*, 1. *Vendor & Vendee*, 4.

DEFENDANTS.

See *Practice*, 32.

DELIVERY.

See *Sales*, 2.

DELIVERY BOND.

See *Statutory Judgments*, 1.

DEMAND.

See *Indorser*, 2, 3, 4.

DEMURRER.

See *Practice*, 21.

DISCRETION.

See *Amendments*, 1. *Courts*, 1, 2. *Mandamus*, 2, 5, 12. *New Trials*, 3. *Practice*, 29.

DOWER.

1. To what estate attaches.—Under the former territorial statute, to sustain the right of dower, the husband must have had a strict *legal title* —but under the late statute, it is only necessary that he be *seized* of an estate of inheritance. *Kirby v. Vantreece et al.*, 368.

2. Same.—A valid purchase and continuous possession by a party, for the space of eleven years or more, without deed, will be deemed quite sufficient to perfect his legal title; and though his legal title be not perfected by prescription or limitation, yet if he have so perfect an equity as to entitle him to a legal title in fee, whenever demanded, he would, in the language of the statute, be "seized of an estate of inheritance," to which the right of dower would attach upon his death. *Ib.*

DURESS.

See *Contracts*, 4.

EJECTMENT.

1. Swamp and overflowed lands.—An entry of lands with the register of the United States land office, in accordance with the law authorizing him to act, and the receipt of the purchase money by the proper officer, although no patent be issued, *vests* such title and legal interest as enables the purchaser to maintain ejectment; and a subsequent grant, by the United States, of such land, under an act entitled "An act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits, approved September 28, A. D. 1850, conveys

no right or title, as against the original purchaser, from the United States to the State, or its vendees, further than a naked legal title in trust for the party holding the prior and more equitable title. *Trulock et al, v. Taylor, ad.*, 54.

ELECTIONS.

See *County Clerk*, 1, 2, 3.

EMANCIPATION.

1. EFFECT OF PROCLAMATION.—The emancipation proclamation of January 1, 1863, did not liberate and free the slaves in the insurrectionary States, outside the lines of occupation of the national forces. *Kaufman & Co. v. Barb*, 24.

EQUITY.

1. JUDGMENTS—*When enjoined.*—Equity will not relieve against a judgment at law, when the defense could be made at law, unless it is clearly shown that the defense set up is meritorious, and the party was prevented from making it by unavoidable circumstances, or without any default or laches on his part. *Lester v. Hoskins, Heiskell & Co.*, 63.

See *Lien*, 1. *Choses in Action*, 1.

EQUITY JURISDICTION.

See *Amendments*, 4, 5.

EQUITY PLEADING.

1. WHAT ASSIGNEE MUST ALLEGE.—The assignee of a note, which is a lien upon land, must allege in his bill, to inforce the lien, the agreement between the vendor and vendee, and unless he does, he will not be heard in a court of equity. *Wakefield v. Johnson, Adm'r*, 506.

2. SAME.—On title bond to convey, on the payment of the residue of the purchase money, an assignment of the note carries with it the lien; and the assignee, to avail himself of the vendor's lien, must allege in his bill the considerations of the title bond; as, also, whether any other notes, which are liens, remain unpaid; so the holders thereof should be made parties before tendering a deed. *Ib.*

See *Answer*, 1, 2; *Practice*, 4, 5, 21, 22; *Vendor and Vendee*, 3.

EQUITY PRACTICE.

1. WHEN BILL DISMISSED ON ANSWER.—Where the allegations of the bill are not within the personal knowledge of the defendant, and he admits, or states in his answer that he has no knowledge of the same, save as stated in the bill; and neither party introduces any proof on the trial, the bill is properly dismissed for the want of equity. *Barclay, et al., v. Dawson, Adm'r, et al.*, 417.

2. When remedy at law, etc.—Where the record shows that complainant has an ample and complete remedy at law, the bill should be dismissed for want of equity. *M. & L. R. R. R. Co. v. Woodruff*, 649.

See *Answer*, 1, 2; *Bill of Review*, 1, 2, 3; *Errors*, 1; *Fraudulent Conveyances*, 5; *Practice*, 4.

EQUITABLE TITLE.

See *Practice*, 5.

ERRORS.

1. Apparent.—By error apparent upon the face of the decree, is to be understood that it so appears by a comparison of the decree with the bill, answer and other proceedings. *Evans v. Parrott, Adm'r, et al.*, 600.

See *Practice*, 10, 31.

ESTATES.

See *Dower*, 2; *Administration*, 6.

ESTATES UPON CONDITION.

1 Precedent and subsequent.—Where an estate is conveyed upon a condition *precedent*, the condition must be performed before the estate will pass, but when the condition is *subsequent*, the estate passes at the execution and delivery of the deed. *Sheppard v. Thomas*, 617.

2. Same.—Whether a condition is *precedent* or *subsequent*, depends upon the intent of the parties creating the same, and not upon the technical words used. *Ib.*

EVIDENCE.

1. When presumed legal.—Where the record shows nothing to the contrary, it must be presumed that the evidence received by the court below was legal. *Bumpass & Hicks v. Taggart*, 398.

2. Parol—*Effect of*.—The rule that parol evidence is not admissible to contradict, vary or materially affect a written contract, is not contravened by the admission of such evidence to show a failure, a want, or an illegal consideration in a written contract. *Waymack v. Heilman, et al.*, 449.

3. Admissibility of wife.—The exclusion of the wife, when offered as a witness for the husband, at common law, was upon the ground of her interest in the subject matter, and when offered as a witness against the husband, on the ground of public policy; but our Constitution has made great innovations, upon the common law rule, respecting the exclusion on account of *interest*; admitting all parties in interest to testify. *Magness v. Walker*, 470.

4. WHEN WIFE COMPETENT.—Where the wife was agent for the husband in the making of the contract, she is competent to testify when called by the husband. *Ib.*

See *Administration*, 1; *Answer*, 1, 2; *Appearance*, 1; *Constitutional Law*, 10; *Criminal Law*, 3; *Fraudulent Conveyances*, 2, 5; *Indorser*, 2; *Interest*, 1; *New Trials*, 5; *Partnerships*, 2; *Practice*, 13, 22; *Records*, 1, 2; *Sheriff's Deeds*, 2; *Trespass*, 1.

EXCEPTIONS.

See *Bills of Exception.*

EXECUTIONS.

See *Attachments*, 4; *Sales*, 1; *Sheriff's Deeds*, 1.

EXECUTOR.

See *Administration.*

FAILURE OF CONSIDERATION.

See *Promissory Notes*, 1.

FERRIES.

1. FRANCHISE OF.—A ferry franchise is a grant from the State, and it cannot be created by parties and made transferrable and descendable in fee, or absolutely, as individual property, separate and apart from the land. *Haynes, admr'. v. Wells*, 464.

2. FRANCHISE—*To whom limited.*—The right of a ferry license is limited, by statute, to the owner or party rightfully in possession of the land on the river, and is regulated by the proper authorities for the public good. *Ib.*

3. JURISDICTION OF COUNTY COURT—*In matters of*—Whether the establishment of a ferry is for the public convenience, except where inhibited by statute, is a question for the proper county court, and its decision is absolutely binding upon every one, unless exceptions be taken and the judgment reversed or set aside. *Ib.*

FERRYMEN.

1. RESPONSIBILITY OF—Ferrymen, like all other common carriers, are regarded in law as insurers of the property committed to their care, and are responsible for all losses or damages to it, which do not come within the excepted cases of the acts of God and the public enemy. *Harvey v. Rose*, 3.

2. AS COMMON CARRIER—*Burden of proof.*—As a common carrier, a ferryman is compelled to receive all goods and property offered for transportation,

and in such capacity, he is presumed to have charge of it, and the burthen is upon him to show that he had not such control over it as to invest him with that character in respect to it. *Ib.*

3. When answerable for negligence.—Where it affirmatively appears that the owner retains the exclusive control of the property, the ferryman is not chargeable if loss occur, as a common carrier or insurer, but is only answerable for *actual* negligence; and if in such case the loss be occasioned by the willful wrong or negligence of the owner, so that but for it, the loss would not have occurred, the owner cannot recover, except where the direct cause of the loss is the omission of the ferryman, after becoming aware of the owner's negligence, to use a proper degree of care to avoid the consequence of such negligence. *Ib.*

FRAUD.

1. When practiced party must be prompt in communicating it.—A party upon whom fraud has been practiced, must be prompt in communicating it when discovered. *Wilson v. Strayhorn*, 28.

See *Agents*, 1, 2. *Contracts*, 7. *Fraudulent Conveyance*, 2. *Misrepresentation*, 1, 2. *Trusts, etc.* 2, 3.

FRAUDULENT CONVEYANCES.

1. Grantor being embarrassed, not proof of.—The fact of a grantor being embarrassed, is no proof that a conveyance is fraudulent. *Cox v. Fraley*, 20.

2. What evidence relevant.—Fraud may be shown against any deed, and evidence tending to show fraud in the execution of a deed, to hinder or delay creditors, is relevant and should be admitted. *Blair, adm'r. v. Alston*, 41.

3. When set aside.—The rule in equity that a party, seeking to set aside a contract, must place or offer to place the opposite party in *statu quo*, is not applicable to a case where a deed has been obtained by fraud and without a valid consideration. *Freeman et al. v. Reagan*, 373.

4. Cognizable in a court of equity.—Bad faith and unconscionable acts can have no allowance or favor in a court of equity, and in a bill charging the execution and procurement of a deed under such circumstances—the strength of mental capacity of the parties, the circumstances surrounding them, their relationship etc., make up the grounds upon which the court can find the real influences that produced the conveyance. *Hightower et al. v. Nuber*, 604.

5. When relieved against, etc.—If the evidence adduced, or the circumstances surrounding the procurement of the conveyance, show that the party, in whose favor the conveyance is made, possessed an undue advan-

tage over the grantor, and in person, or by agent, exercised an improper influence over such one and to the advantage of the grantee, it is an act against conscience, and within the cognizance of a court of equity and will be relieved against. *Ib.*

See *Contracts*, 8.

GUARDIAN AND WARD.

1. For what appointed.—A guardian for an *infant* is appointed solely because of the infancy, and no inquiry is made as to sanity. *Fleming v. Johnson, et al.*, 431.

See *Probate Court*, 1, 2, 3; *Sales*, 3, 4.

HOMESTEAD.

1. Plea of.—Plea of *homestead* is a good defense to a possessory action, as against title acquired under execution. *Hughes v. Watt*, 228.

HOT SPRINGS.

See *Construction of Statutes*, 1, 3.

ILLEGAL CONSIDERATION.

1. When for Confederate service.—A plea that the *consideration* of a note sued on was a horse, bought by the maker for the *Confederate service*, with the knowledge of the payee, is a *good* defense to a suit thereon, by the payee. *Booker v. Robbins & Page*, 660.

ILLEGAL COHABITATION.

See *Criminal Law*, 1.

INDICTMENT.

1. When Time not material.—In an indictment for murder, the time of committing the murder is not material, if it appear that it was committed before the finding of the indictment. *Lee v. The State*, 260.
2. Requisites of.—The Code of Criminal Practice, except in respect to particular words employed in the description of certain offenses, is not to be held as dispensing with the clearness and certainty, in charging the offense, recognized by the former practice and the common law. *Thompson v. The State*, 323.

See *Constitutional Law*, 5; *Criminal Law*, 1, 6; *Practice*, 15, 16.

INDIAN LANDS.

1. United States—*Title to Indian country*.—The United States holds the fee simple to the lands occupied by the Indian tribes, and may, if it seem fit,

disregard their right of occupancy, and, before a cession by the Indians, convey, either an unincumbered title in fee simple, to take effect immediately, or a title subject to their right of possession, and to take effect only, when they, by voluntary cession, shall have yielded their title. *Gaines, et al. v. Hale & Rector*, 168.

2. SAME—*Policy of government.*—The policy of the government has been to protect the lands occupied by the Indians from settlement, and not to convey the title until the possessory rights of the Indians have been extinguished; therefore, it is not to be presumed that the United States intended that the act of 12th April, 1814, should extend to lands south of the Arkansas river, the title to which was not ceded to the Federal government until August, 1818. *Ib.*

INDORSER.

1. RELEASE OF.—To release an indorser on the ground of extension of time given by the indorsee to the maker, or on further security given by the maker to the indorsee, it must be shown that a consideration was paid or promised for the delay or further security. *Hazard v. White*, 155.

2. WAIVER OF DEMAND, ETC., HOW SHOWN.—It is competent to show by parol the waiver of demand and notice at the time of the indorsement. *Ib.*

3. LIABILITY OF.—Demand and notice, within proper time, or a waiver thereof, must be proved to fix the liability of the indorser. *Ib.*

4. DEMAND AND NOTICE—*Waiver of.*—An unconditional promise to pay by the indorser, with a full knowledge of the facts by which he is released at law, is an implied waiver of demand and notice and a promise by indorser of a promissory note to pay *after due*, is *prima facie* evidence of demand and notice. *Ib.*

INJUNCTION.

1. DISSOLUTION OF.—The dissolution of a temporary injunction, before a hearing on complaint and answer, is not such a final order as that an appeal will lie from it. *Citizens Bank of Louisiana v. Walker*, 468.

See *Equity*, 1; *Mandamus*, 12.

INSTRUCTION.

1. RECORD MUST SHOW OBJECTIONS.—Where the record fails to show that the defendant objected to the instructions given by the court, or that the court refused to give instructions asked by the defendant, the objection will not be heard here. *McKenzie v. The State*, 334.

2. WHEN IMPROPERLY GIVEN.—An instruction, though unobjectionable in itself, is improperly given where there is no evidence to warrant it. *Marshall, Adm'r, v. Sloan, et al.*, 513.

INTERLOCUTORY JUDGMENTS.

See *Recognizance*, 2, 3.

INTERNAL IMPROVEMENT FUND.

See *Counties*, 3, 4.

INTEREST.

1. SUSPENSION OF.—When a debtor, without fault on his part, is prevented from paying the debt at and after maturity, through the act of the creditor or the law, interest should be abated during the time he is so prevented—and this, the debtor should show by affirmative proof. *Pillow v. Brown & Childress, Ex'rs*, 240.

JEOPARDY.

1. WHEN DOES NOT ATTACH.—When, after the jury has been selected and sworn, unauthorized separation and misconduct is satisfactorily shown, the court may quash the venire, discharge the selected jurors, and award a new venire; and the defendant will not be entitled to a discharge from sentence under the verdict found against him, by reason of being formerly put in jeopardy. *McKenzie v. The State*, 334.

2. WHEN ATTACHES.—Jeopardy cannot attach until the jury is duly impaneled, and all the machinery of the court fully organized. *Ib.*

See *Criminal Law*, 2; *Constitutional Law*, 5; *Practice*, 15, 16.

JUDGES.

1. SPECIAL—*Election of.*—Under section 758, the clerk is not authorized to hold an election for a special judge at chambers. *Palmer v. McChesney*, 452.

JUDGMENTS.

1. WHEN FROM UNDER CONTROL OF COURT.—The judgments of a court, after its adjournment, pass from under its control. *Hardy's Ex'rs, ex parte*, 94.

2. WHEN NOT ENFORCED.—A judgment based on a certificate of entry, which has been properly canceled, being inequitable, will not be enforced. *Gaines, et al., v. Hale and Rector*, 168.

See *Attachment*, 2, 4; *Equity*, 1; *Practice*, 18; *Recognizance*, 2, 3; *Statutory Judgments*, 1.

JUDICIAL DISCRETION.

See *Mandamus*, 2, 5, 12.

JURIES.

See *Practice*, 14; *Verdicts*, 1, 2, 3.

JURISDICTION.

1. PROHIBITION.—Prohibition will not lie to an inferior court, in a cause arising out of its jurisdiction, until that matter has been pleaded in the original court and the plea refused. *City of Little Rock, ex parte*, 52.

2. CIRCUIT COURTS.—The circuit court will not be presumed to take cognizance of matters not within its jurisdiction. *Ib.*

3. OF JUSTICES OF THE PEACE.—Under the present Constitution justices of the peace have jurisdiction in all criminal cases below the grade of felony, but that jurisdiction is not exclusively vested in justices of the peace. *State v. Smith*, 149.

4. WHEN CONCURRENT.—Under the provisions of the Code of Criminal Practice, the jurisdiction may be exercised concurrently by the circuit courts, in cases of assaults and assaults and battery. *Ib.*

See *Appeals*, 1, 2; *Ferries*, 3; *Mandamus*, 9; *Practice*, 5, 14; *Probate Court*, 1; *Sales*, 4; *Supreme Court*, 1, 2.

JUSTICES OF THE PEACE.

See *Jurisdiction*, 3, 4; *Appeals*, 4.

LAW OF NATIONS.

1. INTERCOURSE BETWEEN ENEMIES PROHIBITED.—During war, all intercourse is prohibited between enemies. *Pillow v. Brown and Childress, Ex'rs*, 240.

LEGAL PRESUMPTION.

See *Presumptions*.

LICENSE.

See *Construction of Statutes*, 11.

LIEN.

1. WHEN ENFORCIBLE IN EQUITY.—A sale or lease by one joint-stock owner of his joint interest to the other for a valuable consideration, reserving, by trust deed, a lien on the joint stock interest and the increase thereof in the line of business, is a continuing security, enforcible in equity, between the parties and their privies, with knowledge of the prior incumbrance. *McClure v. McDermon*, 66.

2. RETENTION OF TITLE INCONSISTENT WITH.—The retention of *title* and the reservation of a "lien" upon the same property is inconsistent with, and at variance with the ordinary transactions of mankind. *Sheppard v. Thomas*, 617.

See *Attachment*, 2, 3; *Equity Pleading*, 1, 2; *Practice*, 9; *Sales*, 1; *Surplusage*, 1.

MANDAMUS.

1. WHEN WILL LIE.—It is a general rule that where a person has a legal right to insist that a certain act shall be done, the performance of which is, by law, made the duty of a public officer, mandamus will lie. *Howard, et al., v. McDiarmid*, 100.

2. SAME.—Mandamus will lie to compel the heads of departments of State to perform a mere ministerial act imposed upon them by law, though not in those acts requiring the exercise by them of judgment and discretion. *Black, Adm'r, v. Auditor*, 237.

3. PETITION FOR—TO BE SWORN TO.—The practice is well settled that a jurat is necessary to a petition for *mandamus*. *Ib.*

4. HEARING UPON.—Under section 519, Code of Practice, the *hearing* upon *mandamus* is to be by the *court*, and not by the judge at chambers. *Palmer v. McChesney*, 452.

5. WITHIN DISCRETION OF THE COURT.—In this country the writ of *mandamus* is not a writ of *right*—it is derived by grant from the government, through the Constitution or legislative enactments; the issuing or withholding it, is within the judicial discretion of the court. *Fitch v. McDiarmid*, 482.

6. GOVERNED BY COMMON LAW RULES.—When the power has been granted in general terms to a court, it is governed by the common law rules as to when it is proper to be issued. *Ib.*

7. OFFICE OF THE WRIT.—The purpose of the writ is *not* to establish legal rights or to inquire into the titles to offices, but to enforce the performance of a duty. *Ib.*

8. WHAT A PARTY MUST SHOW.—A party, to be entitled to the writ, must show by his petition that he has a clear *legal right* to the subject matter and that he has *no other* adequate remedy. *Ib.*

9. JURISDICTION OF SUPREME COURT.—The question of the original jurisdiction of this court in cases of *mandamus* and *quo warranto* is settled—it is *res-adjudicata*. *Ib.*

10. WHEN AND FOR WHAT WILL LIE.—*Mandamus* never lies to control judicial discretion; it only lies to compel the performance of a public duty, and only then when there is no other legal remedy. *Hays, et al., ex parte*, 510.

11. PURPOSE OF WRIT—The writ cannot be used to establish a right, but may be used to enforce a right after it is once established. *Ib.*

12. WILL NOT CONTROL JUDICIAL DISCRETION.—The issuing of an injunction is not an act ministerial in its character only, but one of judicial discretion, and mandamus never lies to control that discretion. *McMillen, et al., v. Smith, et al.*, 613.

See *Construction of Statutes*, 8; *Supreme Court*, 1.

MARRIED WOMEN.

See *Evidence*, 3.

MISDEMEANORS.

See *Jurisdiction*, 3.

MISJOINDER OF PARTIES.

1. WHEN OBJECTIONS TO, CONSIDERED WAIVED.—Where the assignor of a note is improperly joined with the assignee in a suit upon the note, and judgment is rendered in his favor, jointly with the assignee, although the judgment as to him is erroneous, yet if no motion be made in the court below to correct the error, it will be no ground for reversal in this court, and will be considered as waived. *Booker v. Robbins & Page*, 660.

MISREPRESENTATION.

1. WILL NOT ALWAYS AVOID A CONTRACT.—Every misrepresentation will not avoid a contract—the fact or thing misrepresented, must be of such a character that the party deceived *had a right to rely upon it.* *Wilson v. Strayhorn*, 28.

2. MUST BE MATERIAL.—Misrepresentations, to be fraudulent, must be *material*, must mislead the party to his damage, and must be *false.* *Ib.*

MISTAKES AND ACCIDENTS.

1. WHEN MUTUAL.—Where the mistake is *mutual*, courts of equity will *correct*, but *not make* a new contract. *Wilson v. Strayhorn*, 28.

2. CORRECTED AFTER CAUSE SUBMITTED.—Discovery of mistake in the number of lands, after a cause is submitted for final hearing, may be corrected. *Rhea, Adm'r. et al. v. Puryear, et al.*, 344

MUNICIPAL CORPORATIONS.

See *Corporations.*

MURDER.

1. INTENT—*Time not material.*—Where the State proves beyond a reasonable doubt that the accused perpetrated the murder, by lying in wait, or by other kind of willful, deliberate, malicious and premeditated killing, it is murder in the first degree, and the *time* when the intent was formed to take life is not material, so it be shown the design thus formed was before the act of killing. *McKenzie v. The State*, 334.

See *Verdicts*, 3, 4.

NEW TRIALS.

1. WHEN MOTION FOR, OVERRULED.—When it is made to appear, to the satisfaction of the court, that what may have appeared to be an improper influence upon the jury, was not so in fact, the court should overrule a motion for a new trial based on that ground. *McKenzie v. The State*, 334.

2. WHAT MUST APPEAR.—To entitle a party to a new trial, on the ground of *surprise*, it must clearly appear that he has used proper diligence in the preparation of the trial, and that he is wholly free from negligence, and that without the interposition of the court, injustice would be done. *Mirick v. Britton*, 496.

3. MOTION FOR, WHEN ADDRESSED TO DISCRETION OF COURTS.—A motion for a new trial, on the ground that the witness swore contrary to expectation on the trial, is addressed to the discretion of the court, and will not be granted unless the party show that he has used proper diligence by taking the precaution to converse with the witness beforehand. *Ib.*

4. WAIVER OF.—Where a party, for any good cause, is unprepared to go to trial, and fails, by motion to postpone or continue, to show the fact to the court at the proper time, he waives his want of preparation, and all right to afterwards object. *Ib.*

5. MOTION FOR, ON NEWLY DISCOVERED EVIDENCE.—To entitle a party to a new trial, on the ground of newly discovered evidence, the affidavit must show, *First.* the names of witnesses whose testimony has been discovered, and the facts expected to be established by them. *Second.* Facts and circumstances sufficient to prove that the applicant has used due diligence in preparing his case for trial. *Third.* That the facts and circumstances, newly discovered, have came to his knowledge since the trial, and are such, as if adduced on the trial, would have been competent to prove the issue, and would probably have changed the issue. *Fourth.* That the evidence is not cumulative. *Ib.*

See *Appeals*, 10, 11; *Bills of Exception*, 3; *Practice*, 17, 19.

NOTICE.

See *Sheriffs' Deeds*, 2.

OFFICE—STATUTORY.

See *Constitutional Law*, 3.

OFFICER.

1. De facto.—To constitute a *de facto* officer, there must be a rightful government. *Penn et al. v. Tollison*, 545.

See *Constitutional law*, 9.

ONUS PROBANDI.

See *Ferrymen*, 2.

PARTIES TO ACTION.

1. When administrators not necessary parties.—When there is no allegation of indebtedness against a deceased person's estate, or that the administration had not been closed, and the record discloses no interest favorable or adverse, of any of the defendants in the assets of the estate; and no grounds upon which they might be liable in another suit, it is not necessary that the administrator be made a party. *Rhea, ad. et al. v. Puryear et al.*, 344.

See *Misjoinder of parties*, 1. *Practice*, 9, 24, 25, 27, 30.

PARTNERS.

See *Partnership*.

PARTNERSHIP.

1. Survivors.—Surviving partners have the exclusive possession and management of the business of a firm, dissolved by the death of one of the partners, but only for the purpose of settling and closing the same, and are tenants in common with the representatives of the deceased partner. *Adams, ex'r. v. Ward & Co.*, 135.

2. Acts of agent.—Without some evidence to connect it with a transaction with the original firm, a receipt in the hand writing of an agent of the surviving partner, not mentioned therein as such, is irrelevant and inadmissible in evidence, as against a demand in favor of the original firm. *Ib.*

3. When rights of partners vest.—Agreement of partnership to commence *in futuro*, upon the death of one of the parties, before the time fixed for commencement, no estate or interest, intended to be contributed by either of the parties, vests in the partnership and the survivor takes nothing as such. *Cline v. Wilson et al.*, 154.

4. Right of Survivor.—A surviving partner has a right to the possession and control of the partnership property for the purpose of settling and closing the business, and not for the purpose of carrying it on. *Ib.*

5. SUIT AGAINST—*Requisite of pleadings.*—In a declaration on a promissory note, signed by defendants by their firm name, it is sufficient to allege that they made the note, without stating that they were partners or setting forth in the body of the declaration the manner or style in which they executed the note. *Ib.*

PARDON AND AMNESTY.

1. POWER, WHERE VESTED—The pardoning power is not naturally or necessarily an executive function, and where the Constitution is silent, vests no more in one branch of the government than the other. *State v. Nichols*, 74.

2. POWER OF LEGISLATURE.—The power to pardon, *after conviction*, vested in the Governor by the Constitution of 1864, is not prohibitory of the exercise of that power by the Legislature, *before conviction*, nor is it inhibited by the powers delegated to the federal government. *Ib.*

3. WHEN INHIBITED.—Where there is no express or implied limitation in the exercise of the pardoning power granted to the executive, it operates as an inhibition against the legislative branch interfering with it. *Ib.*

4. PLEA OF PARDON.—Plea of tender and acceptance of pardon, before indictment found, is good and is not an interference with the administration of justice by the courts. *Ib.*

5. CANNOT BE REVOKED.—After tender and acceptance of pardon, no subsequent action of the executive or Legislature can revoke it. *Ib.*

6. ACT OF MARCH, 1867,—The Act of March 1, 1867, entitled, "An act of pardon and amnesty," is not in conflict with the present Constitution. *Ib.*

PLEADING.

1. PRESUMPTION OF FACTS.—Pleas are taken most strongly against the party pleading, and a plea, not averring that the sale took place within the Federal lines, or that the negro man had ever been within them after the proclamation of January 1, 1863, the presumption is against such facts. *Kaufman & Co. v. Barb*, 24.

2. DEFAULT ADMITS TRUTH OF ALLEGATIONS.—Where the defendant has been duly notified and makes no answer, he thereby admits the truth of the allegations in the declaration. *Bumpass & Hicks v. Taggart*, 398.

See *Amendments*, 2. *Civil Code*, 1. *Homestead*, 1. *Parties to action*, 1. *Partnership*, 5. *Practice*, 3, 4, 6, 13, 21, 22, 24, 25, 26. *Usury*, 1, 2. *Vendors*, 2.

POSSESSORY RIGHT.

See *Public lands*.

PRACTICE.

1. RES JUDICATA.—All questions determined when a cause is before this court on an appeal, are *res judicata*, and must be treated as settled. *Scott et al. v. Eaton, Betterton & Co.*, 17.

2. RULING UPON MINOR POINTS.—Where there is no equity in the bill, a party is not aggrieved by rulings upon minor points. *Cox v. Fraley*, 20.

3. TIME OF FILING PLEADINGS.—After issue joined, the filing of a special plea, at subsequent term, is within the discretion of the court. *King v. Carnall*, 36.

4. EQUITABLE ISSUE—HOW DISPOSED OF.—Where, under the Code of Practice, an equitable defense may be made to a suit at law, and the case is not transferred to the equitable side of the docket, the issue made on such defense is not to be disregarded, and such issue must be disposed of by the court according to the principles involved, either of law or equity. *Truelock et al. v. Taylor, ad.*, 54.

5. EQUITABLE TITLE—*When pleaded*—An equitable title, in an action on a United States land patent, can be pleaded in a State court when permitted by the law of the State. *Ib.*

6. PLEAS—*Election of*—Parties can only be required to elect between pleas presenting the same issue *and both well pleaded. Ib.*

7. REMITTITUR.—The rule adopted in *Fowler v. Johnson, 11 Ark. 280*, affirmed. *Hardy's ex'rs. Ex-parte*, 94.

8. *When to be entered.*—Remittitur must be entered before cause disposed of, on appeal or writ of error, by this court. *Ib.*

9. GENERAL CREDITORS, WHEN NOT ALLOWED TO BE PARTIES.—General creditors, in the absence of any fraud of their rights by complainant, will not be allowed, on petition, to be made parties defendants to a bill to enforce a specific lien created, by mortgage, prior to their rights. *Foley et al. v. Whittaker ex.*, 95.

10. WHEN PARTY CANNOT COMPLAIN OF AN ERROR.—A party cannot complain of an error, when error, if any, is in his favor. *Kent v. Gray, ad.*, 142.

11. WHEN RECORD TAKEN AS TRUE.—Where the record recites, as part of the transcript of the justice, before whom the suit was brought, that a note was filed, this court is forced to take the record as true, the party not having taken the proper steps in the court below to contest it. *Ib.*

12. PRESUMPTION, ETC.—Where the record does not show that the court below was asked to rule upon the admissibility of evidence this court is bound to presume in favor of the decision of the court below, whenever the record fails to clearly and affirmatively show that there was error. *Ib.*

13. WHAT LITIGANT BOUND TO PROVE.—It is a rule well understood that a litigant is not bound to prove more than he avers, and a plea or defense, not denying title in plaintiff or averring title in defendant, is bad on demurrer. *Pugh v. Harbison*, 162.

14. WHEN COURT MAY DISCHARGE JURY.—It is competent for the court, when the jury cannot agree, to discharge them and hold the accused for trial, on the same indictment, by another jury—as also, where a juror in course of the trial becomes so ill, or the prisoner becomes so sick, or in like cases of impossibility to proceed—but beyond this the authority of the court does not extend. *Lee v. The State*, 260.

15. WHAT OPERATES AS AN ACQUITTAL.—Where the indictment is sufficient in form and substance, and the defendant is arraigned, pleads, and the jury is impaneled and sworn to try the issue, it is to be presumed that the defendant is demanding a speedy trial, and a dismissal of the indictment by the court, without the consent of the defendant, and holding him to answer another indictment for the same offense, operates as an acquittal. *Ib.*

16. PLEA OF FORMER ACQUITTAL.—Where the defendant pleaded former acquittal and not guilty at the same time, the plea of former acquittal should be first tried, and if the plea be found against him, the judgment should be, that he answer the indictment. *Ib.*

17. NEW TRIALS.—While this court will not revise the decision of the circuit court refusing a new trial, where the only ground presented is mere weight of evidence—yet a verdict should be set aside where it is clearly against the weight of evidence, so that at first blush it would shock our sense of justice. *Gatlin & Gibson v. Wilcox*, 309.

18. JUDGMENT, WHEN ERRONEOUS.—It is error, on dismissal of an appeal for want of jurisdiction, to render judgment for costs. *Tuohy & Green v. Rector*, 315.

19. NEW TRIALS.—This court will not reverse the decision of the circuit court refusing a new trial, when the only ground presented is the weight of evidence. *Ford v. Ward*, 360.

20. WHEN FINDING REVERSED.—The finding of the court below will not be disturbed unless it is so obviously against the weight of evidence as to be palpably unjust. *Sawin & Sickles v. Izard Bros., & Prewitt*, 371.

21. WHEN DEMURRER NOT AVAILABLE.—Where a demurrer points out no specific defect in the bill, although allegations, that ought to have been made, were omitted in the bill, yet, if the result of the suit, so far as the defendant is concerned, could not have been different, and the decree in the court below is a full and final adjustment of all his rights in the premises; and if those who may be liable to further costs or litigations do not complain, a demurrer ought not to avail the defendant. *Freeman et al. v. Reagan*, 373.

22. EQUITY PLEADING.—When the defendants to the original bill, by their cross-bill, take upon themselves the affirmative and submit their rights to the consciences of those originally complaining, they are compelled to abide by the responses of the original complainants unless, by more than equal evidence, they disprove such responses. *Hutton, admr. et al. v. Moore, adm'r.* 382.

23. NOTE MAY BE STAMPED AFTER SUIT COMMENCED.—A note not stamped in accordance with the *stamp act*, does not thereby become void or invalidated, but may be stamped, even after suit commenced, to the satisfaction of the court. *Bumpass & Hicks v. Taggart*, 398.

24. AMENDMENT OF RECORD.—Where several defendants are jointly sued, the action may be discontinued as to all but one, and prosecuted as to that one, on the joint action—but if the plaintiff wish to proceed as in a single action against that defendant, the record should be so amended. *King v. Caldwell*, 405.

25. DEFENDANT ENTITLED TO JOINT DEFENSE.—Where the action is prosecuted against the remaining defendant, on the joint cause of action, it is error in the court to refuse him the benefit of the joint plea and to give instructions which cut off his defense under it. *Ib.*

26. VERDICT—*Not disturbed if defendant had all his defense.*—When there are several counts and the pleas have been abandoned as to one, it is incorrect for the jury to return a verdict on more than one issue; but if the evidence offered by defendant would have only defeated the first count and the others would not have thereby been affected, and he had the full benefit of all his defense, and the plaintiff was entitled to recover under the testimony on the other counts—the verdict will not be disturbed. *Ib.*

27. ERROR IN DISMISSAL.—Error in refusing to dismiss as to some defendants and in permitting the record to be amended after jury sworn, will not avail, unless asked for by the defendant in the court below. *King v. Caldwell*, 405.

28. BILLS OF EXCEPTIONS.—Where there is no bill of exceptions taken—no motion for a new trial, an agreed statement of facts constitutes no part of the record, unless made so by bill of exceptions. *King & Ackmeyer v. City of Little Rock*, 479.

29. RULE TO SHOW CAUSE.—Rule to show cause against particular relief sought is obtained on motion, *ex-parte*, and the time for the party to answer is governed entirely by the circumstances surrounding the case, and is left within the sound discretion of the court granting the same. *State, ex rel. v. McDiarmid*, 480.

30. JOINT PARTIES—*When not served*—Where several are jointly sued, some of whom are not served, judgment against those served will not be reversed on that account; and those defendants, not served, cannot prosecute the appeal. *Neal, et al., v. Singleton*, 491.

1. ERRORS—*Motion to correct*—Premature trial is a clerical misprision under the Code of Civil Practice, and neither it or any other error that might be corrected on motion, will be heard here, unless such motion was made in the court below and overruled. *Ib.*

32. "DEFENDANTS."—*How construed.*—Where the judgment is against the *defendants*, the word "*defendants*," will be construed and regarded to mean the defendants who appeared or were served. *Ib.*

33. CHANGED BY CODE.—When the case was tried in the probate court before, and in the circuit court *after* the Code of Practice went into full operation, the court should be governed in the determination of the case by the Code of Practice. *Smith & Bro. v. Van Gilder, Adm'r*, 527.

34. REQUISITES OF APPEALS.—Where neither the evidence nor the instructions of the court, in the trial below, are saved by bill of exceptions, or any exceptions are taken to any of the proceedings of the court in the case, there is nothing before this court to determine. *Patton v. Cobb*, 616.

35. AGREED STATEMENT.—The filing of a written statement of agreed facts does not thereby become a part of the record, unless made so by order of court, or a bill of exceptions. *Ashley v Stoddard, Jr., & Co.*, 653.

36. WHEN PRESUMPTION IN FAVOR OF COURT BELOW.—Where the record contains the declarations of law made by the court, but not the facts they were applied to, it will be presumed the court below decided correctly. *Ib.*

See *Administration*, 4, 5; *Amendments*, 1, 2; *Answer*, 1, 2; *Appeals*, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14; *Attachments*, 1, 5; *Bills of Exception*, 1, 2 3; *Construction of Statutes*, 12; *Continuances*, 1; *Contracts*, 2; *Courts*, 1; *Criminal Law*, 3; *Damages*, 1; *Equity Practice*, 1; *Evidence*, 4; *Fraudulent Conveyances*, 2, 3; *Instructions*, 1, 2; *Jeopardy*, 1, 2; *Judgments*, 1; *Mandamus*, 3, 4, 5, 6, 8; *Mistakes*, 1, 2; *Misjoinder of parties*, 1; *New Trials*, 1, 2, 3, 4, 5; *Partnerships*, 5; *Pleading*, 2; *Recognizance*, 1, 2, 3; *Records*, 1, 2; *Sheriffs' Deeds*, 2; *Sureties*, 1; *Tender*, 1; *Verdict*, 1, 2, 3, 5.

PRESUMPTIONS.

See *Appeals*, 12; *Evidence*, 1; *Practice*, 12, 36.

PRINCIPAL AND SURETY.

See *Surety*, 1.

PROBATE COURT.

1. JURISDICTION OF.—It was competent for the probate courts, under the Constitution of 1836, and act approved December 24, 1846, to order guardians to sell the real estate of their wards, at public or private sale, as the court in its discretion might direct. *Fleming v. Johnson, et al.* 421.

2. SAME.—Probate courts are superior courts, and the regularity of their proceedings are presumed, and when the validity, derived under a guardian's or administrator's sale, comes in question, in a collateral suit, this court will only look to see if the probate court had jurisdiction—unless error be patent upon the face of the proceeding. *Ib.*

3. APPEALS FROM, TO BE TRIED DE NOVO.—The practice, on appeals from the decisions of the probate courts, has been changed by the Civil Code of Practice. Under the Code, all cases appealed from the probate to the circuit courts are to be tried anew, as if no judgment had been rendered. *Smith & Bro. v Van. Gilder, Adm'r*, 527.

See *Administration*, 4; *Sales*, 4.

PROHIBITION.

See *Appeals*, 2; *Jurisdiction*, 1.

PROMISSORY NOTES.

1. WHEN VOID.—A promissory note given for a supposed liability, which has no foundation in law, is without consideration and void. *George v. Terry*, 160.

See *Indorser*, 1, 2, 3, 4.

PROTEST.

See *Demand*.

PUBLIC LANDS.

1. IMPROVEMENTS ON.—Settlers making valuable improvements on the public lands, reserved for the exclusive use of the government, have not been regarded as trespassers, and such improvements are, by statute, protected as property. The interest which a person has in such improvements is a possessory right against all the world except the United States or their grantee. *Gaines, et al., v. Hale & Rector*, 168.

2. WHO MAY CANCEL CERTIFICATES.—It is well settled that either the secretary of the Interior, or the commissioner of the general land office, may cancel a certificate of entry or patent, when erroneously issued. *Ib.*

3. PROOF OF SETTLEMENT—The act of the 29th May, 1830, required proof of settlement or improvement should be made to the satisfaction of the register and receiver, prior to any entries being made, and in default of such proof of settlement or improvement, no interest vested in the preemption claimant. *Ib.*

See *Construction of Statutes*, 1, 2, 3, 4; *Judgments*, 2.

QUO WARRANTO.

See *Mandamus*, 9; *Supreme Court*, 1; *Trials*, 1.

REBELLION.

See *States in Rebellion.*

RECOGNIZANCE.

1. PRACTICE ON.—Errors in the recitals of a writ of *scire facias*, on forfeited recognizance, are amendable on motion to quash, in the court below, and unless such motion is made, it will not avail here. *Marr, et al., v. The State*, 410.
2. SAME.—The proper practice on forfeited recognizance, is to take an interlocutory judgment and issue a *scire facias* thereon, though a mere default may be entered, and a *scire facias* issued requiring the delinquents to show cause why a judgment should not be entered. *Ib.*
3. SAME.—Where the proper interlocutory judgment was taken in the first instance, the later judgment should only declare the former final, and order execution. *Ib.*

RECORD.

1. PROOF OF.—Parol evidence is admissible to prove the contents of a record, ancient or recent, *after* proof of its loss or destruction satisfactory to the court. *Mason v. Bull, Ellis & Co.*, 164.
2. ORAL AND WRITTEN TESTIMONY—*How made of record.*—Neither oral or written testimony constitute any part of the record, unless it is made so by order of the court, by agreement of the parties, by demurrer, by oyer, by bill of exceptions or by special verdict. *Scott v. The State*, 521.

See *Instructions*, 1; *Practice*, 35.

REGISTRARS.

1. DUTIES OF.—The duties of registrars are executive, and so far as the right of appeal from their decisions to this court, by a party aggrieved, may be inferred from, or may have been intended to be given by the act of July 15, 1868, providing for the appointment of registrars by the Governor, being contrary to the meaning and intent of the Constitution, no appeal will lie. *Allen, ex parte*, 9.

REMITTITUR.

See *Practice*, 7, 8.

REVENUE STAMPS.

See *Construction of Statutes*, 7; *Practice*, 23.

SALES.

1. ON EXECUTION—*Proceeds, how applied.*—Personal property is bound from the time the execution comes into the hands of the sheriff, and

where there are several executions, coming to hand at different times, and a sale under the last, the proceeds should be applied in satisfaction of the others in their order. *Hunauer & Co. v. Casey, Adm'r*, 352.

2. WHAT CONSTITUTES SALE AND DELIVERY.—In the agreement for the sale of goods, when the price is to be subsequently fixed by means agreed upon, until the price is so fixed, there is no such action or contract as amounts to a perfect sale or delivery. *Hutton, Adm'r, et al. v. Moore, Adm'r*, 382.

3. CONFIRMATION OF, CURES DEFECTS.—The confirmation of a sale, made in pursuance of an order of court, cures all defects or irregularities, unless it is attacked directly. *Fleming v. Johnson. et al.*, 421.

4. PURCHASERS AT ADMINISTRATOR'S SALE.—Where the probate court has jurisdiction of the subject matter, the papers and proceedings in the case upon which an order of sale is had, are presumed to have been regular, and a purchaser, at a guardian's or administrator's sale, will not be bound to look further back than the order of the court, or to inquire as to its mistakes. *Ib.*

See *Administration*, 3; *Probate Court*, 1, 2.

SANITY.

See *Criminal Law*, 3; *Guardian*, 1.

SCIRE FACIAS.

See *Recognizance*, 1, 2.

SENATORIAL AND REPRESENTATIVE DISTRICTS.

See *Constitutional Law*, 1.

SERVICE.

See *Constitutional Law*, 18, 22.

SHERIFFS' DEEDS.

1. WHAT NECESSARY TO MAKE VALID.—To constitute a good and valid deed under an execution sale, there must be a valid judgment, a sufficient execution and levy, advertisement and sale. *Hughes v. Watt*, 228.

2. RECITALS OF, MAY BE PUT IN ISSUE.—A sheriff's deed, though *prima facie* evidence of the facts recited, yet a party may put the recitals in issue and go behind the deed to show their falsity, and where their falsity is shown, being public records, it effects the sufficiency of the deed and all concerned with notice.

SLAVES.

See *Emancipation*, 1; *Pleading*, 1; *Constitutional Law*, 2, 5.

SPECIAL JUDGE.

See *Judges*.

SPIRITUOUS LIQUORS.

See *Construction of Statutes*, 11.

STAMPS.

See *Revenue Stamps*.

STATUTES CONSTRUED.

See *Construction of Statutes*.

STATES.

1. GOVERNMENT OF—*Must be recognized by Congress*.—States have no existence, politically, outside of and independently of the Constitution of the United States, and it rests with Congress to declare what government is established in a State and they must recognize it. *Penn, et al., v. Tollison*, 545.

2. DE FACTO.—There is no such thing as a *de facto* State known to the Constitution of the United States. *Ib.*

3. WHAT GOVERNMENTS ACKNOWLEDGED BY COURTS.—The government recognized by the President of the United States, whether foreign or domestic, is the one acknowledged by the courts. *Ib.*

See *Constitutional Law*, 19, 20; *Officer*, 1.

STATES IN REBELLION.

1. COURTS OF.—The force and effect of all acts of the courts of a State in rebellion depends upon the recognition of the conquering power. *Thompson v. Mankin.*

2. NOT RECOGNIZED AS LEGAL.—The governments, established by the States in rebellion, were never recognized by the government of the United States as the legal State governments. *Ib.*

3. BELLIGERENT RIGHTS OF.—The according of belligerent rights, to a State in rebellion, does not constitute a government *de facto*. *Ib.*

See *Constitutional Law*, 18.

STATUTE OF LIMITATIONS.

1. WHAT WILL SUSPEND.—To suspend the statute of limitations or to remove the bar when it once attaches, there must be an acknowledgment

of the debt or a promise to pay it. If it be an acknowledgment simply, it must be express and to the effect that the debt is due at the time. If it be a promise, that also must be express and pre-supposes an acknowledgment. *Ringo v. Brooks*, 540.

2. SAME.—The acknowledgment or promise must clearly identify the debt; must identify it with such certainty as will determine its character and the amount due; it must be made to a party in interest, to the person to whom the debt is due, or one authorized to act for him, and *with the intent to pay it at the time.*

3. SAME.—Where there is no privity between the parties, a promise or acknowledgment will not suspend the statute.

See *Dower*, 2.

STATUTORY JUDGMENTS.

1. ON DELIVERY BOND.—When an execution is sued out upon a judgment, duly levied upon property, a formal bond taken for its delivery and duly returned forfeited, the former judgment is merged and extinguished, and a statutory judgment springs into existence upon the forfeiture of the forthcoming bond. *Lipscomb v. Grace*, 231.

SUMMARY JUDGMENTS.

See *Statutory Judgments*.

SUPREME COURT.

1. POWERS OF.—Under the present Constitution, the Supreme Court, in the exercise of its original jurisdiction, has power to issue writs of *mandamus* and *quo warranto*. *State v. Johnson*, 281.

2. JURISDICTION OF.—The Constitution having given this court jurdisiction to issue the writs, *with power to hear and determine the same*, the court has the power to determine the facts arising on the writs in which it exercises jurisdiction. *Ib.*

See *Appeals*, 5; *Mandamus*, 9.

SURETIES.

1. A PERSONAL DEFENSE NOT AVAILABLE TO PRINCIPAL.—The defense that a person signs a note as surety, is a personal defense and one that the principal of a note can not set up. *Marshall, Admr., v. Sloan, et al.*, 513.

See *Bankruptcy*, 1.

SURPLUSAGE.

1. WHAT AMOUNTS TO.—Where the words, employed in the reservation of an equitable right, amount to no more than a mere assertion of what the law is, such words are mere surplusage. *Sheppard v. Thomas*, 617.

SURVIVOR.

See *Partnership*, 1, 3, 4.

SWAMP LANDS.

See *Ejectment*, 1.

TAXES AND TAX TITLES.

1. REDEMPTION.—The owner, in order to redeem, is not required to pay to the purchaser taxes paid by him subsequent to the purchase and before redemption. *Stephens v. Holmes, et al.*, 48.

See *Vendor and Vendee*, 1.

TENDER.

1. OF PURCHASE MONEY.—Where vendor wants the purchase money, the deed should be tendered before filing a bill; and where vendee wants a deed, the purchase money should be tendered before filing a bill. *Wakefield v. Johnson, Adm'r*, 506.

TITLES.

See *Ejectment*; *Trusts and Trustees*; *Vendor and Vendee*.

TRESPASS.

1. WHAT PLAINTIFF MUST SHOW.—In trespass the plaintiff must show that he has either the actual or constructive possession of the property sued for. *Mirick v. Britton*, 496.

See *Administration*, 3.

TRIALS.

1. BY JURY—*To what cases extends, etc.*—The right of trial by jury, at common law, did not extend to summary proceedings, nor to civil proceedings against a public officer, and the proceding by *quo warranto* is nothing more nor less than a civil proceeding against a public officer. *State v. Johnson*, 281.

See *Practice*, 15, 31, 33. *Constitutional law*, 5.

TRUSTS AND TRUSTEES.

1. WHEN PRESUMED.—Trusts are never presumed, unless clearly intended by the parties, except in cases where a failure so to declare would operate as a fraud upon one of the parties. *Pillow v. Brown & Childress*, 240.

2. TRUSTEES—*Purchase by, fraudulent.*—The purchase, by a trustee or agent, of the property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it. *White v. Ward and wife*, 445.

3. SAME.—Any such purchase is an abuse of such confidence and relationship, and any title, benefit or advantage derived therefrom, by the purchaser, is, in equity, fraudulently acquired, and inures to the benefit of the *cestui que trust*, or principal. *Ib.*

USURY.

1. HOW PLEADED—Usury should be specifically pleaded; it is not sufficient to aver that a note was made, signed, sealed and delivered at a particular place; facts, sufficient to show the intention of the parties, should be averred. *Laird v. Hodges*, 356.

2. REQUISITES OF PLEA.—A *corrupt agreement* and the *intention* to take or reserve more than the legal rate of interest, are essential ingredients in all usurious contracts, and must be averred in a plea of usury. *Ib.*

VENDOR AND VENDEE.

1. TAX TITLE.—Neither the legal or equitable title to lands or town lots, sold for the non-payment of taxes, vests in the purchaser or holder of the certificate of purchase, until the execution and delivery of the collector's deed, and the relation of vendor and vendee does not exist between the purchaser and owner until such execution and delivery. *Stephens v. Holmes et al.*, 48.

2. VENDORS—*When liable for taxes.*—A plea or answer, by the maker of a note given in part consideration for the purchase of lands, that indorsee of the note knew at the time of the indorsement that there was a controversy between the vendor and vendee (the maker and indorser), concerning who should pay the taxes on the lands so sold, should aver such a character of contract, between the vendor and vendee, as would entitle the vendee to a deed with covenants of general warranty or a bond to that effect. *Scott v. Cantrell*, 226.

3. PURCHASE MONEY—*Failure to pay, not a forfeiture.*—The mere fact that money is due and unpaid, does not create a forfeiture, nor is such neglect regarded, in equity, as a *default*. *Wakefield v. Johnson, adm'r.* 506.

4. DEED AND TENDER OF PAYMENT.—The payment of the purchase money, and the execution of the deed, are acts that are to be *simultaneously* done, and not in the order they happen to be stated in the title bond. *Ib.*

See *Equity Pleading*, 1, 2. *Tender*, 1. *Vendor's Lien*, 1, 2.

VENDOR'S LIEN.

1. WHEN AVAILABLE TO ASSIGNEE, ETC.—When the vendor of lands neither makes nor agrees to make a conveyance until the purchase money is paid, and the vendee's obligations, executed for the purchase money, claim upon their face that they were executed for the specific lands, and the public records show that the vendor holds the title, the vendor's lien is available to the assignee of the notes or obligations, as also to the vendor's legal representatives. *Hutton, adm'r. et al. v. Moore, adm'r.* 382.

2. WHEN NOT AVAILABLE TO ASSIGNEE.—If vendor conveys title without reservation, his lien is an individual equity, of no force until declared by a court of equity and does not pass as a right to an assignee of the purchase money notes. *Ib.*

3. WHERE PERSONAL.—Where the lien reserved is *personal*, the assignment of the notes, given for the purchase money, does not carry with it the lien without words to that effect in the deed. *Sheppard v. Thomas*, 617.

4. WHAT VENDEE SHOULD SHOW.—The vendee should show a waiver of the lien of the vendor, otherwise its retention will be presumed. *Ib.*

See *Equity Pleading*, 1, 2.

VERDICTS.

1. WHEN SET ASIDE—*improper influences.*—The provisions of the Criminal Code of Practice to protect a jury from improper influence, are directory and cautionary, and the omission of the court, in the conduct of a trial, to comply with them, will not, of itself, vitiate a verdict or be cause for a new trial, without some evidence that some prejudice or injury has resulted to the defendant in consequence of the omission. *Thompson v. The State*, 323.

2. WHEN NOT DISTURBED.—Where evidence is adduced and shows that the jury were not in anywise influenced, biased or prejudiced by the exposure, the verdict will not be disturbed. *Ib.*

3. SHOULD SHOW DEGREE IN MURDER.—In an indictment for murder, if the jury find the accused guilty, they should find by their verdict whether it be murder in the first or second degree; and if they fail so to find, by their verdict, the degree of guilt, it cannot be ascertained by reference to the indictment. *Ib.*

4. SAME.—A verdict of conviction in a case of murder, which does not find the degree of murder, is so fatally defective that no judgment can be entered upon it. *Allen v. The State*, 333.

5. WHEN OBJECTION WAIVED—When a verdict is so defective that no judgment can be entered upon it, the defendant who might have had it per-

fected when rendered, is considered as consenting to it, and as waiving any objection to being put to answer before another jury. *Ib.*

6. WHERE DIFFERENT GRADES CHARGED.—In an indictment charging a public offense of different grades, or containing several counts charging different grades of the offense, a general verdict of "guilty, as charged in the indictment," not finding the degree of the offense, it will be presumed that the jury found in favor of the higher grade of the offense charged. *Curtis v. The State*, 439.

7. SHOULD FIND THE DEGREE.—In an indictment for *murder*, a verdict of conviction which does not find the degree of murder, is so fatally defective that no judgment can be entered upon it. *Trammell v. The State*, 534.

8. SAME.——A verdict of conviction in a case of murder, which does not find the degree of murder, is so fatally defective that no judgment can be entered upon it. *Neville v. The State*, 614.

See *Practice*, 17, 26.

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