REPORTS

OF

CASES AT LAW AND IN CHANCERY,

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ARKANSAS.

BY NORVAL W. COX,
OFFICIAL REPORTER.

VOLUME XXVII.

CONTAINING CASES DECIDED AT THE DECEMBER TERM 1871, JUNE TERM 1872, AND DECEMBER TERM 1872.

LITTLE ROCK:
LITTLE ROCK PRINTING AND PUBLISHING COMPANY, PRINTERS.]
1873.

Rec. Aug. 28, 1873

OFFICERS OF THE SUPREME COURT.

HON. JOHN McCLURE, CHIEF JUSTICE.

HON. LAFAYETTE GREGG,
*HON. WILLIAM M. HARRISON,
HON. JOHN E. BENNETT,
HON. ELHANAN J. SEARLE,
†HON. MARSHALL L. STEPHENSON,
} ASSOCIATE JUSTICES.

HON. T. D. W. YONLEY, ATTORNEY GENERAL.
N. W. COX, CLERK AND REPORTER.
WILLIAM S. OLIVER, SHERIFF.

*Term expired January, 1873.
†Elected to fill vacancy caused by expiration of term of Hon. Wm. M. Harrison.

PULASKI CHANCERY COURT.

HON. W. J. WARWICK, CHANCELLOR.

JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT.....HON. W. H. H. CLAYTON.
SECOND CIRCUIT.....HON. WM. F. HENDERSON.
THIRD CIRCUIT.....HON. JAMES W. BUTLER.
FOURTH CIRCUIT.....HON. JAS. H. HUCKLEBERRY.
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. JAMES T. ELLIOTT.
TENTH CIRCUIT.....HON. HENRY B. MORSE.
ELEVENTH CIRCUIT.....HON. JOHN W. FOX.
TWELFTH CIRCUIT.....HON. P. CALLAN DOOLEY.
THIRTEENTH CIRCUIT.....HON. MYRON D. KENT.
FOURTEENTH CIRCUIT.....HON. GEO. A. KINGSTON.
FIFTEENTH CIRCUIT.....HON. LEROY D. BELDIN.
SIXTEENTH CIRCUIT.....HON. ELISHA MEARS.

JUDGES OF THE CRIMINAL COURTS.

PULASKI COUNTY.....HON. CHARLES P. REDMOND.
PHILLIPS COUNTY.....HON. CHARLES C. WATERS.

TRIBUTE OF RESPECT

TO THE MEMORY OF

HON. GEORGE C. WATKINS.

STATE OF ARKANSAS,
IN THE SUPREME COURT:

DECEMBER 16, 1872.

Hon. E. H. ENGLISH announced to the court the death of Hon. GEORGE C. WATKINS, Ex-Chief Justice, 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:

Resolved, That in the many losses that have afflicted our time-honored profession, none in our State has caused deeper emotions of grief than the death of GEORGE C. WATKINS, former Chief Justice of Arkansas, and whose history has been so closely blended with hers for so many years, and with heartfelt sorrow we deplore the loss of one, who in his judicial life, won national reputation by the legal acumen and depth of research that adorned his opinions; who, in his professional life, won the affection and fidelity of his clients by his devotion to duty and their interests, and who, in his social life, enlivened his hearthstone with the love of his children, relatives and friends by his quiet home virtues and hospitality, and his fellowmen by his ready ear and assistance lent to suffering humanity.

Resolved, That while we sadly condole with the children of the deceased, and other members of his family, in this their so great a loss, yet we beg to temper their grief by recalling the noble memories of this most able judge, this excellent lawyer, tender father and guileless christian gentleman.

Resolved, That as a mark of our esteem and sympathy, we attend as a body his funeral, and respectfully request that the judges of the Supreme Court, the judge of the United States Court, and the judges of the Circuit, Chancery and Criminal Courts join with us in thus paying the last tribute of respect to the mortal remains of our departed professional brother.

Resolved, That the chairman of this meeting present these resolutions to the Supreme Court, and that U. M. Rose present a copy of the same to the United States Circuit Court, and Freeman W. Compton present a copy of the same to the Chancery Court, and R. A. Howard present a copy of the same to the Circuit Court, and J. L. Witherspoon present a copy of the same to the Criminal court, prefaced with such remarks as they may deem proper to make, and request that the resolutions may be spread upon the records of the several courts.

The court, by the Hon. LAFAYETTE GREGG, responded to the resolutions, and ordered that the same be spread upon the record.

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ERRATA.

Page 9, line 12, for "*purchases*," read "*discloses*."
Page 24, line 22, for "*precepts*" read "*principles*."
Page 33, line 12, for "*condemnation*," read "*enunciation*."
Page 36, line 20, for "*indorsor*" read "*indorsee*."
Page 37, line 7, for "*manuscript*," read "*transcript*."
Page 55, line 18, for "*prior*," read "*from*."
Page 59, line 16, for "*trial*" read "*final*."
Page 60, line 30, after "*court*," insert "*not*."
Page 87, line 11, for "*trust*," read "*that*."
Page 93, line 32, for "*actually*," read "*adversely*."
Page 98, in *Tuley vs. Ready et al.*, for "*William*," read "*Milton*," wherever it occurs.
Page 109, line 31, after "*dollars*" insert "*ten*."
Page 130, line 31, for "*confidence*," read "*conscience*."
Page 133, line 8, for "*subtly*," read "*subtlety*."
Page 142, line 26, for "*convention*," read "*constitution*."
Page 153, line 29, for "*void*," read "*avoid*."
Page 154, line 17, after the word "*lands*," insert "*within six miles of a navigable water course, and fifty cents per acre for all lands*."
Page 164, line 10, for "*forfeited*," read "*perfected*."
Page 164, line 14, for "*their*," read "*this*."
Page 164, line 15, for "*specification*," read "*specific lien*."
Page 198, line 31, for "*judgment*," read "*payment*."
Page 204, line 14, for "*United States*," read "*State*."
Page 207, line 34, for "*countries*," read "*counties*."
Page 216, line 9, for "*a*," read "*as*."
Page 228, line 26, for "*non-resident*," read "*resident*."
Page 237, line 6, for "*first*," read "*fourth*."
Page 256, line 1, transpose the words "*appellee*" and "*appellant*."
Page 263, line 10, for "*laws*," read "*bars*."
Page 279, line 15, for "*However*," read "*Moreover*."
Page 281, line 29, for "*rate*," read "*vote*."
Page 284, line 15, after "*between*" insert "*these and*."
Page 285, line 18, for "*these*," read "*their*."
Page 285, line 31, for "*considered*," read "*concerned*."
Page 286, line 25, for "*transcripts*," read "*manuscript*."
Page 287, line 27, for "*occasionally*," read "*necessarily*."
Page 291, line 10, for "*Tenn.*," read *Term*."
Page 325, line 27, for "*possession*," read "*evidence of title*."
Page 329, line 20, for "*second*," read "*record*."

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

DECEMBER TERM, A. D. 1871.

ADAMS et al. v. HOBBS.

LANDLORD—*Lien of, when attaches.*—The lien of the landlord, for rent, is a charge upon the crop, and accrues as soon as there is any crop upon which it may attach.

SAME—*Enforcement of, by Attachment.*—Under the Act of December 28, 1860, the process of attachment was designed to give the landlord a more efficient remedy for the enforcement of his rights under the lien, and the attachment, when issued, relates back, as enforcing the lien, to the time when the lien accrued.

PRACTICE—*Judgments in Attachment where Interplea.*—Under the Act of January 9, 1861, where property attached is interpleaded for, the judgment, when against the defendant in the original suit, should be against him with an order of execution against the property attached, in the event the interplea should be determined in favor of the plaintiff.

INTERPLEADER—*Judgment on.*—On trial of the interplea, if the property be found subject to the attachment, the judgment should be that the plaintiff have execution against the property, and if the same is not delivered to the sheriff by the interpleader, on demand, that execution issue, on the return of the facts in the *scire facias* by the sheriff, against the interpleader and his securities.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Watkins & Rose, for Appellants.

There was no breach of the bond, under the law at that

time, until after execution against the interpleader, and a failure by him to deliver up the property. *See Acts* 1860, *p.* 299.

The bond was conditioned to deliver to the "sheriff or his successor in office, whenever demanded by such sheriff, after execution upon such judgment should come to his hands to be levied therein." The law on the subject has never been changed, and no change could affect the liability of the sureties after the execution of the bond. *Woodruff vs. State*, 3 *Ark.*, 285; *Curran vs. State*, 12 *Ark.*, 321.

Garland & Nash and *Wassell & Moore*, for Appellee.

The only point in the case has already been decided by this court, directly upholding the decision of the court below. *Sevier vs. Shaw, et al.*, 25 *Ark.*, 417.

We submit, the case ought to be affirmed, with damages. 14 *Ark.*, 171; 10 *Ark.*, 494.

SEARLE, J.—The statement of this case, as far as may be necessary to evolve the questions to be decided, is simply as follows:

The appellee brought suit, by attachment against one Zane, in the Pulaski Circuit Court. The attachment was levied on the 30th day of December, 1867, upon Zane's cotton (85 bales) to enforce a landlord's lien, under a lease, from Hobbs to Zane, of the plantation upon which the cotton was produced. Pending the attachment, Adams, one of the appellants, having, by interplea, claimed the cotton, so levied upon, under a mortgage executed subsequently to the execution of said lease, and before the attachment was levied, and upon his executing a bond, with Tibbetts and Taylor as securities, in favor of Hobbs, the cotton was turned over to him on the 1st day of January, 1868. The trial came on to be heard, at the May term, 1869, of the Pulaski Circuit Court. On the 1st day of July, 1869, judgment by default was rendered against Zane,

in the attachment suit. On the same day the interplea was tried by the court, sitting as a jury, and judgment rendered against Adams, the interpleader, and Tibbetts and Taylor, his securities, from which they appeal to this court.

By the assignment of errors, two questions are presented for consideration, namely:

First—Was the landlord's lien paramount to the lien created by the mortgage?

Second—Was the judgment, on the trial of the interplea, properly rendered against the appellant and his securities?

The first inquiry is virtually answered by the opinion of this court, in *Sevier, adm'r, vs. Shaw, Barbour & Co.*, 25 *Ark.*, 417. In that case, this court held "that the lien of the landlord is a charge upon the crop for the payment of the rent, and accrues as soon as there is any crop upon which it may attach, and does not in any manner depend upon the maturity of the rent. * * * The Act of December 28, 1860, which gives the landlord the process of attachment for enforcing his lien, declares that the proceeding may be commenced before the rent is due." The process of attachment is simply designed to give the landlord a more efficient remedy to enforce his rights under the lien, when the tenant is disposed, fraudulently, to remove the crops from the premises and dispose of them. From the above observations, it will be seen that, as soon as the writ of attachment is sued out, it relates back as enforcing the landlord's lien, as soon as his right to a lien accrues. In the case before us, Adams took the mortgage subject to the lien, as the same was executed after the lien had accrued. The judgment, therefore, of the court below, in declaring the cotton in controversy subject to the levy of the attachment, was not erroneous.

Second—The other question is: was the judgment, upon the determination of the interplea, properly rendered against the interpleader and his securities upon the bond? This interplea was interposed and determined under the provisions of the Act of January 19, 1861, and from this Act we must

determine whether or not the judgment was properly rendered.

This act (Sec. 1.) provides that when any sheriff shall levy a writ of attachment upon any property claimed by any person, not a party to such writ, such person may reclaim such property, by making oath that the property is his, and by giving bond, in favor of the plaintiff in the attachment suit, with good and sufficient securities, etc., conditioned that he will interplead at the term of the court to which the writ shall be returnable, and that he will prosecute such interpleader to judgment, without delay. And further, the act requires that if the plaintiff shall recover judgment against the defendant, (in the original suit) the property so reclaimed shall be delivered to the sheriff, or his successor in office, whenever demanded by such sheriff; after execution upon such judgment (in the original suit) shall come to his hands to be levied thereon, etc.; and then it provides that if any person, to whom such property is so returned, shall refuse or neglect to deliver the property to the sheriff, according to the condition of the bond, it is made the duty of the sheriff to return the writ of *fieri facias* issued, upon the judgment rendered in the original suit, setting forth the facts that the condition of the bond has been broken. It is also provided that the bond shall contain that, in case the property so levied upon shall not be delivered as provided for in the act, it shall have the force and effect of a judgment, etc. And *Sec.* 2, of the act, provides that on the return of the writ, showing the forfeiture of the bond, execution shall issue against all the obligors in the bond, etc.

In the case before us, we find that the court first tried the original suit, rendered judgment by default against Zane, and *ordered execution against the cotton attached*, in the event that the interplea should be determined in favor of the plaintiff. The court then tried and determined the interplea, finding that the cotton levied on was subject to the attachment, and rendering the following judgment:—"It is thereupon considered

that said plaintiff have execution against said cotton, and if the same is not delivered to the sheriff of Pulaski county, by said interpleader, on demand, that execution issue on the return of the facts in the *fieri facias*, by said sheriff, against John D. Adams, Jonas M. Tibbetts and Charles M. Taylor, on the interpleader bond, for the sum of two thousand nine hundred and five dollars, or so much thereof as will be sufficient to satisfy the said damages and costs," etc. It will be seen from the above brief synopsis of the act of January 19, 1861, and the trials and judgments in this case, under the provisions of this act, that the latter followed the former with almost unnecessary particularity. The act requires that execution shall issue upon the judgment, in the original suit, against the defendant, in this case, *in rem*, against the cotton alone, by the agreement of the parties, and that in the event the property is not re-delivered, the sheriff shall return the *fieri facias*, with a showing that the condition of the bond is broken. So the court adjudged and ordered in almost the language of the act. The act requires that on such return and showing of the forfeiture of the bond, the clerk shall issue an execution, in favor of the plaintiff, against all the obligors in the bond, and so the court ordered. We cannot therefore discover that there was any error in the court below in this matter.

Finding no error in any of the proceedings in the trial and disposition of this case, in the court below, the judgment is affirmed with costs.

BUCK et al. v. MARTIN et al.

PURCHASE WITHOUT NOTICE—*What plea or answer must state, etc.*—In setting up a *bona fide* purchase without notice, the plea or answer must state, briefly, the contents of the deed of purchase; that the vendor was *seized in fee* and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous *to, and down to the time of paying the money* and the delivery of the deed, and, if notice is specially charged, the denial must be of *all the circumstances referred to* from which notice *can be inferred*, and it must show *how the grantor acquired title.*

What the title must be.—The title purchased must be apparently perfect—good at law—a vested estate in fee simple—it must be a regular conveyance.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Wassell & Moore and *Bell & Carlton*, for Appellants.

We submit that, as appellants had no notice of the liens when the case was tried, the appellee's equitable lien could not be enforced against him, an innocent purchaser, without notice. *Shall vs. Biscoe*, 18 *Ark.* 142; *Scott vs. Orbison*, 21 *Ark.* 202.

MCCLURE, C. J.—In January, of 1867, Lucy J. Martin, by her deed of that date, conveyed to one Thomas A. Hinton, (who is also a party defendant to this suit) certain property in the town of Pine Bluff. The consideration, named in said conveyance, is a certain forty acres of land described in said deed and one note, at twelve months, for two hundred and fifty dollars, signed by said Hinton. The complaint, of Lucy J. Martin, alleges that on the 19th day of February, 1867, the said Hinton, by a mortgage deed, conveyed said lands to the defendant, John L. Buck, to secure the payment of certain sums of money in said mortgage deed mentioned. That said mortgage deed was filed, for record, subsequent to the filing of the deed from the complainant to Hinton, and that said mortgage deed recites that there was due and payable on said

Pine Bluff property, the sum of two hundred and fifty dollars, with interest, etc. The bill concludes with a prayer for the amount of said note and interest, and that said land be sold to satisfy the same, etc.

John L. Buck is the only one of the defendants who made answer in the court below. In his answer he alleges that, about the 19th day of February, 1867, said Hinton applied to him to borrow certain moneys, and offered to execute to said respondent, (Buck) a deed of mortgage, on the Pine Bluff property, to secure the same. That he inquired as to title, and was informed by said Hinton that he had an absolute deed to said lot, given in exchange for other land; that Hinton was in possession, and, on examining the records, he could not find the deed, and therefore relied on the statements of said Hinton, and, having no information or notice of said complainant's claim or pretended lien, accepted said deed of trust in good faith and without any notice whatever of complainant's equity or lien, and denies that she had any; that when said sum of money, secured by said deed of trust, matured, and the same being unpaid, said lots of land were sold under the provisions of said deed, and the respondent became the purchaser; that he is in possession under said deed of purchase, and that he is a purchaser for a valuable consideration without notice and entitled to the protection of the court, etc.

At the hearing below, the complaint was decreed to be taken as confessed as to all of the defendants, save John L. Buck. The court further decreed a vendor's lien upon the land, hereinbefore mentioned, for $289 00, and ordered that the same be sold in default of payment. From this decree, Buck appealed to this court.

The question presented is, does the response of Buck show him to be an innocent purchaser? The rule laid down by the Supreme Court of the United States, in the case of *Boone vs. Chiles* (10 *Peters*, 177), was, that "in setting up a *bona fide* purchase without notice, by plea or answer, it must state the deed of purchase, the date, parties and contents briefly; that

the vendor *was seized in fee* and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous *to, and down to the time of paying the money*, and the delivery of the deed, and if notice is specially charged, the denial must be of *all the circumstances referred to*, from which notice *can be inferred;* and the answer or plea must show *how* the *grantor acquired title;* the title purchased must be apparently perfect; good at law; a vested estate in fee simple. It must be a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor." Does the respondent, Buck, bring himself within this rule? We think not.

The complaint alleges that the deed from Mrs. Martin to Hinton recites the non-payment of two hundred and fifty dollars of the purchase money; it also alleges that the deed of mortgage, from Hinton to Buck, recites the non-payment of two hundred and fifty dollars of the purchase money. These are allegations charging notice of the existence of the lien of the vendor. The only denial Buck makes of this charge is, that he examined the record and found no deed from Mrs. Martin to Hinton, and because he found no such deed, that he relied on Hinton's statements as to title; but there is no denial that the deed of mortgage, from Hinton to himself, does not recite the non-payment of the two hundred and fifty dollars. If such a recital existed in the mortgage, it is apparent that he had notice of the existence of the vendor's lien. In the absence of any deed upon record from Mrs. Martin to Hinton, it is but natural that he, as a prudent man, examined the deed itself; if he did, then the deed was notice to him of the non-payment of a part of the purchase money. But be this as it may, if he expects to rely upon the fact of being an innocent purchaser, he must bring himself within the rule. To do this, he was bound to plead the deed from Mrs. Martin to Hinton. Had he done this, he would have pleaded notice to himself; had he pleaded the deed of

mortgage from Hinton to himself, and this he was bound to do to bring himself within the rule, the fact would have become apparent that he had notice at the time he took his mortgage. If the deed had acknowledged the entire payment of the purchase money, and the mortgage had made no allusion to the two hundred and fifty dollars due to Mrs. Martin, and he had pleaded these things, he then would have stood before this court in the light of an innocent purchaser. Where one relies upon protection on the ground of being an innocent purchaser without notice, it is incumbent on him, who sets it up, to establish a legal title in his vendor. If, however, in doing this, he purchases an equity in some one else, he cannot plead his ignorance of that equity, to establish the fact that he is a purchaser without notice. In this case notice is specially charged; there is no denial of the circumstances referred to, in the complaint, or is there anything in the answer, showing title in either Buck or his vendor. No vested estate in fee simple has been shown to exist in Hinton, which did not also show that the purchase money had not all been paid. For these reasons, and finding no error in the proceedings of the court below, the judgment is affirmed.

COLLIER, Adm'r, v. KILCREASE, Adm'r.

ADMINISTRATION—*Revocation of Letters, etc.*—On affidavit filed, by a party interested in an estate, that the administrator is *insolvent*, it is error in the Probate Court to revoke the letters of administration, without requiring the administrator to give additional bond, and without any showing that his securities were not ample.

APPEALS—*Should be tried de novo.*—Appeals from the Probate to the Circuit Courts should be tried anew.

APPEAL FROM RANDOLPH CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

English, Gantt & English, for Appellant.

1. The Probate Court may revoke letters, on affidavit, notice and proof when an executor or administrator *becomes of unsound mind*, or *wastes* or *mismanages the estate*, or acts so as to *endanger his co-executor*. *Gould's Digest, ch.* 4, *sec.* 35.

2. On an affidavit that an administrator is *likely* to *become insolvent*, the Probate Court may require him to give a new bond (as well as for other causes named in the statute), and if he fails to give the new bond, may then revoke his letters. *Gould's Digest, ch.* 4, *sec.* 36–7–8, *pp.* 110–11; *Renfro vs. White*, 23 *Ark.*, 195; *State vs. Stroop*, 22 *Ib.*, 328.

SEARLE, J.—Collier was the duly appointed administrator of the estate of Wilson, deceased. Kilcrease, who had married Wilson's widow, filed an affidavit in the Probate Court of Randolph county, in January, 1869, stating that he had reason to believe that Collier was likely to become insolvent, and prayed the court to revoke his letters of administration.

The evidence, upon the hearing of the matter, was to the effect that Collier was insolvent. The court ordered the revocation of his letters, from which Collier appealed to the Circuit Court. The Circuit Court affirmed the order, and Collier appealed to this court.

The only question to be determined, in this case, is, did the

affidavit and evidence show a sufficient legal ground for the revoking of Collier's letters of administration? It is discoverable, at a glance, that the application and affidavit were made under *sec.* 36, *ch.* 4, *Gould's Digest.* This section provides that if any heir, legatee, creditor, security, or other person interested in any estate, shall file in the Probate Court, etc., an affidavit, stating that the affiant has reason to believe that the principal in the executor's or administrator's bond has become, or is likely to become insolvent, and shall have given the principal fifteen days' notice of the time and place of hearing such complaint, "The court shall examine the same and make such order as shall seem proper."

Does the clause, "the court shall examine the same and make such order as shall seem proper," give such court, upon a sufficient showing of such insolvency, the power of at once revoking the letters of administration, or does it only authorize it to make such order as may seem proper in relation to the giving of an additional bond? Undoubtedly, we think, the latter. For by sections 37 and 38, of the same chapter, which seems to have been designed to carry out and perfect the provisions of section 36, it is declared that, if an additional bond be given, it shall discharge the former securities from any liability, etc., after the approval and filing of such additional bond, and that, in the event of a failure to give such additional security as may be required by the court, within ten days after the making of the order requiring additional security, the letters of such administrator shall thenceforth be revoked and his authority cease at that time. It is further to be observed, that it is only in those cases and for those causes where the administration law explicitly provides for it, may letters, etc., be revoked, without first requiring additional bonds. Here the Probate Court arbitrarily revoked the letters without requiring Collier to give additional bond, and without any showing that his securities were not ample.

It appears from the transcript, further, that the Circuit Court did not try the case anew upon the appeal, but simply,

upon reviewing the transcript from the Probate Court, declared that there was no error, and affirmed the judgment. The Circuit Court should have tried the case anew. See *Smith & Bro. vs. VanGilder*, 26 *Ark.*, 527.

For the errors indicated the judgment is reversed, and the cause is remanded to the Circuit Court with instructions to try the case anew and not inconsistent with this opinion.

RAMSEY v. CARHART.

QUO WARRANTO—*Will not issue on the relation of private person.*—The writ of *quo warranto* will only issue on the relation of the Attorney General, in the name of the State, in cases where the whole community are interested, and will not be granted at the instance of an individual for the determination of a *private right.*

PETITION FOR QUO WARRANTO.

Watkins & Rose, for Petitioner.

As to the objection that the writ of *quo warranto* can only be brought on the relation of the Attorney General, and not on the relation of any other person, we submit:

That the amendment of the law by *Sec.* 525, of the Code, was merely the adoption of the English statute of 9 *Anne, ch.* 20.

The Code proceeding is only the *quo warranto*, of the common law, codified, and it does not lie in the Code to impair the jurisdiction of this court, by prescribing new forms, though the Code or any other statute, may prescribe the manner of proceeding in any of the courts. *State vs. Graham*, 1 *Ark.*, 428; *Anthony, ex-parte*, 5 *Id.* 358; *Miller v. Heard, Id* 75.

Montgomery & Warwick, for Defendant.

McCLURE, C. J.—The only question presented, by this case, is, whether a *quo warranto* will issue on the relation of a private person? It was held, in the *State vs. Ashley*, 1 *Ark.*, 279; in *Caldwell vs. Bell & Graham*, 6 *Ark.*, 227, and the *State vs. Williams*, that the writ of *quo warranto* would only issue on the relation of the Attorney General, in the name of the State, in cases where the whole community are interested, and would not be granted at the instance of an individual for the determination of a *private right.*

The counsel for the appellant ask: "Will any one say that the jurisdiction of this court depends upon the breath of the Attorney General?" and in response to the question, says, "God forbid." In response to the query propounded by counsel, this court takes occasion to say, that the jurisdiction of this court is derived from and regulated by the Constitution of the State, but it is for the Attorney General to see whether the offices or franchises of the State have been usurped; he is the law officer of the government, and is presumed to discharge his duty. The office, in controversy, is one created by the Constitution; it is a grant of power by the people; the Attorney General is their highest law officer, and so long as the "people" do not complain, through him, of usurpation of an office or franchise, it is but fair to presume that no usurpation has taken place. It may be asked, if this be true, how can one, entitled to an office, get possession of it, if *quo warranto* is denied, or the Attorney General refuses to discharge his sworn duty? *Section* 525, of the Civil Code, declares that, "Whenever a person usurps an office to which he is not entitled by law, an action, by proceedings at law, may be instituted against him, either by the State, *or the party entitled to the office.*" This section furnishes the complainant, in this case, with a full and perfect remedy to assert and maintain his right to the office he claims, and neither the neglect of the Attorney General, nor a denial of jurisdiction in this court, in any manner, interferes with his remedy.

Quo warranto was invented, originally, *not* to determine

which of two persons were entitled to an office, but to require the incumbent to show by what authority he was exercising or attempting to exercise the duties of an office, created by sovereign authority. The issue was between the *State and the person in office;* and not between two persons who claimed the right to exercise its duties. In short, quo warranto is the writ of the *State* and only issues at the instance of the State. It was not, nor is it now designed or used as a remedy, at law, by which *individuals* may contest the right to an office. The Legislature has provided a separate remedy for the determination of such a question, and the parties must seek the remedies provided for them, instead of one provided for the *State.*

The writ is denied and the cause ordered to be stricken from the docket.

GREGG, J., dissenting.

CAMPBELL v. GOODRICH.

PETITION FOR QUO WARRANTO.

W. J. Thompson and *Watkins & Rose*, for Petitioner.
Montgomery & Warwick, for Defendant.

MCCLURE, C. J.—The doctrine announced in *Ramsey vs. Carhart*, disposes of the only question in this case.

Quo warranto denied, and the case will be stricken from the docket.

GREGG, J., dissenting.

HILL v. SEWELL.

SHERIFFS—*Liability in levying executions, etc.*—Where an execution, against principal and security, comes to the hands of the sheriff, and through neglect, want of diligence, favor or extension of time, by the sheriff, he fails to make the money out of the principal, or the principal become insolvent, the sheriff becomes responsible to the security for the amount he may be forced to pay.

SECURITY—*When protected in equity.*—When a sheriff, without the consent of the security, through favor or extension of time to a principal, pays off an execution, in his hands, against principal and security, and procures an assignment of the execution to himself, equity will enjoin him from proceeding against the security for the amount so paid.

APPEAL FROM UNION CIRCUIT COURT.

HON. G. W. MCCOWN, *Circuit Judge.*

Watkins & Rose, for Appellant.

In this case we take it that if the law would subrogate the negligent sheriff to the rights of the creditor, whose judgments he had paid, an assignment would be useless; and that an assignment could not impose any additional burden on the surety, which was not inherent in the nature of the situation. Otherwise his liability in the end might be made to depend on the terms of a contract between other parties, of the existence of which at the time he had no knowledge. But sureties cannot be concluded by any fabricated account between third persons. *United States vs. Boyd*, 5 *How., U. S.* 29.

"Subrogation is not to be allowed, except in a clear case, and when it works no injustice to others." *Lloyd vs. Galbraith*, 32 *Penn.*, 103. Even if a stranger had the judgments without being delinquent in respect thereof. *Dunn vs. Nichols*, 25 *Ark.*, 129; *see also Rusk vs. Ramsey*, 3 *Munf.*, 417; *Hammond vs. Chamberlin*, 26 *Vt.*, 406; *Miller vs Dyer*, 1 *Duval (Ky.)* 263. The case of *Finn vs. Stratton*, relied upon by appellee, has been overruled, and is not law. *See Com. vs. Stratton*, 7 *J. J. M.*, 90; *Stan. Com.* 2 *Dana* 397, *and Rawe vs. Williams*, 7 *B. M.*

John H. Carlton and *Garland & Nash*, for Appellee.

Mere indulgence does not release the security. *King & Houston vs. Bank, etc.*, 9 *Ark.*, 189, 190; 13 *Miss. Rep.*, 125; 5 *Cal.* 173; 3 *Cowan*, 446. Not even when the principal, in the meantime, becomes insolvent; 14 *Miss.*, 473. Nor when the principal dies, and the creditor neglects to prove his claims against the estate of the principal, until it is barred by the statute of non-claim. *Ashley, et al., vs. Johnston, et al.*, 23 *Ark.* 165; *citing Johnston vs. Planter's Bank*, 4 *Smede & Marshall*, 171; *Cohen, et al., vs. Com. of S. F.* 7; *Ibid* 441: *Marshall vs. Hudson*, 9 *Yerg.* 63; *McBroom vs. Governor*, 8 *Porter*, 33; *Wisinger vs. Cawthorn*, 6 *Ala.*, 716.

But by *sections* 1 *and* 2, *chapter* 157, *Gould's Digest*, 1015, appellant might have given Grinnet notice in writing to proceed against the principal, Witherington, and if the plaintiff had delayed even thirty days, appellant would have been discharged. *State Bank vs. Watkins*, 6 *Ark.*, 123; *Ib.* 317; *Caldwell vs. McVickers*, 9 *Ark.*, 418; *Cummins & Fenno vs. Garretson*, 15 *Ark.*, 132; 14 *Ark.*, 216. But he slept on his rights *then*, and *can't* be heard *now*.

"The right of the officer to occupy, by substitution, the place of the plaintiff in an execution, to whom he has paid the amount, is founded on principles of unquestionable justice." *Finn vs. Stratton*, 5 *J. J., Marshall* 366; *Bray vs. Howard*, 7 *B. Monroe* 467; 5 *Mon.*, 128 *Ky.*

GREGG, J.—On the 27th day of March, 1861, the appellant presented his bill, to the Judge of the Sixth Judicial Circuit, for an injunction. He alleged, therein, that on the 2d day of April, 1859, one Grinnett, as guardian, etc., recovered two judgments against A. L. Worthington, each for $1301 61, and on the 29th day of the next July, he caused executions to issue, which, on the 27th day of September following, were respectively duly levied, and the appellant then became security on Witherington's delivery bonds; that the property thus released was not delivered, and the bonds were returned

forfeited. That on the 1st of November, 1859, executions were issued on these forfeited bonds, and on the 7th of the same month, delivered to the appellee, who was then sheriff of Union county, to be by him levied and collected. That he gave no notice to the appellant, and on the return day of these executions, endorsed them wholly unsatisfied, and returned them without the knowledge or consent of the appellant. That during the time the sheriff so held these executions, Worthington had ample property, visible and subject to execution in the county, out of which the sheriff could have levied and collected said amounts, but that he, without the knowledge of the appellant, took the promise of Worthington that he would pay the money on or before the return day, which he failed to do, and after the return of the executions, to avoid a rule being made against him, because of the failure to levy and collect, the appellee paid them off.

That in 1860 or 1861, Worthington became much embarrassed, and with the knowledge and consent of the appellee, left the State, and that afterwards, when there was no hope of making the money out of Worthington, the appellee, for his own benefit, and to reimburse himself for the moneys he had so paid out, on the 20th day of March, 1861, caused other executions to be issued, on said forfeited delivery bonds, and directed the then sheriff of said county to make said amounts out of the property of the appellant, and that said sheriff was proceeding to collect the same, and he prayed an injunction; a temporary injunction was issued. The cause then slept over the war; after which, depositions were taken, and in April, 1870, it came on for final hearing, and the court found that there was no equity in the bill, and decreed that it be dismissed for want of equity, and that the appellant pay all costs, from which decree he appealed to this court.

The case of *Finn vs. Stratton*, 5 *J. J. Marshall*, 366, referred to by the appellee, is exactly in point in his favor. Judge Buchanan, in that case, held very strongly in favor of the sheriff, and that, wherein his misconduct had prejudiced a

security; but the Supreme Court of his State refused to follow that ruling. In the case of *Staton vs. The Commonwealth, etc.*, 2 *Dana*, 377, they held a sheriff liable to a security who had been forced to pay, because the sheriff had levied a junior instead of a senior execution; and in the case of *Rowe vs. Williams*, 7 *B. Monroe*, 206, wherein the sheriff held an execution against a principal and his security, in an injunction bond, and having levied upon the property of the principal debtor, through his neglect, the property was run off and the levy lost, upon the security being compelled to pay off the debt, that court held that the sheriff was liable to the security, in an action, for the amount he had been compelled so to pay; and in a later case of *Miller vs. Dyer, etc.*, 1 *Duval*, 263, the case of *Finn vs. Stratton* is expressly overruled; in this last case, by the neglect of the sheriff, he became liable and paid off the judgment and procured an assignment of the execution to himself, and attempted to make the money out of the security, who applied for an injunction, and the court said he was entitled to that relief, in equity, because, if forced to pay, he could then sue the sheriff and recover back from him; and these established rulings, of the Kentucky courts, fully sustain the appellant. See also, 7 *J. J. Marshall*, 90; *Staton et al., vs. Commonwealth*, 2 *Dana*, 397; 2 *Johns*, 445; 3 *Munf.*, 417. In this case, the appellee did not deny but that Witherington had ample property, subject to execution, during all the time the writs were in his hands, against him and the appellant, and if he had, that fact was abundantly proven. Nor is it pretended but that the appellee could have collected the money from the principal debtor, if he had made an effort so to do. At his own risk, he chose to favor the debtor, and declined to make the levy upon his promise that he would pay.

It is a principle well understood that, where a burden must fall between parties alike indifferent as to the beneficial considerations, it should be borne by him who had been most in fault; he, whose action has most contributed to an inequitable

result, should bear that responsibility. In this case, there is another and strong reason why the law should be as it is; the appellee was a public officer, sworn to a faithful performance of his duties. The well being and peace of society depends much upon the prompt and efficient enforcement of all the laws; without that, the rights of none are secure, and when such an officer departs from the line of his duty, as marked out by the law, he is held to a rigid account, and if loss must fall between him and one not at fault, the law readily throws the damages upon him.

This was not a mere neglect of duty on the part of a public officer, but was, as shown clearly by the evidence, a willful and intentional assumption of responsibility to extend time to the principal debtor, by reason of which he became insolvent before the debts could be collected, and this well illustrates the propriety of the rule that throws the responsibility upon him; his own wrong and neglect should not burden another less at fault than himself, and the appellant was no more bound by the bond he had given to release the property, in this case, than was the appellee by the bond he had given to execute the duties of his office in all cases.

The decree of the court below is reversed, and this cause is remanded to the court with directions to grant a perpetual injunction and adjudge costs against the appellee.

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HIGHTOWER et al. v. HANDLIN & VENNEYS.

SUPREME COURT—*Jurisdiction of, in matters of cost.*—Where it is decided that an inferior court had no jurisdiction in a cause, this court, on appeal, can render no judgment for such costs as have accrued in that court, but it is proper to render judgment for the costs made in this court, against the party bringing suit.

EXECUTIONS—*Requisites of.*—An execution must be authorized by a judgment, and must follow it in every essential particular, not only as to material matters of form, but also as to the amount for which it is rendered.

SAME—*When sales made, void.*—Where several levies and sales are made for separate sums, only such sales or levies would be void as are made to satisfy the amount in excess of the judgment; but where one sale is made to satisfy the sum actually due, and the execution has been issued for a sum greatly in excess of that sum, the whole proceeding will be declared void.

SAME—*Recourse of purchaser, when proceedings void, etc.*—Where the judgment of a court, or an execution issued thereon, is declared void, by competent authority, the purchaser, under such sale, takes nothing, but would have recourse upon the sheriff, who made the sale, for the money paid at it.

SAME—*Where sale made after return day.*—The sale of real estate, under an execution, after the return day, is without authority and void.

PETITION TO QUASH EXECUTION.

Gallagher, Newton & Hempstead, for Plaintiffs.

1. Courts have power over their own process, when deed has not been executed, approved, etc. *State Bank vs. Noland*, 13 *Ark.*, 301; 6 *Ark.*, 425; 10 *Ark.*, 541.

2. Judgment for costs cannot be rendered when courts have no jurisdiction. 5 *Eng.*, 569; 21 *Ark.*, 93.

3. At the time of the issuance of the execution and pretended sale, the terms of the Supreme Court were the third Mondays of April and October of each year. *Acts of* 1868, *p.* 144.

4. Executions issued from any court of record should be returnable the second day of next term thereafter. *Gould's Digest, p.* 501, *sec.* 9.

5. Judgment should have been for costs of Supreme Court only. *Gould's Digest*, 284, *sec.* 89.

6. A sale after the returning day is void. 3 *Smeede & Marshal*, 471. Should have been sold under *ven. ex.* *Young vs. Smith*, 23 *Texas*, 598; *Newton vs. State Bank*, 14 *Ark.*, 9.

7. Sale, under execution for much greater amount than judgment, void even as against *bona fide* purchaser. *Harlings vs. Johnson*, 1 *Nev.*, 613.

T. D. W. Yonley, for Defendants.

BENNETT, J.—On the 2d day of December, A. D. 1867, William H. Norton, *et al.*, recovered a judgment against the plaintiffs in a certain cause, then pending in this court, wherein said Norton, *et al.*, were appellants, and said plaintiffs, as heirs-at-law of Joseph Miller, deceased, were appellees, on appeal from the Circuit Court, in chancery, of Sebastian county, for the Fort Smith district.

The judgment of this court was, that "the decree of said Circuit Court, in chancery, in this cause be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with *costs;* and that this cause be remanded to said Circuit Court, in chancery, with instructions to dismiss the bill for want of jurisdiction.

"It is further ordered and decreed that said appellants recover of said appellees all their costs in this court, in this cause expended, and have execution thereof."

On the 2d day of September, A. D. 1868, an execution was issued from this court upon said judgment for costs, not only for the amount of the costs of the parties in the Supreme Court, which were taxed at $25 00, but also for the costs of the Circuit Court, which amounted to $151 75, in all, amounting to $178 60, with the cost of issuing the execution.

This execution was returnable, by law, on the 20th day of October, 1868, which was the second day of the next October term.

It came to the hands of the Sheriff of Sebastian county, to whom it was directed, on the 7th day of September, A. D. 1868, to be executed, and was by him levied upon the follow-

ing property, to-wit: Lot No. 12, in Block No. 15, in the city of Fort Smith, and was advertised to be sold on the 26th day of October, 1868, and was by him offered for sale and sold to these defendants, for $25 00. These facts appear from the endorsements and return of the sheriff upon the execution.

The plaintiffs have filed their petition in this court to set aside the sale and return of the sheriff, under the execution, and to declare the same void; because,

First. If the court had no jurisdiction of the subject matter in controversy, it could not render a judgment for cost.

Second. Because the sale, under the execution, was made six days after it should have been returned.

The first proposition, to which our attention is directed, would be correct if this court, in deciding the case, had said it had no jurisdiction; but it has done no such thing. It has merely said that the Circuit Court, from which the appeal came, had no jurisdiction of the matter in controversy.

This court acquires jurisdiction, in such matters as are not original, by virtue of the prayer for, and the order granting the appeal. When that is regular, the jurisdiction is complete here. The question of jurisdiction in inferior courts, in certain cases, is, often, one of an intricate nature, and can only be settled by the highest tribunal in the State; but when once decided that the inferior court had no jurisdiction, there can be no judgment rendered for such costs as have accrued in that court, but it is proper to render judgment for the costs made in this court against the party bringing suit. In the case before us, the Clerk of the Circuit Court certified the costs made in that court, and the clerk of this court added them to those made here, which was erroneous.

But will this protect the petitioners against a *bona fide* purchaser at a judicial sale?

It has been well settled, we think, that an execution must be authorized by the judgment, and must follow it in every essential particular, not only as to material matters of form, but also as to amount for which it is rendered.

While it is not incumbent upon bidders and purchasers, at judicial sales, to inquire into any irregularity which may have been permitted by the court rendering the judgment, or the clerk in issuing the execution, if it is regular upon its face; yet, if for any cause the proceedings of either should be declared void, by competent authority, he could not take anything by reason of such sale, but would have recourse upon the sheriff, who made the sale, for the money he paid at it.

When several levies and sales are made for separate sums, only such sales, or levies, would be considered void as are made to satisfy the amount in excess of the judgment. If, however, but one sale is made to satisfy the sum actually due, and the execution has been issued for a sum greatly in excess of that sum, the error can only be remedied by setting aside and declaring void the entire proceeding under the execution.

The case of *Knight vs. Applegate's heirs*, 3 *Monroe*, 336, is in point. An execution was levied for about forty-two dollars more than the judgment authorized, and the court, for that reason, held that the sale bond could not be sustained. Judge Owsley, who delivered the opinion of the court, after holding that the execution was void, proceeded to say: "To uphold a sale of land, made under an execution, by an officer, it is not enough that the execution purports upon its face to be regular, and appears to have emanated from competent authority, there must also be a judgment to which the sale money is to be applied. The reason is obvious; lands are made subject to sale under writs of *fieri facias* by statutory enactment, and it is only in satisfaction of judgments that the statute has authorized the sale, there must, of course, be a judgment to which the proceeds of the sale may be applied to make the sale a valid one. It would, therefore, judging from the facts proved on the trial of the motion, seem to follow that the sale bond cannot be sustained, for the land appears to have been sold, and the bond taken for a sum equal to that mentioned in the execution, which issued in favor of Knight, against the estate of Applegate, and as the judgment

in favor of Knight, is in fact, far less than the execution, there is no judgment to which the excess contained in the execution, and included in the bond could be applied."

Chief Justice Lewis, in the case of *Hastings vs. Johnson*, 1 *Nevada*, 615, says: "That an execution issued and sale of property made, when there is no judgment authorizing it, would be utterly void, there can be no doubt, and for the same reason, we think that an execution and sale for a sum exceeding that actually due upon the judgment, would be equally void, because there is no judgment to authorize the collection of the excess for which execution is issued. When the discrepancy between the judgment and the execution is a mere trifle, levy and sale will not be disturbed, because it is said, *lex non curat de minimis;* but when the discrepancy is material, it cannot be overlooked or disregarded by the courts." The same doctrine is announced in the case of *Peck vs. Tiffany*, 2 *Comstock*, 458. By reference to the judgment in this case, we find there was none for money, except for the costs of this court, which appears by the allegation of the petition, and not denied, to have been twenty-five $\frac{20}{100}$ dollars; but the execution called for one hundred and seventy-six $\frac{95}{100}$ dollars, over six times the amount. In accordance with the precepts, as laid down in the above cited cases, and in accordance with our own judgment, we consider the sale of land, under such circumstances, voidable, and in such cases the sale may be set aside, even though the right of *bona fide* purchasers have intervened.

As to the second cause, why the sale should be set aside, we think it, if possible, more conclusive than the first. A sale under an execution, of real estate, after the return day, is void and without authority, as the power conferred by the writ was non-existent.

It was held in the case of *Lehr vs. Dale, ex dem. Rogers*, 3 *Smeede & Marshall*, 471: "If we view the execution as, in law, returnable to the April term, it is manifest that a sale made under it, in July, 1841, was irregular, and conferred no

title. The sheriff having been bound by law to make a return of the writ to the April term, it had, at this time, discharged its office. He acted, then, without legal process, and consequently without authority, since the latter expired with the writ. The authority, for the sale of the real estate, *could* only have been obtained by a writ of *venditioni exponas.*" See, also, *Borden vs. McKinnie*, 4 *Hawk's Law and Equity Rep.*, 282; *Towns vs. Harris*, 13 *Texas*, 507; *Young vs. Smith*, 23 *Texas*, 599.

In some of these cases it has been held that personal property levied on before, may be sold by the sheriff after the return day, without a *ven. ex.*, but real property cannot. The proper course is, to make return of the execution upon the return day, and thereupon issue a *venditioni exponas* to the officer to sell. A seizure of personal property vests a special property in the sheriff, who may take possession of it for the purposes of the execution, and complete the sale after the returning day, by virtue of the authority previously given, whereas, a levy on land gives no right of property or possession. It gives no authority to the officer to take possession and turn the defendant out, but only the right to enter for the purposes of sale. It confers authority to pass the title merely, not to change the possession; there must be in existence some lawful authority for the conversion and sale of the property. The execution could confer none after the return day, for it was dead. The sale, in the case before us, was made some six days after the return day, without any other authority than the original execution. It was therefore void. For these reasons, the prayer of the petitioner must be granted. The return of the sheriff and sale under the execution are set aside and held for naught.

ANDERSON v. BENJAMIN, ex use, etc.

APPEAL FROM CLARK CIRCUIT COURT.

HON. E. J. SEARLE, *Circuit Judge.*

James L. Witherspoon, for Appellant.

BENNETT, J.—No motion for a new trial having been filed in the court below, this case stands the same as *Merriweather vs. Erwin; Steck vs. Mahar*, etc., and others.

GREGG, J., dissenting, says: For the same reasons stated in the case of *James H. Merriweather vs. Elint Erwin*, I dissent from the opinion of a majority of the court in this case.

WOODRUFF v. SCRUGGS.

PENAL STATUTES—*Effect of repeal.*—Upon the repeal of a penal statute, no penalty can be enforced, nor punishment inflicted for a violation of the law while in force, unless there be some special provision to that effect.

LEGISLATURE—*Power to modify remedy of contracts.*—The General Assembly has power to alter or modify the remedy as to the enforcement of contracts, but not so as to virtually or substantially destroy or take away the same.

CONSTRUCTION OF STATUTES—*Act of July* 13, 1868.—The act of *July* 13, 1868, repealing the usury laws of this State, operated upon all contracts made previously to its passage, still outstanding, as well as upon all future contracts; but the intent and effect of the statute was not that of a repeal of an absolute penal statute to invalidate contracts previously made, but only to take away or destroy the defense of usury thereunder.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Watkins & Rose, for Appellant.

We submit that the statute ought not to be construed so as to have a retroactive effect, or to make contracts good that were illegal at the time they were made. *Baldwin vs. Cross*, 5 *Ark.*, 510; *Crittenden vs. Johnson*, 14 *Id.* 464; *Couch vs. McKee*, 6 *Id.* 493.

That the repeal of the usury laws did not affect contracts in force at the time of the repeal; see particularly, *Mitchell vs. Doggett*, 1 *Branch*, (*Fla.*) 356; *Merville vs. Le Blanc*, 12 *La. An.*, 221; *Seegar vs. Seegar*, 19 *Ill.*, 121; *Root vs. Pinney*, 11 *Wis.*, 84; *Simonton vs. Vail*, *Id.* 90; *Brown vs. Haight*, 18 *Id.* 102; *Morton vs. Rutherford*, *Id.* 298.

Garland & Nash, for Appellee.

BENNETT, J.—The appellee sued the appellant in the Pulaski Circuit Court, on a note executed in 1866, and due in two months. The appellants pleaded usury. To this plea Scruggs demurred.

First, Because there were no usury laws then, when the plea was filed, in this State.

Second, The plea failed to aver specifically, a corrupt intent.

The court below sustained the demurrer—appellants resting, judgment was rendered against them; they appealed to this court.

The first question, for our consideration, is, what was the effect of the repeal of the statute of usury of 1838, by the act of the Legislature of 1868.

The seventh section of *Chap.* 92 *of Gould's Digest*, reads as follows: "All bonds, bills, notes, assurances, conveyances and all other contracts or securities whatsoever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for

the loan or forbearance of any sum of money, goods or things in action, than is prescribed in this act, shall *be void.*"

The prescription is found in the second section of the same chapter, and is, in effect, as follows: "Parties may agree in writing for the payment of interest, *not exceeding* ten per centum per annum, on money due or to become due upon any contract, whether under seal or not."

The Constitution of the State, which went into effect in 1868, in *Art.* 15, *Sec.* 21, gave to the General Assembly the power to declare, by general law, what shall be the legal interest upon contracts, when no rates of interest were specified; but distinctly declares that no law should ever be passed limiting the rate of interest for which individuals may contract, in this State. The General Assembly, which met under the authority of the Constitution of 1868, on the 13th day of July, of the same year, repealed all of *Chapter* 92, *Gould's Digest*, with the exception of *Secs. IV, X, XI, XII.* By the same enactment, it was declared to be lawful for parties to stipulate in the note and agree on any sum of interest that may be taken and paid upon any one hundred dollars of money loaned, etc. *Section six*, of the same act says: "No plea of usury, nor defense founded upon any allegation of usury, shall be sustained in any court in this State."

We learn from Sedgwick, in his work on Statutory and Constitutional Law, *page* 129-30-31, and the cases there cited, "That there can be no doubt of the truth or validity of the assertion that when there is a repeal of a penal statute, no penalty can be enforced, nor punishment inflicted for a violation of the law while in force, unless under some special provisions." Nor can it be denied that the General Assembly can alter or modify the remedy as to the enforcement of contracts, unless the enactment should virtually or substantially take away the same.

Sec. 6, of the act of the Legislature, approved July 13, 1868, abolished the defense of usury in the State, and the same act repealed all usury laws on our statute books.

While we are not prepared to say that "the plea of usury, sustained under our former law, was in its effects a penalty upon the plaintiff in the loss of his entire debt, and thus place parties, coming under the operation of that law, in the same situation they would have been under an absolute penal statute," we can, with safety, say that the statute repealing the usury laws and abolishing the defense of usury, operated upon all contracts made before it was passed, still outstanding, as upon all future contracts. The act was unquestionably retrospective in its character. All general rules of construction must yield to the clear intention of the Legislature, sufficiently expressed. In this instance, the intention is clear and fully expressed when it declares: "No plea of usury, or defense founded upon any allegation of usury, shall be sustained in any court of this State." It makes no reservations or exceptions, but is emphatic—commanding the courts not to sustain any such plea.

The appellant insists that this statute shall not be construed so as to make contracts good that were illegal at the time they were made, or in other words, making that valid which was before void. In defense of his position, he has cited numerous cases. One of the most pointed is that of *Morton vs. Rutherford*, 18 *Wis.*, 298. Judge Cole, in delivering the opinion, says: "Subsequent legislation is relied on to show that the defense of usury is not available. By the law, in force at the time the contract was made, it was usurious and void. To the same effect was the law when the suit was commenced, and by the law of 1856, an usurious contract was declared valid and effectual, only to secure the repayment of the principal sum loaned. But how this *latter* enactment, even if it attempted it, could render valid an antecedent contract which was void, we do not comprehend. The law of 1856 can have no bearing upon the question. The defense of usury is doubtless available."

The case of the *President, Directors, etc., of the Springfield Bank vs. Samuel Merrick et al.* 14 *Mass.*, 332. In Massachu-

setts there was a law that the bills and notes of banks, not incorporated by law, should not be received or negotiated by banking corporations of that State, under a heavy penalty. It was held that a promissory note, payable in such bills to a banking corporation, made while the statute was in force, was void, and that no action could be maintained upon it by the promisees after the statute was repealed. Chief Justice Parker remarked that, "the subsequent repeal of the act can have no effect upon a contract while it was in force. As well might a contract made for the purpose of trade with an enemy, during war, be purged of its illegality, by the return of peace."

The case of *Mitchell vs. Doggett*, 1 *Florida*, 371, is also cited by appellant, with approbation, wherein Chief Justice Hawkins says: "When a contract is illegal, at the time of its inception, by force of a statute, no action can be maintained upon it, although the statute is repealed which declared it illegal." Other adjudications are cited, but the above are the strongest among them.

While we are willing to admit that the above opinions are entitled to great respect, emanating as they do from the highest tribunals of the States, yet we must respectfully dissent from the principles of law thus laid down, so far as they relate to usurious contracts. In our opinion, they are not dictated by any principles of sound policy, morality or law.

While the statute of 1868, by declaring that "no plea of usury, nor defense founded upon any allegation of usury, shall be sustained in any court of this State," and repealing all previous usury laws, may affect injuriously the antecedent legal rights of the borrower, the appellant, in this case, under the contract, there is much of reasonable intendment and allowable presumption derived from the nature of the right affected and the circumstances under which the contract was made. It may be well doubted whether the borrower, under an usurious contract, has any antecedent rights of the nature of vested rights, created by this contract, or existing under

and by the terms of it, which the law can affect. How do Woodruff's rights stand in a legal point? They are, under and by the terms of the contract, to receive and enjoy until demanded, the money of Scruggs. Scruggs' rights are to receive interest and the principal sum when due. But the statute of usury, operating upon them, avoided his right to demand them and the legal obligation of Woodruff to pay. This privilege of refusing to pay the claim upon demand, not under and by virtue of the terms of the contract, or any presumable intention of the parties different from that which appears upon its face (for we think it would be doing Woodruff injustice to suppose he took the money from Scruggs originally with the intention of enjoying it without ever repaying), but under and by virtue of a general law, is the only antecedent right of the defendant which the statute of 1868 can affect. That privilege, and it was nothing more than a privilege, the legislature intended to take away by validating the contract in this respect. The right of the defendant originated in a statute founded upon policy, intended to protect the needy borrower from the presumed temptation of the lender to demand exorbitant interest for forbearance. That right, of the defendant, to insist upon a forfeiture by the plaintiff of his debt, was a legal right before the repeal, but not an equitable one. The courts of equity do not view the statute as courts of law are compelled to do. If a borrower goes into a court of equity, in respect to a security given in connection with usurious contracts, or to avoid extortion or oppression, the court will always compel him to pay principal and legal interest, because there is a moral obligation resting on him to do so, and it is equitable that he should be compelled to do it.

In the case of *Kilborn vs. Bradly*, 3 *Day*, 356, the court said: "The statute against usury, on principles of public policy, renders void contracts upon usurious considerations. But the lender incurs no penalty unless he actually takes usury, and courts of equity, on relieving against oppression

or extortion, order the repayment of the sum really loaned or due, with lawful interest. The moral obligation of the borrower to pay the principal sum actually loaned, with the lawful interest, is unimpaired."

In the language of Judge Duncan in *Satterlee vs. Mathewson*, 16 *Sarg. & Rawle*, 191, "there can be no vested right to do wrong." In the case of *Baugher et al. vs. Nelson*, 9 *Gill*, 309, the court say: "In the nature of things there can be no vested right to violate a moral duty or to resist the performance of a moral obligation, and although a borrower may be justified in morals, as he is in law, in resisting the payment of illicit interest, extorted from him in consequence of his necessitous condition, he certainly can have no right, as a matter of private justice, to repudiate his contract so as to escape from the payment of the sum actually received." The doctrine announced in these cases, and many more might have been added, stands upon the principle that the borrower is, at all times and under all circumstances, under a moral obligation to pay to the lender the sum actually loaned, with interest, as a fair compensation for its use. This is all the law of 1868 purposes to accomplish. The legislature, in the exercise of its remedial authority, expressly given it by the Constitution, comes to the aid of all courts, both legal and equitable, and declares no plea of usury, nor any defenses founded upon usury, shall be heard or entertained in them.

The Chancellor, in the case of *Wilson vs. Hardesty*, 1 *Md.*, 66, made use of the following language: "Notwithstanding the language of the act of 1704 is so strong, it is very certain that contracts within its provisions are not, under all circumstances, treated as merely void." This was a case where the complainant was seeking to avoid the contract because it was usurious, as the statute of Maryland declared that all such contracts were absolutely void. The contract, in the present case, was wrong, only, because the statute prohibited more than ten per centum, and was wrong, only, to the additional interest expressed on the face of the note. For that wrong

the statute said the contract should be void. Since then, the legislature has taken away this penalty and has said, in effect, such contracts are valid. That it had the power to do this admits of no serious question.

We might have disposed of this case upon the simple proposition as to the power of the legislature over remedies, but inasmuch as the defense has been based upon the fact of the illegal nature of the original transaction, we have thought it our duty to say what we have as to the equitable nature of it, outside of the statute which has declared usurious contracts void.

The emphatic condemnation of the act of July 13, 1868, wherein it says, "No plea of usury, nor defense founded upon any allegation of usury, shall be sustained in any court of this State," is mandatory upon all courts and is only depriving defendants of the privilege of making a certain defense, which before was permitted. Such mandate, operating only upon the remedy, without destroying a right, the legislature was acting within its scope and power.

As to the second ground of demurrer, it will not be necessary for us to argue, the subject matter not being allowed to be pleaded, it cannot be of any importance how it might be done. The court did not err in sustaining the demurrer, therefore judgment is affirmed.

WINSTON v. RICHARDSON.

INDORSERS—*What necessary to bind.*—To charge an indorser, it is necessary to prove that payment was demanded of the maker within proper time and refused, and that the indorser had due notice thereof, or that the indorsee had used due diligence to make such demand and give such notice, or that they were waived by the indorser.

ASSIGNORS—*Notice necessary to bind.*—An assignor is not liable on his assignment, unless he has received due notice of the non-payment or protest of the instrument assigned.

APPEAL FROM IZARD CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

Watkins & Rose, for Appellant.

Appellee sued appellant as indorser, and offered no evidence of demand of the maker and notice to the defendant. Without these, the defendant was under no obligation either moral or legal. *Green vs. Thornton*, 7 *Ark.*, 383; *Ruddell vs. Walker*, *Ib.* 457; *Grace vs. McDaniel*, 13 *Id.* 395; *Nevill vs. Hancock*, 15 *Id.* 517; *Jones vs. Robinson*, 11 *Id.* 504; *Levy vs. Drew*, 14 *Id.* 336.

There being no evidence then to support the finding, the court should have granted a new trial. *Reed vs. Latham*, 1 *Ark.*, 66; *Pogue vs. Joiner*, 7 *Id.* 463; *Russell vs. Cady*, 15 *Id.* 540; *Wallace vs. Brown*, 17 *Id.* 449; *Hicks vs. Manees*, 19 *Id.* 701.

Byers, for Appellee.

BENNETT, J.—This suit was originally instituted before a Justice of the Peace and came to the Circuit Court on appeal, and was founded on the following described note:

"BATESVILLE, ARK., January 1st, 1861.

One day from date I promise to pay to the order of George Case, one hundred dollars for value received with ten per cent. interest from maturity.

(Signed) W. T. HOBGOOD." [Seal.]

On which were the following assignments:

"For value received I assign the within to S. H. Winston, with no recourse on me.

June 15, 1861.

(Signed) THOMAS WORNAC.

For value received I assign the within note to Thomas Richardson.

August 31st, 1861.

S. H. WINSTON."

There were several indorsements for various sums of money received at different times, but as these do not affect the questions as presented to us, we do not copy them.

On the 8th day of September, 1869, the cause came on to be heard and was submitted to the court sitting as a jury.

The plaintiff, to sustain his cause of action, introduced the above described note, as evidence, to which the defendant objected. The court overruled his objection and permitted the same to be read. The plaintiff then introduced Elisha Arnold, as a witness, who testified as follows:

"I was the administrator of William T. Hobgood, deceased, the maker of said note. I first took out letters during the war, during which time I paid most of the claims against said estate in full, in Confederate money. After the war, I was again required to administer upon the estate and paid, on the note, the several amounts credited and indorsed thereon, except the credit of four dollars and twenty cents. The estate was unable to pay the whole amount of the indebtedness, and has been finally settled, and I have been discharged. I do not know whether there was any order of the Probate Court authorizing me to pay the claims or not."

John A. Byler, a witness for the plaintiff, testified: "That the record book, of the Izard Probate Court, was in the country a short distance, being there for the purpose of being transcribed, and that he knew that Elisha Arnold, as administrator of William T. Hobgood, had made a final settlement with the Probate Court, and that the estate did not pay the

claims probated in full. I dont' think there was any probate order by the Probate Court."

This was all the evidence in the case. The transcript says: "After argument of counsel the court found the law to be in favor of the plaintiff and rendered judgment against the defendant," etc. To which findings the defendant excepted and filed motion for a new trial, which motion was overruled.

The motion for a new trial says it should be granted, because, 1st. The court erred in permitting the note sued on to be read in evidence; 2d. That the judgment of the court is not sustained by sufficient evidence; 3d. That the judgment of the court is contrary to law and evidence.

Upon the overruling of the motion the defendant prayed an appeal.

This is an action brought by the holder of a note against the indorser. It has been repeatedly held, by this court, that in order to charge an indorser, it is necessary to prove that payment was demanded of the maker within proper time and refused, and that the indorser had due notice thereof, or that the indorser had used legal diligence to make such demand and give such notice, or that they were waived by the indorser. See *Nevill vs. Hancock*, 15 *Ark.*, 571. "An assignor is not liable on his assignment unless he has received due notice of the non-payment or protest of the instrument assigned. *Ruddell vs. Walker*, 7 *Ark.*, 457; *Grace vs. McDaniel*, 13 *Ark.*, 395; *Jones vs. Robinson*, 11 *Ark.* 504; *Levy vs. Drew*, 14 *Ib.* 336.

We look in vain through all the evidence to find any waiver of demand or notice, or where they have been made; without these, the defendant, being an indorser, was under no legal or moral obligation to pay, and the finding was supported by no evidence whatever. The court should have sustained the motion for a new trial. For this error, the judgment is reversed and cause remanded.

MERRIWEATHER v. ERWIN.

APPEALS—*Motions for new trial, etc.*—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. (*Steck vs. Mahar*, 26 *Ark.*, *approved.*)

APPEAL FROM CHICOT CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Watkins & Rose, and *Adams & Dixon*, and *Pike & Johnson* for Appellant.

Garland & Nash, for Appellee.

BENNETT, J.—The appellee sued the appellant, in the Chicot Circuit Court, in assumpsit, and the appellant pleaded the general issue, payment and set-off. Issues, upon these pleas, were made up and a trial had, and verdict for the appellee. Merriweather appealed.

The bill of exceptions does not show that there was a motion for a new trial filed in the cause below. In the manuscript, there is what purports to be a motion for a new trial, marked filed on the 23d day of October, 1869, but not signed by the clerk. After the cause was sent to this court, counsel for appellant and appellee, on the 27th of October 1870, filed an agreement in words, as follows:

"It is hereby agreed, between the counsel of said parties, that the motion for a new trial, which was filed and marked filed on the 23d of October, 1869, was not noted of record or acted on; is, in fact, no part of the record on appeal, and is not to be regarded as such.

[Signed.] STREET & PIKE,
Counsel for Merriweather.

GARLAND & NASH,
For Erwin."

It has been decided by this court, at its last term, in the case of *Steck vs. Mahar*, 26 *Ark.*, 537: "That 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. When the error complained of does not relate to errors growing out of the *evidence* or *instructions*, but such as 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 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 an appeal will lie to this court."

The case before us is one, where not only the facts, but the declarations of law are questioned, and very clearly comes under the ruling of the case above cited. Wherefore, when the counsel for the appellant, agreed that no motion for a new trial was made in the court below, they admitted their case away:

The language of the Code (*sec.* 886) is: "A judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior courts, until such motion has been made there and overruled."

No effort having been made to correct the errors complained of, in this case, in the court where they originated, we must sustain the former ruling of this court.

Let the judgment be affirmed.

GREGG, J., dissenting.—I will only announce that I am unable to see a sufficient reason to concur with the majority of the court in the construction of the Code, which forbids us from passing upon the legality or illegality of the instructions, by the court, given to the jury in this case.

In this case, after the evidence was all before the court and jury, the appellant moved the court to give certain instruc-

tions to the jury, as the law applicable to the evidence before them; the court refused to so instruct them, and he excepted, and by his bill of exceptions brought the evidence all upon the record. The court, at the instance of the appellee, gave different instructions to the jury, to which he excepted, and the jury found for the appellee one thousand dollars. Appellant rested upon his exceptions and prayed an appeal to this court which was granted, and among other things, he here insists that we should review such instructions and declare whether or not they are law as applicable to the evidence before that court, and now before us in the record of the cause.

The majority of the court held that we cannot pass upon such instructions, because there was not a motion made for a new trial in the court below; we are of opinion that the legality or illegality of the rulings of the court, upon these instructions, is purely matter of law, and as the record sets out all the evidence, as it appeared in the court below, it is perfectly competent for us to announce whether or not that court instructed the law, as applicable to this state of facts.

Section 886, of the Civil Code, is quoted. We hold that should be considered and construed in connection with other provisions of that Act. If taken in a broad and unlimited sense, it would deprive this court from reversing the most glaring errors of law, if a new trial was not moved in the court below. If the Circuit Court should sustain a demurrer to a valid complaint, and adjudge costs against the plaintiff, such would be an error that might be, on motion, corrected in that court; the plaintiff might move the court to reconsider the demurrer; that might be sustained, the demurrer overruled and the case reinstated on the docket; but, notwithstanding this error might have been corrected in the court below, by motion, this court does not hesitate to consider whether or not the demurrer was properly overruled, and why not? Because it is a question of law that appears upon the record; the record shows the error. That is all true, but is it not equally true that the

case before us shows the error, in instructing the law as applicable to the facts, and if we take section 886, in the broad sense, we could not consider either error here. It says: "A judgment or final order which can be corrected, on motion, in the inferior court, shall not be reversed until a motion is made there and overruled;" but there are other provisions to be considered with this. Section 365 says: "An exception is an objection taken to the decision of the court upon a matter of law." Sec. 366, "the party objecting to the decision, must except at the time," etc. Sec. 367 is, "no particular form of exception is required; the objection must be stated, with so much of the evidence as is necessary to explain it and no more, and the whole as briefly as possible." Then, if the exceptions are shown in the record, can they not be heard in this court, without a motion in the court below, and, in this case, the exceptions do so appear.

In all cases where a litigant desires the court to pass upon the weight or sufficiency of the evidence, in the court below, a motion must first be made there; the judgment of that court must be had before coming into this court, and this rule applies to oversights, informalities, misprisions, etc., etc.; that should, as a matter of course, be corrected in that court, and a case should not, for such causes, be reversed here, until a motion is made and overruled there, and section 886 applies to errors like these. *Ingersoll vs. Bostwick*, 22 *N. Y.*, 425; *Johnson vs. Casserly*, 6 *Seld.*, 570. A different construction would lead to absurdities. If we limit the meaning of the language in that section, so that we can pass upon a demurrer or any other question of law here, without such motion, it seems to me the same construction would require us to pass upon all questions of law properly brought upon the record before us, and in this case, the bill of exceptions properly sets out all the evidence and then sets out the propositions of law which the court was asked to declare as applicable to the evidence. The court solemnly considered the appellant's instructions and declared they were not the law, to which he excepted and

prayed an appeal; and he now comes before us and asks that we determine whether or not these propositions were law arising upon the evidence then before the court. Now, it seems to us, this is as purely a question of law as any that could arise upon a demurrer or otherwise; the evidence all being duly certified here, and the sole question being, did the court mistake the law, when moved to apply it to the evidence? Does it not seem that the proper rule would be, that any error of law, properly brought before us, upon the record, could be examined and passed upon in this court, without a motion for a new trial in the court below? If the matter is passed upon there and properly excepted to, ought not that to be sufficient? But if objections, not going to the deliberate judgment of a question of law, by the court, but to the weight of evidence, the verdict of the jury and such misprisions, informalities, etc., etc., as above referred to, the party should not be heard here, unless, on motion, the court below refused to make the correction.

By an examination of our Code, we find a large class of errors it is made the duty of Circuit Courts to correct, principally referred to in sections 375 and 571, and errors of this class must be corrected as a matter of course, and the inferior court is authorized to correct them after adjournment of the term at which they occur; and section 886 evidently relates to errors of this kind, and we do not claim this conclusion as an original thought, but upon an examination of the decisions upon the Kentucky Code (from which it is well known that most of ours was copied), we found their Supreme Court placed this construction upon it; section 903, of their Code, and 886 of ours, are alike verbatim, and section 579 of theirs is similar to 571 of ours, and by consulting the notes accompanying the Kentucky Code, it will be seen that in explanation of 903, they show that the cases in which such motion must be made, in the court below, before the matter is assigned for error in the Court of Appeals, are such as are classed in section 579.

In the case of *Wilson vs. Barnes*, 13 *B. Monroe*, 330, the lower court committed an error by rendering a judgment for a larger amount than was shown to be just, and also by computing interest on a note, which formed a part of the matter of complaint, for too long a time; the Supreme Court said, in view of these sections exactly like ours: "The wrong computation of interest was a clerical misprision, and the judgment for that cause would not be reversed, because it could have been corrected on motion in the court below; but for the error in rendering judgment for said sum of one hundred and fifty dollars, the judgment is reversed and the cause remanded for further proceedings," etc. Here was an erroneous judgment for damages, which would have been a good cause for setting it aside, on motion; no such motion was made, yet the Supreme Court, that must be presumed to have been familiar with the intent and meaning of their Code, reversed the judgment and remanded the case, and why? Simply because the record showed that the court below had committed an error of law. We feel assured, from an examination of the decisions under the Kentucky Code, wherein it is verbatim the same as ours, that for all errors of law that appear in the record, the appellate court will reverse without a motion for a new trial.

In the case of *Raymon vs. Reed*, 16 *B. Monroe*, 350, where a question of service was up, the Supreme Court say: "We think, after the appearance of the defendant, the judgment against him would have been authorized, had he failed to object to the same, but he appeared and objected; had there been no appearance to the action, the judgment would have been regarded as premature and a clerical misprision, and no appeal to this court would have been authorized until the Circuit Court had refused upon motion to set aside the judgment.

"*But the defendant having appeared and objected to the judgment, the court having decided upon its propriety, the error is an error of the court, and not a mere clerical misprision*, wherefore

the judgment is reversed," etc. Here, it will be seen, there was no motion for a new trial, nor was there any demurrer; it was simply a mistake of the court in declaring the service sufficient. The case of *Humphreys vs. Walton*, 2 *Bush.*, 580, seems to intimate against the doctrine, in the above cases, and in favor of the ruling of the majority of the court; but in the case of *Union Insurance Co., of Louisville, vs. Groom*, long since that, the Supreme Court said the intimation in the case above was mere "*obiter*," and is not regarded "*as authoritative or right.*" They say, "on a full issue and much testimony, the judge to whom both law and facts were submitted, rendered judgment for the amount claimed in the petition. An authenticated bill of exceptions purports to recite all the evidence on the trial, but there having been no motion for a new trial, the preliminary question, whether without such motion for a new trial, made and overruled, this court can entertain the appeal, meets us at the threshold." And they proceed to declare that they have cognizance of the appeal and to dispose of the case upon its merits. 4 *Bush.*, 289. This was no dictum of the judge, but the question, stronger than in the case before us, was presented directly to that court and they squarely meet it and decide that the case is before them for a decision upon the merits. In the case before us, the evidence was all before the court and all appears of record here, and the appellant, upon the evidence, moved the court to declare or instruct the law; the court refused the instruction; he excepted, and when judgment went against him, he appealed to this court, and now asks us to say if that court did not commit error in ruling against him; and as the Supreme Court of Kentucky said, he had then taken the judgment of that court. The majority say we cannot pass upon the instruction because he did not move for a new trial; but it seems, to us, it is a question of law, and that this court should pass judgment upon it; the appellant cannot question the facts upon the record; the evidence stands as true and sufficient, but he says the court below did not decide the law, and

that is what he here complains of; that he there moved the court to decide the law in his favor, but the court overruled his motion and refused his instruction, and he excepted, and we are now told that he ought then to have moved the court, again, to hold the law in his favor, and to grant a new trial because the court had decided the law against him. Now it does seem to us when he, on one motion, takes the deliberate judgment of the court below upon a question of law, and excepts to its ruling, that, under the Code, it is sufficient to allow such ruling to be brought before us for review, without these repeating motions.

Codes are said to make the law easy, but the questions misconceived, by eminent counsel, fail to show us the excellence of the improvement.

Before the adoption of the Code, there could have been no question but the legality of these instructions would have been properly before us; the ruling has been uniform since the case of the *State Bank vs. Conway*, 13 *Ark.*, 344; *See State Bank vs. Wilson*, 14 *Ark.*, 113; *Stillwell vs. Gray*, 17 *Ark.*, 475; *Gordon vs. Miller*, 21 *Ark.*, 398; *Strayhorn vs. Giles*, 22 *Ark.* 517. By a careful examination of these and many other cases that might be referred to, it will be clearly seen that this court has, for many years, consistently held, that a verdict and judgment would not be set aside for the want of sufficient evidence, unless there was a motion for a new trial, but whenever any exceptions were taken to any ruling of the court, upon the law, this court would consider all such exceptions shown upon the record, whether of instructions, demurrer or other matters of law.

In the case of *Myers vs. Moore*, 19 *Ohio*, 136, under provisions in a Code similar to ours, where one of the parties moved an instruction, which the court refused to give, and the evidence was set out and he appealed, the Supreme Court said: "But it is insisted, for the plaintiff in error, there is a formal but a fatal defect in the proceedings before the court of common pleas, and as a consequence of that defect, that no foun-

dation is laid for reviewing, upon a writ of error, the judgment of that court. The record, from the common pleas, does not show that after judgment was rendered by that court, a motion was made for a new trial, that motion overruled and an exception taken to the decision overruling the motion;" the court then proceed to discuss the exception taken to the instruction of the court and to pass upon its merits. *See* 18 *B. Mon.*, 94; 2 *Met.*, 542; 15 *Ohio*, 58; 4 *Ohio*, 389.

The rule, as laid down, is this: When a question of law has been submitted to the court below, and by that court passed upon and excepted to, no motion for a new trial is necessary before appealing, but if the correctness of the ruling upon the law depends upon its application to the evidence or other extraneous facts, then the evidence or such facts must be brought upon the record by a bill of exceptions, so the appellate court can see if the law was properly applied.

We have been unable to find any law or precedent, requiring a proposition of law to be twice submitted to an inferior court, before an appellate court would review its judgment. If the party appealing relies alone upon the question of law, decided by the lower court, and that ruling of law appears upon the face of the record (and if brought there by a duly certified bill of exceptions, it does as fully appear as would a ruling upon a demurrer to a complaint at law) then no motion need be made. If a litigant is satisfied with all the pleadings and with all the evidence, he has only to move the court to declare the law; if the court overrules his motion, must he again move the court to hold the law in his favor and grant a new trial, because the court does not understand the law, as he does? we think not. The deliberate judgment of the court upon the law, once called forth and shown upon the record, is sufficient to have it reviewed here, and hence, we are of opinion, that the instructions in this case are subject to review.

SMITH v. LAFFERRY.

FORCIBLE ENTRY AND DETAINER—*Actions of, distinct.*—The actions of Forcible Entry and Forcible Detainer, as provided for in our system of practice, are separate and distinct actions.

FORCIBLE ENTRY—*What necessary to show.*—In an action of forcible entry it is necessary to show that the defendant did actually enter into the lands or tenements of the plaintiff, without the consent of the person having the *possession in fact* of the premises.

FORCIBLE DETAINER—*What must appear.*—In an action of forcible detainer it must appear on the face of the warrant, in some way, that the relation of landlord and tenant exists, or existed between the plaintiff and defendant, said to have been in possession, at the time of the entry.

ACTIONS OF—*Cannot be joined.*—The actions of forcible entry and forcible detainer cannot be joined so that a warrant for forcible entry can be the foundation for a verdict of forcible detainer; in the one, force is the gist of the action; the other is founded on a breach of contract.

APPEAL FROM JOHNSON CIRCUIT COURT.

HON. WILLIAM N. MAY, *Circuit Judge.*

Clark & Williams and *Floyd & Cravens*, for Appellant.
English, Gantt & English, for Appellee.

BENNETT, J.—This is an action of forcible entry, instituted, by the appellee against the appellant, before a Justice of the Peace of Johnson county, to recover the possession of certain lands. A verdict of not guilty was rendered. Appellee filed traverse and appealed to the Circuit Court; judgment for the appellee—motion for a new trial, which was overruled, and appellant appealed to this court.

The motion for a new trial contained six different causes for setting the verdict aside:

First, Because the verdict is not sustained by sufficient evidence.

Second, Because the verdict is contrary to law.

Third, Because the court erred in giving the instructions to the jury, asked by the plaintiffs, against the objection of the defendant.

Fourth, Because the court erred in refusing to give the first and third instructions asked by the defendant.

Fifth, Because the court erred in giving the first and third instructions asked for by the defendant, as altered by, and modified by the court.

Sixth, Because the court erred in refusing to give to the jury the fourth instruction asked by the defendant.

For the purpose of disposing of the case, as far as this court is concerned, we have only to consider the first two reasons assigned for a new trial, viz: That the verdict is not sustained by evidence, and is contrary to law.

Forcible entry is defined by the Code of Practice to be, "An entry into lands or tenements without the consent of the person having the possession, *in fact*, of the premises."

It is well known that the practice act, from which the above definition is taken, is, in the main, but a copy of the Kentucky Code. Adjudications, therefore, had in that State, since its adoption, as to its construction, are entitled to great weight.

In the case of *Hunt vs. Wilson*, 14 *Ben. Monroe*, 46, it was held that "The only legitimate inquiry upon a warrant for a forcible entry by the defendant, upon the lands occupied by the plaintiffs, is, whether the defendant entered upon the land which, at the time of such entry, was in the *actual possession* of the plaintiffs."

It is true, this decision was rendered under the statute of Kentucky passed in 1810. The 17th section of which reads as follows: "The forcible entry intended by this, is, and shall be, an entry with or without multitude of people, against the will, or without the assent of the person or persons who, at the time of such entry, have the possession, *in fact*, of the premises, into which such entry may be made."

But in the case of *Belcher vs. Bennett*, 4 *Met.*, 308, it was held, "that the provisions of the Code, regulating proceedings in cases of forcible entry and detainer, are a substantial enactment of the Act of 1810." Therefore, the decision in the case

of *Hunt vs. Wilson*, has as much weight as though rendered since the adoption of the Code.

The actions of forcible entry and forcible detainer, as provided for in our system of practice, are separate and distinct. On forcible entry, it is necessary to show that the defendant did actually enter into the lands or tenements of the plaintiff, without the consent of the person having the *possession, in fact*, of the premises.

In *Fowler vs. Knight*, 10 *Ark.*, 43, it was held that, "to maintain the action of forcible entry and detainer, the plaintiff is *not* bound to show that he was in actual possession of the premises when the defendant entered." But in a later case, *McGuire vs. Cook*, 13 *Ark.*, 448, the court says, "upon the facts in the case of *Fowler vs. Knight*, which was forcible entry and detainer, the decision was doubtless correct; but so far as it may be infered from the opinion in that case, that this action may be maintained upon a constructive possession, *i. e.*, that the title draws to it the possession as of personalty, or that where the entry is peaceable, if made without color of title, the law will imply force, or that the plaintiff may recover by showing his right to the possession, without showing that he had the possession, and lost it by means of the defendant's entry, or that by making the affidavit and giving the bond required, this summary proceeding may become a substitute for the action of ejectment, the court declares that such is not the law."

While these decisions were made under the old statute, we must hold that the principles are the correct ones.

In forcible detainer it must appear, on the face of the warrant in some way, that the relation of landlord and tenant exists, or existed between the plaintiff and defendant, said to have been in possession, at the time of the entry.

Tried by these criterions how stands the case at bar?

Conceding the fact that the defendant below, the appellant here, was in actual possession of the tract of land, as stated in the warrant, which by no means has been conclusively proven,

and conceding further, that the parol contract of rent, alleged to have been made for two years, was null and void as to the year 1870, the last of the two years, by reason of its being in derogation of the statute of frauds, still the plaintiff below, the appellee here, has failed to sustain his action.

Was he, Lafferry, in *actual possession*, or had he the *possession in fact*, at the time of the alleged forcible entry of the defendant, Smith, viz: on the 14th day of December, 1869, or as the time would have been alleged by the amended warrant, January 1st, 1870.

This question of possession is the paramount one, yet the testimony does not disclose this fact, but, on the contrary, clearly shows that Smith, the appellant, for the year 1869, was the tenant of Lafferry and, by virtue of a contract for rent, did enter upon and take possession of the old field on the s½ of nw¼, and the sw¼ of the ne¼ of section 24, township 8 north, range 24 west, and held the same for that year. This is sworn to by the plaintiff, Lafferry himself, and he further says, "the defendant was entitled to the possession thereof, under the contract, for the whole of the year of 1869."

It is evident, then, the entry could not have been forcible; nor could the plaintiff have been in *actual possession* at this time. From the declarations of law, as laid down in the instructions given by the court below, it must have thought that it was only necessary for the plaintiff to have shown that he had title to the land in question, and had not given the defendant permission to enter upon it, in order to maintain this action. But this is erroneous. This is not the proper proceeding to try questions of title, but that of possession, and of possession only, where the plaintiff has been dispossessed by the acts of the defendant.

As to this case, as it would have been presented in an action of forcible detainer, we, at present, desire to say nothing. Suffice it to say, that these two actions cannot be joined, at least, a warrant for forcible entry cannot be the foundation for a verdict of forcible detainer. In the one, force is the

gist of the action; the other is founded on a breach of contract. Yet, the court below has treated this case as though there was no difference, but that they might be commingled. For these reasons, judgment is reversed.

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SIMMONS v. ROBERTSON.

LANDLORD AND TENANT—*Tenant cannot dispute title of.*—A tenant, in possession, is not at liberty to question the title of the person under whom he holds, or attorn to a third person.

SAME—*Cannot set up hostile title.*—A tenant, while the relation of landlord and tenant exists, cannot rent from one who has acquired a title hostile to that of his landlord, though it be a better title.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Moore, Murphy & Van Gilder, for Appellant.

We think the court clearly erred in refusing to give the second and third instructions asked for by the plaintiff.

That the tenant cannot dispute the title of his landlord. See 1 *Ark.*, 495; 9 *Ark.*, 333; 13 *Ark.*, 387 *and* 455; 15 *Ark.*, 104; 20 *Ark.*, 560; *Taylor's Landlord and Tenant, section* 728, *and note*; 1 *Washburn on Real Property*, 483, 484, 486 *and* 487; 3 *Pet.*, 44, 5 *Pet.*, 485.

The third instruction, that the tenant cannot rent from one who has acquired title hostile to the landlord, is certainly the law. *Stewart vs. Roderick*, 4 *Watts & Serg.* 188. See particularly *Jackson vs. Hooper*, 5 *Wend*, 246; 1 *Washburn on Real Property, page* 486, *3d edition, and authorities there cited.*

Bell & Carlton, for Appellee.

GREGG, J.—On the 10th of January, 1870, the appellant, before a justice of the peace, commenced his action of forcible detainer. On the 15th of the same month, both parties appeared, and a jury was impaneled, who found the defendant guilty of the forcible detainer, and it was adjudged that the plaintiff have restitution of the premises, and that the defendant pay all costs. On the same day, the appellee filed a traverse, that the inquisition returned was not true, and prayed a stay of the proceedings until the matter could be heard according to law; upon his giving bond with approved security, in the sum of six hundred dollars, an appeal was granted, proceedings stayed, and the case certified to the Circuit Court. At the September term, 1870, of that court, the parties went to trial and a verdict and judgment was had for the defendant; the appellant moved the court for a new trial which was overruled, he excepted, filed his bill of exceptions and prayed an appeal, which was granted.

It was, in evidence, that the appellee rented the premises from the appellant, and placed hands thereon, and cultivated fifty acres, for which he paid one hundred dollars rent; by his own testimony he had the right to cultivate the farm or only a part thereof, and pay two dollars per acre for what he did cultivate. At the beginning of the year 1869, the appellee moved his family on the place, and held it during that year.

In January, 1870, the appellant, by his agent, demanded possession of the premises from the appellee, who then said he might have had possession of his place long ago, if Ivey, an agent, had not treated him so badly. He testified that he finished gathering his crop about the 15th of December, 1868, and tried again to rent the place from Ivey, for the year 1869, but he would not rent to him; that he was going to rent to Belser, who was then absent, and who did not want the place, and he told appellee that he could rent from Col. Brooks, as the agent of Mrs. Smith, and he did rent from Col. Brooks, as such agent, for the year 1869. He

stated that he moved off his crop about the 15th of December, 1868, and left no teams or other things there, and having settled with Ivey, the place was turned over to him; that, under his renting from Brooks, he moved on the place the 1st of January, 1869, and that that was the first time he ever took possession of the place; that he did not tell the appellee, or his agent, that he did not intend any longer to hold the land under the appellant, and that he was, at the commencement of the suit, holding under Mrs. Smith, and had rented from her agent for 1870, and he had paid the same agent for 1869. Brooks testified that he told the appellee, when he first applied to rent, that he must get peaceable possession, to turn over to Simmons and then rent from him.

The appellant asked three instructions; the second and third of which were refused, and they were as follows:

"2. If the jury believe from the evidence that defendant, Robertson, rented the land in dispute from the plaintiff, Simmons, or his agent, he cannot dispute the title of said Simmons to the land.

"3. That if the jury believe from the evidence that the said defendant, Robertson, rented the land in dispute from Simmons, or his agent, he cannot rent from one who has acquired a title hostile to that of his landlord, though it be a better title."

The defendant then asked six instructions; the first five of which the court gave, as follows:

"1. Before the plaintiff can recover, in this action, the jury must believe from the evidence that the relation of landlord and tenant existed between the plaintiff and defendant at the commencement of the suit.

"2. The action of unlawful detainer rests upon contract, without regard to the ownership or other title to the property in controversy.

"3. If the jury believe from the evidence that the defendant entered upon the property in controversy, in January, 1869, under a contract of lease from Mrs. Smith for that year,

and, at the time of the commencement of plaintiff's action, was in possession of said property under a contract of lease from I. L. Brooks for 1870, the jury must find for the defendant.

"4. If the jury believe from the evidence that the defendant did cultivate a portion of the land, for the year 1868, under contract with Hill, the agent of the plaintiff, and that contract was fully executed, and defendant afterwards rented the property, in controversy, from Mrs. Smith, and got possession of said property, in 1869, under this contract with Mrs. Smith and not the plaintiff, the jury must find for the defendant.

"5. If the jury believe from the evidence that the defendant only rented, in the year 1868, fifty-odd acres of the land in controversy, from plaintiff's agent, the plaintiff must identify the land rented, and can only recover for that amount in this action, if the jury believe that the relation of landlord and tenant did exist between the plaintiff and defendant."

The sixth instruction had no bearing on the case, and was properly excluded.

It seems to us that there are but few, if any, propositions of law better settled than the one that a tenant cannot dispute his landlord's title, and why the court refused to give the second instruction asked by the plaintiff, we are unable to see.

The third instruction, asked by the plaintiff, was but another enunciation of a well settled principle of law, applicable in this case, and should have been given. See 1 *Washburne on Real Property*, 483, and cases there referred to.

The first instruction given for the appellee, as an abstract proposition of law, was correct, but, without an explanation as to what constituted the relationship of landlord and tenant, was well calculated to mislead the jury.

The second instruction of the defendant, if taken in connection with other correct instructions, is deemed unobjectionable. A contract might be express or implied, and it is

the holding after the expiration of the contract that is the subject of complaint.

The defendant's third instruction was erroneous, justified by neither the law or the evidence. The testimony of all, even that of the appellee, showed conclusively that he rented the premises for the entire year of 1868, and that he did not tell the appellant, or his agent, that he did not intend any longer to hold the land under him; his renting did not close until the last day of December, 1868, and, according to his own statements, he moved on the land under his agreement with the agent of Smith, on the first of January, 1869, so that not a single day intervened between the time he rightfully had possession, under his leasing from the appellant, until he claimed to be in possession under an adverse claim. If such sharp practice was tolerated by courts of justice, this important possessory action would be worthless. The appellee testified that he was not in possession until he went on the premises, January, 1869, under his renting from the agent of Mrs. Smith; but he also states he rented from appellant's agent and put his laborers on the place; had over fifty acres cultivated, etc., showing as full possession as if he had been residing on the premises; and he further testified that he endeavored to lease for the year 1869 from appellant's agent; and Rule testified that, in 1870, he told him that appellant would have *had his lands long ago*, if Ivey, the agent, had not treated him badly. If this testimony be true, he recognized the appellant as the owner, as late as 1870, but still he was attempting to hold under another. The fourth and fifth instructions were erroneous, because there was no evidence on which to base them, and they were calculated to mislead the jury.

The appellee, in this case, entered into possession under the appellant, and he was not at liberty to question his right of possession or to attorn to a third person, and the court below erred in overruling appellant's motion for a new trial. The judgment is reversed and the cause remanded to be proceeded in according to law and not inconsistent with this opinion.

BRIGHT v. BOSTICK et al.

ASSUMPSIT—*Will lie for use and occupation.*—The action of assumpsit will lie for the use and occupation of property. | 27 55 | 58 139 |

VERDICT—*When set aside for excessive damages.*—The verdict of a jury will not be set aside on the ground of excessive damages, unless the evidence clearly show them to be so.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

B. T. Du Val, T. D. W. Yonley, for Appellant.
Clark & Williams, for Appellees.

SEARLE, J.—This was an action of assumpsit brought, in the Sebastian Circuit Court, by Pennywit, in his lifetime, against E. B. Bright, for the use and occupation of certain mill property in that county. After the death of the plaintiff, Pennywit, the cause was revived in the names of the appellees, as his executors.

The facts are substantially as follows: Pennywit, the testator of the appellees, purchased the mill property, in question, under a decree of the Sebastian Circuit Court, sitting in chancery, and was awarded a writ of possession for the property, on the 23d of February, 1857, by that court. Bright, who was in possession, appealed from the order of the Circuit Court, granting the order of possession, which order was affirmed by this court, at the January term thereof, A. D. 1860.

Pennywit brought this suit to the August term A. D. 1860, of the Sebastian Circuit Court, against Bright, to recover from him, for the use and occupation of said mill property, prior to the date of the writ of possession, until he, Pennywit, obtained possession under the decision of this court. A change of venue was taken, by agreement of parties, to the Fort Smith district of Sebastian county. Pennywit died and the cause was revived in the names of his executors, Charles G. Scott, Samuel L. Griffith and John S. Bostick. The de-

fendant pleaded non-assumpsit, to which issue was joined. The cause was submitted to the court sitting as a jury; finding for plaintiffs and damages assessed at four thousand dollars.

The defendant moved for a new trial upon the following grounds:

First, The finding of the court was contrary to the law and the evidence.

Second, The court erred in regard to the law of the case.

Third, The finding of the court was for the plaintiffs, when, by the law of the land, it should have been for the defendant.

Fourth, The damages assessed were excessive.

The court overruled the motion for a new trial and rendered judgment against the defendant for the sum of four thousand dollars; whereupon he appealed to this court.

The first three grounds for a new trial will be considered together, as they seem to present but one question, and that is, can assumpsit be maintained for use and occupation, in a case like the one under consideration? The right to recover, for use and occupation, does not exist by the common law. It is entirely a statutory remedy, and, in this State, the right to recover, by this kind of procedure, is conferred by statute. *Section* 13, *Chapter* 100, *Gould's Digest*, provides that "where lands or tenements are held and occupied by any person, without any special agreement for rents, the owner of such lands or tenements, his executors or administrators, may sue for and recover a fair and reasonable compensation for such use and occupation, by an action on the case, in any court having jurisdiction."

This question has been settled in this court, in the cases of *Clem vs. Wilcox*, 15 *Ark.*, 102, and *Dell vs. Gardner et al.* 25 *Ark.*, 134. In the latter case, the question is very ably and elaborately discussed, by Chief Justice Walker, and his opinion settles, beyond a doubt, the right of the appellees, in this case, to recover in an action of assumpsit, for the use and occupation of the property in question. So fully is the ques-

tion considered in that case, that we deem it unnecessary to do more than refer to that decision.

It was found, on the trial below, that Bright, the appellant herein, was in possession of the mill property during the time mentioned in the declaration. But one question remains to be considered, namely, that the damages were excessive. It was proven by one of the witnesses, Hayman, that the property was worth two thousand dollars a year. Hayman further stated that he was a regular miller, and mill-wright; that he had been engaged in the business all his life, and that he was well acquainted with the mill in litigation. Hammersly, another witness, testified that the mill and property were worth eight hundred dollars a year. He further stated that he had but little knowledge as to the value of such property; that Mr. Hayman was a regular miller, and was well qualified to judge of the value. Clark, another witness, stated that he thought that the use of the mill was worth one thousand dollars, for the year 1857, and eight hundred dollars per annum for the years 1858 and 1859. He stated that he was a miller. He also stated that Hayman was a good miller and mill-wright and a good judge of the value of mill-property. The above is the substance of what was proven on the trial, and we are of opinion that it clearly establishes the fact, that the rent of the property, for the time it was in the possession of Bright, was worth even more than the amount of the judgment rendered against him. We cannot therefore regard the damages as excessive, from the testimony contained in the transcript. Finding no error in the judgment of the court below, the same is affirmed with costs.

SLARK, STAUFFER & CO. v. VAN GILDER.

APPEALS—*Trials, de novo.*—Cases, on appeal, from the Probate to the Circuit Courts, should be tried *de novo*, even though no motion be made for that purpose.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Watkins & Rose, for Appellants.
J. W. Van Gilder, for Appellee.

SEARLE. J.—This suit was first instituted and tried in the Probate Court of Ashley county. From the judgment of that court, the appellants appealed to the Circuit Court. In the Circuit Court, they moved for a trial *de novo*, which was overruled, and to which they excepted. Thereupon, the Circuit Court having examined the transcript, from the Probate Court, found no error therein, and affirmed the judgment of the Probate Court. On account of this, as well as other rulings, the appellants appealed to this court.

The Circuit Court committed error in not trying this case *de novo*. *Smith & Bro. vs. Van Gilder*, 26 *Ark.*

The provisions of the law seem to be mandatory, and cases of this description should be tried anew, even though no motion be made for that purpose.

For the error, above indicated, the judgment of the Circuit Court is reversed, and the cause remanded to be proceeded in according to law, and not inconsistent with this opinion.

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HARRISON v. TRADEE AND WIFE.

CONSTITUTIONAL LAW—*Writs of Error, Clerks may issue.—Chapter* 124, *Gould's Digest*, regulating the issuance of Writs of Error, is not in conflict with the present Constitution, and so much thereof, as has not been repealed by subsequent legislation, is in force, and the clerk of this court is authorized to issue such writs in vacation, as well as in term time.

ERROR TO PHILLIPS CIRCUIT COURT. MOTION TO QUASH WRIT OF ERROR.

Watkins & Rose and *Palmer & Sanders*, for Plaintiff.
English, Gantt & English, for Defendants.

BENNETT, J.—On the 1st day of June, 1870, when this court was not in session, and without an order of court, the clerk issued a writ of error to Phillips county Circuit Court, upon which the transcript, in the above entitled cause, has been returned. The defendants have filed a motion to quash the writ and strike the case from the docket; because, *First*, there is no law authorizing the clerk of this court to issue a writ of error. *Second*, Said writ was issued by the clerk of this court, June 1st, 1870, when the court was not in session, without an order of the court, and without authority of law.

Section 4, *Art. VII*, of the new Constitution, provides: "The Supreme Court shall have general supervision and control over all inferior courts of law and equity. *It 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. Trial judgment, in the inferior courts, may be brought by writ of error or by appeal, into the Supreme Court, in such manner as may be prescribed by law."

Article 15, *section* 16, of the Constitution says: "All laws of the State, not in conflict with this Constitution, shall remain in full force until otherwise provided by the General Assembly or until they expire by their own limitation."

Section 859 *Chapter* 1, of the Code of Practice provides: "The mode of bringing the judgment or final order of an inferior

court, to the Supreme Court for reversal or modification, shall be by appeal, which shall be granted as a matter of right."

We cannot say that the Legislature, by the above enactment, intended to abolish the writ of error; even if it had done so, it would have been a futile attempt, inasmuch as the Constitution has given this court the power to issue it, that power would have been exercised in all proper cases; and had the Legislature failed to provide a manner for reaching this court by that writ; it could, and would have made its own rules for the exercise of that power.

But we are not left in that dilemma. As has been seen by the 15th *Article*, 16th *section*, "that all laws not conflicting with it are in force." The old statute, in Gould's Digest, regulating the issuance of writs of error, not being in conflict with any part of the Constitution, is in force, or so much of it as has not been repealed by subsequent legislation. Some portion of this statute has been repealed, as for instance, *section* 879 of the Civil Code says: "No written assignment of error shall be necessary, but the judgment may be reversed or modified for any error appearing in the record, to the prejudice of the appellant."

This repeals *section* 26, *of chapter* 124, of *Gould's Digest*, and it is not necessary to make any written assignment of error, as was the practice under the old law. Having decided that the old statute is in force, section one of that law fully answers the second proposition, as raised by the defendants in error. It says: "Writs of error, upon any final judgment or decision, of any Circuit Court, shall issue, of course, in all cases, out of the Supreme Court, in vacation, as well as term time," etc. Shall issue *out* of the Supreme Court, *by order of*—, issue as any other writ or summons, subject to the regulations prescribed by law.

Motion to quash overruled.

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LEWIS AND WIFE v. BOSKINS, Adm'r, Etc.

TITLE BOND—*Effect of contract.*—Where land is sold on a credit and bond is given to make title on payment of the purchase money, the effect of the contract is to create a mortgage, the same as though the vendor had conveyed the land by an absolute deed to the purchaser and taken a mortgage back to secure the payment of the purchase money.

LIEN OF—*Against whom a charge.*—The lien, created by a title bond, exists as a charge or incumbrance on the land, not only against the purchaser, his heirs and other privies in estate, but against all subsequent purchasers.

PURCHASER IN POSSESSION—*Cannot deny vendor's title.*—A purchaser, entering into possession under his contract of purchase, cannot, so long as he retains such possession, deny his vendor's title.

EXECUTORY CONTRACT—*Where purchase of better title by vendee, etc.*—A person in possession, under an executory contract, buying in a better title than his vendor's, can derive no advantage from it against the vendor, and the same will inure to the benefit of the vendor, under whom he entered, and all that he can demand is the sum he paid for the better title, with interest.

OBLIGOR—*When discharged from performance.*—If the obligee does anything to obstruct or prevent the obligor from performing his part of the contract, the obligor is discharged from his obligation to perform it; the contract, in legal effect, is, on his part, performed, and he may demand performance at the hands of the other party.

APPEAL FROM ST. FRANCIS CIRCUIT COURT.

HON. WM. STORY, *Circuit Judge.*

Watkins & Rose, for Appellant.

We submit that the half interest of the sister in the lands having been conveyed and fully paid for, the court erred in decreeing that the administrator of Brown had a lien upon *all* the lands. *Bailey vs. Greenleaf*, 7 *Wheat*, 50. At most, Brown was only an agent for his sister's interest in the lands, and neither an agent or trustee could have a vendor's lien. *Burr vs. Robinson*, 25 *Ark.*, 281.

B. C. Brown, for Appellee.

HARRISON, J.—William F. Brown and his sister, Martha P. Seaborn, wife of John M. Seaborn, owning jointly a tract of

land in St. Francis county, the said William F., in the year 1858 or 1859, with the consent and concurrence of his sister and her husband, sold the same to John Castleman for $2100. Castleman, at the time of the purchase, paid $1000, and gave Brown his note for $1100, payable at a future day, but when does not appear, and took from him a bond obliging himself to make him a deed of conveyance upon its payment, and, under his purchase, entered into the possession of the premises. Brown paid Mrs. Seaborn one-half of the price for which he sold the land, except $379, and he agreed and assumed to pay that. Brown died in 1861; whether before or after the maturity of the note, the record does not show, but leaving it unpaid, and without having conveyed the land and without having paid the balance due Mrs. Seaborn.

There being, in consequence of the war, no administration upon his estate for several years after his death, the note remained, the meanwhile, in the hands of his widow, Margaret E. Brown, and whilst she had it in her possession, and on the 20th day of February, 1863, Castleman applied to her to allow him to take it up, and give in lieu of it, a note for principal and interest to herself, to which proposition she assented, and he executed a note for $1170 to her, payable one day after date, bearing ten per centum interest, and she thereupon gave up to him the other. Castleman, on the 28th day of March, 1863, sold the land to Oliver Lewis, and delivered him possession. As part of the consideration of his purchase, Lewis agreed to pay Castleman's note to Mrs. Brown, and to that end he paid the $379 due Mrs. Seaborn by Brown's estate, and had the same indorsed as a credit upon the note, and Mrs. Seaborn and her husband, on the same day, executed a deed of conveyance for her undivided half of the land, at his instance, to Eliza C. Lewis, his wife.

Administration was afterwards granted upon Brown's estate, and the administrator brought this suit against Lewis and his wife, the heirs of Brown, who were infants, and other proper parties, to enforce his lien for the remainder of the

purchase money, and, upon the facts as thus substantially presented by the pleadings and the proof, the court decreed that the Lewises should pay to the plaintiff the sum of $1324 32; that the land should be charged with the payment thereof, and that in default of payment, by a day named, the land should be sold, etc.

From this decree Lewis and wife have appealed to this court.

As Mrs. Brown was not the administratrix of her husband, nor the legal representative of his estate, and acted wholly without authority in surrendering to Castleman his note and taking the other in lieu of it, the latter did not operate as a payment or discharge of the former, nor in anywise affect the rights of the plaintiff, in respect to the unpaid purchase money, and his lien upon the land for the same.

The law is well established that when a vendor sells land upon a credit, and gives the purchaser a bond to make him a title upon the payment of the purchase money, the effect of the contract is to create a mortgage, as if the vendor had conveyed the land by an absolute deed to the purchaser and taken a mortgage back to secure the payment of the purchase money. *Smith vs. Robinson*, 13 *Ark.*, 533; *Moore & Cail vs. Anders*, 14 *Ark.*, 628; *Graham vs. McCampbell*, *Meigs*, 42; *Tanner vs. Hicks*, 4 *S. & M.*, 294. Such being then the nature of the contract, it is manifest that the lien, so created, exists as a charge or incumbrance on the land, not only against the purchaser and his heirs and other privies in estate, but also against all subsequent purchasers. *Smith vs. Robinson, supra; Moore & Cail vs. Anders, supra; Shall vs. Biscoe*, 18 *Ark.*, 142; *Pintard vs. Goodloe*, *Hemp.*, 502; *Thredgill vs. Pintard*, 12 *How.*, 24. But the appellant insists that no lien ever subsisted in favor of Brown or his administrator upon the half of the land that Mrs. Seaborn owned, and that, if there ever was such a lien, it was discharged or lost by her conveyance to Mrs. Lewis, which rendered it impossible for his heirs to perform his agreement in respect to the conveyance of that part of the

land, and it would, therefore, be inequitable to call upon them to pay for her half of the land, when they could not perform his contract to convey it. Leaving out of view Lewis' agreement with Castleman to pay the note to Mrs. Brown (given as was intended by him in lieu of that he had given for the land), and under which he obtained the possession from Castleman, as well as the historical fact that bonds for title originated in and came into common use through the inability of the vendor, under the land system of the United States, to make title at the time of the sale, we find a conclusive answer to this claim of immunity from the demand of the plaintiff, in the well known rule of law, that a purchaser, entering into possession under his contract of purchase, cannot, so long as he retains such possession, deny his vendor's title. *Pintard vs. Goodloe, supra*; *Willison vs. Watkins*, 3 *Pet.*, 43; *Wilson vs. Weatherly*, 1 *Nott & McCord*, 373; *Meadows vs. Hopkins, Meigs*, 181. If the vendor is unable to convey the title and he would rescind the contract, he must restore the possession and do so entirely. He cannot enjoy the property and refuse to pay the price. *Thredgill vs. Pintard, supra; Pintard vs. Goodloe, supra; Wilson vs. Weatherly, supra; Willison vs. Watkins, supra.* And the conveyance, so far from taking the case out of the rule, or affording a protection against the lien, gives occasion for the application of another rule, a corollory of the former, which may be thus stated. A person in possession, under an executory contract of purchase, buying in a better title than his vendor's, can derive no advantage from it against the vendor, and the same will inure to the benefit of the vendor under whom he entered, and all that he can conscientiously demand is the sum he paid for the better title, with interest. *Pintard vs. Goodloe, supra; Thredgill vs. Pintard, supra; Searcy vs. Kirkpatrick, Cooks (Tenn.)*, 211; *Mitchell vs. Barry*, 4 *Hayw.*, 136; *Meadows vs. Hopkins, Meigs*, 181.

In the case, before us, Lewis claimed a credit on his purchase from Castleman for the amount paid for Mrs. Seaborn's

title, and he received an allowance for the same in the decree.

Equally unavailing is the objection that there cannot be a complete performance of Brown's part of the contract, since Mrs. Seaborn has conveyed her interest in the land to Mrs. Lewis. That conveyance was made at Lewis' instance, and it is a familiar and well settled principle, that if the obligee shall do anything to obstruct or prevent the obligor from performing his part of the contract, the obligor is discharged from his obligation to perform it; the contract on his part is, in legal effect, performed, and he may demand performance at the hands of the other party. *Bac. Abr., title, "Conditions," Letter Q,* 3; 3 *Com. Dig., title, "Condition," L. C.*

There is no error in the decree and the same is affirmed.

CAMPBELL AND WIFE v. WARE.

DESCENTS AND DISTRIBUTIONS—*Construction of.*—Where the inheritance is ancestral and comes from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement but in exclusion of the mother's line; and so, on the other hand, if it came from the mother's side, then to the line on the part of the mother from whence it came, to the exclusion of the father's line.

APPEAL FROM JOHNSON CIRCUIT COURT.

HON. W. N. MAY, *Circuit Judge.*

Floyd & Cravens, for Appellants.
English, Gantt & English, for Appellee.

BENNETT, J.—This was a bill for partition and to quiet title. The decree below was in favor of Ware, the complainant. Campbell and wife, the defendants, appealed to this court.

The facts, as appear by bill and answer, are in substance as follows:

Harman H. Brewer died intestate, on the 6th day of September, 1859, seized and possessed of the lands as set forth and described in the bill, leaving him surviving, his widow, Susan F. one of the appellants, (who afterwards intermarried with appellant, Campbell,) and his son, Nicholas Brewer, Jr., his sole heir at law.

Harman H. Brewer acquired the lands in controversy. His homestead and improvements were upon two of the tracts and the others were detached and wild. His widow, Susan F. continued to occupy the homestead, without assignment of dower, from his death until the filing of the bill. She was the mother of Nicholas Brewer, Jr., his sole heir at law.

Nicholas Brewer, Jr., died a minor, intestate, and without issue, about the 7th day of September, 1864, leaving him surviving, his mother, Susan F., and his grandfather, Nicholas Brewer, Sr.

Nicholas Brewer, Sr., died about the 14th day of October, 1864, having in 1860, made a will, by which he devised his estate to his grandson, Nicholas Brewer, Jr., his two daughters, Julia A. Brewer and Mildred Ware and her son, the appellee, with succession to the survivors.

In the year 1864, Mildred Ware died intestate, leaving her surviving, her son James N. Ware, the appellee, her sole heir and distributee.

Julia A. Brewer died, intestate, in October, 1867, without issue, leaving her surviving, appellee, her sole heir and distributee.

Susan F., the widow of Harman H. Brewer, intermarried with appellant, Campbell, in January, 1868.

Mrs. Campbell claims title to the lands as the sole heir and successor to her son, Nicholas Brewer, Jr., by her former husband, Harman H. Brewer.

James N. Ware claims title as the sole heir and successor under the will of Nicholas Brewer, Sr.

The will was made in 1860, before Nicholas Brewer, Jr., had died. We have assumed, and we think there can be no controversy as to the fact, that Mildred Ware was the daughter of Nicholas Brewer, Sr., and that James N. Ware was her son, although it is sought to be controverted, in the answer of the defendants, but the proof is overwhelming and conclusive on that point.

Under these statements of the facts, the only question that is to be determined is, whether the grandfather or the mother of Nicholas Brewer, Jr., is entitled to his property.

As has been stated, Harman H. Brewer, the father of Nicholas Brewer, Jr., acquired these lands and by his death they descended to his son, subject to the dower interest of his wife, Susan F. The son had made no further acquisition to them.

The transmission of property, whether by descent, succession or purchase, depends upon municipal regulations, and the statutes of descents, in force at the time of the death of Nicholas Brewer, Jr., must govern this case. This is the act, approved *December* 13, 1837, for the construction of which we must be governed by the case of *Kelly's heirs et al. vs. McGuire and wife et al.*, 15 *Ark.*, 555; *Loftis vs. Glass, exr.*, 16 *Ark.*, 680; *West et al. vs. Williams et al.*, *Ib.* 682; *Scull et al. vs. Vaugine et al. Ib.* 695; *Cloyes et al. vs. Beebe et al.* 14 *Id.* 489.

It has been held in the above cited cases, that there are two kinds of estates under our statute of Descents and Distributions, one *ancestral*, the other *new acquisitions*. In the case of *Kelly's heirs et al. vs. McGuire and wife et al.*, the court says: "The manifest intention of the first part of *Section* 10 was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle which invariably followed the line of the blood. If the estate comes to the intestate by the father, or as it may be differently expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturning the inflexible rule of the common law, that

an estate could never ascend, but should rather escheat to the lord. And so, if it comes by or on the part of the mother, it goes to the mother and her heirs, in exclusion of the heirs of the father. In other words, it remains in the paternal or maternal line, from which it was derived." * * *

"The 10th and 22d sections must be construed together, although the exact expressions used in the latter, are not contained in any part of the statute. But words of equivalent signification are employed, and they are embraced within the spirit of the 22d section." * * * * * And further the court says: "The portion of the 10th section, as to *new acquisitions*, gives the father and mother a life estate only, with remainder to the collateral heirs of the intestate, such as brothers and sisters and their descendants, and so on. A new acquisition or newly acquired estate does not afford, of itself, an exact idea of the acquisition."

The first section of the law is general and comprehensive, embracing all lands, whether ancestral or newly acquired, subject to certain exceptions and qualifications, and these exceptions refer to real estate alone. This section also constitutes the table by which real estate is to descend, and personal property to be distributed. The effect of the first section is to vest an absolute estate of inheritance in lands in the person who takes. *Hilliard, in his Trustees on Real Property, vol.* 207, says: "In Arkansas, if there are no descendants, and the estate came from the *father*, it passes *to him and his heirs*. The half blood and their descendants inherit it, unless the estate is ancestral, in which case, *none inherit but those of the ancestral blood.*"

The court, in the case of *Kelly's heirs vs. McGuire, et al*, announced as a part of their conclusions: "That, as to real estate, it was the design of the legislature, when there were no descendants, to point out the line of succession, and that this is to depend on the fact, whether the inheritance is ancestral or new, and if ancestral, then whether it came from the paternal or maternal line. If the inheritance was ances-

tral and came from the father's side, then it will go to the line on the part of the father from whence it came, not in postponement, but in exclusion of the mother's line; and so, on the other hand, if it came from the mother's side, then to the line on the part of the mother from whence it came, to the exclusion of the father's line." This, we think, settles the law of this case. The lands, on the death of Herman H. Brewer, who acquired them, descended to his son, Nicholas Brewer, Jr., subject to the dower claim of the widow. Nicholas Brewer, Jr., held the lands, not as a new acquisition, but as an ancestral estate, an estate that came by his father and, on his death, the estate ascended to his grandfather, Nicholas Brewer, Sr.

On his death, to say nothing of his will, the lands descended to his two daughters (Mildred Ware and Julia A. Brewer) of whom the appellee, James P. Ware, son of Mildred Ware, is the only survivor, sole heir, and has the legal title to the lands, subject to Mrs. Campbell's dower.

The bill prays that one third of the lands be partitioned to Mrs. Campbell, as her dower right, and the remainder to James N. Ware, complainant below, and his title thereto confirmed and quieted. The court below decreed as prayed, which we think was right.

Decree affirmed.

TRAPNALL & TRAPNALL v. TERRY & STEELE.

SCIRE FACIAS—*Nature of, when demurrable.*—The writ of scire facias occupies the place of both declaration and writ of summons, and when the facts, set up in the writ, are not sufficient to show a cause of action, a demurrer would be a proper response.

When motion to quash.—Where there is no record in the court, as a foundation upon which the writ could properly issue, it is such a matter in abatement as might be reached by motion, and a party is not necessarily compelled to resort to a plea of *nul tiel record.*

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Ringo and *Clark & Williams*, for Appellants.

Under our statute, the death of a sole plaintiff or defendant does not abate the suit, but the party, in whom the action survives, may continue the cause, by an order of court, substituting himself. *Digest, Chap* 1, *Sec.* 7; after quashal of the *scire facias* (which we submit was erroneous), the court, under the subsequent motion made for that purpose, should have required the defendants to show cause why the appellants should not be made parties. *Noland vs. Leech, exr's.*, 10 *Ark.*, 504.

The order, of 25th April, 1866, was not such a final judgment of dismissal, as could not be revoked or set aside at a subsequent term. It was a nullity; both the plaintiffs were dead—it was not a judgment on the *merits* dismissing the case. The case of *Harrell et al. vs. Mason*, 9 *Ark.*, 406, relied on by the appellees, is not applicable—is not law. *Gleason vs. Carter*, 28 *Geo.*, 516; *Gowenys vs. Loyd*, 4 *Texas*, 483; *Rumbels vs. Jones*, 3 *Ind.*, 35; *Parker vs. Badger*, 6 *Foster* (*N.* 71), 466. *Meade vs, Rutledge*, 11 *Texas*, 44; *Dennison vs. Holliday*, 38 *Eng. Law. and Eq.* 496; *Venable vs. Smith's Ex'r.*, 1 *Duval* (*Ky*), 195.

The case of *Hubbard vs. Welch*, 11 *Ark.*, 151, cited by appellees, is not in point—it was a judgment upon the merits—and

so with all the cases. They are all judgments upon the merits—none other have ever been held conclusive. See *Brooks vs. Hananer*, 22 *Ark.*, 174; *Rector vs. Danley*, 14 *Ark.*, 304; *Pulaski County vs. Lincoln*, 13 *Ark.*, 103; *Smith vs. Danley*, 2 *Ark.*, 66; *Walker et al. vs. Jefferson*, 5 *Ark.*, 25; *Ashley vs. Hyde & Goodrich*, 6 *Ark.*, 101; *Rawdon, Wright & Hatch vs. Rapley*, 14 *Ark.*, 203; *Cossitt vs. Biscoe*, 12 *Ark.*, 95; *Yell vs. Outlaw*, 14 *Ark.*, 621; *Cunningham vs. Ashley*, 16 *Ark*, 181.

Gallagher, Newton & Hempstead, for Appellees.

The order and judgment of the court, dismissing the cause, could only be reached by appeal or on error. 6 *Eng.*, 519; 7 *Eng.*, 218; 18 *Ark.*, 53; 21 *Ark.*, 117.

Second, The term having passed, the court no longer had control of the matter. 1 *Eng.*, 282; 5 *Ark.*, 709; 14 *Ark.*, 203; *Ib.* 568; 1 *Eng.*, 100; 7 *Eng.*, 95; 22 *Ark.*, 176.

Third, If the judgment was void, it should have been reached by writ of error *coram nobis*. *Hempstead U. S. Ct. Ct. Rep. Dist. Ark.*, *p.* 699.

Fourth, By analogy of Statutes of Limitations, as to writ of error, three years, or proper construction of *section* 94, *Gould's Digest*, parties were barred.

GREGG, J.—On the 31st day of May, 1869, the appellants, by attorney, appeared in the Circuit Court and represented that after the institution of a suit in ejectment, in that court, against said defendants, by Martha F. Trapnall and Mary R. Trapnall, they had departed this life; that the suit had thereupon abated and the property descended to these appellants by inheritance; and they moved the court for orders and process proper to revive the action in their names, and that a writ of *scire facias* issue, which was ordered returnable to the next term of the court.

On the 14th of December, 1869, the defendants appeared and filed their motion to quash the *scire facias*, alleging:

First, That the writ was not moved for in time.

Secondly, That the writ shows, on its face, that the plaintiffs are not entitled to have the action revived.

Thirdly, That there is no such suit pending in court, as the one described in said writ.

Fourthly, The writ is otherwise bad, etc.

On the 2d of February, 1870, the court sustained the motion and ordered that the case be stricken from the docket.

On the 8th, of the same month, the plaintiffs filed a motion to set aside the order last referred to and to revive the suit, which motion was taken under advisement until the next term of the court.

On the 29th of June, 1870, the parties appeared and the court overruled the motion, and adjudged that the defendants go hence and recover their costs; from which judgment the plaintiffs appealed to this court.

As a basis, for the proceedings on the *scire facias*, it is shown, upon the record, that on the 6th day of August, 1861, the parties, alleged to have died, filed their declaration in ejectment against the defendants, in the Pulaski Circuit Clerk's office, and, on the 28th of September of that year, the parties appeared in the then Circuit Court of that county, and, by consent, the case was continued.

The next that appears is an order of the Circuit Court, of said county, made on the 25th of April, 1866, striking the case from the docket for the want of jurisdiction, the proceedings having been instituted after the ordinance of secession and before the reorganization of the State government; then follows the proceedings as above indicated.

The counsel, for the appellants, insist that upon the motion to quash the writ of *scire facias*, nothing can be looked to but the face of the writ. They assume that the motion, like a demurrer, goes alone to the sufficiency of the writ upon its face.

We are not prepared to concede this to its fullest extent; the motion is more nearly allied to a plea in abatement than a demurrer. The writ of *scire facias* occupies the place of both declaration and writ of summons.

If the facts, set up in the writ, are not sufficient to show a cause of action, a demurrer would be a proper response. But if the *scire facias* should require a defendant to answer in a suit, entirely and radically different from the one that had been in prosecution before the court, or require him to show cause why an action should not be revived, when in fact no action had ever been brought against such defendant, we see no reason why a motion, in the nature of a plea in abatement, might not be sustained. The court judicially knows its own records, and it appears to us, if there is no record in the court, as a foundation upon which a writ could properly issue, it is such matter in abatement as might be reached by motion, and that the party is not necessarily compelled to resort to a plea of *nul tiel record;* such would be an improvident issue of a writ and the court might even, on its own motion, quash such writ.

The third ground set up in the motion to quash was, that "There is no such suit pending in court, as the one described in the writ." We are of opinion that the records, before the court, justified the finding, and that there was no error in quashing the writ. The judgment of the Circuit Court is affirmed.

COLLIER, admr. etc. v. HUNTER & OAKES.

SUITS—*Consolidation of.*—An order of court is necessary before several suits pending, as provided in *Sec.* 132, *Chap.* 133 *of Gould's Digest*, can be regarded or treated as consolidated.

BANKRUPTCY—*Plea of, good defense.*—A person cannot be or remain a party to a suit after his bankruptcy, and the plea, when properly pleaded, is a good defense.

PRACTICE—*Trials de novo.*—All cases, on appeal from inferior courts to the Circuit Courts, must be heard *de novo.*

APPEAL FROM RANDOLPH CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

English, Gantt & English, for appellant.

First, The Circuit Court erred in affirming the judgment of the Probate Court without a trial *de novo—Collier, ad. vs. Kilcrease, MS. opinion, present term.*

Second, The cases were treated as consolidated without an order of court for that purpose.

Third, The court erred in sustaining the demurrer to appellants plea of *bankruptcy. Brightley's Bankrupt Law, p.* 48.

Fourth, The auditor's reports, upon the accounts, were confirmed, though no notice was given appellant of the time and place of auditing them, nor did the auditor report the evidence to the court on which he acted as required by the statute. *Dig. Ch.* 4, *Sec.* 133, *p.* 127; *Dig. Ch.* 28, *Sec.* 74, *p.* 227.

SEARLE, J.—This cause originated in the Probate Court of Randolph county. It appears, from the transcript, that the appellant, Collier, who was the administrator of the estates of Michael S. Wilson and Jonathan Wilson, deceased, filed, in said court, his account current for settlement in each case. Hunter and Oakes, appellees, herein, being creditors of said estates, filed objections to the accounts. The Probate Court referred the accounts to an auditor, who made his reports thereon, and the reports were objected to, on the part of the

appellant. After separate trials of the issues of the two cases, thus made up, the court confirmed the reports. The appellant asked for new trials, which were disallowed; whereupon he appealed to the Circuit Court. The transcripts of the two cases were certified together up to the Circuit Court, and that court regarded and disposed of them as being, or having been, consolidated. Here, also, the appellant pleaded the bankruptcy of Oakes, one of the appellees, to which the appellees demurred, and the court sustained the demurrer. The court then, upon examination of the transcript, found no error and affirmed the judgment; whereupon, the appellant appealed to this court.

From the above statement, three questions are presented for our consideration:

First. Was it error, in the court below, in regarding the two cases, as instituted and tried in the Probate Court, as consolidated, and thus disposing of them?

Section 132, *Ch.* 133, *Gould's Digest*, provides that "whenever several suits shall be pending in the same court, by the same plaintiff against the same defendant, for causes of action which may be joined, or when several suits are pending in the same court by the same plaintiff against several defendants, which may be joined, the court, in which the same may be prosecuted, may, in its discretion, order such suits to be consolidated into one action." The cases, under consideration, were doubtless regarded and treated as consolidated under this section. And yet, it appears that neither the Probate nor the Circuit Court made any order for their consolidation. It seems that the Circuit Court treated the two cases as consolidated, simply, because they were certified together from the Probate Court. This, to say the least of it, was very informal.

But we may say, further, that these actions were not such as could be consolidated under the above cited section. The defendants are different in the two cases. The grounds of action and the defenses are also different. The trials, there-

fore, and the judgments must be separate and distinct. From the consolidation so much confusion has already resulted and necessarily will result, that these adjudications, in their present shape, would be a matter of impossibility.

Second. Did the court below err in sustaining appellees' demurrer to appellant's plea of bankruptcy as to Oakes?

A transcript of the plea is not before us; and the only evidence, we have, that such a plea was interposed, is an entry to that effect. We cannot, therefore, determine whether or not the court erred in sustaining the demurrer. We may, however, remark that if the plea properly set up the bankruptcy of Oakes, the court should have overruled the demurrer. For, in relation to one adjudged a bankrupt, it is declared in section fourteen of the bankrupt law of the United States, that "all debts due him, or any person for his use, and all liens and securities therefor * * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee." From this section it most clearly appears that one cannot be or remain a party to a suit after his bankruptcy. Oakes sued in the character of a creditor of the estates of which the appellant was the administrator. If his bankruptcy was properly alleged, under the bankrupt act, the demurrer was not well taken and should have been overruled.

Third. Did the court below err in affirming the judgment of the Probate Court, on the appeal, without a trial *de novo?*

The opinion in the case of *Smith & Brother vs. Van Gilder*, 26 *Ark.*, 527, and affirmed, at the present term of this court, in the case of *Slark, Stauffer & Co. vs. Van Gilder*, is conclusive of this question. It is there decided, that all cases, on appeal from inferior courts to the Circuit Courts, must be heard *de novo*. The court below should have tried this cause *de novo*. Having failed to do so, the judgment must be reversed and the cause sent back to that court to be proceeded with according to law and not inconsistent with this opinion.

BYERS et al. v. DANLEY.

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RESULTING TRUSTS—*Nature of, etc.*—A resulting trust is a mere creature of equity, founded upon presumptive intention, and designed to carry that intention into effect.

When will not attach, etc.—It will not attach in the person paying the purchase money, if it was not the intention of either party that the estate should so vest in him.

AGENTS—*When purchase by, will not operate as a resulting trust.*—Where an authorized agent purchases land for his principal and advances the purchase money, not as a *loan to him* upon the security of the lands purchased, or for the purpose of converting the money into lands, but as an advance to the principal, to enable the agent to accomplish the object of his principal, no trust will result in favor of the agent.

SAME—*Liens of, for advances, etc.*—An agent has an implied or equitable lien, enforcible within proper time, in equity, for advances, expenses, commissions, etc., made in the purchase of lands for his principal, and this lien is incident to the debt and continues in the agent so long as he has the possession of the lands or title papers, but if he parts with the possession, or the debt be paid or barred by the statute of limitation, the lien is gone.

POSSESSION—*What must be, to operate in favor of holder.*—Possession, in order that the statute of limitations may operate in favor of the holder, must be adverse, intentional, actual, continuous and unbroken for the full period prescribed by the statute; if there be an interruption of holding, the term of adverse possession is closed, and upon resumption of possession, a new point is made from which limitations will again begin to run.

PARTITION—*When not cognizable in equity.*—Partition cannot be had in chancery when the lands asked to be divided are held adversely, or the title is in dispute, except in cases where the lands are unoccupied and there is only that possession in law, which is connected with the title to the lands.

APPEAL FROM WHITE COUNTY CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

W. R. Coody and Rice & Benjamin and Whipple, for Appellants.

First, We submit that no trust could result or be declared in favor of Smith; he invested the money as the agent of Northrop, and with the understanding that Northrop should pay it back. 17 *Miss.*, 228; 5 *Cush.*, 431; 1 *Md.*, *chap.* 479; 2

Paige, 217; 1 *Dev. and Bat.* (*N. C.*), 119; 6 *Ala.*, 404; 12 *Peters S. C.*, 241; 4 *Cranch.*, *C. C.*, 541; 39 *Barbour*, 625; 10 *Vesey*, 366-7; 14 *Gray*, *Mass.*, 119 *and* 122 (*note*); 34 *Miss.*, 5 *George*, 611; 7 *B. Monroe*, *Ky.*, 433; 2 *Spence Equity Jurisdiction*, 204. Equity will not allow the intention of the parties to be frustrated by mistake or fraud, but will give the title its proper direction. *Smith's Leading Cases in Equity*, 562; 28 *Ala.*, 127; 3 *Iowa*, 422; 9 *Watt's*, 32; 1 *Story Equity*, *sec.* 54 *g.*; 1 *Paige*, 495; 2 *Wash. C. C.*, 321; 4 *Desau*, 487; 2 *Blackford*, 213, 8 *N. H.*, 195; 2 *Johnson*, *Chy.* 585.

Second, Smith, acting as agent, his act, in reference to the subject matter of the agency, was the act of Northrop. *Story on Agency*, *sec.* 2; 1 *Oregon Rep.* 272. Northrop paid the money, and Northrop received the deed; and there was no possible room for a resulting trust in favor of Smith. 3 *Sumner*, 466; 28 *Penn.* 419; 30 *Ib* 133; 58 *Ala.* 127; 17 *Ill.*, 623; 18 *Penn.*, 283; 13 *Ill.*, 221-7; 2 *Black U. S.*, 613; 23 *Cal.*, 51; 21 *Ark.*, 539; 18 *Ind.*, 462; 39 *Penn.*, 369; 2 *Md. Chy.*, 515; 2 *Washburn on Real Property*, 102 *and* 166; 1 *Barbour*, 180. In order to create a resulting trust in favor of him who pays the purchase money, the money must be paid *before* or *at the time of purchase*, and no future advance of the purchase money, after the trade is made, will be sufficient. In other words, "the trust must arise, if at all, out of the circumstance that the money of the real, and not of the nominal purchaser formed, *at the time of the purchase*, the consideration of that purchase, and was intended, *at the time*, by the party to be converted into land. 1 *Hoff. Chy.*, 90; 3 *Ala.*, 302; 13 *Iowa*, 521 *and* 540; 46 *Maine*, 311; 13 *Ill.*, 186, 221 *and* 227; 16 *Vermont*, 500; 3 *Md. Chy.*, 547; 32 *Penn.*, 371; 33 *Penn.*, 158; 3 *Miss.*, 190; 16 *Texas*, 214; 28 *Miss.*, 249; 2 *Wis.*, 552; 2 *Ind.*, 95; 2 *Johnson Chy.*, 405; 5 *Ill.*, 1 *to* 19; 6 *Cowen*, 706 *to* 725; 2 *Pope*, 218; 8 *N. H.*, 187; 2 *Fairfield*, *Me.*, 9; 16 *Maine*, 268; 6 *Dana*, 331; 3 *Wendell*, 638; 2 *Ark.*, 71; *Harrington Chy.*, 12, 130; 3 *Paige*, 390; 3 *Maine*, 41; 4 *Md.* 465.

Third, Smith had a lien, and only a lien, upon the title

papers and the lands for his commissions, services, expenses, and advances, which grew out of his relation, and was incident to Northrop's indebtedness to him. *Story on Agency, sections* 350 *to* 390 *inclusive;* 4 *Ill.*, 94; 3 *Story Equity, secs.* 1215 *to* 1217; 2 *Kent*, 634; *Montague on Liens*, 1; *Smith's Mercantile Law*, 336-7, 514, 515; 2 *Camp. Rep.*, 579.

Fourth, As to the Statute of Limitations, Northrop having the legal title, the constructive possession, by the payment of taxes, etc., followed the legal title, and he was in constructive possession until ousted by actual possession. 21 *Ark.*, 9; *Ib.*, 74; 1 *Hempstead, C. C.*, 225; 2 *Washburn on Real Property, top page* 484, *sec.* 8 *and* 9; 1 *Cowen*, 286; 6 *Serg. and R.*, 140. Then as to the actual possession of twelve acres of the lands, as alleged (but not proven) by Bond, in 1845, and continued until 1852. Before title can be acquired by possession, it must be adverse, actual, continuous and unbroken, for the full period prescribed by the statute; 22 *Ark.*, 78. Until the Act of the 4th of January, 1851, the period of limitation for real property, in this State, was ten years, (*English's Digest*, 98, *Section* 1), which Act of 1851 repealed the old Act of 1839; and by the second section, established the period of limitation as to lands at seven years, and the old statute bar of ten years, not having attached to Smith's actual possession from 1845 until 1851, was operated upon by the new Act of limitation, as a demand in existance at the time of its passage, and gave the parties interested, seven years after the passage of this new Act in which to bring their actions, unless the same was served by the provisions of the first section of the Act of 1851. 5 *Ark.*, 510; 6 *Ark.*, 513; *Gould's Digest, page* 748, *Section* 1 *and* 2.

The saving clause in the first section of the Act 4th of January, 1851, only applies to parties who had three years' possession of lands, etc., prior to the passage of the Act, "holding and claiming the same by virtue of a deed or deeds of conveyance, devise, grant or assurance." But if Smith had possession, it did not work a disseizin, or lay a proper founda-

tion for a title to become complete under the Statue of Limitation; for the title must be a fee or it amounts to nothing. 2 *Wash.* 498, *section* 18.

There must be an actual occupancy, clear, definite, positive, notorious and hostile. 6 *S. and R.*, 21; 9 *Penn.*, 226; 5 *Met.*, 15 *to* 33; 15 *Ill.*, 271; 5 *Md.*, 256; 20 *Howard*, 32; 15 *Pick*, 250; 2 *Geo.*, 191; 11 *Cush.*, 210; 10 *Johnson*, 477; 7 *Mass.*, 383; 11 *Penn.* 189.

Causing lands to be surveyed, lines marked, and occasionally cutting grass upon it is not sufficient. 4 *Mass.*, 216; 6 *Johnson*, 218; 2 *Rich.*, 627.

The occupancy must be manifested by fences or otherwise. 14 *Pick.*, 224; 10 *Barbour*, 254. Making sugar occasionally, in camp built on land, not sufficient. 1 *A. K. Marshall*, 207. Nor would a "lap," or "slash" fence around woodland be sufficient. 3 *Met.*, 125; 2 *Johnson*, 230; 10 *N. H.*, 397; 7 *N. H.*, 436. Cutting wood, clearing land, and running working lines, not sufficient. 6 *Cush.*, 129; 18 *Vt.*, 294; 1 *Allen*, 245.

The possession must be continued, adverse and exclusive, during the whole period prescribed by the statute. 20 *Howard*, 32; 13 *Pick.*, 250; 26 *Geo.* 191. The possession must be with the manifest intention to claim title to the land occupied against the true owner; in fact the intention with which the possession was commenced and continued are the only tests. 32 *Miss.*, 127; 30 *N. H.*, 355; 4 *Wheat*, 213; 6 *Ind.*, 273; 39 *N. H.*, 278 *and* 281; 9 *Johnson*, 180; 5 *Peters, U. S.*, 102; 8 *Cowen*, 589.

Clark & Williams, for Appellee.

We assume the position:

First, That when the deed of Creagh was first made and delivered to Austell & Marshall, it was an escrow, dependent for its effect as a deed, upon Smith's paying the one hundred and eighty dollars.

Second, That when that condition was complied with, the legal title passed to Northrop, and related back to the first

delivery against Creagh, and all parties claiming under him, except, perhaps, an attaching creditor, who might seize the land before the deed became absolute, as to which there is no question here. See *Hempstead vs. Johnson*, 18 *Ark.*, 125; 4 *Kent's Commentaries*, 155. We refer especially to the language of Judge Kent, as referred to in last reference. *McDowell vs. Cooper, et al.*, 14 *Sergeant & Rawle, Penn. Rep.* 296; *Harrison vs. Trustees of P. Academy*, 12 *Mass. Rep.* 460; *Canning and wife vs. Pinkham et al.*, 1 *New Hamp. Rep.* 353; *Buffon vs. Green*, 5 *New Hamp.* 71; *Goodrich vs. Wallace*, 1 *Johnson N. Y., Cases* 253; 4 *Kent*, 454, 456; *Shep. Touchstone*, 285.

The delivery of a deed to a third party is good, although the use is not declared. *Soverbye vs. Arden*, 1 *J. Ch. R.* 240. An actual delivery of the deed is not necessary to pass title. 1 *Edwards Chancery*, 497. When the grantor delivers the deed to a conveyancer, employed by the parties, to be deliverd to the grantee, the title passes immediately to grantee. *Reed vs. Mable*, 10 *Paige C. R.*, 409; *Byers vs. McClanahan*, 6 *Gill & J.* 250; *Tate vs. Tate*, 1 *Dev. & Bat. Ch.*, 22.

The naked legal title then vested in Northrop, charged with an equity in Smith for the payment of $313 00. This equity could be discharged by Northrop, by payment, within a reasonable time, and thus make his title good. That reasonable time did not extend beyond the period of ten years, which, by the law then in force, was ten years. See *English's Digest, Chap.* 99, *Sec.* 1; *Revised Statutes of* 1839, *Chap.* 91, *Sec.* 1; and was not repealed or altered until 1851, when the period was reduced to seven years, and Smith's possession, three years before, and Danley, claiming under him, three years thereafter, adversely to Northrop and his heirs, they are barred by the Act of 1851. *Gould's Digest, Chap.* 106, *Section* 1. When the Statute of Limitation commenced running against Northrop in 1840, it did not cease at his death, even in favor of minor heirs, for disabilities are not cumulative, and his heirs took, subject to the same rules and laws that Northrop held under. See *Carter vs. Cantrell*, 16 *Ark.*, 154;

Brinkley vs. Willis, 22 *Ark.*, 5; *Lytle vs. State*, 17 *Ark.*, 608. And Danley's possession can be added to Smith's to complete the bar. *Cunningham vs. Broomback*, 23 *Ark.*, 336.

We submit further, that Smith having furnished the purchase money, the legal title was vested in Northrop, with resulting trust in Smith.

Where a party purchases property and takes deeds in name of a third party, the latter is trustee of a satisfied trust, and his heirs cannot oust the former in ejectment. *Brown vs. Weast*, 7 *Howard Miss.*, 181; *Powell vs. Powell*, *Freeman's Chancery Miss. Rep.*, 134; *Methodist Episcopal vs. Jaques*, 1 *John. Chancery Rep.* 450; *Boyd vs. McLean*, 1 *Johnson Ch. Rep.*, 582; *Botsford vs. Burns*, 2 *Johnson Ch. Rep.*, 409; *Livingston vs. Livingston*, 2 *John. Ch. Rep.*, 540; 4 *English*, 518; *Cook vs. Bronaugh*, 13 *Ark.*, 187; *Cain vs. Leslie*, 15 *Ark.* 312; *Shields vs. Trammell*, 19 *Ark.*, 51; *Ferguson vs. Williamson*, 20 *Ark.*, 272.

The payment of a part of the purchase money of a tract of land raises a resulting trust in favor of the party by whom such payment is made. *Chadwick vs. Felt*, 35 *Penn. State R.*, 305; 16 *Texas*, 314.

Resulting trusts are not within the statute of Frauds. See above authorities. See *Rose's Digest*, 782; *Ib.* 366; *title Statute Frauds*, 15; and cases there cited.

A trust intended for the benefit of a third party, without his knowledge, may be affirmed by him afterwards. *Cumberland vs. Codington*, 3 *John. Ch. Rep.*, 261; *Shepherd vs. McEver*, 4 *John. Ch. Rep.*, 136.

Parol evidence is admissible to establish a *fact* from which the law will raise or imply a trust. *Moore vs. Moore*, 38 *New Hampshire*, 382.

Oral declarations are sufficient and competent to make out a trust by implication of law. 25 *Georgia*, 403; and the evidence of the trust may be circumstantial. 26 *Georgia*, 625; 29 *Geo.* 67.

On the same subject, see *Wells vs. Robinson*, 13 *California*,

133; 1 *Head* (Tenn.) 305; 2 *Ib.* 684; 12 *Indiana*, 348; 1 *Clark* (*Iowa*) 226; *Ib.* 271; *Ib.* 423.

Generally a constructive trust arises in favor of the one who furnishes money for the purchase of land. *Sullivan vs. McLemans*, 2 *Clark*, (*Iowa*) 437.

Where can we imagine a stronger state of facts to create an equity than we have here? It includes all three of the grounds of equitable interference. 1st, Fraud. 2d. Trust. 3d, Mistake. It was a fraud in Northrop to employ Smith to advance money and give his services under the agreement proved, and then abandon it. It was a trust because Smith advanced the money. It was a mistake to take the deed to Northrop instead of to himself.

BENNETT, J.—On the 2d day of April, 1858, Benjamin F. Danley, appellee, brought suit in equity, to quiet and perfect title and for the possession and rents, against appellants and others. Some of the defendants demurred to the bill; some failed entirely to defend in any form. Defendants, Cheek and Mays, regularly defended by answer and proofs, etc. Upon the hearing, a final decree was entered giving appellee possession of the lands, from which an appeal was taken.

The facts, as appears from the bill and records in this case, are substantially as follows:

On the 11th day of July, 1835, the lands in controversy, to-wit: S. W. ¼ of Section 10, Township 7 North, Range 7 West, were patented by the United States to Frederick Pace. On the 8th day of December, 1835, Pace sells to John G. Creagh and, on the 5th day of January, 1840, one Algernon S. Northrop, desiring to purchase said lands, and meeting with one Erastus Smith, at Little Rock, who was an attorney, and at that time upon an extensive tour in the south-west, employed said Smith, as his agent, to purchase said lands for him, provided he could find out the owner for the same, agreeing to give Smith one hundred dollars for his services, bear his necessary expenses, and pay back to him the purchase

money which he might have to advance upon the purchase of said land. To all of which, Smith, at the time, agreed, and, for the purpose of consummating the purchase of said lands for Northrop, proceeded to Mobile, Alabama, where he was informed Pace, the original patentee, lived in Clark county of said State. Smith went immediately to see Pace, from whom he learned that he had, years before, sold the lands to Creagh; Smith then went back to Creagh; proposed to purchase said lands from him for Northrop. Smith purchased the lands for Northrop, as his agent, for one hundred and eighty dollars, but not being able to advance the purchase money, at the time, Creagh agreed to execute the deed to Northrop, and send the same to Aslett & Marshall, of Mobile, to be delivered to Smith, as the agent of Northrop, upon the payment of the purchase money. Two months after, to wit, on the 13th day of May, 1840, Smith was at Mobile and, as the agent of Northrop, secured the deed and title papers from Aslett & Marshall, and advanced, for Northrop, the purchase money. On the 15th of May, 1840, Smith sent deed and title papers to Goodrich & Boardman, at Little Rock, with his account, made out against Northrop, for his fees, expenses and purchase money advanced, with instructions to deliver the same to Northrop upon the payment of his account, amounting to three hundred and thirteen dollars. The bill then alleges title in Creagh; that the same passed to Northrop subject, of course, to Smith's equities for commissions and advances made by him, as the agent of Northrop; states that the papers remained with Goodrich & Boardman for a long time and were lost; that Smith learned that Northrop had abandoned the trade, etc. Smith took possession of the land in 1840; paid taxes until sale to Danley in 1851 or '52. In 1850, Northrop died intestate and without children. In 1852, Danley, knowing all the facts, purchased the lands from Smith for five hundred dollars. Smith makes a quit claim deed; Danley takes possession of the lands and had them surveyed off into town lots, etc.; held the same until 1855, adversely,

and until commencement of suit, so far as to pay taxes. In 1855 appellants, and those under whom they claim, took actual possession under an adverse title, exhibited in the bill. The bill then alleges constructive possession, by Smith, from 1840 until 1845 by payment of taxes, and then by agent Bond, until sold to appellee, in 1852. Twelve acres of the land were cleared; that Danley took possession, by his agent, in White county, who was known to appellants.

In 1853–4, Danley gave notice by advertisement and by agent, warning all persons not to trespass on said lands. On the 20th of April, 1852, Danley got a quit claim deed from Northrop's father; the brothers and sisters, except Thomas J., refusing to make a deed. Thomas J. gave Danley a quit claim deed dated 30th of December, 1857.

The bill then sets out Jones' deed from Creagh, on the 10th of May, 1855; Jones' deed to Cheek, of June 7, 1855; Sheriff's deed to Byers, January 1, 1856; Jones' deed to Heard, June 22, 1855; to Cheek, October 7, 1855; to Mays, October 20, 1855 (all recorded), and alleging them fraudulent and void; that appellants knew of his claim and took forcible possession of the lands. The bill then alleges perfect title to said lands both in law and equity, and by adverse holding from 1840 to 1855, and prays for decree for title, possession and cancellation of appellants' deeds; but if the proof is not sufficient to support his allegations as to title, that a decree be rendered declaring he has an estate during the life of Henry Northrop, with a fourth remainder in fee, and for the enforcement of Smith's lien for advances, commissions, etc., and for general relief. This bill was filed April 2, 1858.

July 5, 1858, appellee filed amended bill making certain persons parties to the bill, and decree *pro confesso* was entered up as to certain defendants.

January 1, 1859, defendants, except Cheek and Mays, files demurrer.

January 4, 1859, demurrer was overruled and defendants stood and decree *pro confesso* went against them. Cheek and

Mays filed answer to the bill denying the allegations to the same; setting up statute of frauds, and that they are innocent purchasers without notice, and stating their purchase from Pace, etc. After which the case was continued from time to time upon orders to take depositions, etc.; when, at the April term 1869, a final decree was entered against the appellants for the possession of the lands, and order of reference as to the rents and profits, etc.; to reverse which, the appellants prayed and obtained an appeal to this court.

The above statement of facts presents the following propositions for adjudication, viz:

First. Did the payment of the purchase money for the land by Smith, an agent, create a resulting or equitable trust in his favor, upon the failure of the principal to refund the money thus advanced, a deed having been executed in the name of the principal?

Second. Was the possession of the land by Smith, and Danley, his vendee, of such a nature, and held for such a length of time as ripened into a perfect title?

Third. Can partition be had, in chancery, when the property to be divided is held adversely, or when the title is in dispute?

Resulting trusts, or those which arise by implication of law, are specially excepted from the operation of the statute of frauds. *Gould's Digest, Sec.* 3, 549. Trusts of this sort were said by Lord Hardwick, in *Lloyd vs. Spillet*, 2 *Atk.*, 148, to arise in three cases: *First*, When an estate is purchased in the name of one person, but the money or consideration is given by another; *Secondly*, When a trust is declared only as to part and nothing said as to the rest, what remains undisposed of results to the heir at law, and they cannot be said to be trustees for the residue; and, *Third*, In cases of fraud and when transactions have been carried on *mala fide.*

Judge Lomax, in his copious and valuable *Digest of the Laws, respecting Real property in the United States*, considering the doctrine of implied trusts, lays down thirteen different

causes when such a trust may be raised. For the purpose of considering the case now before us, it will only be necessary to copy the second and eleventh. He says an implied trust is raised "where an estate is purchased in the name of one person and the consideration is paid by another;" also, "where fraud has been committed in obtaining a conveyance." 1 *Lomax Digest*, 200.

Thus we believe it to be a well established principle, both in England and most of the United States, that if one man purchases an estate in lands and does not take the conveyance in his own name, but in trust of another, the trust of the legal estate results to him, who pays the purchase money. This trust results by the mere operation of law, though the person, in whose name the conveyance is taken, executes no declaration of trust, and may be proved by parol evidence. *Sugden on Vendors*, 443; *Gascoigne vs. Throing*, 2 *Vern.*, 366; *Ross vs. Nevill*, 1 *Wash.*, 16; *Foster vs. Trustees of the Atheneum*, 3 *Ala.*, 302; *Dillard vs. Crocker*, *Spears*, *ch.* 20; *Dorsey vs. Clarke*, 4 *Har. & J.*, 551; *Bank of the United States vs. Covington*, 7 *Leigh.*, 466; *Paul vs. Chantian*, 14 *Miss.*, 580; *Page vs. Page*, 8 *N. H.*, 187; *Long vs. Steyer*, 8 *Texas*, 460; *Purdy vs. Purdy*, *Md.*, *Ch. Dec.*, 547; *Creed vs. Lancaster Bank*, 1 *Ohio State R.*, 1; *Banan vs. Banan*, 24 *Vt.*, 375; *Strumpler vs. Roberts*, 18 *Penn. State R.*, 283; *Barker vs. Vining*, 30 *Maine*, 121. However, in some of the States, the law does not allow a trust to result in favor of one paying the purchase money, if the deed is taken in another's name, if there is no fraud in the transaction. This is the rule in New York, with this exception, "unless it is done without the knowledge or assent of the party paying the money, or unless the party paying the money have creditors, in which case a trust results in their favor. So, if A purchases land with B's money and takes a deed to himself, with the knowledge of the owner of the money, it will not raise a resulting trust in his favor." *Norton vs. Stone*, 8 *Page*, *Ch.* 222; *Jenks vs. Alexander*, 11 *Page*, *Ch.* 619; *Brewster vs. Power*, 10 *Page*, *Ch.* 562; *McCartney vs.*

Bostwick, 32 *N. Y.*, 59. A like rule prevails in Minnesota, Kentucky, Indiana and Michigan. But in Minnesota, if one pays money for an estate and takes a deed in another's name, it will be presumed to be a fraud. In Indiana, if an agent pays his principal's money and takes a deed in the name of a stranger, without the knowledge and assent of the principal, it will raise a trust in favor of the latter. In Michigan, a trust cannot be raised by parol. *Sumner vs. Sawtelle*, 8 *Minn.*, 318; *Graves vs. Graves*, 3 *Met.*, 169; *Wynn vs. Shuner*, 23 *Ind.*, 375; *Grosbeck vs. Seely*, 13 *Mich.*, 345. It may be considered, also, as well settled in this country, that a resulting trust may be established, upon parol evidence, against the answer of the grantee denying the trust; but the evidence must be full, clear and satisfactory. *Boyd vs. McLean*, 1 *Johnson's Ch.* 582; *Elliot vs. Armstrong*, 2 *Blackford*, 199; *Snelling vs. Utterback*, 1 *B. M.*, 609; *Larkins vs. Rodes*, 5 *Porter*, 196; *Page vs. Page*, 8 *N. H.*, 187.

There is no doubt, also, that such a trust may be set up after the death of the nominal purchaser. *Freeman vs. Kelly*, 1 *Hoffman*, 90. By far the most numerous class of cases, where the doctrine of resulting trusts has been sought to be applied, are those where the purchase money for the conveyance of land has been paid in part or in whole by one man and the title deed taken in the name of another. The case before us is somewhat different from those heretofore adjudicated. Here we have an authorized agent making a purchase of land for a principal; the agent paying his own money for the land and the vendor making a deed to the principal, who did not afterwards refund the purchase money thus advanced or in any way endeavor to ratify the acts of the agent. In the meantime the agent holds the muniment of title and takes possession of the land. Do these facts create an equitable lien, in the nature of a resulting trust, in favor of the agent? A resulting trust is a mere creature of equity, founded upon presumptive intention and designed to carry that intention into effect, not to defeat it. It will not attach in the

person paying the purchase money, if it was not the intention of either party that the estate should vest in him. *Botsford vs. Burr*, 2 *Johnson's Ch.*, 405; *Steeve vs. Steeve*, 5 *Ib.*, 18; *Syme vs. Harder*, 1 *Page*, 494; *White vs. Carpenter*, 2 *Ib.*, 218; *Phillips et al. vs. Cramond*, 2 *Wash. C. C.*, 441; *McGuire et al. vs. McGowen*, 4 *Dessaussure*, 487; *Page vs. Page*, 8 *N. H.*, 187; *Elliot vs. Armstrong*, 21 *Blackford*, 199; *Sedge vs. Morse*, 16 *Johnson*, 199.

Equity will not make contracts for parties, but will look close to their intention and design in reference to their transactions, as manifested by the circumstances of the case, and, when discovered, will endeavor to carry out and enforce the same. And even when intention has been frustrated or turned aside by fraud or mistake, equity will control and cancel such fraudulent transactions, correct the mistake and give the property or title its proper direction, in strict accordance with the intention or purpose of the parties.

But it is not necessary to look to the circumstances which surround this case for the evidence of intention, but simply to the agreement of the parties as alleged in the bill. Then it appears that Smith, as the agent of Northrop, was to purchase the lands for him, which he did do, and advanced the purchase money, not as a *loan to him*, upon the security of the lands, or for the purpose of converting the money into lands, but as an advance to Northrop to enable him to accomplish the objects of his principal.

From all these circumstances no intention of a trust can be gathered. It was not intended by Smith to invest the money advanced to Northrop, in said lands, but as the agent of Northrop, and upon the faith of his agreements to pay the same back, with an hundred dollars for his services and necessary expenses, he paid the money. The money advanced was not made by Smith for a specific part of, or direct interest in the lands, but simply as the agent of Northrop, for him and upon the faith of his personal credit and previous agreement.

It being evident, from the above agreement and authorities, that Smith can have no trust declared in his favor, it may be asked, inasmuch as he was the agent for Northrop and advanced the money to make the purchase, what equities he had for such advances, or what remedy had he against Northrop or the lands purchased?

First, If Northrop was a non-resident of Arkansas, as alleged in the bill, he could have made out his account against him, attached it to the proper affidavit, under the statute, attached the lands and had them sold to pay the debt. See *Gould's Digest*, 163, *Secs.* 1, 2, 3, *etc.* Here would have been a complete remedy at law.

Second, Smith could have sent his account to Illinois and there brought assumpsit for money paid for Northrop, at his request, and Northrop, not being insolvent, he in this way had another complete remedy at law.

Independent of these personal remedies, agents have, for the payment of their commissions, advances, disbursements and responsibilities, in the course of their agency, an established right, which in many cases becomes more important and effectual than any other means of remedial redress; that is to say, an agents' lien. Story, in his work on agency 433, defines this lien "to be a right in one man to retain that which is in his possession, belonging to another, until certain demands of him, the person in possession, are satisfied. It is a qualified right therefore, which may be exercised over the property of another person."

These liens of agents, like all liens, arise by operation of law. Chief Justice Gibbs, in *Wilson vs. Heather*, 5 *Taunton*, 642, said: "The right of lien does not arise out of any contract whatsoever, but out of a right to hold property, until the party claiming the lien has been paid for the operation he performs."

Thus we see, if Smith was an agent of Northrop and, in carrying out the objects of his agency, he advanced money or incurred expenses for his principal, he had a lien and only a

lien upon the title papers and the land for his commissions, services, expenses and advances, which grew out of this relation and was incident to Northrop's indebtedness to him. The extent of this was but a mere right to retain them until his demands were satisfied, and in this case, the property being real estate, he could retain it until the rents and profits had discharged the lien. In case of a mortgagee who ejects his mortgagor, he can only hold the lands until the rents and profits pay his debts or discharge his lien. So, if a mortgagor voluntarily surrenders the possession, no absolute estate passes to the mortgagee by virtue of his possession, but simply a right to retain the same for certain purposes, nor is it any adverse holding so as to ripen into a title, except upon mere presumption of payment. 2 *Hilliard on Mortgages*, 16.

It cannot be contended that an agents' lien stands upon higher ground than that of a mortgage created by the solemn act of the parties.

Then Smith, having no title, could not convey a greater one to Danley, the appellee, and having merely a lien which could not exist for a moment without possession, it could not be transferred, and the effort of Smith to release the same to appellee, and delivering him the possession, as alleged in the bill, destroyed the lien and the appellee took nothing by his release. *Story on Agency, Sec.* 360, 367. Hence, appellee can have no title or right of possession to the lands in controversy by reason of Smith's lien.

Implied liens and equitable mortgages are the creatures of a court of equity, which Smith, by timely application, could have invoked, and if he had obtained a decree to that effect, he could have enforced it against the lands. Such liens and mortgages are incidental to the debt and if that debt has been paid or barred by the statute of limitations, the lien is gone; therefore, the indebtedness from Northrop to Smith, having been created in 1840, Smith failing to apply the remedies at his command within three years, the period of limitations applicable to such demands, he was barred from enforcing

them, and with the death of the remedy the lien ceases to exist.

We next come to consider the question as presented in our second proposition.

Was the possession of the land by Smith, and Danley, his vendee, of such a nature and held for such a length of time as ripened into a perfect title?

It has been well settled that the possession upon which the statute of limitations will operate, for the holder, must be adverse, actual, continuous and unbroken for the full period prescribed by the statute—if there be an interruption of holding, the term of adverse possession is closed and upon a resumption of possession, a new point is made from which limitations will again begin to run. *Angel on Limitations, Chap.* 31, *Sec.* 84; *Potts vs. Gilbert*, 3 *Wash. C. C. R.*, 478; *Doe vs. Campbell*, 10 *John.*, 477; *Roderick vs. Searle*, 5 *Seg. & Rawles*, 240; *Anderson vs. Mulford*, 1 *Haywood*, 320; *Doe vs. Ridley*, 1 *N. C.* 282; *May vs. Jones*, 4 *Litt.*, 23; *Sharp vs. Johnson*, 22 *Ark.*, 79.

The possession of Smith and Danley must have been adverse, hostile. What constitutes possession, and what evidence is sufficient to support it, are, of course, questions of law. Entering or appropriating the profits under a claim of exclusive right or with palpable *intent* to possess exclusively, when the other is not in actual possession, *is* an actual ouster and any actions palpably displaying such intention are evidence competent to render the entry an ouster. See the cases cited in *Parker vs. Proprietors of Locks and Canals, on Merrimack river*, 3 *Met.*, 91; *Prescott vs. Nevers*, 4 *Mason*, 330; *Marcy vs. Marcy*, 6 *Met.* 360; *Abercrombie vs. Baldwin et al.*, 15 *Ala.*, 364; *Calhoun vs. Cook*, 9 *Barr.*, 226; *Dukeman vs. Parish*, 6 *Ib.* 212; *Doe vs. McCleary*, 2 *Carter, Ind.* 405; *Johnson et al. vs. Tonnelin*, 18 *Ala.*

Sole possession or retainer of the profits for a *great* length of time, is competent evidence for a jury, of an *intent* or *claim* to possess exclusively, therefore, competent evidence of act-

ual ouster. *Chambers vs. Pleak*, 6 *Dana*, 426; *Bolton vs. Hamilton*, 2 *Watts & Sergeant*, 294; and cases there cited. It must have been *actual*. There must, therefore be, in all cases, an *entry*, in order that an ouster may be made, and an adverse possession begun. And it would seem that the legal notion of an *entry* to divest a possession, is the same with that required to revest possession, viz: a going upon the land with palpable intent to claim the possession as his own. *Miller vs. Shaw*, 7 *Seg. & Rawles*, 129; *Lessees of Holtzapple and wife vs. Philibaum*, 4 *Wash, C. C.* 356; *Altemus vs. Campbell*, 9 *Watts*, 28.

The nature of this claim of possession which must accompany the intrusion into the land, in order to constitute an entry, appears to be, not the assertion of a previously existing right to the land, but the assuming of a right to the land from that time, and a subsequent holding with assertion of right. This is what is meant when it is said that the possession must be taken under claim of right. This intention to claim and possess the land, is *one* of the qualities indispensible to constitute a disseisin, as distinguished from a trespass. *Ewing vs. Barnett*, 11 *Peters*, 41. For one going upon the land and staying there, without claiming or asserting the land to be his own, is a mere naked intruder or trespasser, and effects no ouster. *Society for the Propogation, etc. vs. Paulet*, 4 *Peters*, 480; *Lessee of Clark et al., vs Courtney*, 5 *Ib.*, 320. To bar a legal title, an entry on the land is indispensible; payment of taxes, alone, will not do. *Sorber vs. Willing*, 10 *Watts*, 141; *Humphreys vs. Rohn*, 480, 8 *Ib.*, 78; *Naglee vs. Albright et al.*, 4 *Wharton*, 291; *Murphy vs. Lloyd*, 3 *Ib*, 538.

There seems to be no cases to contradict this, when a legal title is to be barred. In *McCall vs. Wily*, 3 *Watts*, 69, there was an entry, and payment of taxes was relied on to define the extent of the ouster or the amount of land that was actually held.

It must have been continuous. If the property is of a character to admit of permanent, useful improvement, the possession should be kept up during the statutory period,

by actual residence, or by continued cultivation or enclosure. *Johnson vs. Irwin*, 3 *Serg. & Rawle*, 291; *Roger vs. Benton* 10; *Ib.* 303; *Jackson vs. Schoonmaker* 2, *Johnson*, 230.

Occasional occupancy, with payment of taxes, will not do; *Sorber vs. Willing*, 10 *Watts*, 141; but if the same is not such as to admit of residence or improvement, such use and occupation of it, as from its nature it is susceptible of, with claim of ownership, will be an actual possession. *West vs. Humphreys*, 162.

It must have been unbroken. As to whether several adverse possessions can be tacked together, the States differ among themselves. In South Carolina, in *King vs. Smith*, *Rice* 11, it was decided that they cannot be joined by conveyance from one to another. In the case of *Lessee of Potts vs. Gilbert*, 3 *Wash C. C., R.* 475, Judge Washington was clear that when several persons enter into possession, the last cannot tack the possession of his predecessor to his own, and even if there had been conveyances, he asks: "What had any of them in point of title to convey." In *Mason vs. Small*, 9 *Barr*, 194, it was said that Judge Washington's decision in *Potts vs. Gilbert*, was never acknowledged as sound law by any land lawyer or judge of that State.

In New York, Vermont, Massachusetts, Pennsylvania, Kentucky and Tennessee, possessions may be tacked, if one comes in under the other, and the possessory estates are connected and continuous, not otherwise. *Brandt vs. Ogden*, 1 *Johns*, 156; *Jackson vs. Thomas*, 16 *Ib.*, 293; *Winslow et al., vs. Newell*, 19, *Vt.*, 164; *Ward vs. Bartholomew*, 6 *Pickering*, 410; *Wade vs. Lindsey*, 6 *Met.*, 407; *Melvin vs. Proprietors of Locks and Canals on the Merimack river*, 5 *Ib.*, 15; *Overfeild vs. Christie*, 7 *Serg. & Rawles*, 173; *McCoy vs. Trustees of Dickinson College*, 5 *Ib.*, 254; *Adams et al. vs. Ternnan et al.*, 5 *Dana*, 399; *Chilton et al. vs. Wilson's heirs* 9 *Humph.* 399:

It seems also, that the possession, to be an ouster, must be of such a nature, and of such notoriety as to raise the presumption that the owner will have notice of it and its extent.

See *Proprietors, etc., vs. Call.*, 1 *Mass.*, 483; *Proprietors, etc., vs. Springer*, 4 *Mass.*, 416; *Herbert vs. Hanrich*, 16 *Ala.*, 581. As to the extent of the possession it is generally conceded that if one enters into possession under a deed, his possession is deemed to extend to the bounds of that deed, though he actually possess only a small part. In *Ewing vs. Bennett*, 11 *Peters*, 41, it is said: "It is well settled, to constitute an adverse possession, there need not be a fence, building or other improvement made; it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises, in controversy, for twenty-one years, after an entry under claim and color of title."

Applying the above tests and principles to the possession of Smith and Danley, we are compelled to say that there was no such adverse, continuous and intentional possession, as will satisfy the requirements of the Statute of Limitations, in conferring any right or title whatever, upon them, by reason of such possession. Because, under the Act of January 4, 1851, the law then in force, the period of limitation for real property, in this State, was ten years. *English's Digest*, 98, *Section* 1.

The allegations of the bill are, that Smith, through his agents, at Little Rock, took possession of said land in 1840, and continuously, uninterruptedly and adversely to all the world, continued to have notorious and peaceful possession; when the proof only shows a constructive possession by payment of taxes up to 1845, when he sent his agent, Bond, to take possession, and cultivated the cleared land, and paid taxes until 1849. See *Dep.* 243. Danley then bought of Smith, and alleges that he took possession, but nowhere is it shown that he held actual possession until the expiration of the ten years, except by the payment of taxes for a few years. Never occupied any portion of them, or improved or cultivated them, or even manifested any claim thereto, except by having his agent, Robbins, survey a portion of it off into town lots,

which, as we have already seen, is not a sufficient possession under the Statute of Limitations.

This case, also, presents the question, whether partition can be had, in chancery, when the property, asked to be divided, is held adversely, or when the title is in dispute. In the case of *Adams vs. Ames Iron Co.*, 24 *Conn*, 330, the court says: "It was an established rule of the common law, by which the writ of partition would be only between co-partners; that the plaintiff must be in possession or seized of the lands when the writ was brought; and since the remedy by partition has been extended to joint tenants and tenants in common, the same rule has been uniformly adopted, whether the remedy is sought by writ or bill in equity."

In the case of *Leno vs. Patterson*, 1 *Watts & Serg.* 185, it was determined that an adverse holding by one tenant in common for any length of time, however short, previously to the institution of an action of partition, will bar a recovery in such form of action. In the case of *Daniel vs. Green et al.*, 42 *Ill.*, 473, wherein one party was holding adversely to the one who sought partition, the court says: "To permit the bill to be maintained, would be to hold that purely legal titles may be tried by a suit in Chancery, instead of by an action of ejectment, in every case to recover lands adversely held."

In the case of *Longwell vs. Bently*, 3 *Grant's cases, Penn.*, 177, the court says "This action cannot be supported without proof that the parties, at the commencement of the suit, held the land together. Proof that the one in possession held adversely for any length of time, however short, is proof that they did not hold together, and entitled the defendant to a verdict." In the case of *Bonner et al. vs. Props. of the Kennebeck Purchase*, 7 *Mass.*, 475, the court observes, that partition only lies for persons actually seized, and the petitioners were non-suited.

We do not, however, conceive that the rule, above stated, extends to lands unoccupied, when there is only that possession in law which is connected with the title to the land. There could be no adverse possession under the circumstances

and those having the legal title would, in law, be seized of the land in such sense that they would be entitled to a partition. But when one is in the adverse possession of land, claiming it exclusively against all others, another, claiming title and out of possession, cannot maintain his bill. He must first try his right in an action of ejectment, and after that is established, he may institute his proceedings for partition.

In the case before us, the bill distinctly alleges that the complainant is out of possession and that other parties, than those he asks to have the lands divided among, are adversely in possession and claim to own them under a title adverse to them. Which has the better title is purely a legal question and can only be settled in a court of law.

It is a maxim of equity jurisprudence, of universal application, that where a party has a full, adequate, and complete remedy at law, he cannot seek relief in a court of equity; such we deem the appellee has had at all times. Not even the *quia timet* jurisdiction of a court of Chancery can be called into operation, except upon an apprehension of an injury to a party from an assertion of an injury, which he has no means of procuring to be tried in the ordinary tribunals of law.

It is clear, from the examination of the whole case, that whatever right or title appellee has to the land in question, he derives through the Northrop deeds, and upon the strength of them he must rely. The titles thus derived are legal ones, and the controversies arising upon those deeds and their construction are purely questions of law. However, it may not be deemed improper to express our opinion on these titles. But the court does not assume a definitive decision upon them, with a view to a decree upon that basis, as that decision is properly to be made by a court of law, but with a view to prevent further litigation upon that point.

From the deeds presented in the record, the appellee has the life estate of Henry Northrop in the lands, as stated in

the bill; upon the death of said Northrop, he is entitled to one-fourth of the remainder.

One of the witnesses stated that Henry Northrop is now dead, but inasmuch as this fact is not alleged in the bill, we have treated the case as though he were alive.

The decree of the White Circuit Court, in Chancery, is reversed and the cause remanded with instructions to dismiss the bill for want of equity.

TULEY et al. v. READY et al.

EXECUTION SALES—*Title of purchaser.*—The purchaser, at a sheriff's sale, can not acquire any greater interest than the judgment debtor possessed at the rendition of the judgment, and where the title or interest so acquired comes in litigation, it devolves upon the purchaser to show what the title or interest of the execution debtor was.

PURCHASER WITHOUT NOTICE—*Defense of, what plea or answer must show.*—The answer or plea of a party claiming to be an innocent purchaser, must state *first*, the deed of purchase, the date, parties and contents; *second*, that the vendor was seized in fee and in possession, and *third*, a *bona fide* payment of the purchase money and want of notice down to the payment of the purchase money and the execution of the deed.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellants.

MCCLURE, C. J.—On the second of April, 1860, Milton B. Tuley sold and conveyed to one William D. Baird certain lands in Jefferson county. At the time of the sale, Baird paid four thousand dollars, and executed his two writings obligatory in the sum of twenty-five hundred and ninety-six dollars

each, payable on the 2d of April, 1861 and 1862, respectively. The deed of conveyance is in the usual form, save that it contains the following condition: "But it is nevertheless expressly understood and agreed by the parties, that the said two notes for the two thousand five hundred and ninety-six dollars and thirty cents each, shall be and remain a lien upon said land and premises until the same shall be fully paid off, with all interest that may accrue threon; then this deed is to vest an absolute title in the said party of the second part, his heirs and assigns forever." On the 16th of August, 1866, M. B. Tuley assigned the two notes, alluded to, to Enos S. and Albert L. Tuley.

On the 21st of February, 1868, Enos S. and Albert L. Tuley filed their bill, in the Circuit Court of Jefferson county, against Charles W. Ready, as administrator of William D. Baird deceased, Catherine Valentine, Philo G. Valentine, William Baird, Charles E. Baird, Violet Baird, Amanda Baird and William P. Grace.

The object of the bill, as to all the defendants, except Grace, was to enforce a vendor's lien.

In December of 1865, Grace obtained a judgment against William B. Tuley, in the sum of $690 65. Execution issued and levy was made upon the lands sold and conveyed to William D. Baird, by Milton B. Tuley, as the property of said Milton. The property, so levied upon, was advertised and sold to Grace for $100.

The bill recites the above facts, and alleges that the pretended title of Grace throws a cloud around the rights of the appellants, and greatly diminishes the value of said lands, if the same should be ordered to be sold to satisfy their said lien. The prayer as to Grace is, that his title, thus acquired, may be cancelled and held for naught. The prayer as to others is, that they may be made parties defendants, and that the appellants may have a decree for the sale of the lands.

Ready, the administrator of Baird, made no response, nor did either of the Valentines. Grace filed an answer and cross

bill, making Enos S. Tuley, Albert L. Tuley, Charles M. Ready, administrator of William D. Baird, deceased, Catharine Valentine, Phillip Valentine, William Baird, Violet Baird, Charles E. Baird, and Amanda Baird, parties defendants. The cross bill sets up a judgment, execution and sale of the property, described in the deed of Milton B. Tuley to William D. Baird, to himself. It admits that, on the day of his purchase, Owen, acting as the agent of Enos S. and Albert L. Tuley, notified him of the sale of the property by Milton B. Tuley, to Baird, and of the lien reserved in favor of the unpaid notes for the purchase money, then in Owens' hands, as the agent of the Tuleys; but he charges that the assignment of the notes, to the Tuleys, was made without consideration, and for the purpose of defrauding the creditors of said William B. Tuley, one of whom was Grace; that Milton B. Tuley and William D. Baird are both deceased; that the heirs at law of Baird, as well as the said Ready, administrator of Baird, have abandoned the right to perfect the title to said lands, and do not pretend to have any interest in the same. The relief asked in the cross bill is, that he, Grace, upon final hearing, may have a decree fully confirming and establishing his title to said lands as against the claims and demands of the complainants, in the original bill, and also against any claim or demand which the heirs at law, or the estate of the said William D. Baird may pretend to have in or to said lands, and that they and each of them may be perpetually restrained and enjoined from ever proceeding to set up or establish any claim or title to said lands, by reason of either the sale and purchase mentioned in said bill, or the assignment and transfer of said lands by the said William B. to the said complainants.

Enos S. and Albert L. Tuley filed an answer to the cross bill of Grace—a *guardian ad litem* was appointed for the infant heirs of Baird, who answered that he knew nothing of the facts set up in the bill, cross bill or answer of the parties, and asked the protection of the court.

At the final hearing, a decree, *pro confesso,* was taken as to Ready, the administrator of Baird, Philo G. Valentine, and Catharine Valentine. It was further decreed that Enos S. and Albert L. Tuley were not entitled to any relief whatever, and that the said William B. Tuley, at the time of the assignment and transfer of said notes, mentioned in said bill, executed said assignment in fraud of the rights of said Grace, and in order to defeat the collection of the judgment of the said Grace; that there was no consideration for said assignment, and that said bill be dismissed with costs. It was further decreed that Enos S., and Albert L. Tuley, as well as the other defendants to said cross-bill, be and the same are hereby enjoined from setting up any claim to a lien on said lands by reason of the premises set up in said original bill; whereupon the complainants appealed to this court.

The deed of Milton B. Tuley, to William D. Baird, was not recorded at the time of the sale. The purchaser at a sheriff's sale cannot acquire any greater interest than the judgment debtor possessed at the rendition of the judgment. This being true, a very pertinent inquiry arises, and it is: What interest did William B. Tuley have in the land by him deeded to Baird? The facts are that Milton B. Tuley, in April of 1860, sold and deeded the land to Baird, in consideration of $9,192 60, four thousand dollars of which was paid at the time of the purchase. But Grace claims that he had *no notice of this sale,* because the deed from Tuley to Baird was not *placed of record,* and insists that, because of this, he is a purchaser without notice. If it be true that Grace is a purchaser without notice, he is entitled to protection, and not otherwise. Now let us examine the facts, as to whether he was an innocent purchaser. W. F. Owen testifies that, "on the day of sale, he, acting for the complainants, gave notice that Milton B. Tuley had sold the land, about to be offered for sale, to Baird, and had made him a deed." To whom this notice of claim was given, or in whose presence it was made, does not appear; but it does appear, from Grace's answer, that

Owen, one of the attorneys of the complainants, gave notice that the "complainants claimed a lien on said lands for the balance of the purchase money," on the day and at the time the sheriff put up and offered said lands for sale.

This admission, of itself, might be strong enough to amount to notice of the sale of the lands to Baird by Tuley. Upon this point, however, we shall not express an opinion, as the testimony of Grace, himself, evinces a knowledge of the sale, obtained from Milton B. Tuley. Grace testified, "that after the recovery of the judgment against Milton B. Tuley, and before the assignment of the note to Enos S., and Albert L. Tuley, he had a conversation with Milton B. Tuley, and said Milton told him that *he had back the land*," (referring to the land mentioned in the deed from Tuley to Baird.) This conversation was had before the sale. From the facts and circumstances recited, it becomes apparent that Grace must have known of the sale from Tuley to Baird. If Tuley "*had the land back*," it is for Grace to show that fact, or he takes nothing by the purchase at the sheriff's sale. There is a demurrer clause in the answer of the Tuleys to the cross bill of Grace, alleging that said cross bill does not, on its face, show or disclose a case for relief, either at law or in equity.

This court held in *Byers vs. Fowler*, 12 *Ark.*, 218; and in *Cook vs. Bronaugh*, 13 *Ark.*, 192, that "the answer of a party claiming to be an innocent purchaser, must state:

First The deed of purchase, the date, parties and contents.

And *Second*, That the vendor was seized in fee and in possession.

And *Third*, A *bona fide* payment of the purchase money, and want of notice down to the payment of the money and the execution of the deed.

In the case at bar, Grace, in his cross bill does not attempt to allege any title whatever in Milton B. Tuley, but, on the contrary, admits in his own testimony and answer, and cross bill, that he knew the title to the property, which was levied on

and sold by the sheriff and purchased by himself, was in Baird and not in Tuley.

Before one can have relief, such as is asked in the cross bill, the party asking it, must show, affirmatively, that his judgment debtor had an interest in the lands sold, and just what that interest was. The cross bill does not even set up any title to the property, in Milton B. Tuley at any time, or that Tuley was ever seized of the fee; nor is there a denial of notice down to the time of payment and the execution of the deed.

Having determined that Grace acquired no title by reason of the sheriff's sale, it is plain that the demurrer to the cross bill ought to have been sustained. The complainants having made him a party defendant to the suit, he had a right to attack the assignment of the notes to the complainants, and show that it was fraudulent, and a fraud upon his rights. If his answer and cross bill had been so framed, the court, after having declared the assignment a fraud, and without consideration, might have ordered the property sold, and the proceeds distributed among the creditors of William B. Tuley, deceased; but the bill was not so framed. The assignment of the notes, whether fraudulent or otherwise, did not confer any title to the lands, in either Grace or Tuley; because the legal title to the land passed to Baird, with the execution and delivery of the deed. The assumption, in the bill, that Tuley made a conditional sale, is erroneous, as it is clear from the face of the deed, that the condition annexed to it was not for the purpose of *retaining title*, but for the purpose of protecting and securing the balance of the purchase money. The legal title to the property, as we have said, is in Baird; at his death, it passed to his heirs, subject to such incumbrances and liens, as he or the law may have fixed to it. We agree, with the court below, that the assignment to the complainants, by Tuley, was fraudulent and without consideration, and for the purpose of defrauding creditors, and the decree of the court, in dismissing the bill of complainants, is affirmed.

Grace, as we have already shown, has no interest or claim to the lands purchased by him, at the sheriff's sale; this being true, it was erroneous to grant him a perpetual injunction against the complainants and the other defendants; for this error, the cause is remanded, with instructions to dismiss the cross bill for the want of equity therein. It may be asked, at this point, what becomes of the notes? The answer is, that they are properly assets of the estate of Tuley, deceased, whose legal representative is entitled to the possession thereof. Grace, and the other creditors of the estate of Tuley, deceased, inasmuch as the assignment to the complainants has been declared fraudulent, are bound to look to the same fund for the payment of their debts and judgments, as though no fraudulent assignment had been made.

BASS et al. v. HANEY.

PRACTICE—*When decree affirmed with damages.*—Where it appears from the record that the appeal is taken for delay, the decree or judgment, of the court below, will be affirmed with damages.

APPEAL FROM HOT SPRING CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

M. L. Jones, for Appellants.
Garland & Nash, for Appellee.

GREGG, J.—On the 15th of February, 1870, the appellee commenced his suit, in Hot Spring county, to foreclose a mortgage given to secure $900. At the March term, following, both parties appeared and the appellants filed a set-off, which appellee admitted to be correct and no further defense was made. The cause was submitted to the court and a finding of $470 $\frac{95}{100}$, in favor of appellee, for which a decree was rendered, the mortgage foreclosed, and an order to sell the property in case payment was not made. On the 7th of next September, after a *fieri facias* had been issued for the sale of the property, the appellants presented to the clerk of this court, a transcript and supersedeas bond, and prayed an appeal, which was granted and proceedings stayed; since which time they have taken no steps whatever to prosecute their appeal, and the appellee has filed his motion for an affirmance of the decree, etc.

The record is clear, and the case fully appears to be one for delay.

The decree is therefore affirmed, with ten per centum damages on the amount recovered, and ordered to be certified to the Circuit Court, in chancery, of Hot Spring county, to be there carried into effect.

McDIARMID v. FITCH et al.

REGISTRARS—*Duties of, etc.*—Registrars are required, by the act of July 15, 1868, so soon as their duties are closed, to deposit the original books with the clerks of their respective counties, and on failure to do so, mandamus will lie to compel them.

PETITION FOR MANDAMUS.

E. W. Gantt and Rice & Benjamin, for Petitioner.
Montgomery & Warwick, for Respondent.

GREGG, J.—Individually, I have heretofore announced an opinion against the jurisdiction of this court in cases like this, which is an original petition filed in this court, December 26, 1870, in which it is alleged that the defendant was president of the Board of Registration, in said county, for the year 1870.

That the board had registered, or pretended to register, the voters of the county; that, before the 8th day of November, the registration was completed, and the books closed, and that it was the duty of the defendant, as soon as possible, to deposit the original books with the clerk of said county, and that he had frequently demanded said books of the defendant, but he willfully and maliciously neglected to deposit the same, and a prayer for a mandamus, ordering and compelling him to deposit said books, etc.

On the 9th of January, 1871, the defendant appeared here, and filed his response, in which he admits he was duly appointed and acting president of said Board of Registration, and that prior to the general election, held on the 8th day of November, the voters of said county were, by him and his associate members of the board, duly registered; that he had delivered a certified copy of said books of registration, but the original books, so made by them, had not been delivered to the petitioner, but would be so delivered as soon as possible; and that said books, at the time of filing the petition

herein, were not ready for delivery. And concluded with a demurrer clause to the petition. The cause was not submitted until the 18th day of December, 1871.

The thirteenth section of the registration law, approved July 15, 1868, among other things, provides that, "the registrars shall, as soon as possible, deposit with said clerk the original books of registration, which shall be kept and preserved among the records of the county," etc. Other sections of that act provided that, upon the close of the registration, the registrars, before the election, shall make certain copies of the registration books and furnish them to officers designated, and these provisions, being followed by the one quoted above, show the intention of the legislature to have been that, so soon as the registrars' duties were closed, they should deposit the original books with the clerk of the county, that they might be preserved with the other records of the county.

These duties had all been performed more than two months before the respondent filed his answer herein. He gives no excuse for having so long failed to comply with the law, but says he will file them as soon as possible, and more than a year after the time his duty required him to file such books, he submits his case to this court, without giving any reason for having so long neglected to so file the books.

The response is wholly insufficient and a peremptory mandamus is awarded.

CHISM et al. v. TOOMER.

PROMISSORY NOTES AND BILLS—*When void by alteration, burthen of proof, etc.* Any material alteration of a note or bill, after delivery, without the consent of the maker, either as to time of payment or amount, whether such alteration be favorable to the maker or not, renders the note or bill void, and a plea by the maker, setting up such defense, where the alteration appears upon the face of the note or bill, devolves the burthen of proof upon the payee or holder to show that the alteration was made before the delivery, or afterwards, by consent of the maker; otherwise, where the alteration does not appear upon the face of the note or bill.

APPEAL FROM JOHNSON CIRCUIT COURT.

HON. WILLIAM N. MAY, *Circuit Judge.*

English, Gantt & English, for Appellants.

First, The obligation filed before the Justice, as the foundation of the suit, shows no cause of action, and the Circuit Court should have dismissed the case, on appeal. *Latham vs. Jones,* 6 *Ark.,* 371; *Dicus vs. Bright,* 23, *Ark.,* 110; *Levy vs. Shurman,* 6 *Ark.,* 182.

Second, The court erred in sustaining the demurrer to the answer—it showed a material alteration of the instrument sued on, and was good as a special plea of *non est factum. Story on Prom. Notes,* 6 *ed. sec.* 408; *a* and notes; *Brown vs. Briggs,* 20 *Ind.,* 139; *Gardner vs. Walsh,* 32 *Eng. L. & Eq.,* 162; *U. States vs. Nelson,* 2 *Brock.,* 62; *McVean vs. Scott,* 46 *Barber (N. Y.)* 319; *Hall admx. vs. McHenry,* 19 *Iowa,* 521; *Boalt vs. Brown,* 13 *Ohio (N. S.)* 364; *Morrison vs. Willy,* 18 *Md.* 169; *Martin et al. vs. Thompson et al.,* 24 *Howard U. S.* 316.

Third, The court erred in rendering judgment for 10 per cent. interest, the words "until paid," not being in the note. *Brewster vs. Wakefield,* 22 *Howard U. S.,* 119.

Clark & Williams, for Appellee.

There being no bill of exceptions on motion for a new trial,

there is nothing for this court to consider except the action of the court in sustaining the demurrer of appellee to the amended answer.

The alteration of the note was not such as could vitiate—it was not fraudulent and could injure no one. The plea does not pretend that the payee was privy to the alteration, or knew anything about it. See 2*d Parsons on Cont.* 718, *et seq., and notes.*

McCLURE, C. J.—Suit was commenced before a Justice of the Peace, of Franklin county, in November 1860, by Joshua Toomer, on the following instrument:

"One day after date we or either of us promise to pay James Patterson, Internal Improvement Commissioner, one hundred and ten dollars, for value received, with ten per cent. per annum from date.

Witness our hands and seals.

January 24, 1857.

D. A. R. MAYS, [Seal.]
(Signed) G. H. CHISM, [Seal.]
W. M. BLACK, [Seal.]"

Chism, only, was served with process. After several mistrials before the Justice of the Peace, judgment was rendered in favor of Chism, and Toomer appealed to the Circuit Court. In the Circuit Court, Chism filed an answer, in the nature of a special plea of *non est factum.* The plea in substance sets up, that he, Chism, wrote, signed, sealed and delivered, to the wife of Mays, a note for three hundred dollars which was to be signed by the husband of Mrs. Mays, and one W. M. Black; that, after said writing was delivered to the wife of Mays, the word "three," before the word "hundred," was stricken out and the word "one" written before the word "hundred," and before the word dollars; that he never directed or consented, and that he gave no authority whatever, to any one, to make said alterations; nor did he direct or consent to the delivery of the said writing to any person, after such alteration, or

have any knowledge of such alteration until a short time before the commencement of this suit. The answer then concludes by saying, "The said defendant therefore says that the said writing, so altered as aforesaid, is not his act and deed, wherefore he prays, etc."

To this answer, a demurrer was filed, which was by the court sustained. The appellant declining to plead further, judgment was rendered against Chism for $110 $\frac{00}{100}$ debt, and $144 $\frac{50}{100}$ interest, and thereupon Chism appealed to this court.

The first ground of demurrer is, "that the answer fails to aver any erasure, alteration or interlineation in said writing, *after delivery thereof to the payee*, and fails to aver any participation in the alleged alterations, interlineations and erasures, *by the plaintiff or his assignor*."

The second ground of demurrer was: "that the alterations, erasures and interlineations, in said answer set forth, tending to diminish the rights of James Patterson, the payee of said writing, and the plaintiff in this cause, his assignee, appearing on the face of said writing, the law presumes said alterations to have been made before or at the time of execution, without proof to the contrary. And said answer failing to aver that the same were made after delivery of the writing sued on, and by or through the procurement of said Patterson or the plaintiff, is defective as a defense, although really made after the signing and delivery to Mays' wife, as in said answer set forth."

As will be seen, the demurrer admits that the instrument sued on was altered from a note of three hundred dollars to a note for one hundred and ten dollars. From the demurrer it appears that the court below was of opinion, first, that it was the duty of Chism to implicate a holder of the note, after issue, in the alterations, or that the appellant would be bound by such alterations as Mays and Black did afterwards make. The proposition is erroneous. Chief Justice Gibson, in *Simpson vs. Stackhouse*, (9 *Barr*. 186) in speaking of the alteration of a note said: "As bills and notes are intended for circula-

tion, and as payees do not usually receive them, clogged with impediments to their circulation, *there is a presumption that they start fair and untarnished, which stands until it is repelled*; and a *holder*, (mark you) a holder, ought therefore to explain why he took it branded with marks of suspicion. The maker of a note cannot be expected to account for what may have happened to it after it left his hands; but a payee or indorsee who takes it condemned and discredited *on the face of it* ought to be prepared to show what it was when he received it."

The second conclusion to which the court seems to have come is, that inasmuch as Chism was not *damnified* by the alteration of his co-obligors, that the change was not *material*. This is not the test to determine whether the alteration is "*material*." The test is whether the alteration made it a new note; and not whether the new note was more or less beneficial to one of the obligors. Some of the courts of the Union have held that if blank spaces be left in a note or bond, and the same were afterwards filled up, that consent would be implied. *Wiley vs. Moon*, 17 *Serg. & Rawle*, 438; *Smith vs. Croker*, 5 *Mass.* 538; 7 *Blackf.* 412.

An alteration of the day of payment, by extending the time, is an alteration which might be regarded as beneficial to any one of the obligors; yet such an alteration renders the note void as to those who did not consent. 3 *Yeates*, 391; 19 *Penn. State*, 119. In the case of *Henman vs. Dickinson*, 5 *Bing.*, 183, a bill had been changed from £40 17s. 6d. to £49 17s. 6d., and the alteration appeared on the face of the bill, just as it does in this case. It was urged, on the trial, that the party producing the bill ought not to be compelled to show that the alteration was made before acceptance, but that the onus of establishing this fact should be with the defendant. In response to the proposition, Chief Justice Best said: "We are of opinion, that where an alteration appears on the face of the bill, *the party producing it* must show that the alteration was made with consent of parties, or before the issuing of the bill." In this case, there is no such attempt, and the

burthen of establishing the alteration is transferred from the holder to one of the obligors who positively and emphatically denies the execution of the instrument sued on. This cannot be done. In this case, Chism files a plea of *non est factum;* an issue, formed on this plea, would have determined what? It would have determined whether Chism executed and delivered the instrument sued on. The demurrer confesses the plea, and admits that Chism did not execute the instrument as sued on, but for three hundred dollars; it not only admits this, but it also admits that neither Mays or Black had authority to make any alteration or changes which would bind the appellant, and that the appellant had no knowledge of the alteration until just before the bringing of the suit, which was a period of about ten years. The sole question to be determined, on the appellant's answer, was: Did Chism execute and deliver a note to Patterson, through Mrs. Mays, or any one else, for one hundred and ten dollars? Or, to put it a little broader: Did Chism assent or consent that the note for three hundred dollars, which he delivered to Mrs. Mays, to be signed by her husband and Black, should be changed to a note for one hundred and ten dollars? If he did not, he is not bound. It may be said that the man who was willing to be held for three hundred dollars, ought not to be allowed to complain because he is only held for one hundred and ten dollars. The answer is, that there may have been considerations which would have induced Chism to have signed a note for three hundred dollars, that would not have led him to sign a note for one hundred and ten dollars. For aught we know, Chism was to have paid a portion of the three hundred dollars, and if so, the altering of the note, without his consent, to a note for one hundred and ten dollars, may have been the means of depriving him of the only consideration which moved him to sign the note in the first instance. Be this as it may, one thing is very clear, and it is, that Chism did not sign a note for one hundred and ten dollars, nor did he consent to the three hundred dollar note being changed into a

note for one hundred and ten dollars; therefore it was not his deed, and the court erred in sustaining the demurrer.

There are two other questions argued by appellants' counsel, but, under the view we have taken, the decision of which are not necessary to a disposition of this case; but for the error aforesaid, the judgment of the Circuit Court of Franklin county is reversed, and the court below is directed to overrule the demurrer to the appellants' answer, and the cause is remanded.

HORNER, Adm'r, etc. v. THE STATE.

APPEALS—*Will only lie from final judgments.*—An appeal will only lie from a final order or judgment; the overruling of a demurrer is not such a final order or judgment.

APPEAL FROM PULASKI CHANCERY COURT.

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

Gallagher & Newton and Garland & Nash, for Appellant.
Benjamin, Solicitor General for the State.

GREGG, J.—On the 24th of September, 1867, the appellee filed her bill, in the Pulaski county Chancery Court, to foreclose a mortgage on certain lands. Publication was had and, at the February term 1868, the appellant appeared as a claimant for the lands, and filed his demurrer to the bill, which was considered and by the court overruled, and upon that an appeal was prayed and granted to this court.

Then follows a record agreement of the parties that the cause be referred to the master in chancery, that his report might be made a part of the cause on appeal, and such report

being made, filed and confirmed, the record again states that an appeal was granted.

The chancellor should have proceeded to render a final decree upon the whole case before him.

It has been so often decided and fully settled, in this court, that an appeal will lie only from a final order or judgment, that argument or reference to cases is unnecessary; and to produce an argument to show that an order overruling a demurrer to the bill is not a final judgment in the cause, would not be expected. This cause will be stricken from the docket.

PEAY & SCULL v. TANNEHILL & OWEN.

EQUITY PRACTICE—DECREE BY CONSENT—*How changed.*—A decree, upon terms, by consent of parties, cannot afterwards be changed by supplemental order, on application of one of the parties, as against the objection of the other.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Carroll, Galloway & Bradshaw and Watkins & Rose, for Appellants.

A sheriff is entitled, "for receiving and paying moneys on execution or process, when lands or goods have been taken in custody, advertised or sold, to two per centum commissions, and in no event shall be deprived of such commissions after an execution has gone into his hands, by any settlement or compromise between the parties." *Acts of General Assembly, Ark.*, 1868, 1*st Session, p.* 240; *Crittenden County vs. Crump*, 25 *Ark.*, 235, *and cases cited.*

Garland & Nash, for Appellees.

There is no specification of charges, or an itemized account, no regular fee bill is presented, but the court allows the sheriff this sum ($149 50), and it is reasonable to suppose, in the absence of any exception being saved specifically, or any point being directly made, the court below was correct; this presumption is indulged by the appellate court fully and freely, as to all rulings and judgments of the court below; and it is therefore submitted, that this cause must be affirmed. *Keizer vs. Seabrook*, 25 *Ark.*, 334; *Dillard vs. Parker*, 25 *Ark.*, 503.

HARRISON, J.—The appellees filed their complaint, in equity, in the Jefferson Circuit Court, against the appellants, to restrain proceedings upon a judgment which Peay, one of the appellants, had recovered against them and upon which an execution had already been issued and levied upon their lands, and obtained a temporary injunction thereon.

The defendants answered the complaint; after which a decree, purporting to be by consent of parties, was entered, dismissing the complaint, and against the defendants for costs; and also for the costs attending the execution which were stated, thereon, to amount, in the aggregate, to the sum of $18.50. Afterwards the plaintiffs applied to the court to correct the decree so far as related to the costs, by stating the amount thereof to be $149 50, instead of $18 50, so as to include commissions to the sheriff at two per cent. upon the entire sum the execution required him to make, which alteration in the decree was made by the court, against the objection of the defendants, by a supplemental order. The decree against the defendants could, as the pleadings show, only be made by their consent, which must appear by the record; and although it does appear that they consented to a decree, as was at first entered, the record affirmatively shows that they dissented to the decree as amended. The decree against the defendants cannot therefore be sustained, and inasmuch as the dismissal of the complaint was predicated upon the payment of the costs by the defendants, the whole decree must be reversed and the cause remanded.

27 116
77 103

COUNTY COURT OF UNION COUNTY v. ROBINSON, Trustee, etc.

COMMON SCHOOLS—*District tax, amount by whom fixed.*—The electors of the District, only, have authority to fix the amount of the school tax, and the only limit upon them is, that they shall not levy a less sum than is sufficient to carry on a school for three months in each scholastic year.

SAME—*Trustee—powers and duties of.*—It is the duty of the Trustee to call the meeting and to report certain facts and estimates to the electors and to keep a record of their proceedings, but so far as assessing the amount or the levying of the tax is concerned, he has no voice over any other elector.

SAME—*When electors fail to act.*—When the meeting is not attended by a sufficient number of the electors to hold an election, it is the duty of the Trustee to lay his estimate before the County Court for their action, and, upon which, the law requires the County Court to make the levy.

SCHOOL HOUSES AND SCHOOLS—*Number of, and separate as to whites and blacks.*—The law does not contemplate but one school house and school to each district only, (wherein it provides that separate schools shall be provided for whites and blacks) but in case there should be both white and colored children in the same district, would require separate schools.

COURTS—*Errors in judgment or abuse of discretion, how corrected.*—The discretion or judgment of a court of competent jurisdiction, where there is abuse of the one or error in the other, cannot be controlled by *mandamus*, but may be corrected on appeal.

APPEAL FROM UNION COUNTY CIRCUIT COURT.

HON. GEORGE W. MCCOWN, *Circuit Judge.*

J. H. Carlton and Garland & Nash, for Appellant.

A *mandamus* is not a writ of right. It is always *ex parte*, and will be granted only when a party has shown he has a *legal right*, and no other adequate specific legal remedy. *1st Chp. Genl. Prac.*, 790; *Rex. vs. Bp. of Chester*, 1 *Term*, 696; *King vs. Bishop of Canterbury*, 8 *East.*, 219; *Strong, Petitioner*, 20 *Pick.*, 497; *Cheatham ex parte*, 6 *Ark.*, 437; *Young vs. Mills*, 1 *Ark.*, 11; *Ib.* 121; *Trapnall ex parte*, 6 *Ark.*, 9; *Williamson, ex parte*, 8 *Ark.*, 424.

It will not lie when the party has the right of appeal. *Williamson, ex parte*, 8 *Ark.*, 424; nor when error lies. *Ib.*

It seems in no case, when a subordinate court, *acting judi-*

cially, has, in the exercise of its discretion, or judgment, made an adjudication, can *mandamus* properly issue. *Green vs. County of Pulaski*, 3 *Ark.*, 427; *Brem vs. Arkansas Co. Court*, 9 *Ark.*, 240; *Oneida C. P. vs. People*, 18 *Wend.*, 79; *People vs. Judges of Duchess C. P.*, 2 *Wend.*, 658; *Benson ex parte*, 7 *Cow.*, 363; *Chase vs. Blackstone Canal.*, 10 *Pick.*, 189; *Morse Petitioner*, 18 *Ib.*, 443.

When an inferior court refuses to act, it may be put in motion by a *mandamus*, but cannot be compelled to act in a particular manner, nor render a particular judgment. *Williamson, ex parte*, 8 *Ark.*, 424; *Hutt, ex parte*, 14 *Ark.*, 368.

GREGG, J.—In September, 1870, the appellee presented his petition to the Circuit Court of Union county, for a mandamus against appellant, to compel said county court to levy a larger amount of special school taxes, for district thirteen, in said county, than had been adjudged by the court, because, as he alleged, there were 397 youths in said district capable of attending school, and that but four schools had been provided; whereas, there should be ten, and a sufficient amount of taxes to support that number. He alleged that, according to law, he called a meeting of the legal voters of the district, on the 13th of August, 1870, for the purpose of voting a tax to carry on a three month's school, or one, during such longer time, as the electors might determine.

That the petitioner, as trustee, reported to said meeting of electors, that ten schools were necessary in that district, and it would require a special tax of one thousand dollars to carry on such schools, but the meeting refused to adopt his estimate of the number of schools necessary, or the amount of tax proper to be levied, and they voted for three schools and a special tax of three hundred dollars.

And to increase the number of schools and amount of taxes, he called another meeting on the 2d of September, and laid before the meeting of the same, estimates as before, but the meeting refused to levy but $150 00 additional tax, and to

provide for but one more school. That he reported the action of the electors of said district to the county court, and represented to them that a special tax of $450 00 was wholly insufficient to carry out the spirit and intent of the school law, and moved the county court to levy an additional sum of $550 00, making in all $1000 00, but the county court levied the sum of $450 00 only, and refused to levy $1000 00; and he prays that a peremptory order be made, requiring the county court to levy $1000 00 of special tax, and, in case of refusal, that they be severally attached for "*a contempt of the court and the law.*"

The county court appeared and filed a demurrer to the petition. The circuit court overruled the demurrer, and peremptorily ordered that the county court levy an additional sum of $550 00.

On application, the court set aside this order, and allowed the county court to file an answer. They responded, that at the electors' meeting aforesaid, the appellee reported the children and youths within said district to be 358, and that said school district had $330 00 on hand, and that it was entitled to $518 44 from the State fund, which is shown by reference to the report. That the electors had voted an additional sum of $450 00, as special tax on said district, and established two schools for white pupils, and two schools for colored pupils, and that said sum of $1298 44, was sufficient to support said four schools, etc.; and they refer to the proceedings, and the report of the chairman, to show that said number of schools and said amount is sufficient. They also refer to a petition, signed by seventy, and alleged to be a majority of the voters of the district, protesting against more than four schools, and more than $450 00 special tax.

And they again protest that the electors have the right to fix the number and locate the schools, and determine how much tax shall be levied, and if the trustee controverts the amounts so fixed upon, it must be determined by the judgment of the county court, and such judgment, if erroneous,

must be reached by appeal. The answer was duly sworn to and filed.

Whereupon, the court adjudged the answer insufficient, and that a peremptory mandamus issue; from which judgment the county court appealed to this court. There are two principal questions presented in this case:

First, Does the record show any error in the levy of this tax by the county court?

Second, If the county court did commit error, could that error be corrected by mandamus?

Section 13, *p.* 168, *Acts of* 1868, provides that each county shall be divided into school districts. *Section* 16 provides that new districts may be formed, or the boundaries of districts changed by the *county court*, with the consent of the circuit superintendent. *Section* 19, declares that all persons, qualified to vote for county and State officers, shall be electors for the school district wherein they reside. *Section* 20, that the *electors of any school district shall*, when assembled in school district meeting, *have power*, by a *majority* of *the votes cast* * * * to designate a site for a school house, and determine the time for which a school may be taught, more than three months in the year; to determine what amount of money shall be raised by tax, on the property of the district, sufficient, with the public school revenues apportioned to the district, to defray the expenses of a school for three months, or for any greater length of time they made decide to have a school.

Section 21, provides that the county court shall levy *all taxes voted for school purposes* at the *district school meetings*. *Sections* 27 and 28, prescribe the general duties and powers of the trustee; that he shall have charge of the school house, school property, etc., and shall purchase or build, etc., *as may be directed by a majority of the voters*.

By *Section* 31, he is required to submit a report *to the electors, at the school meetings*, with estimate of the cost of a school etc. By *Section* 32, if the district, at their annual school meeting, *fail to provide for "a school* to be taught at least three months

during that year," etc., the trustee "shall immediately forward to the county clerk, an estimate of the necessary expenses for a school of three months, after deducting the probable amount of the school fund revenues to be apportioned to the district, and a tax shall be levied," etc.

By *Section* 40, it is made the duty of the *trustee to report to the county clerk the amount voted* as a special school tax, and that must be attested *by the chairman of the meeting.*

From these various provisions, it seems strange that any doubt should exist as to the proper authority to assess the special district school tax. In all the various provisions, the electors are alone announced as the authority to fix the amount of said tax, and the only limit upon them is, that contained in the law, that they shall not levy a less sum than is sufficient to carry on a school for three months, in each scholastic year, and there is not a single provision of law giving the trustee any more authority or power in assessing the amount of tax to be collected, than is possessed by any other voter. It is made his duty to call the meeting and report certain facts and estimates to the electors, and to keep a record of their proceedings, but so far as dictating the amount of the levy is concerned, he has no voice over any other elector. It is true, if when a meeting is not attended by five (a sufficient number to hold an election) he then lays his estimates before the county court for their action and, upon which, the law requires the court to make the levy. And to every one who will read the various provisions of this law, it is not necessary to say that the law contemplated but one school house and school to each district, only, wherein it provides that separate schools shall be taught for whites and blacks, and that in case there should be both white and colored children in the same district, would require separate schools. It is made the duty of the county court and circuit superintendent, to so lay off the district, that all may have an opportunity of attending school.

Then, upon the facts, as presented, the County Court cer-

tainly did not err in any ruling they made against the appellee.

And, upon the other proposition, if error had been committed by the County Court, in making the levy, no question is better settled in this court than this, that you cannot control the discretion or judgment of a court of competent jurisdiction by mandamus. A superior court, in proper cases, will issue a mandamus against an inferior tribunal, if such court refuses to take any action in a matter duly presented and properly cognizable before it; but when a court takes cognizance of such matter and passes its judgment upon it, it matters not how erroneous, such error cannot be corrected by mandamus.

In the case before us, the County Court was the proper tribunal to levy the tax—they considered the matter and made the levy; if that levy was not sufficient, that was the tribunal where facts should have been presented to convince their judgment as to the amount necessary to comply with the law. If they would not hear the facts, or, hearing, found against them, their judgment might have been corrected by appeal. This has been so repeatedly held that it can but be a matter of surprise to find a Circuit Court ruling differently. See *Young vs. Miller*, 1 *Ark.*, 11; *Ib.*, 21; *Ib.*, 121; *Green & Co. vs. Pulaski Co.*, 3 *Ark.*, 427; *Trapnall, ex parte*, 6 *Ark.*, 9; *Ib.*, 437; *Williamson*, 8 *Ark.*, 424; *Brem vs. Arkansas County*, 9 *Ark.*, 240; *Cornwall vs. Crawford County*, 11 *Ark.*, 684; *Marr, ex parte*, 12 *Ark.*, 84; *Ib.*, 101; *Hutt, ex parte*, 4 *Ark.*, 368; *Johnson, ex parte*, 25 *Ark.*, 614; *and some later cases.*

The judgment of the Circuit Court is reversed and the cause remanded with instructions to dismiss the application for a mandamus at the costs of the appellee.

OWEN v. REED et al.

EQUITABLE LIENS—*When will not pass by assignment.*—Liens, not reserved by contract or declared by a court of equity, will not pass by the mere assignment of a note in the ordinary course of business.

TRUSTEES—*Powers of, over trust estate, etc.*—Persons dealing with a trustee, on the faith of the trust estate, are bound at their peril to take notice of the scope and extent of the trustee's power, and the trustee cannot bind or incumber, by contract or otherwise, the trust estate, except only so far as the power may be conferred or given by the instrument creating the trust.

POWERS OF—*How construed.*—The powers of a trustee are strictly construed and no presumptions are indulged in their favor, and in case of necessity for extended powers, the trustee must act under the direction and orders of a court of competent jurisdiction.

APPEAL FROM CHICOT CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellant.

The charges made upon the estate by the will, made the estate equitable assets to be administered in a court of equity. *Silk vs. Prime*, 2 *Lead. Cases Eq., part* 1, *top page* 212, *et seq. and notes; Note, Booth vs. Blundell* (*top page*, 213); *Merival*, 232; *S. C.* 19.

The estate being kept together for a certain time to be worked for the benefit of all, charges it with equal burdens, upon the principle of contribution. *Adams' Eq.*, 267; 1 *Story Eq.*, 64; and so far as the absolute legacies are postponed, it matters not, as they are vested at once, but only a time for payment is given or named. *Quarles vs. Watkins*, 23 *Ark.*, 179. And it is but equity for those benefited, and having these legacies, to contribute to pay expenses as the will provides. *Eyre vs. Countess of Shaftsbury*, 2 *Lead. Cases, part* 2, *p.* 166–8, *et seq.; Alexander vs. Waller*, 6 *Bush.* (*Ky.*), 332–445.

Bell & Carlton and D. H. Reynolds, for Appellees.

Since the establishment of *trusts*, it is well settled law that

trustees hold only for the benefit of the *cestui que* trust, and the legal estate should not be subjected to any of their incumbrances. *Hill on Trustees, p.* 379; *Lomax's Dig., vol.* 1, *p.* 299; *First P. Wms.*, 278; 2 *P. Wms.*, 318; *Noel vs. Irvon*, 2 *Freem.*, 43.

Nor can the legal estate, *or any other estate held only in trust*, be affected in equity by the judgment, or other debts or engagements, or by the bankruptcy or insolvency of the trustees. *Hill on Trustees, p.* 379; *Elliott vs. Armstrong*, 2 *Black.*, 208; *Bostick vs. Keizer*, 4 *J. J. Marsh*, 599. It is a well settled rule, that trustees *for infants* cannot break in upon the capital of the trust fund. *Hill on Trustees, p.* 573. The beneficiaries in these settlements are usually in a helpless situation, either from infancy or coverture, and it is indispensible to the safety of the estate to hold the trustees to a strict accountability. *Hester et al. vs. Wilkinson et al.*, 6 *Humph.*, 219. See also the cases of *Mundy vs. Vawter et als.*, 3 *Grat.*, 518; *Carter et als. vs. Rolland et ux.*, 11 *Humph., p.* 333; *Chaplin vs. Moore*, 7 *Mon. R., p.* 170.

GREGG, J.—On the 9th of November, 1869, the appellant, on behalf of himself and other creditors, filed his bill in the Chicot Circuit Court, in which he alleged that on the 8th of July, 1859, George Reed, the husband of said Susan, and the father of George Reed, Jr., and two other minors, defendants in this suit, departed this life, leaving a will, duly executed, in which he had provided that his estate, in said county, should remain in the possession and under the control of said Susan, and that she should receive the rents and profits thereof, for the support of herself and family and the payment of certain debts and bequests; that the same should be held by her, as trustee, without any claim of dower and without administration, until said George, Jr., should arrive at twenty-one years of age, when, jointly with his mother, he was to have control and possession of said property. The lands, on which the family were to reside, during the life of said Susan, were to

pass to him, and when his brothers and sisters should arrive at majority, George was to pay each of them $10,000, which was to be a charge upon the lands; that the legacies and annuities provided for, in the will, for some more distant relations, were not to be a charge upon the body of the estate, but upon the net profits, and if the proceeds were not sufficient to pay all, the expenses of the family were to be first paid, and in no event was any of the property to be sold or divided before George arrived of age. The estate was large and very valuable. That no letters, testamentary or of administration, were ever taken out, but that the estate has been occupied and possessed by the said Susan, and it is now in the joint possession of her and the said George. That on the 1st day of January, 1866, the said Susan Reed was indebted to George Connelly & Co., of New Orleans, in the sum of fifteen thousand dollars, for supplies furnished and moneys advanced her, necessary to support the family, and carry on the plantation in the cultivation of cotton, etc., and being so indebted, she, on the 8th day of February, 1866, executed her three promissory notes for the sum of five thousand dollars each, due respectively at one, two and three years, and that said firm indorsed said notes to the plaintiff, and that the plaintiff had recovered judgment on one of them, which was unsatisfied and that the other notes were wholly unpaid.

The said Susan was indebted to *Newman & Buckingham* in the sum of $1,200, and to Dean, Adams & Gaff $500, and to others unknown, who are offered the privilege of joining in this suit. That the defendants have enjoyed the profits of the estate up to this time, and that the estate is liable to them, etc. And he prayed that an account be taken and the said Susan and George be decreed to pay said plaintiff the amount due and, in default thereof, that the estate be held liable and the lands sold to satisfy such claims, and for general relief.

At the October term, 1870, the defendant, George Reed,

filed a demurrer. The minors, by their guardian, answered, and the said Susan also filed an answer, in which she admitted that her husband died at the time alleged and that he left a large estate; that he willed as stated, and that she, as trustee, has held the same for the purposes named in the will. She admitted that she owed the parties named in the bill for supplies furnished her, and that she executed her notes as stated, which were accepted as a full satisfaction of all she owed them, and she averred that a large part of said notes was for an usurious interest, and she insists that they were void and that the plaintiff knew the consideration upon which they were given. She admitted the judgment and that the notes were not paid, and averred that the indebtedness was her individual liability, and that the estate is in no way responsible therefor.

And she inserted a demurrer clause in her answer and insisted that the plaintiff's remedy was complete at law; that the bill showed no equity on its face, etc.

John Connelly, of the firm of George Connelly & Co., appeared and, by order, was made a defendant, and filed an answer in which he attempted to set up cross matter against the complainant, but he did not call upon complainant or any one else to respond to his allegations of interest in the proceeds of the suit, nor did he show any equities that entitled him to intermeddle in such proceedings, and the court should not have permitted his pleadings to incumber the record in the cause. At the March term, 1870, the demurrer of George Reed was heard and sustained. The bill was dismissed for want of equity, and the complainant appealed to this court.

So far as shown from this bill, the appellant is the holder of negotiable notes, assigned to him in the usual course of business, and if it were true, as he alleged, that George Connelly & Co. had a lien upon the estate of George Reed, deceased, for supplies furnished to support the family and the plantation, would such lien enure to the benefit of the appel-

lant? There is no pretense that they had or could have claimed anything more than an implied or equitable lien, and as no lien had been reserved by contract, or declared by a court of equity, it could not have passed to him by a mere assignment of the notes in the ordinary course of business.

The rights of George Connelly & Co. must depend upon their agreement with Susan Reed, and upon her power as trustee under the will of George Reed, deceased.

It is not claimed that she individually had any right, or ownership, in the estate, which authorized her to incumber or transfer the same, but whatever of power or authority she had, was conferred upon her as trustee, by the will of the deceased.

The will is not difficult to understand. It, in substance, provided that his wife (said Susan) should for a time hold his entire estate in trust for his children and the payment of certain debts, legacies and annuities, and then it is to be partitioned in a specified manner among his children. The will authorized her to use the rents and profits for the maintenance and education of the children and the support of the family, payment of certain legacies, etc., and that the entire income may be used for such purposes; but it is expressly provided that the charges are against the profits and not against the body of the estate, and that the whole of the property shall be kept together for a home for the family.

This will was duly recorded, and the defendant, Susan, acting under it, was notice altogether sufficient to George Connelly & Co., or any one else who dealt with her, on the faith of the trust estate, and they were bound at their peril to take notice of the scope and extent of her power, and, as above stated, she had no power, only such as was given her by the will; and it is a well understood rule that all trustees are held to a strict account, and no presumptions of power are indulged in their favor; it must be directly expressed or fully implied in the grant, and especially so where infants or others who are helpless, are concerned; and, even

in cases of necessity for extended powers, the trustee must act under the direction and orders of a court of competent jurisdiction, and cannot, at their own discretion, make inroads upon the body of a trust estate.

Mr. Hill, in his valuable work on Trustees (*Marg., p.* 399) says: "It is a settled rule of the court, that trustees for infants ought never, of their own authority, to break in upon the capital of the trust fund, even for the advancement of the infant, and still less merely for his maintenance.

Therefore, if the instrument, the trust, do not authorize an application of the corpus of the fund in advancement and maintenance, however advantageous to the infant to make such payments, this can be done only with safety under the sanction of the court," etc.

In the case of *Hester et al. vs. Wilkinson et al.*, 6. *Hump.* 219, the court said: "But courts of chancery never permit trustees, of their own authority, to break in upon the capital of the trust estate, and to sanction the expenditure, after it has been made, would give a license to trustees that would endanger estates committed to them; the beneficiaries * * * * are usually in a helpless situation * * * * and it is indispensable to the safety of the estate, to hold the trustee to a strict accountability," etc. *Munday et al. vs. Vawter et al.*, 3. *Gratton* 518. *Enlyn vs. Enlyn*, 2. *P. Wm.* 669. *Ivey vs. Gilbert*, *Ib.* 13.

A trustee, if so disposed, is not allowed by individual acts or responsibilities to consume or burden a trust estate. *Bostick vs. Keizer*, 4. *J. J. Mar.* 600. *Chaplin vs. Moore*, 7. *Mon.* 171. Judgments against trustees, as individuals, cannot affect the trust property. *Hill on Trustees*, 269. (*Marg. p.*) *Ib.* 367.

To apply the principles announced in these cases to the one before us, there seems to be no serious difficulty in coming to a conclusion. There was not only an absence of authority to expend the body of Reed's estate, but the will expressly declares that only the rents and profits should be used, and these provisions appeared upon the public record of the county and

constituted facts of which creditors must be presumed to have taken notice, and if they saw fit to credit her as trustee under the will, could, under no circumstances, have looked beyond the rents and profits for their pay.

There is no allegation in the bill that credit was given to her as trustee, or that she was trusted on the credit of the estate or of the rents and profits of the estate, or that the whole of the indebtedness was not an individual liability of hers. There is an interrogatory appended to the bill, asking whether all or any part of the indebtedness was contracted by the said George Reed, deceased, in his lifetime, but she was under no obligation to notice such question, when there was no allegation in the bill to support such an interrogatory. The whole tenor and scope of the bill, in stating the contract, tends to charge her with an individual liability. And in February, 1866, *George Connelly & Co.*, closed up all accounts and took her individual promissory notes for the full amount, and these notes, as other commercial paper, in the market, passed into the hands of the complainant, and we find but a single allegation in his bill, that conduces to show that any responsibility, under any circumstance, should attach upon Reed's estate, and that was that the supplies furnished to Susan Reed were for the use of the plantation and the family. But if she and that firm had expressly agreed that the estate should be liable to them for the supplies, according to the authorities referred to, the lands could not be held subject to the payment of such demand, because she had no authority to pledge the estate in that way, and if it had been required to the use of the body of the estate, as a necessity to the subsistence and support of the family, etc., to have made ordinary creditors secure, an order of a competent court should have been had, declaring such necessity and authorizing such use. But as stated, the bill alleges that she was credited with the supplies, her individual notes were taken for the amounts, and by assignment, in the usual course of business, they came into the hands of the complainant, and in

that way, we are of opinion he acquired no rights he can enforce against the lands of the estate of George Reed, deceased, and that the court below did not err in sustaining the demurrer to the bill.

The decree of that court is in all things affirmed.

CLAYTON v. BERRY, Auditor.

CONSTRUCTION OF STATUTES—*Specific appropriations.*—When the legislature has directed what amount shall be set apart for certain specific expenditures or for the payment of certain debts, all executive and ministerial officers are bound to obey its directions.

COMMISSIONER OF CLAIMS—*Nature of findings.*—The findings of the commissioner of claims, appointed under act, approved, *March* 28, 1871, are not judgments against the State, but are only "in the nature of a judgment," which the commissioner shall make out and deliver to the claimant, who may file them with the Auditor of State, who shall draw his warrant on the treasurer, payable out of the moneys appropriated for that purpose.

AUDITOR—*Not to issue warrant when appropriation exhausted.—Section* 18 *of Chap.* 2, *Gould's Digest*, forbidding the Auditor from issuing a warrant when there is no appropriation to draw against, or when an appropriation has been exhausted, is not in conflict with the Constitution of 1868, but is in full force.

PETITION FOR MANDAMUS.

W. W. Wilshire, A. H. Garland, R. A. Howard, B. C. Coblentz, E. W. Gantt, and T. D. W. Yonley, for Petitioner.

Montgomery, Attorney General, for Respondent.

BENNETT, J.—On the 4th day of December, 1871, a petition was filed in the office of the clerk of this court, by Reuben Clayton, alleging that, on the 29th day of November 1871, he recovered a judgment, based upon militia claims, against the

State for one hundred and four dollars, before Samuel W. Mallory, a commissioner, appointed under an act of the General Assembly, approved March 28, 1871.

Said petition further alleging that on the 4th day of December 1871, he presented a certified copy of said judgment to J. R. Berry, Auditor of State, and requested said Auditor to issue a warrant on the treasury for the amount of the same, but the Auditor refused to issue said warrant; he therefore prays for a writ of *mandamus*, etc.

The Auditor, on the same day, waiving notice, enters his appearance and files his response to the petition, stating:

First, That the appropriation made, by the act to provide for the payment of property taken for the use of the militia, etc., has been expended, and there is no other appropriation out of which the claim can be paid or against which a warrant can issue.

Second, That the petitioner has not presented to him any judgment against the State, whereby he, as Auditor, is obliged by any law to issue warrants upon.

To which response petitioner files a demurrer, saying the response does not show sufficient matter, in manner and form, to preclude him from having the writ awarded as prayed.

Shall the demurrer be sustained?

It must be conceded that the people, in framing the Constitution, committed to the legislature, the law-making power of the State. This is the fundamental principle in the political organization of all American States. The legislative power is the authority, under the Constitution, to make laws and to alter and repeal them. What laws shall be enacted must depend upon legislative wisdom, discretion and confidence.

Under our Constitution the legislature shall also provide for raising revenue sufficient to pay the expenses and the indebtedness of the State. It has the control of these public moneys, after they are collected, and provides for disposing of them for the public good and for public purposes. What is

for the public good, and what are public purposes, are questions which it must decide upon its own judgment; but when it has decided and directed what amount shall be set apart for certain specific expenditures, or for the payment of certain debts, all executive and ministerial officers are bound to obey its direction.

Article X, Sec. 8, of the Constitution of the State says: "No money shall be paid out of the treasury until the same shall have been appropriated by law." Webster has defined appropriation to be, "the act of setting apart or assigning to a particular use." Chitty says: "It is the application of the payment of a sum of money by a debtor to a creditor to one of several debts, which are due from the former to the latter." *Law*, in the sense in which the word is here employed, is the rule of civil conduct, or statute, which the legislative will has prescribed.

The expression, "appropriated by law," means the act of the legislature setting apart, or assigning to a particular use, a certain sum of money to be used in the payment of debts or dues from the State to its creditors. *Art. V. Sec.* 20, of the Constitution also says, "No portion of the public funds or property shall ever be appropriated by virtue of any resolution. No appropriation shall be made except by a bill duly passed for that purpose."

The people, in their sovereign capacity, have said that no money shall be paid out of the treasury, until their representatives, by a solemn enactment, have assigned and set apart the public revenue of the State for specific purposes.

Counsel insist that there has been such an appropriation made to pay militia claims. True, one hundred and twenty-five thousand dollars were set aside for that purpose, but the auditor says it has been taken up by claims, heretofore allowed, and there is no fund upon which to draw a warrant. Still counsel urge that it was the intention of the law-making power to appropriate enough money to pay *all* the claims which might have been assessed against the State for militia

purposes. Where such an intention can be drawn from, we are unable to discern. Lord Coke says: "If any section of a law be intricate, obscure or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious meaning of another." *Co. Lit.* 381.

Then it is a rule of construction, that the whole is to be examined with a view of arriving at the true intention of such part. In interpreting clauses, we must presume words have been employed in their natural and ordinary meaning. Chief Justice Marshall, in the case of *Gibbons vs. Ogden*, 9. *Wheat.* 188, says: "The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have understood what they meant." Story on Constitution, *Sec.* 453, says: "The true sense in which words are used in a statute, is to be ascertained, generally, by taking them in their ordinary and popular signification, or, if they be terms of art, in their technical signification."

This is but saying that no forced or unnatural construction is to be put upon their language, and it seems so obvious a truism, that one expects to see it universally accepted without question.

The statute under consideration nowhere, from the title to the conclusion, by implication or otherwise, makes any allusion to setting apart or assigning any money to carry out its provisions, except in *Secs.* 7 and 8, which read as follows:

"SEC. 7. The Commissioner shall receive, in compensation of his services, a salary of twenty-five hundred dollars out of money hereby appropriated, to be paid on the warrant of the Auditor, in like manner as the salaries of other State officers are paid. The necessary and contingent expenses of said office shall be certified by the Commissioner to the auditor of public accounts, who shall draw his warrant upon the Treasurer of State therefor."

"SEC. 8. That the sum of one hundred and twenty-five

thousand dollars be and the same is hereby appropriated for the payment of such claims as may be allowed by said Commissioner, and the salary and contingent expenses of said Commissioner."

The above sections are free from any technical words, and are clothed in language that is easy to be understood, clearly expressing the intention of the legislature. Why an attempt has been made, by interested, subtly and ingenious argument, to induce this court to force from this statute a meaning its framers never held, is beyond comprehension. But it is said that the finding of the Commissioner, under the act, is a judgment of a court of law against the State and, as such, the Auditor must draw his warrant for the amount on the treasury. The proposition is founded upon a statute in the "Chapters of the Digest," approved April 12, 1869, *Sec.* 4 of which is as follows: "The Auditor of State shall draw his warrant on the treasury for the amount of any judgment obtained against the State, and the same shall be paid out of any money in the treasury not otherwise appropriated by law."

While this enactment might perhaps be successfully attacked upon constitutional grounds, we do not deem it necessary, for the purpose of the determination of this cause, to enter into this question, that point not being directly raised, but will proceed upon the assumption that the above section is valid law.

Was the certified copy of the finding of the Commissioner, appointed under the provisions of the act of the legislature, approved March 28, 1871, as presented to the Auditor of the State, on the 4th day of December, 1871, a judgment obtained against the State?

Blackstone, in the 3. *Vol.* of his Commentaries, 395, says: "Judgments are the sentences of the law, pronounced by the *court*, upon matters contained in the record of an action before it. Judgments at law are final proceedings in an action at law, by which the *court* applies the law to the particular case prosecuted before it."

"A court, as understood in its full modern signification, consists of at least three constituent parts: the *actus, reus* and *judex*. The *actus*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon the fact and, if any injury appears to have been done, to ascertain and, by its officers, to apply the remedy." 3. *Bl. Comm.* 25.

It is claimed, that the act appointing the Commissioner and defining his duties does all this; that the claimant is the plaintiff; the State the defendant, and the Commissioner the judicial power.

While the claimant may be, with propriety, considered as a plaintiff, we can see no such propriety in saying the State is a defendant, as that word is used and understood as a constituent part of a court. Under the statute, no notice is provided to the State, by or through any of its officers, that this or any of the numerous claims, that have been allowed, were presented for adjudication—nor does it, in any way, provide the manner in which the interests or the rights of the State can be protected, excepting through the Commissioner. No chance or opportunity is given the Attorney General, the law officer of the State, or the Auditor, the custodian of its vouchers, or the Treasurer, the receiver of its public funds, to appear before this tribunal to inquire into the justness, the validity or foundation of any claim or demand made against it. Were we to hold that the legislature intended to create a new judicial court, whereby the defendant, the most, or at least an equally interested constituent part of it, was to be called upon to make satisfaction, without notice, and to be judged without a hearing, it would be rolling the spirit of constitutional liberty back behind the days of the Star Chamber, the members of which were the sole judges of the law, the fact and the penalty. In that infamous tribunal, the defendant had process served upon him, and could appear and make a statement of his case.

The proceedings and finding of the Commissioner, under this enactment, has been likened to the Court of Claims created by the act of Congress.

There can be no similarity whatever. The Act of Congress, creating that court, expressly provided that the United States should be represented before it by a solicitor and assistant solicitor, appointed for the government, by the same authority that appointed the judges. And the United States, as well as the claimant, are allowed the right of appeal. See original *Act, February* 24, 1855, 10 *Statutes at Large*, 12, *and amendatory Act of March* 3, 1863.

Then again, as to the judicial power of the commissioner. A portion of section one of the statute says: "The commissioner * * * shall give bond to the State in the sum of ten thousand dollars, with good and sufficient security, conditioned that he will *faithfully* and *honestly* discharge his duty."

Where can a statute, under any written constitution, be found that requires a judicial officer, strictly speaking, to give a bond for the *faithful* and *honest* discharge of duty? The statement of such a proposition bears its absurdity upon its face, and needs no argument to convince a thinking mind that the law making power of the State did not intend that the commissioner should be clothed with judicial power to that extent, as would render his decision as *res adjudicata*, and from which, as far as the State is concerned, there could be no appeal. Thus placing in one man's hands the unbridled power to unlock the coffers of the State, the receptacle of the people's money, and with an unstinted grasp take therefrom thousands of dollars or evidences of indebtedness, only so that these findings be based upon demands, arising under the acts of the militia, with no intermediate forum or officer to check his progress. We will do the legislative department no such injustice by such a ruling. These findings are only, as the statute says they are, "in the nature of a judgment, which the commissioner shall make and deliver to the claimant, who may file them with the Auditor of State, who shall

draw warrants upon the Treasurer of the State, payable out of the moneys hereinafter appropriated for that purpose."

The moneys "*hereinafter appropriated*" are the one hundred and twenty-five thousand dollars which the Auditor says has been expended; but counsel, for claimant, nevertheless, say, it is the duty of the Auditor to draw his warrant on the Treasurer for the amount so found. That it is not the province of this officer to know or say when the appropriation has been exhausted.

Section 18, *Chapter* 2, *Gould's Digest* says: "No such warrant shall be drawn by the Auditor or paid by the Treasurer, unless the money has been previously appropriated by law, nor shall the amount drawn for a period, under one head, ever exceed the amount appropriated by law for that purpose."

This statute has never been repealed, nor does it conflict with any of the provisions of the Constitution of 1868, but is in full force, and is express in terms, forbiding the Auditor from issuing a warrant, when there is no appropriation to draw against, or when an appropriation has been exhausted. Under any view of the case, if the facts, as stated by the Auditor in his response, are true, can we hold that it is not sufficient, in law, to prohibit the issuance of a writ of mandamus.

Demurrer overruled.

GREGG, J.—I fully concur with the court, except as to the original jurisdiction of this court.

RICE v. SHOOK et al.

STATES IN REBELLION—*Status of inhabitants.*—During the late civil war, the *status* of the inhabitants of the insurrectionary States, outside of the territory therein held by the United States, was that of public enemies of the government.

LAW OF NATIONS—*Intercourse interdicted.*—During war, all trade and intercourse between the citizens or subjects of one of the belligerent States or powers, with those of the other, are interdicted.

CONTRACTS—*Against public policy invalid.*—All contracts made with a public enemy, without the license or permission of the government, are, upon the grounds of public policy, invalid and void.

COURTS—*Of what, will take judicial notice.*—Courts will take judicial notice of the fact that certain localities or portions of a State, in insurrection, were in the possession and under the custody of the forces of the United States, but will not infer therefrom, that individuals resided there, or in the territory over which the government had re-established its authority, as against the averments of a plea that they were public enemies.

APPEAL FROM INDEPENDENCE CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

Byers & Cox, Rice & Benjamin, for Appellants.

Watkins & Rose, for Appellees.

During the prevalence of a war, the citizens of the hostile States are incapable of entering into a valid contract with each other. 7 *Peters*, 586; *Story on Prom. Notes, Sections* 94 *and* 95.

The civil war between the United States, and the seceding States, involved the usual consequences and rights of international wars. *The Sarah Star, Bl. Pr. Cas.*, 69.

The war continued, and was not ended till August 20th, 1866. See opinion by *Casey, C. J., U. S. Ct. claims, Grossmayer vs. U. S. Dec'r. T.* 1868; *President's Proc., Aug.* 20, 1866.

HARRISON, J.—This was an action upon a promissory note for $400, executed to the appellant by the appellees, and dated at Little Rock, February 7th, 1865.

The only question in the case is raised by a demurrer to the defendants' plea, which alleges that the note was executed during the late civil war, and that, at the time, the plaintiff was a citizen of the State of Minnesota, and the defendants were citizens of the State of Arkansas, adhering to and aiding the rebellion, and public enemies of the United States, and that the execution of the same was not by any license or permission of the United States.

That, during the war, the *status* of the inhabitants of the insurrectionary States, outside of the territory therein, held by the United States forces, was that of public enemies of the government, was conclusively settled by the Supreme Court of the United States, in the Prize cases, 2 *Black*, 635, and the case of *Mrs. Alexander's cotton*; 2 *Wal.*, 404; and see also, *Phillips vs. Hatch*, 1 *Dill.*, *C. C. Rep.* 571; and it is a principle of public law, recognized by all nations, that, during war, all trade and intercourse between the citizens or subjects of one of the belligerent States or powers, with those of the other, are interdicted, except by the license or permission of the government, or in the mere exercise of the rights of humanity. Consequently, all contracts made with a public enemy, without the license or permission of the government (no contract can arise from the mere exercise of the offices of humanity), are, upon the ground of public policy, invalid and void.

Although the court will judicially notice that, at the date of the note, Little Rock and a large part of the State were and had been, for some considerable time previously, in possession of the forces of the United States, yet no such inference, as that the defendants resided there or in the territory over which the government had re-established its authority, and could not longer be regarded as enemies, can be drawn therefrom, in opposition to the direct averment of the plea that they were public enemies. The plea was good and the demurrer to it was, therefore, properly overruled. Judgment affirmed.

McCLURE, C. J., dissenting.—The case of *Hatch vs. Phillips*, (1 *Dill. C. C. R.*, 571), is cited by the majority in support of their position. The effect of the decision in *Hatch vs. Phillips* is, that a state of war existed, in Texas, from the date of the President's proclamation (August 16, 1861,) until the 20th of August 1866, at which time the President declared the rebellion at an end in the State of Texas. I presume the object in citing this case was to indirectly assert the fact, that the rebellion in Arkansas did not close until April 2, 1866, and that a state of war continued in Arkansas from August 16, 1861, to that time, such as rendered all contracts between citizens of the United States and the State of Arkansas absolutely void. From all conclusions of this kind, I most respectfully dissent.

It was held in the case of *Mrs. Alexander's cotton* (2 *Wal.* 419), that "all the people of each State and district, in insurrection against the United States, must be regarded as enemies, *until* by the action of the *legislature* and the *executive*, or otherwise, that relation is thoroughly and permanently changed." This principle of law is correctly stated, and I do not pretend to refute it. The point of disagreement between the majority of the court and myself is, that they recognize the 2d of April, 1866, as the day on which the restrictions on trade were removed, while I fix it at another and different date. As will be seen by the language of Chief Justice Chase, in the case of *Mrs. Alexander's cotton*, trade with persons in the insurrectionary districts, by persons claiming or having a residence or citizenship, outside of such an insurrectionary district, is interdicted, not until the close of the war or insurrection, but "*until the legislature and the executive otherwise direct.*" The general law of nations, in matters of this kind, in relation to trade with a public enemy, during a period of war, has no application whatever to the condition of affairs existing between the United States and the States in rebellion, save, in those instances, where there was an absence of positive law, or orders made by an officer authorized by law to

declare what relations should exist between the citizens of the United States and the citizens of the insurrectionary States.

I insist, that not only Congress, but the Executive of the United States, in the manner and through officers designated by the law and war-making power of the United States, changed the general rule, that during war all trade by citizens of other States, with the citizens in rebellion, was suspended and inhibited until the close of the war.

On the 16th of August, 1861, the President of the United States, by proclamation, interdicted all commercial intercourse between the loyal States of the United States and the disloyal States. An act of July 13, 1861, authorized the President to make such a proclamation, and to license and permit commercial intercourse with any part of said State or section (in rebellion) with the inhabitants so declared to be in insurrection, and also, authorized the Secretary of the Treasury to appoint such officers, and make such regulation in relation to such trade as might be necessary. The Secretary of the Treasury, by virtue of said authority, divided the territory into districts. Under the second paragraph we find that Arkansas, or that portion of it "*occupied by National troops operating from the North,*" is placed within the limits of the first special agency, and that part of Arkansas, "*occupied by National troops operating from the South,*" is placed within the limits of the fifth special agency.

The present Chief Justice of the United States, was, at the time these orders were made, Secretary of the Treasury, and in his instructions to the agents of the special districts thus created, he directs the agents as follows: "*First,* To allow within districts in insurrectionary States, when the authority of the government is so completely re-established, in your judgment, sanctioned by that of the commanding General, as to warrant it, and between such districts and loyal States, *the freest commercial intercourse, compatible with prevention of supplies to persons within rebel lines.*"

This order was issued long before the execution of the note sued on in this case, and clearly discloses the policy of the government in relation to trade with persons in rebellion. The question now arises: Was the authority of the United States so completely re-established as that the "freest commercial intercourse," between the parties to this suit, would result in "furnishing supplies to those persons in rebellion." The majority of the court say, they will "judicially notice that, at the date of the note, Little Rock and a large part of the State were, and had been for some time previously, in possession of the forces of the United States." It seems to me, if they take judicial cognizance of such a fact, that the majority might have gone a step farther, and have taken judicial cognizance of the different acts of Congress, and orders made in pursuance thereof, by the officers therein designated. It is a matter of public notoriety that the federal forces took possession of the city of Little Rock, where the note sued on was executed and delivered, in September, 1863, and that a continuous possession has been held down to the present time, against persons claiming to be public enemies. Chief Justice Chase, while he was yet Secretary of the Treasury, in speaking of restrictions upon intercourse with those in rebellion said: "There does not seem to me to be so much danger in intercourse which does not involve the furnishing of supplies." It appears, from one of the pleas of the appellees, that the consideration for the note, sued on, was for legal services performed by the appellant toward the appellees, in getting them out of prison. How such service or such intercourse would endanger, or interfere with the prosecution of the war, waged by the United States against these persons in rebellion, I am at a loss to see. If this note is void, it was only so, because the giving of it was contrary to public policy, and when I say public policy, I mean the public policy of the government of the United States. The majority have said that they will take judicial cognizance of the fact, that Little Rock, and a considerable part of the

State were, at the time of executing and delivering the note to the appellant, held and occupied by the national forces. Then, I ask, why not take cognizance of the fact, that the appellees were within the lines of the federal army and subject to federal laws and authority, when this note was executed? It was held in the case of the *United States vs. Hayward*, 2 *Gall.*, 485, that by the conquest and occupation of Castine by the British, that the American citizens, residing there, were released from all allegiance to the United States government, so long as the place was held by English troops; but the moment the authority of the United States was sufficient to afford protection to its citizens, that moment their allegiance was due to their government, and the citizen could no more claim to be a public enemy of the United States, than a citizen of Arkansas, who was in the late rebellion, could claim it to-morrow. While it may be conceded that the citizen of Arkansas, who was within the lines and protection of the army of insurgents, owed his allegiance to the party in power, it does not follow that such a person may come within the lines of the army of the United States and the protection of the government, and there plead his treason to defeat a legal and valid obligation.

In the early part of 1864, the loyal people of Arkansas assembled in convention at the city of Little Rock, where the note was executed and delivered that is now the subject of this suit, and formed a convention. Members of the legislature were elected, as well as the officers of the executive and judicial departments. The government, thus formed, received the fostering care of the President of the United States, and was protected by federal bayonets from the time of its creation until July of 1868, at which time that government gave way to the present. The XIIIth Article of Amendment to the Constitution of the United States, was submitted to the legislature for ratification, and by it ratified in April of 1865. The authority and power of the United States government was as completely and firmly established at the city

of Little Rock, where the note was given, and at the time it was given, as it is to-day. The mistake into which the majority of the court have fallen is, in accepting it as a fact, that the armies of the rebellion held possession of the State of Arkansas in February, 1865. It is a well known fact, and one of which judicial notice may be taken, that the courts were open for the transaction of judicial business, at this city, as early as September of 1864. The presumption arising from this fact is, that the courts were open by the permission, assent and consent of the United States authorities. This point conceded, and another presumption follows, and it is, that the employment of counsel to defend and prosecute causes therein was not interdicted. One of the pleas filed in this case discloses the fact, as has already been stated, that the consideration of the note was legal services performed by the appellant toward and for the appellees. The plea, however, does not disclose whether the services were performed before the State courts or a military tribunal; nor does it make any difference where they were performed, if the United States authorities allowed the appellant to appear as counsel for the appellees, for the toleration of the appearance would imply a consent on the part of the government, that the appellees might employ him.

I have carefully examined the case of *Phillips vs. Hatch*, 1 *Dill.*, 571, and an examination of the facts in that case discloses, that the contract was made *within the lines of the insurgents*, and not within the lines of the federal army, as was the fact in this case. The seizure of Mrs. Alexander's cotton was justified upon the ground that the seizure was made *within the lines of the enemy*. The brig Amy Warwick, was condemned as a prize on the ground that the owners of the cargo, resided *within the lines of the enemy*. The vessel Hiawatha and her cargo were condemned as a prize for similar reasons. The Crenshaw was returned to the claimants because they lived *within the federal lines*. In my research, I have been unable to find a single case where property was held as a

prize capture, where the owner lived within the federal lines; nor have I been able to find a single case, where a contract has been held void where it was executed within the federal lines, as was the fact in the case at bar. The allegation in the plea is, that the appellant was a citizen of the State of Minnesota, one of the States of the United States; that the appellees were citizens of the State of Arkansas, one of the Confederate States; that at the time of the execution and delivery of the note sued on, the United States was at war with the Confederate States; that the appellant adhered to and aided the United States, and that the appellees adhered to and aided the Confederate States; that these acts constituted them public enemies, and that the appellees had neither the sanction or authority of the United States government to make the note, and that, by reason of the want of authority, and of being public enemies, the note is unlawful, illegal, void, etc.

To this plea, the substance of which has been given, a demurrer was filed, one clause of which is general. The question arising upon the record is, *not* whether the appellees have *alleged* that they were public enemies, as the majority seem to infer, but whether *the facts stated in the plea* constitute them public enemies. From the beginning to the end of the plea, there is no allegation that Little Rock, the place where the note was executed, was within the confederate lines. It is true, that Little Rock is in the State of Arkansas, and that the plea alleges that the State of Arkansas adhered to the cause of the Confederate States, and that the appellees aided and adhered to that cause; but what does this establish? Nothing, absolutely nothing; for the court say, that they will take judicial cognizance of the fact, that Little Rock was within the federal lines at the time of the execution and delivery of the note. If the court will take cognizance of such a fact, why not take cognizance of the other fact, that neither the law of nations, reason nor common sense, recognize such a thing as a public enemy, except in a criminal

sense, within the lines over which the government has re-established its authority, as it had at Little Rock? There is no answer to the proposition, unless it be assumed that the State of Arkansas and its people were public enemies until April 2d, 1866, when the President, by proclamation, declared the insurrection at an end.

If such an assumption be indulged in, it follows that the action of the State of Arkansas, from the early part of 1864, until July of 1868, is a nullity. The XIII and XIV Amendments, to the Constitution of the United States, were submitted to a legislature selected and convened under the Constitution of 1864; under such circumstances, will any man, but a member of the Rip Van Winkle school, say that the government of the United States did not recognize the existence of, and re-establishment of the power and authority of its own government? My idea is, that the plea, if it can be sustained at all, should have stated that the appellees *were within the rebel lines* at the time of the execution and delivery of the note. The general rule is, that courts will not give any greater force and effect to a pleading than the language used, will, by a fair construction, authorize. In short, no presumptions are indulged in favor of the pleader.

It was the duty of the appellees to have stated, not that they were public enemies, but the facts and acts which constituted them public enemies. The facts and acts being stated, it is the duty of the court to ascertain from such facts and acts, whether they, in fact, constituted the persons recited, public enemies of the United States. In this view, the majority of the court disagree with me, and contend that the assertion that the appellees "were public enemies," at the time of making the note, is an allegation of *a fact* in the plea, and that a general demurrer admits such an assertion as a *fact*. This, I think, is a grave error, as I understand the demurrer to admit, that the fact the appellant was a citizen of the United States, and of the State of Minnesota, and adhered to that cause, and that the appellees were citizens of the State

of Arkansas, adhering to the confederate cause, did not constitute them public enemies. I regard the assertion, in the plea, that the appellees were public enemies, *not as the allegation of a fact*, but rather as a *conclusion of law*, arising in the mind of the pleader from the facts he had previously stated.

Had the pleader alleged that the note was made *within the lines of the rebel army*, and this fact had been admitted by a demurrer, then I admit that the plea ought to have been sustained; but there is no such allegation. There is no allegation as to where the appellees resided at the time of making the note. The plea admits it was executed and delivered at the city of Little Rock. The presumption arising from this fact is, that the appellees resided there; for in law, a man is presumed to be at the place the record last finds him. This presumption has to be overcome by a direct allegation, and in order to do this, in the case at bar, if the appellees desired to show they were public enemies, it was their duty to make such an allegation as would show, affirmatively, that their residence was within the confederate lines. An allegation that they were citizens of the State of Arkansas, does not negative the fact that they were inside of the lines of the federal army which, the majority say they will take judicial notice, extended over the city of Little Rock, and a very considerable portion of the State. The majority of the court, however, in their desire to aid a man who flaunts his treason in their face as a reason why he should not pay his debts, reverses the rule that a plea shall be construed most strongly against him who pleads it, and say that their judicial cognizance of the fact that Little Rock was held and occupied by federal troops, from September, 1863, to the present hour, will not be indulged in, against a direct averment of the plea, that these appellees were public enemies, and that they will indulge the presumption, that the appellees were public enemies, because they say so, and that too, in the absence of any allegation from which such a conclusion can be drawn.

There is not a member of this court, nor a member of this

bar, but knows, as a matter of public history, that the rebel confined in prison at the city of Little Rock, in February of 1865, had the same right, and exercised it without any molestation on the part of the government of the United States, to employ counsel that a loyal man had. Yet, in the face of such knowledge, and the existence of such permission, the majority of the court have sustained a plea, the contents of which are known to be false, and contradicted by the public history of the times.

So far as the appellant and appellees are concerned, I care no more for them than I do for that portion of the human family with which I have no acquaintance. It is the precedent established by the decision to which I object, and which has led to this dissent. It has been solemnly announced from this bench, as I understand the opinion of the majority, that all transactions and contracts had and executed in the State of Arkansas, by a loyal citizen on the one side, and a rebel on the other, prior to the 2d day of April, 1866, are void, unless special permission was given the rebel to make the contract. I do not believe this to be the law, yet it has been so declared from this bench.

I might go into an extended argument, and support it by the best law writers on international law, that the employment of counsel for the defense of a criminal, did not come under the head of "commercial intercourse," when restricted to the facts in this case, but it is unnecessary, and I am content to let the matter rest on what has already been said.

McLERAN v. MORGAN et al.

PLEADING—*Where style of court omitted in declaration.*—The omission to give the style of the court in a declaration, is a formal defect, which may be corrected on motion, in the court below, and where no objection is made there, it cannot be urged in this court.

DECLARATION—*When suit by firm, what not necessary.*—In a suit by a firm, where the style of the action is sufficiently stated, the names of all the parties and the firm name of the plaintiffs given, it is not necessary to repeat these in the body of the complaint, if they are sufficiently referred to.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Montgomery & Warrick, for Appellant.

First, The Code does not authorize a recovery upon any statement of facts, which, before its adoption, did not authorize a recovery in some form of action. See *Hill, for use of Wintersmith vs. Barrett, etc.*, 14 *B. Monroe, p.* 84, 86.

Second, The body of the petition should show who complains, and if partners, to describe and name each partner, etc., as at common law. 1 *Chitty Pl.*, 257-264; *Stephens' Pl.*, 302-441; *Gould's Pl.* 77-8.

Third, The simple filing of the note, sued on, does not dispense with any necessary allegation to constitute a cause of action. *Dodd vs. King*, 2 *Met.*, 430.

Fourth, The complaint is not entitled to any court, nor is relief prayed from any court. *Code, sec.* 109; *Myer's (Ky.) Code, p.* 326, *d.*

Fifth, The indorsement on the note shows title in some one other than plaintiffs. *Myer's (Ky.) Code, p.* 326, *f.*

A. H. Garland, for Appellees.

The only cause of demurrer that existed at all was obviated or removed when the case was dismissed as to Andrews; but really this joinder of parties was always permissible. You had to render separate judgments, but they could be sued

jointly. *Code, secs* 32, 34, *etc., p.* 29; *Gould's Digest, p.* 628, *chap.* 94.

GREGG, J.—The appellees brought their suit, upon a promissory note, against the appellant, and Marquis L. Andrews, as the administrator of James O. Gill, to the last November term of the Pulaski Circuit Court.

The appellant, and Andrews, as administrator, appeared and filed a joint demurrer, and Andrews filed a separate demurrer.

The court sustained Andrews' demurrer and the plaintiffs elected to discontinue as to him. The court overruled the appellant's demurrer, and he rested and final judgment was rendered against him, and he appealed to this court and obtained a supersedeas.

This is a suit at law and commences as follows:

"Charles E. Morgan, William B. Buck, Albert Perrin and Emerson G. Elkington, Firm name of E. C. Morgan & Co., } *Plaintiffs.*

vs. } Complaint at law.

James McLeran, and Marquis L. Andrews, administrator of James O. Gill. } *Defendants.*

The plaintiffs, in the above entitled case, state that the defendants, James McLeran and James O. Gill, now deceased, the said Marquis L. Andrews, his administrator, by their promissory note, dated October 6, 1868, agreed to pay to the plaintiffs, six months after date thereof, the sum of $1466 $\frac{32}{100}$, which note is herewith filed and made a part of this complaint.

No part of said debt has been paid, wherefore they pray judgment for their debt and for other relief."

The note filed answered the description of the complaint and was signed "McLeran & Gill."

The appellant set up three causes of demurrer: First, That the complaint is insufficient in law; Secondly, The matters and things therein contained, do not constitute a cause of action by plaintiffs against these defendants. Lastly, that there is a misjoinder of parties defendants.

The first and second causes of demurrer amount, in substance, to the same and may be considered together.

It is suggested that the style of the court is not given, which is likely a misprision in making up the transcript; at all events, it is one of those formal defects that the court below should always allow corrected, upon motion, and as no objection was made there, it cannot be successfully urged in this court.

It is urged that the complaint is insufficient, because the body of it does not contain the name of each plaintiff, with the averment that they did business in a firm name stated, and also an averment that the defendants were indebted to them and that they executed the note in a certain style, etc.

Section 109, of the Civil Code, states what the complaint must contain:

First, The style of the court.

Second, The style of the action, consisting of the names of all the parties thereto, distinguishing them as plaintiffs and defendants, followed by the words "complaint at law," etc.

Third, A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action.

Fourth, A demand of the relief to which the plaintiff considers himself entitled.

Section 138, declares if the action is founded on a note, or other writing as evidence of indebtedness, it must be filed as a part of the pleading. In this case, the style of the action is sufficiently stated, the names of all the parties and the firm name of the plaintiffs given, and it is not necessary to repeat all these in the body of the complaint if they are sufficiently referred to, as in this case, to fully apprise the defendants, whose complaint they are to answer, and followed by sufficient averments of the nature and cause of the action.

The appellant, also, urges that there is no averment of his (James McLeran's) liability. He (James McLeran) is charged as being one of the defendants; the complaint avers that the

defendants, by their promissory note, bearing date, etc., six months after date, etc., agreed to pay the plaintiffs $1466 $\frac{39}{100}$ etc., and filed the note and made it a part of the pleading.

This sufficiently advised the defendant as to what he was called upon to answer, and the note being on file and forming a part of the pleading, the defendant was thereby fully advised as to the terms of the note and the manner of its execution, and consequently could have well set up any defense he may have had to the merits of the action.

There is no error in the judgment rendered by the court below and that judgment is affirmed with the usual damages.

HARRISON & STEWART v. LEWIS, Commissioner.

SWAMP AND OVERFLOWED LANDS—*Statutes regulating sale of, etc.*—Where a party enters swamp lands of the State, at private entry, after the same has been offered for sale at public vendue, in pursuance of the Act for that purpose, and pays for the same the amount fixed by law, he cannot be deprived of that title, which is to be evidenced by a patent, by a subsequent neglect of an officer in not performing an act which the law says shall be done, but which is not necessary to his title.

CERTIFICATE OF ENTRY—*Of what force and effect.*—The regularity of the issuance of certificates of entry may be inquired into, and the certificate may be held voidable for irregularities or fraud, but they are to be held *prima facie* good and regular, and he, who would seek to deprive the holders of their rights under them, must assume the burthen of proof, and show sufficient facts to warrant a court of law or equity to set the certificate aside.

COMMISSIONER OF IMMIGRATION AND STATE LANDS—*Duty of.*—Under the Act *approved July* 15, 1868, providing for the appointment of a Commissioner of Immigration and State Lands, all the duties that were required of the Auditor, in relation to such lands, now devolve on said Commissioner.

PETITION FOR MANDAMUS.

Watkins & Rose, for Petitioner.

The entry was properly made, and the neglect of the officer to report it could not void it. *Taylor vs. Brown*, 5 *Cranch*, 241, 2, 3; *Lytle vs. State of Arkansas*, 9 *How.*, 333; *Craig vs. Bradford*, 3 *Wheat*, 494; *Stringer vs. Toney*, 3 *Peters*, 338; *Nicks vs. Rector*, 4 *Ark.*, 253.

Montgomery, Attorney General, for Respondent.

BENNETT, J.—On the 12th day of December, 1870, plaintiffs filed a petition in the office of the clerk of this court, stating that, on the 25th day of May, 1859, Colin J. McRea and Lucien Mead, entered, in the State Land Agent's office, at Little Rock, a portion of the swamp and overflowed lands granted to the State by Act of Congress, and that said Land Agent gave McRea and Mead a certificate of entry, particularly describing the lands thus entered, the price paid, and acknowl-

edging the receipt of the payment of the amounts due for the purchase of the land.

The petition further alleges, that the said certificate of entry was duly assigned by McRea and Mead to the petitioners; that petitioners presented said certificate of entry to James M. Lewis, Commissioner of Immigration, the defendant, and demanded that it should be certified by him to the Governor of the State, that a patent to the lands might be obtained; but said Lewis, as Commissioner, declined and refused to certify the same. Therefore, they pray for a writ of mandamus, etc.

On the 9th day of January, 1870, the defendant filed his answer, stating that there is no record in his office showing an entry of the lands as described in the petition, nor do the records or books of his office show that any money was ever paid in consideration of said lands. That he has no means of judging of the genuineness of said certificate of entry, mentioned in the petition; that the records of the Little Rock district, for the year 1859, are in his office; that said records do not show that any such entry was ever made. The defendant also alleges the right of said plaintiffs to the certificate of entry, to enable them to secure a patent, depends upon facts which can only be decided by a court of chancery. The fact that there is any record entry of the lands as described in the certificate of entry, either in the General Land Office of the State, or of the original books of the Little Rock Land Office, is not controverted.

The only question then, to determine, is, whether the neglect of the land officer, to enter and report lands, can void his certificate of entry issued, so as to prevent the issuance of a patent.

The certificate of entry as referred to and made a part of the petition, by exhibit, is numbered 790, and signed by one B. F. Owen, State Land Agent for the Little Rock district, and stamped with the seal of his office. *Section* 7, of the *Act of January*, 1850, respecting the State lands, reads as follows:

"The Land Agents shall have full power and authority to sell any of the lands granted by Congress to the State, under the designation of swamp and overflowed lands, but in making such sales, shall be governed by the rules, provisions and regulations now in force and hereinafter provided, or which may exist by law at the time of such sale."

The "rules, provisions and regulations in force" were that notice should be given of confirmation of said lands in the various counties, calling upon persons claiming pre-emptions to any of them, to come forward and prove up the same; that such lands would be offered at public sale, stating the time and place when the sale would take place, etc. *Sections* 11 and 12, of the same *Act*, then provides that "all lands, not sold at the time appointed for such public sale, shall be liable to be entered at any time thereafter, for swamp land scrip, at the rates herein fixed, which is hereby declared to be seventy-five cents per acre, for all lands being more than six miles from a navigable water course; and the Land Agent shall give to the purchaser a certificate of such entry, in which he shall specify the lands entered, and the amount received for such entry, and shall also note such entry on the township maps, and in his book to be kept for that purpose."

The certificate of entry now before us, was issued in strict conformity to the above enactment, with the exception of making a "note of such entry on his township maps, and in his book to be kept for that purpose."

It is a well established principle, that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right, by the misconduct or neglect of a public officer, the law will protect him. *Lytle vs. State of Arkansas*, 9 *How.*, 333.

In this case, McRea and Mead entered a portion of the swamp lands of the State, at private entry, after the same had been offered for sale at public vendue, in pursuance of the Act of the General Assembly for that purpose, and paid for said land the full amount per acre, as fixed by said Act;

nothing more could be done by them, and nothing more could be required of them under the Act, and it would be unreasonable to deprive them of that title, which is to be evidenced by a patent, by a subsequent neglect of an officer, not appointed by them, and over whose acts they could exercise no control, in not performing an act which the law says shall be done, but which is not necessary to perfect title.

We do not say that no inquiry into the regularity of these preliminary measures, requisite to the issuance of a certificate of entry, can be made, nor that these certificates could not be made voidable for frauds or otherwise, but they must be held to be *prima facie* good and regular, and he who would seek to deprive the holders of their rights under them, must assume the burthen of proof, and show sufficient facts to warrant a court of law or equity to set the certificate aside.

In the case before us, nothing but the fact that the land agent has neglected to make the proper entry of these lands on his book, and to note the payment of the money for the same, is alleged as an excuse for not certifying the same to the Governor for a patent. No positive allegation of fraud in his issuance of the certificate, nor positive denial of the payment for the lands has been made, and if made, no proof has been adduced to sustain them.

Section 22, of the act of January 12, 1853, makes it the duty of the Auditor, to prepare patents for all lands sold by the several land agents, after the same shall have been paid for, or, if paid for at the time of the sale, conveying the same to the purchaser in fee simple, which patents, with other evidence of payment, shall be submitted to the Governor for his signature for and in behalf of the State.

Under an act to provide for the appointment of a Commissioner of Immigration and State Lands, approved July 15, 1868, it now becomes the duty of said commissioner to perform all the duties which were required of the Auditor in relation to such lands. Therefore it is proper and right he should make the certificate as asked for by the plaintiff.

GREGG, J., dissenting. I concur in the conclusions of the court in this case, but not in the jurisdiction of this court.

27 156
65 422

ADAMS, Ex'r, and BERRY v. HEPMAN.

PRACTICE—*When case stricken from docket.*—Where no exceptions are taken, nor any appeal prayed for or granted, either in the court below or by the clerk of this court, the case will be stricken from the docket.

APPEAL FROM FRANKLIN CIRCUIT COURT.

HON. WILLIAM N. MAY, *Circuit Judge.*

Robert A. Howard, for Appellants.
Garland & Nash, for Appellee.

GREGG, J.—This suit was brought by Hepman against George C. Alden, James M. Oliver, Charles Berry and William C. Adams, in the Franklin Circuit Court, and afterwards revived in the name of William A. Adams, as the executor of William C. Adams.

The whole record is so imperfect and confused, as, in some particulars, to be unintelligible.

The defendants all appeared, and Alden and Oliver filed a joint plea of bankruptcy; afterwards, the record says Alden filed a plea, but no such plea appears. Then follows a long answer of Adams and Berry, setting up several matters, none of which amounted to a defense, and no distinction of paragraphs was made, if intended for more than one defense.

The record then recites, that the plaintiff demurred to the first, second and third paragraphs of "the defendants' answer." Whether this was intended as a demurrer to the answer of Alden and Oliver, or Adams and Berry, or to both, does not appear. All the defendants are named in the captions, and no distinction is anywhere made in responding to their pleadings. The record then recites, that the plaintiff filed his demurrer to "the last paragraph, or additional answer of the defendants," but up to this time no answer appears to have been filed by all the defendants, nor does there appear any separate answer or other paragraph after the answer of Adams and Berry.

Then follows an entry, reciting that the "said several demurrers came on to be heard,' and the court sustained said demurrers, and the defendants, by leave, filed another answer, and the plaintiff filed a demurrer thereto. What disposition was made of this answer and demurrer, does not affirmatively appear; but they are followed by a judgment *nil dicit*. No exceptions were taken; nor was any appeal prayed for or granted, either in that court or by the clerk of this court; and for this reason, the case is ordered stricken from the docket. *See Sykes vs. Laffrry*, 26. *Ark. Henry & Co. vs. Gibson & Helmer, Ib.*

MOORE et al. v. DUNCAN, Trustee.

EQUITY—*Will not grant relief, when remedy at law.*—Where a party has a full, adequate and complete remedy at law, he cannot seek relief in a court of Equity.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

English & English, for Appellants.

Tunstill was in possession of the land, and there was nothing to hinder Duncan, the appellee, from bringing ejectment. According to the allegations of the bill, the appellee had an ample remedy at law, and no right to go into equity. *See Danley vs. Byers*, decided at present term.

Gallagher, Newton & Hempstead, and *John Carroll*, for Appellee.

The appellants mistook their remedy in attempting to seize

this trust fund through a process from a law court. It should have been attempted only in equity. *Pope vs. Boyd*, 22. *Ark.*, 535. *Biscoe vs. Royston*, 18. *Ark.*, 508. *Pettit vs. Johnson*, 15. *Ark.*, 55. 4. *Kent's Com., Marg., p.* 303. *Hill on Trustees, Marg., p.* 229. *Trusts and Trustees, by Tiffany & Bullard*, 772.

Since then the property in the hands of a trustee cannot be reached by an execution at law, on a judgment against the *cestui que trust*, it is clear that the appellants, holding under such a sale, have no title whatever; and therefore the decree of the Circuit Court, declaring the sale void, is correct, and should be respected and affirmed by this court.

GREGG, J.—This is a complaint in equity, brought by the appellee against the appellants, to the March term 1870, of the Ashley Circuit Court.

The bill alleges that William P. Duncan, in July 1864, conveyed to James G. Duncan 440 acres of land, and certain personal property in trust. That afterwards, and without the trustee's knowledge, the appellants, Moore and Rolfe, obtained judgments, before a Justice of the Peace, against said William P. Duncan; had executions issued and returned "*nulla bona*," and transcripts filed in the office of the Circuit Clerk of said county, and other executions, issued by said clerk, were levied upon said lands, and they were, by the sheriff, advertised and sold, as the property of William P. Duncan, and bid in by Moore and Rolfe, who afterwards sold and conveyed to Tuntstill. That all the defendants had full notice of the deed of trust and the title in the complainant; that the defendants had wrongfully entered into possession of the lands and received large profits, more than the amount of their judgments, which judgments the plaintiff offered to pay, if found just, and he prayed that the deeds from the sheriff to Moore and Rolfe and from them to Tuntstill, be cancelled, and that they be required to account for rents, and that possession be delivered to him, etc. The defendants appeared and demurred to the bill; the court sustained the

demurrer, and the complainant filed an amended bill to the effect above stated, to which the defendants likewise demurred, but, upon the hearing, the court overruled their last demurrer and they excepted and declined to make any further response. Whereupon the cause was heard upon the bill, amended bill and exhibits, and the court decreed that the sale made by the sheriff be set aside, and the deeds to the defendants cancelled and held for naught, and that the plaintiff recover possession of the lands; that a writ issue, etc., and that defendants pay costs. From which decree the defendants there appealed to this court.

In the case of *Byers et al. vs. Danley*, decided at the present term of this court, through his Honor, Justice Bennett, this court said: "It is a maxim of equity jurisprudence, of universal application, that where a party has a full, adequate and complete remedy at law, he cannot seek relief in a court of equity," etc. See *Memphis & Little Rock Railroad Co. vs. Wm. E. Woodruff*, at same term.

In the case under consideration, the appellee not only sets up a legal title in himself, but he alleges that he has nothing but a legal title; that the equitable estate is in another, and he holds but a naked legal title; hence, his claims are especially cognizable in a court of law. According to his own exhibits, if a recovery is had in his own name, and it is thus he sues, it must be on purely a legal title.

He charges the appellants with wrongful and illegal possession of the lands, and he prays that they be ousted and the lands restored to him, his title cleared, etc.

Litigants have a constitutional right to have such facts tried by a jury of their countrymen, and it seems to us he should be remitted to a court of law, there to determine his right of possession, and that the court below erred in not sustaining the demurrer to his complaint.

The decree is reversed and the cause remanded with directions to sustain the demurrer and dismiss the bill for want of equity.

PEAY, Rec. R. E. Bank v. CAPPS et al.,

AND

DRENNEN et al. v. PEAY, Rec., on Cross Appeal.

27 160
58 260
27 160
73 99

TRUSTEES—*Purchase of trust property by, when set aside.*—A purchase made by a trustee, of trust property, may be set aside, by the beneficiary, on the ground that the same is a fraud either actual or constructive, but the trustee, as such purchaser, will not be allowed to raise the objection.

PURCHASERS—*Cannot retain possession and avoid payment.*—The vendee, in possession, under a contract of sale, cannot retain possession and avoid payment of the balance of the purchase money, on the ground that the vendor cannot make as good a title as agreed; before he can avail himself of such defense he must offer to rescind the contract.

APPEAL FROM PULASKI CHANCERY COURT.

HON. T. D. W. YONLEY. *Chancellor.*

U. M. Rose, for Appellant.

Garland & Nash and Clark, Williams & Martin, for Appellees.

WHYTOCK, *Special Supr. Judge.* — This is a complaint in equity, by Peay, as Receiver of the Real Estate Bank, against Capps' and Drennen's heirs and representatives and others, to quiet title and enforce a vendor's lien.

The Pulaski Chancery Court decreed that the title to the land in suit be vested in the defendants, the heirs at law and legal representatives of John Drennen, deceased, subject to the lien of the Bank; and that the heirs of Larkin Capps, deceased, and his widow, and the heirs at law, and administrator of the defendant, Joseph Green, be enjoined from setting up, or pretending to set up any title to the premises described in the complaint. The Chancery Court further decreed that the administrator of Drennen pay to the Receiver the sum of four thousand one hundred and sixty dollars, together with interest thereon, out of the assets of Drennen's estate, and, in default, that the equity of redemption of the defendants be forever foreclosed, and the land sold.

The Bank Receiver, and the administrator and heirs at law, both pray appeals from the decree.

The land in controversy, that is, the east half of section twenty-two, township sixteen south, range two west, is situated in Chicot County. It was a donation claim allowed to Larkin Capps, under an act of Congress passed the 24th day of May, 1828. The claim of Capps was, before obtaining his patent, transferred to Joseph Henderson for the sum of $1004, by deed bearing date the 15th day of January, 1828. This instrument contained a power of attorney, by which Larkin Capps irrevocably constituted Henderson his attorney, to locate and enter a quantity of land, not to exceed 320 acres, to which Capps was entitled by virtue of his being a resident and actual settler in that part of the territory of Arkansas which was ceded to the Cherokee Indians. It was further covenanted, that Henderson should have the right to "receive" the same. On the 16th day of March, 1833, Capps, by Henderson, his attorney, *in fact*, applied to the Register of the Land Office at Little Rock, for the entry of the tract mentioned. The application, and the affidavit in support, were filed in the office of the Register, and the patent for the tract was issued in Capps' name, in 1835. It is alleged and proved, that Henderson, acting under a power of attorney, afterwards sold and conveyed the tract to Thomas Tunstill; that Tunstill held and possessed the same for three years when, on May 18, 1837, he sold it to Benjamin Hughes. Hughes, afterwards, on the 30th day of May, 1837, mortgaged the tract, amongst other lands, to the Real Estate Bank, in consideration of certain stock of the Bank. In November, 1844, the lands of Hughes, including this tract, were sold under a decree of foreclosure, and bid in by Drennen, on behalf of the trustees of the Bank. On the 25th of April, 1846, Drennen entered into a "verbal arrangement" with the other trustees, for the purchase of Hughes' lands, embracing this piece. On the 5th of May, 1852, this verbal or oral arrangement was reduced to writing, and the Cashier and Secretary of the

Board of Trustees of the Bank were authorized to close the trade with Drennen.

The present suit was brought on the 10th day of May, 1860, and the relief sought is, that the title to said tract of 320 acres be divested out of the other parties setting up titles, and be declared to be vested in Drennen's heirs and representatives; that the title be cleared and quieted, and Drennen's representatives be required to receive the same as sufficient. That upon failure to pay the purchase money, with interest, the tract be decreed to be sold; that the contract be specifically executed, or that, upon refusal to accept title, the contract be cancelled. The complaint sets forth, and insists upon the effects of various statutes of limitation. The proofs show that Larkin Capps moved from Arkansas to Texas, in 1844, and died in the latter State, in 1846; that he continued to reside in Arkansas from the date of his deed to Henderson, that is, from the 10th of January, 1828, until his removal to Texas, a period of about sixteen years; that after the transfer to Henderson of his claim or right as mentioned, he never pretended to make or assert any claim to the land, and apparently gave it no further attention.

Capps' deed to Henderson contained, besides the covenants above stated, others to the effect, that he promised, when required thereto by Henderson, his heirs and assigns, or representatives, to make and deliver to him or to them such deed, with full warranty, as Capps should receive from the Government; and that Henderson should have and hold the land that Capps might receive from the United States under said claim. The answer of Charles G. Scott and wife, and Scott, as administrator of Drennen, admits that Drennen died in 1855; that his estate is solvent, and that the administrator refused to allow the claim against the estate. It denies the actual possession of the tract by Tunstill, Hughes, or their representatives, except of a narrow strip of about three acres; alleges that Capps has children who are minors; and sets up a deed made by Capps' heirs, which is averred to bear date in

1859, conveying the land to the defendant Green. Green's answer, in effect, sets up a similar state of facts, but further alleges that he had purchased the said tract, for a valuable consideration, of John Capps and the other Capps heirs, and that the defendant himself was a purchaser without notice of the Henderson and Tunstill title.

The Chancery Court held that the instrument of conveyance from Capps to Henderson of his claim to the land, vested in the latter an equitable title, as soon as Capps' donation claim was located; that the legal title of Capps, after such conveyance, was held by Capps in trust for Henderson or assigns, and that, upon the issuance of the patent to Capps, the latter was bound by his covenants to convey the legal title to Henderson; that the covenants, in Capps' conveyance to Henderson, estop the heirs of Capps and those claiming under them, without notice of the covenants, from setting up any title to the land. *See Cocke v. Brogan & Thorn*, 5. *Ark.* 694. *Kirby v. Vantrece et al.*, 26. *Ark.*

That Capps' deed being an ancient one, more than thirty years old, proved itself, and that it was a genuine deed, free from grounds of suspicion, and its custody not inconsistent with its genuineness; that after the lapse of so many years it would be presumed that Capps had conveyed in pursuance of his covenants, or empowered Henderson, as his attorney, to convey the same to Tunstill. Besides that, Tunstill's deposition shows that Henderson conveyed the land to him, acting under a proper power of attorney.

Tunstill testifies that the deed from Henderson to him was recorded in Chicot County, but, as he believes, the records had been destroyed. It appears that the land had been in possession of Tunstill and his grantees, and that they had exercised acts of ownership over it, and he and Hughes had thus held it for a period of thirteen years, at the time of Capps' death. Drennen and his representatives, since his purchase, have been in possession of the tract.

The defendant Green, in view of all these facts, cannot be

considered a purchaser without notice. *Hamilton et al. v. Foulkes et al.*, 16. *Ark.* 340. *Byers et al. v. English. Ib.* 554.

The Chancery Court held that Capps, at the time of his death, had parted with the title to the land in controversy, and that consequently no title descended to his heirs.

The positions assumed by the defendant, Scott, are, that, at the time of the purchase, Drennen was a trustee and could not legally be a purchaser. That Drennen could not have been compelled to pay the purchase money until the title was forfeited; that such was the covenant of the bond; and that the receiver should have sought relief in the Probate Court, where he had all the remedy needed.

The trustee will not be permitted to question the contract. *Richardson vs. Jones*, 3 *Gill & John.* (*Md.*) 163. If there is a case of specification, it is not within the principle contended for as to the proper remedy.

It will be observed that the defendant, Scott, a representative of Drennen's estate, is in possession of the land, and at the same time refuses to pay the purchase money. In other words, the estate retains possession and declines to pay. Nor does the answer seek or offer to rescind Drennen's contract.

The obligation, executed by Drennen, is to the effect that he promises to pay to the trustees of the Bank, the sum of four thousand one hundred and sixty dollars, with interest at the rate of eight per cent, by equal annual instalments, "whenever the title to said tract of land is perfected." This instrument was executed by Drennen, on the 3d of May, 1852, and recites, furthermore, that he had on that day purchased of the Bank this tract and other lands which are described.

It furthermore appears in the case, that Drennen was aware, at the time he purchased of the other trustees the tract in question, of the condition of the title, and that whatever defect there was in it, was fully known to him. He had, in 1850, purchased this tract amongst others, at a sale under a judgment rendered in 1849, in the Chicot Circuit Court, in favor

of the trustees and against the heirs and representatives of Hughes.

The land, except a small improvement made on a part of it, by Tunstill, is shown to have been in a wild and uncultivated state. It was held by the parties in possession, by open and notorious acts of ownership, for a period of thirteen years before the death of Larkin Capps. *Conway vs. Kinsworthy*, 21 *Ark.*, 9. The deed from Capps to Henderson was more than thirty years old at the commencement of this action, and we think was genuine. *Trammell et al. vs. Thurmond et al.*, 17 *Ark.* 203.

It seems to us that this case falls within the principle decided in *Hoppes vs. Cheek*, 21 *Ark.*, 588; *McIndoe vs. Morman* 26 *Wisconsin's* 538, and that Drennen's estate cannot resist the payment of the purchase money; the purchaser, by his representative, being in possession and continuing in possession without interruption. There is no question of fraud in the case. *Lewis and wife vs. Boskin's adm'r., etc., p.* 61, *ante.*

As the counsel for the Receiver does not insist upon the question of interest, his ground of appeal is disposed of, and the judgment as to the subject is not disturbed.

The decree of the Pulaski Chancery Court is affirmed.

KILLIAN et al. v. BADGETT et al.

CONTRACTS—*What proof of incompetency of parties necessary to set aside.*—Where a deed or contract is regularly made, the competency and capacity of the parties to contract are presumed, and a Court of Chancery will not set aside or rescind such contract, unless the proof shows imposition, fraud or undue influence, with weakness of mind in the making or procuring of such deed or contract.

APPEAL FROM PULASKI CHANCERY COURT.

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

Watkins & Rose and M. L. Rice, for Appellant.

The bill charges that Killian obtained the conveyance from his wife by taking advantage of the weakness of her mind, occasioned by excessive use of morphine, and ill-health.

The answer directly denies this, and is good, unless contradicted by two witnesses, or one with strong corroborating circumstances. *Burr vs. Burton,* 18 *Ark.,* 214; *Spence vs. Dodd,* 19 *Id.* 166.

Old age, failing health, and failure to recollect or understand certain transactions, will not alone be sufficient to prove incapacity to make a will. *Clarke vs. Davis,* 1 *Redfield,* 249. Evidence of habits of intemperance and occasional fits of wildness, though indicating an impaired mind, do not establish a want of testamentary capacity. *Fulke vs. Adam, Id.* 454. Whoever alleges want of mental capacity in another must prove it. *Delafield vs. Parish,* 25 *N. Y.,* (11 *Smith,*) 9; *In re Coffman,* 12 *Iowa,* 491. Undue influence must be proved, and cannot be inferred from the mere relationship of the parties. *Wright vs. Howe,* 7 *Jones, Law, N. C.,* 412. When a testator had some insane delusions, but had mind enough to know and appreciate the character and effect of the dispositions of his will, it was held to be valid. *Dunham's Appeal,* 27 *Conn.,* 192; *Van Pelt vs. Van Pelt,* 30 *Barb.,* 134. A person not competent to transact the ordinary business of life may yet make a will. *Stubbs vs. Houston,* 33 *Ala.,* 555.

Garland & Nash, for Appellees.

Imbecility or mental weakness must constitute an ingredient, and a most material ingredient, in examining whether an instrument be invalid by reason of fraud or imposition, or undue influence. *Hill on Trustees*, s. 154; 1 *Story's Eq. J.*, *Sec.* 235, 238; *Wheelan vs. Wheelan*, 3 *Cowen R.*, 537; *Dent vs. Bennett*, 7 *Simons R.*, 539; *S. C.*, 4 *Mylne & Craig*, 269; *Toutside vs. Sherwood*, 1 *Brown Ch. R.*, 558; *Brice vs. Brice*, 5 *Barb.*, *S. C. R.*, 533; *Birdsong vs. Birdsong*, 2 *Head*, (*Tenn*) 289.

WHYTOCK, *Special Sup. J.*—This is an appeal from a decree of the Pulaski Chancery Court, rendered on the 29th day of July, 1868. The suit was commenced by the appellees, Badgett and wife, for the purpose of cancelling a deed in trust, executed by Milus A. Killian and Elizabeth Killian, his wife, to defendant, William B. Badgett, as trustee. The deed bears date the 28th day of May, 1861. The complaint charged that it was procured from Mrs. Killian by the fraud and misrepresentations of the defendant, Milus A. Killian, her husband.

The Chancery Court decreed that the title to the lands described, that is to say, lots one, two and eleven, as designated in Governor Pope's survey and sub-division of the one thousand acre grant, made by the United States, to the State of Arkansas, for the purpose of building a court house and jail, and the south-west quarter of the north-west quarter, and the north-west quarter of the south-west quarter of section twelve; all in township one, north of the base line, of range twelve, west of the fifth principal meridian, situate in the county of Pulaski, just below the city of Little Rock, and containing, by estimate one hundred and ninety-eight $\frac{69}{100}$ acres, more or less, to be in the complainant, Lucetta S. Badgett, as the child and only heir at law of the said Elizabeth Killian, deceased. It appears that Mrs. Badgett was the daughter of Mrs. Killian by a former husband. The Chancery Court further decreed that the title to the lands be quieted. The admin-

istratrix and heir at law of defendant, Milus A. Killian, appealed from the decree.

The complaint charges that, by the deed in question, these lands were conveyed, as stated, through the fraudulent representations and undue influence of defendant, Milus A. Killian; that Mrs. Killian owned the property in her own right, and that the deed thus obtained from her, contained the following conditions: "To William B. Badgett, in trust, nevertheless, that the said Milus A. Killian, and the said Elizabeth, his wife, for and during the term of their natural lives, respectively, without impeachment of, or any manner of waste, should have, hold, use and enjoy the same, and receive and enjoy the rents and profits thereof; and upon trust also, that the said William B. Badgett, upon the written request of the said Milus A. Killian, and the said Elizabeth, his wife, or the survivor of them, might, at any time, and should, upon such request, mortgage or sell the said tract of land or any part or parcels of land, or any part or parts or portions thereof; and that the said Milus A. Killian, and the said Elizabeth, his wife, or the survivor of them, should receive the entire consideration arising from such mortgage or sale, and that the said William B. Badgett, or any trustee that might be appointed, should have full power to make valid titles, in such cases, and if no such disposition should be made of such tracts of land and premises, then, at the expiration of the said life estates, the remainder should descend to the heirs of the said Elizabeth."

The separate answer of Milus A. Killian, admits these terms of the deed.

It is further charged, in the complaint, that at the time of the execution of this deed, Mrs. Killian was upwards of sixty-three years of age; that she was infirm of mind and body; that she had been, during the fifteen years previous, addicted to the constant and excessive use of opium in some of its forms; and that she was, from the weakness or imbecility of her understanding, superinduced by the use of opium, inca-

pable of executing the said deed, or of knowing its full purport. It is also charged that her husband, said Milus A. Killian, took advantage of the weakness of understanding, used undue influence to procure the execution of the deed by her, and misrepresented to her its legal effect.

The defendant, Milus A. Killian, in his answer denies these charges, but admits that Mrs. Killian used morphine inordinately and habitually. He alleges that the deed was prepared according to Mrs. Killian's express wishes.

The transcript is voluminous, and the depositions submitted are numerous, and some of them of great length.

It will be seen, from the foregoing statement of the case, that the question presented to the court, turns mainly upon the determination of the fact as to the condition of Mrs. Killian's mind at the time she executed the deed.

We have carefully examined the transcript, and repeatedly read and compared the various depositions. Mrs. Killian, at the time she made the deed, was about fifty-three or fifty-four years of age. She had complained considerably of her health, which is proved not to have been very good for several years before this time, but it also appears that she generally attended to or supervised her household duties. She died in July, 1862. The witness, whose testimony is greatly relied on by the complainants, to establish the charge of imbecility of mind, is William B. Badgett. He was the eldest son of the complainants, and at the time of the execution of the deed, was twenty-five or twenty-six years of age. He thinks that his grandmother displayed much mental imbecility in her fondness for a pet lap dog, and seems to think that the delight she manifested in being out of doors in the spring-time, at work in her garden, was a sign of weakness. He states that she purchased a great deal of morphine, and would sometimes talk in a childish manner. He fails to specify any other alleged foolish acts on her part; but other statements in his deposition, indicate that she conversed with him very sensibly about the property, and her personal affairs. Mrs. Kil-

lian, evidently was quite fond of him, talked to him frequently about the disposition of her property, and he apparently regarded himself really and directly entitled to her estate, after her decease. Perhaps the mind of the witness was somewhat tinctured with an impression of disappointment that this hope was not realized.

The next witness, for complainants, is Didimus Lewis, a young man, who testifies that he was twenty-three years of age; that he was quite intimately acquainted with Mrs. Killian, during the last three or four years of her life, and had conversations with her of a general character. He says her health was often bad; that she used large quantities of morphine, but that she attended to her household affairs, superintended the selling of eggs, vegetables, etc., and with the exception of taking morphine, conducted herself like any other woman. She spoke to him about her property, and seemed anxious that it should go to William Badgett, or to her grandchildren. This witness further declares that he "never saw her do anything which showed a want of common capacity."

John Peyton, another witness for complainant, testifies that he lived with Dr. Killian's family during the year 1861; that Mrs. Killian complained of her health; that she took morphine, but he did not know how much; that she "was a smart woman when she was at herself." The depositions of the witnesses, Kingston and John and Mrs. Reynolds, on the part of the complainants, are of like general purport, excepting that they state that they had known Mrs. Killian for a longer period.

These are all the depositions submitted on the part of the complainants, except those of the two physicians who were called upon to give their opinion as to the effects produced upon a person by the excessive and inordinate use of morphine. It is apparent that their opinions were given on an assumed state of facts, or as it was to them, a hypothetical case. They agree that morphine taken excessively would

impair the faculties, but that generally it would depend much on the fact as to whether the person was accustomed to its use, and the quantity taken, etc.

The depositions of the following named witnesses are presented on behalf of the defendants:

Mary Clark testifies that she lived with Mrs. Killian for seven years, and was living there when Mrs. Killian died; that she had very good general health, but had, at one time, a bad spell of erysipelas; that she attended to her household duties very regularly, and also to selling articles for market; that witness never saw anything in her that led witness to suppose her mind was affected; that Mrs. Killian took morphine at regular times; that witness had fixed up doses for her; that witness herself, and some of the negroes on the place, often used morphine; that she repeatedly expressed a wish to have Dr. Killian and herself have a living out of her property, and that she appeared, to witness, to be a "smart woman."

The next witness, Dr. Peyton, testifies that he was the family physician of Mrs. Killian for many years; that she was a "sensible, practical business woman;" that he never saw her suffering from the effects of morphine, except that it sometimes produced costiveness; that she sometimes suffered from chills, but that she seemed to be in better health just previous to the year 1861 than before that time; witness never heard, in her lifetime, that she was not of sound mind; never had such a thought himself. He did not consider her a robust woman.

Nancy Davis testifies that she had been acquainted with Mrs. Killian for sixteen years, and saw her often; that complainants did not visit Mrs. Killian much. In other respects this witness states substantially the same facts as the two preceding witnesses.

Dr. James L. Moore testified that he was acquainted with Mrs. Killian; had been since 1858; had staid at her house, and seen her often; never saw a want of capacity; that, in

business matters, she was "sharper than most women," and although she was not a woman of education, she seemed to have read some and conversed very well about what she had read. This witness agrees in substance with the last witness as to her health and her moderate use of morphine.

The next witness, Mr. Pope, testifies that he was the Justice of the Peace who took Mrs. Killian's acknowledgment to the deed in controversy; that he had been acquainted with all the parties for many years; that the deed was left in his custody a day or two before he had time to visit Mrs. Killian to take her acknowledgment; that when he visited her for that purpose, she appeared lively and cheerful and pleased to see him; that he handed her the deed and told her his business; that he remarked to her that he supposed she was acquainted with the contents; that she answered that she was; and that being examined apart from her husband, she said she executed it willingly and without compulsion or undue influence of her husband; that witness always thought her "a woman of a remarkably shrewd, intelligent mind," and that, at the time mentioned, he was at the house altogether for half an hour.

The witness, Mary Scroggins, testifies that she had known Mrs. Killian for about three years before her death; had lived near the Killians, and had visited Mrs. Killian nearly every day and sometimes oftener; had talked to her about her affairs and about Justice Pope's visit; had talked with her about the deed; that she stated that she now had it fixed; had often heard her say that she never intended that complainants should have her property; that witness had written letters for Mrs. Killian; had done her sewing and cutting for her; and that her use of morphine did not seem to affect her judgment.

Amanda Robbins, another witness, testifies that she had lived a neighbor to Mrs. Killian for three or four years just before her death; that she was a woman of good sense; that her health was not very good.

The deposition of Rev. N. P. Ratcliff shows that he had

been acquainted with Mrs. Killian since 1833 and until 1862, and had always considered her sound in mind.

Mary Jaynes, another witness, testifies that she knew Mrs. Killian; that she never heard it intimated that she was of unsound mind; that she used morphine habitually, but she saw no bad effects from the use of it; that she was an intelligent, though uneducated woman, and a close calculator; that she spoke to witness about the deed and expressed herself satisfied with the disposition she had made of the property.

James A. Henry, a witness, testifies that he has been acquainted with Mrs. Killian since 1849, and was to the time of her death; that he used to sell her goods frequently, and never knew or heard that she was of unsound mind; that she sometimes complained of her health.

Dr. R. F. Jaynes testifies that he never heard Mrs. Killian's state of mind questioned before her death. The rest of this witness' evidence is substantially like that of Dr. Moore.

It further appears, in the evidence, that Mrs. Killian and her husband lived pleasantly together.

We consider these facts, as they are presented to us in the case, and decide that the charge of fraud, imbecility and undue influence, set forth in the complaint, are not sustained. We think the evidence decisively establishes the fact that Mrs. Killian, at the time she executed the deed in question, was neither of imbecile mind, nor, so far as can be discovered here, was any imposition or fraud practiced upon her by her husband. The proof shows that she was a sensible woman, watchful of her interests and knew what she had done. That while it is true she used morphine, she does not seem to have done so to excess, or so as to affect her mind. The witnesses who were her daily companions and had been acquainted with her for a long period, amongst whom was her family physician, never made the discovery that she was of unsound mind, but, on the contrary, they, with great unanimity, describe her as "a smart managing woman."

Counsel for complainants have asserted in their arguments

in the case, that they willingly rest it on the authority of *Birdsong vs. Birdsong*, 2 *Head. Tenn.*, 289; *Beller vs. Jones*, 22 *Ark.*, 92, and *Kelly's heirs vs. McGuire*, 15 *Ark.*, 555. What was the state of facts presented in those cases? In *Birdsong vs. Birdsong*, it was proven that the brother of the defendant, and who was the complainant in the case, was of very ordinary capacity and easily overreached even when sober, and the court said that the proof showed him to have been poor, degraded and destitute. It also appeared that the defendant had practiced a gross imposition upon his debauched brother in procuring the deed described in that case. In commenting on the general principle, however, the court in that case remarked, "that contracts will not be avoided unless it appears that undue advantage has been taken by one party of the conditions of the other," through weakness of mind or feebleness of character.

The case of *Beller vs. Jones* was brought for the purpose of setting aside a contract, about which the court said there existed "a permanent misunderstanding." That Jones, the plaintiff, was proven to be a credulous man, liable to be led away by those in whom he confided, and that he had, for some time previous, been subject to great depression of spirits and distress of mind from unhappy domestic relations, to such an extent that induced the generality of his neighbors to suppose him to be impaired in mind. That Beller, the other party, had practiced a misrepresentation or imposition upon him, and had also failed to comply with his own undertakings in the contract. It further appeared that Jones, by the deed in that case, had conveyed all his property, involving the rights of several children. The court placed much stress upon the fact that, by the contract entered into by Jones, the children were to be torn from their home and their only parent, and committed to the care of one who might have no feeling for them, and whose interest was to have them refuse to live with him, that he might be free from an onerous part of the agreement. The court then comments

as follows: "But it does not follow that a court of chancery will rescind a contract because it would not be enforced. There must be imposition, fraud, or undue influence, with weakness of mind, to call into exercise the power of cancelling the acts and contracts of beings who are supposed to take care of themselves, or suffer from their folly. But for such a contract (as that one) to stand, the defendant should show a compliance with his undertaking."

In the case of *Kelly's heirs vs. McGuire*, the court says: "The conveyance was made by Greenberry Kelly to James Kelly, his nephew, in consideration of love and natural affection, and purported to convey, without any reservation, all the real and personal property in Arkansas or elsewhere, which had descended to the donor, or to which he was entitled as the representative of his grandson. The donor, at the time of this transaction, had passed the period usually allotted to human existence. He was in the last stage of second childhood, with his physical energies wasted and his mental powers decayed. A century had passed over his head and still he lived, as he had been living for the last twenty-five years, the recepient of the public bounty; and long before the execution of the deed, his memory was so impaired as to render him unconscious of events, and he appears to have been as ignorant of what was going on in the world, as if he had not existed at all. He was undoubtedly a very infirm and feeble old man, usually in bed; had been afflicted with general palsy for at least twenty-five years; was partially deaf; had been an intemperate man and would become intoxicated whenever opportunity offered; was never known to have property or to transact business or to make contracts, and was incapable of managing or taking care of it." The court describes James Kelly, the nephew and donee, who had procured the deed from this imbecile centenarian, as a 'shrewd trader, who had amassed a large fortune in trafficking in the southern States, and as a person who seemed not to have been over scrupulous in exercising his influence for the benefit of

himself over the donor, and to have kept an eagle eye on the property, until he acquired it by the deed in question."

While we approve the principles established in these cases, they present, as we have intimated, a widely different state of facts from the one before us. *Blanchard et al. vs. Nestle*, 3 *Denio* 37.

Holding, as we do, the deed in question was a valid one, the complaint in this case, must be dismissed.

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STATE v. McDIARMID.

QUO WARRANTO—*State not required to show demand, etc.*—In a proceeding by quo warranto, at the instance of the State, the State is not bound to show a demand for the office, nor to establish any fact, save such as are tendered by a replication, or put in issue by a rejoinder or other plea.

ISSUE IN—*Between whom.—The issue, in quo warranto*, is not between the parties who may be contending for an office, but between the State and the party holding or in possession.

CONSTITUTIONAL LAW—*Legislature may create office of Recorder, etc.*—The Constitution, of 1868, does not define or enjoin the duties to be performed by the county clerks, and it was competent for the legislature under *Sec.* 19, *Art. VII*, to define, add to or take from the duties of the county clerk, and the act, *approved, March* 16, 1871, "to provide for clerks of Circuit Courts in certain counties, and define their duties," is not unconstitutional.

QUO WARRANTO.

Montgomery, Attorney General, Warwick, Wilshire & Coblentz and Garland & Nash, for Plaintiff.

We submit it was competent for the legislature to repeal the act of July 9, 1868, which made the county clerks of the several counties, *ex-officio* recorders thereof, and confer the duties of recorder upon another officer.

The office of recorder is not an office created by the Constitution. See *Sec. I, Chap.* 142, *Gould's Dig.* The Constitution of 1836 is silent as to the office of recorder—it was created by act of legislature. Under the Constitution of 1836, the office of circuit clerk was a constitutional office, and the act of February 12, 1838, created the office of recorder and conferred its duties upon the circuit clerks, while the present Constitution makes the county clerk's a constitutional office, and by the act of July 9, 1868, the duties of the office of recorder was conferred on the several county clerks. Hence, we hold that it was competent for the legislature by the act of March 16, 1871, to relieve the county clerks of the duties of recorder.

See, 1 *Scam., Ill. Rep.*, 537; 1 *Selden*, 285, 289, 291; 3 *N. Y.*, 285; 4 *Ind.*, 342; 7 *Ind.*, 327; 1 *Ark.*, 537-8; 7 *Cala.*, 223-9; *Ib.* 341, 502; 1 *Kansas*, 27; 5 *Kansas*, 304; 1 *Hill*, 81; 14 *Barb.*, 397; *also, Cooly on Const. Linn*, 87, 168 *and note* 4; *Ib.* 172 *and* 3; 275 *to* 278 *and note.*

The doctrine of vested right in office, as against the State, is not recognized in this country. See 9 *Ark.*, 287; 1 *Selden*, 285; 24 *Ark.*, 1; 10 *How.*, (*U. S.*) 402.

Benjamin & Barnes, Gantt and T. D. W. Yonley, for Respondent.

We submit, to oust a county clerk of his right to be recorder by operation of the provisions of the act relied on by the plaintiff, the following questions of fact must be made to appear to the satisfaction of the court:

First, That the county contains 15,000 inhabitants or upwards.

Second, That the Governor has appointed and commissioned a circuit clerk for such county.

Third, That the appointee has qualified by giving bond and taking the oath required by law.

Fourth, That the appointee has the qualification necessary to render eligible to the office of circuit clerk.

Fifth, That the appointee has made application to the county clerk for the books and papers belonging to the recorder's office.

McCLURE, C. J.—At the instance of the Attorney General, a writ of *quo warranto* was issued against George W. McDiarmid, commanding him to show by what authority he assumed to exercise the rights, powers and duties of recorder of Pulaski county.

The defendant, McDiarmid, filed a response to the writ, setting up that he is of lawful age; that he is a qualified elector, and that on the 14th of March, 1868, he was duly elected clerk of Pulaski county, Arkansas; that he was commissioned as such clerk by the then Governor of Arkansas; that he took the oath of office before an officer authorized by law to administer the same; that he executed a bond as required by law, and that the same was duly approved as required by law; that the duties of the office of recorder are part and parcel of the duties of the county clerk, and that his term of office has not yet expired.

To this response, the Attorney General filed a replication, and a demurrer. The replication admits, substantially, all of the allegations of the response, and sets up that the defendant, McDiarmid, held the office of recorder of said county, merely, *ex-officio*, and that the General Assembly, by an Act approved March 16th, 1871, entitled, "an Act to provide for Clerks of the Circuit Courts in certain counties, and to define their duties," transferred the duties of the office of recorder, in counties having a population of fifteen thousand and upwards, from the clerk of the county of Pulaski, and conferred the same on the clerk of the circuit court of Pulaski county; which office was created by the Act last named. That the county of Pulaski has over fifteen thousand inhabitants, and that one James V. Fitch, was by the Governor, on the 17th day of March, 1871, duly appointed clerk of the Circuit Court of said county, and that said Fitch

had duly qualified and entered upon the discharge of the duties of said office. That on the 20th of March, 1871, said Fitch made demand of said McDiarmid for the records, books, papers, documents and property of every description in his possession, belonging to the said office of recorder, and that said McDiarmid still refuses to comply with said demand; that the defendant yet usurps and continues to usurp the office of recorder of said county of Pulaski, and that by reason of the Act refered to, the term of office of said defendant, as recorder, has expired, etc.

The demurrer of the plaintiff was as follows: "Because the said defendant attempts to justify, and does not show a continuous state of facts, such as entitles him to the possession of said franchise of recorder, etc., at the time of the issuance of the writ."

The defendant filed a demurrer to the replication, setting up "that the Act of the General Assembly of the State of Arkansas is repugnant to the Constitution of said State, and is, on that account utterly null and void." The defendant also filed a rejoinder to the replication, setting up "that said James V. Fitch did not, at any time before the commencement of this suit, make application to said defendant to turn over to him the books, papers, documents, and property in his possession, *as clerk of said county*," etc.

To this rejoinder the plaintiff demurred, for the following causes:

First, Because the matters and things therein set forth are not sufficient to preclude the State of Arkansas from having and obtaining judgment.

Second, The law does not require the State to show a demand for the office.

We will take up the questions raised in this case in their order. In a proceeding by *quo warranto*, the State is not bound to show a demand for the office, nor to establish any fact, save such as are tendered by the replication, and put in

issue by a rejoinder or other plea. This disposes of the second demurrer.

Now to the next, which is, that "the rejoinder does not set forth matter and things sufficient to preclude the State." The rejoinder simply sets up that Fitch "did not, at any time before the commencement of this suit, demand the books, papers, etc., in the defendant's possession, pertaining to *said office of clerk* of said Pulaski county." There is no allegation in the replication that Fitch demanded the books, papers, etc., of the defendant, pertaining to the office of the *clerk* of said county. The allegation is, that "Fitch demanded the books, papers, etc., of the defendant, belonging to the office (not of *clerk*) but of *recorder* of said county. The rejoinder, as will be seen, is not responsive to any issue, tendered by the replication; but if it was, the issue raised, or attempted to be raised, could avail the defendant nothing, because the issue here is not between Fitch and McDiarmid, but between the State and McDiarmid. The State is requiring him to show by what authority he exercises the rights and duties of the office of Recorder of Pulaski county; this, and this alone, is the issue tendered by the State, and it is the issue that must be responded to, for we have already said that the State is not bound to show anything save such facts as are tendered by the replication, and put in issue by the rejoinder and other plea.

We have now seen that no fact alleged in the replication is put in issue, and it stands confessed, so far as the facts are concerned. This brings us down to the defendant's demurrer, which asserts that the Act of the General Assembly, creating the office of circuit clerk, in counties having over fifteen thousand inhabitants, and giving to such clerk the duties of the office of recorder, is unconstitutional and void.

Section 19, *of Article VII*, of the Constitution of this State, declares that "a county clerk shall be elected by the qualified electors in each organized county, in this State, for the term of four years, and shall perform such duties and receive such

fees as are now or may hereafter be prescribed by law." The Constitution, as will be observed, does not attempt to define any of the duties to be performed by the clerk, nor does it enjoin any duties upon him. It simply declares that he shall "perform such duties as may be prescribed by law." Under the Constitution of 1836, the qualified electors elected a circuit clerk for each county. This provision of the Constitution left the county and probate courts without a clerk, and the legislature provided that the circuit clerk should be, *ex-officio*, clerk of both the county and probate courts. By an Act of February, 1838, the legislature created the office of recorder, and the language of the second section is, that "the clerk of the circuit court, *until otherwise provided by law*, shall be, *ex-officio*, recorder in each county, etc." From the time of the adoption of the Constitution of 1836, until it was replaced by another, no person seems to have doubted the power of the General Assembly to *add* to the duties of the office of circuit clerk; at least we find nothing in the Reports upon that subject.

We have seen that the Constitution, of 1868, prescribed no duties whatever upon the clerk therein provided for; he was to perform such duties as were then, or might thereafter be prescribed by law. There was nothing in the Constitution indicating whether he was to be clerk of the county court, the probate court, or the circuit court, nor was the clerk, thus elected, entitled to exercise any duties whatever. The legislature, at its first session, perceiving this fact, by an Act, duly passed for that purpose, on the 9th of July, 1868, declared that the clerks, elected under the Constitution, should, by virtue of their office, be clerks of the county, the probate and the circuit courts, and the recorder of the county.

We have now traced the right of the clerk to these different offices, and we find that they are confered by *legislative enactment* We have also seen that the laws, in existence at the time of his election, did not authorize him to exercise the duties of the office of recorder, because the law declared that

the clerk of the *Circuit Court* should be, *ex-officio*, recorder; and we have also shown that the defendant was not even *ex-officio* clerk of the Circuit Court.

The office of clerk, as fixed by the Constitution, is an office which the legislature cannot absolutely abolish; but the duties to be performed, and the fees to be paid, is a thing wholly within the control of the legislature. We have seen that, under the Constitution of 1836, the legislature added to the duties of the office of circuit clerk, the additional duties of that of clerk of the County Court and Probate Court, and those of recorder of the county. There is no provision of the Constitution, that we are aware of, that inhibits the legislature from adding to, or taking from, the duties of an office. In the absence of any such provision, the legislature is the sole judge of the power and authority which shall vest in officers of this class. There is no such thing as a vested right in an officer to discharge a certain specific duty, unless it be the executive of the State. The Constitution enjoins it upon the executive to see that the laws are faithfully executed, and it is not competent for the legislature to provide another officer to perform that duty; but this is not true of any other executive or ministerial officer. The sheriffs of the different counties are collectors of the revenue; this privilege of collection may be taken away from that officer and conferred on the county treasurer or surveyor. The clerk makes out the tax books, but this privilege may be taken from him and given to the county assessor or the coroner, if the legislature so enacts. If these things may be done, why is it that the duty the legislature enjoined on the clerk of the county, of recording deeds, may not be transferred to some other officer? The truth of the matter is, that the legislature has the same right to regulate the duties to be performed by the clerk of the county, that it has to regulate his fees. We have no doubt about the constitutionality of the law, however much we may differ as to the policy of separating the offices. There is nothing in the response which shows any right in the de-

fendant to exercise the duties of the office of recorder; it is therefore ordered that a judgment of ouster be entered against the defendant.

CARROLL v. BOYD et al.

CONFEDERATE COURTS—*Action of, void.*—All the proceedings of the courts of this State, acting under confederate authority, or during the rebellion, are void.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellant.

GREGG, J.—F. A. Boyd recovered a judgment against John Carroll, before a justice of the peace, on the 26th day of September, 1861, and on the 9th day of July, 1866, he filed a transcript thereof in the office of the clerk of the Circuit Court. An execution having been issued by the justice, and returned unsatisfied for the want of goods or chattels belonging to the defendant on which to levy, the clerk issued an execution to the sheriff, and the land of Carroll was levied upon and sold. At the return term, Carroll filed a motion to set aside and vacate the sale, and quash the execution; of which motion, the plaintiff and the purchaser had notice.

The court overruled the motion, and Carroll appealed. The decision in the cases of *Penn v. Tollison*, 26. *Ark.*, 515, and *Thompson v. Mankin*, 26. *Ark.*, 586, holding all proceedings, during the rebellion, of courts in the insurrectionary parts of the State, void, are decisive of this case. The judgment of the Circuit Court is therefore reversed, with instructions to set aside the sale and quash the execution.

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NEIS v. GILLEN.

REPLEVIN—*What plea of non-detinet puts in issue.*—In replevin, the plea of *non detinet* puts in issue the plaintiff's title to the property, as well as the wrongful detention by the defendant and, to entitle the plaintiff to recover he must prove both his title and the detention.

SAME—*Judgment, when for defendant on plea of non detinet.*—Where the plaintiff fails to prove title and detention of property on trial, the defendant will not be entitled to a judgment for return of property or damages on the plea of *non detinet*, unless he plead with the general issue or give notice of matter which, if properly pleaded by avowry or cognizance, would be a bar to the action.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. WILLIAM GLASS, *Special Circuit Judge.*

English, Gantt & English, for Appellant.

The proof shows that the partnership was a special one, and in such case, one having the right of possession may maintain replevin, though the general title to the property may not be in him. *Prater et al. v. Frazier and wife*, 6. *Eng.*, 249; *Cox et al. v. Morrow*, 14. *Ark.*, 603.

In this view of the case, the court below erred in refusing to give the second, third and fifth instructions moved for appellant. *Boynton v. Page*, 13. *Wend.*, 425.

But on the supposition that the parties were full partners, the court should have instructed the jury to find as in case of non-suit. *Bailey v. Stark*, 1. *Eng.*, 191; *Allen v. Davis*, 13. *Ark.*, 28; *State v. Roper*, 8. *Ark.*, 491; *Hill v. Rucker*, 14. *Ark.*, 706. The court erred in instructing the jury that they could not find the facts specially for the court to declare the law, but must bring in a general verdict. *See Sec.* 39, *Chap.* 48, *Gould's Dig.*, *p.* 645; *Secs.* 353, 359, 360, *Code of Practice.* If the amount found was not for the value of the cattle, but for damages to the defendant for being deprived of the possession of them, it was unwarranted by law, grossly excessive, and without any evidence whatever to sustain it. *Noland v. Leech*, 10. *Ark.*, (5. *Eng.*) 504.

B. T. Du Val and U. M. Rose, for Appellee.

The case turned on the question as to whether appellant and appellee were partners as to the cattle replevied. As to this, the evidence was very conflicting and this court will not attempt to weigh it. *Rose's Dig.*, 559, *Sec.* 45.

That one partner cannot sue another at law is a familiar principle. *Allen vs. Davis*, 13 *Ark.*, 28; *Houston vs. Brown*, 23 *Id.*, 333; *Collyer Part. Sec.* 264, *et seq.*

Taking the instructions all together, the case was fairly submitted to the jury, and their verdict should not be set aside. *Burton vs. Merrick*, 21 *Ark.*, 357.

The jury, in finding for the defendant, were bound to give a verdict for the value of the property. *Gould's Dig.*, *Ch.* 145, *Sec.* 38; *Civil Code*, *Sec.* 362.

The judgment, on the whole record, being right, should be affirmed. *Davis vs. Gibson*, 2 *Ark.*, 115; *Payne vs. Burton*, 10 *Ark.*, 54; *Sweeptzer vs. Gaines*, 19 *Ark.*, 96; *Williams vs. Millen*, 21 *Ib.*, 470; *Civil Code*, *Sec.* 370.

HARRISON, J.—This was an action of replevin for fifty-six head of cattle, founded on the wrongful detention of the same, commenced before the adoption of the Code of Practice. The defendant pleaded *non detinet* and the jury found the issue thereon for the defendant and assessed his damages at the sum of $1473 12, and the defendant electing, as the record says, to waive a return of the property, judgment was rendered in his favor for the damages assessed. The plaintiff appealed.

The only point in controversy, on the trial, appears by the evidence, preserved by the plaintiff's bill of exceptions, to have been, whether the defendant was a partner of the plaintiff, and as such, a joint owner with him of the property replevied, and no evidence whatever was offered of a demand, or of any other fact tending to prove a wrongful detention of the same; no valid objection can therefore be urged against the verdict, so far as it was responsive to the issue.

The question, however, arises, whether the defendant was, upon his plea, entitled to a judgment for the damages assessed by the jury.

Although the plea, according to *Sec.* 34, *Ch.* 145, *Gould's Digest*, put in issue the plaintiff's property in, as well as the defendant's wrongful detention of the cattle, and to maintain his action the plaintiff was required to prove both his title and the detention by defendant; yet, a failure to prove his title, was not inconsistent with a want of title in the defendant, and a verdict in favor of the latter was not decisive of a right of property in him, for no question as to his title was involved in the issue.

The question here presented arose in *Brown vs. Stanford*, 22 *Ark.*, 76, and the court in that case say: "Under the 44*th Section of Chap.* 145, *of Gould's Digest*, the Circuit Court, in rendering judgment for the defendants, upon the verdict, also directed a judgment of the return of the negro to the defendants, as a necessary consequence of any judgment in their favor upon final trial; and the question, now before us, is, whether a return of property should be awarded to one, from whose possession it never was taken, to one whose own proof shows that he never claimed the property, and whose successful defense of the action depends upon the fact of his not being liable to any suit about the property. The statute cited is very broad, but it never could have been its intention to have given to a stranger property that he had been illegally sued for; to have punished the owner of property, with its forfeiture, because, by accident, by carelessness, or by real design, he had brought suit for property out of his possession, against one who is proven never to have been in possession."

This reasoning of the court seems to be conclusive, but the statute itself is the best answer to the question; for, by attending to the distinction we have pointed out in respect to the title of the party the plea puts in issue, and on examination of section 35, of the same chapter, it will clearly appear that a defendant is never entitled to a judgment of return, or

for damages for the detention of the property, upon a plea of *non detinet*. It is as follows: "With the plea, denying the taking or *detention* of the property claimed, the defendant may give notice of any matters *which if properly pleaded by avowry*, cognizance, or plea, would be a bar to the action, and which if the goods had been replevied, would entitle him to a return thereof; and he may give such matters in evidence, on the trial, in the same manner and with the same effect, as if the same had been so pleaded." Language, we think, could scarcely be plainer, and it is clear, beyond all doubt, that if the defendant wishes to have the goods replevied, restored to him, he must by avowry, cognizance, or plea, set up and show such matters as entitle him to a return, or else give notice thereof, with the general issue, and that he cannot have a return merely because the plaintiff fails to prove the taking of the goods, or his title to them, and the detention thereof, as the case may be.

The damages assessed by the jury were most likely intended to be the value of the cattle, and not merely compensation for the plaintiff's detention of them, for they amount to the full value proven, and would be grossly excessive if for the detention only. But damages for detention are but an incident to the right of return, and there cannot be a judgment for damages where there can be none for a return. *Whitwell vs. Wells*, 24 *Pick.*, 25.

The judgment of the court below must, therefore, be reversed, and the cause remanded to it, with instructions to enter judgment for the defendant upon the verdict of the jury, except for the damages assessed by them, in accordance with law and consistent with this opinion.

WHITE v. PRIGMORE.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Watkins & Rose, for Appellant.
A. H. Garland, for Appellee.

SEARLE, J.—This is an action brought under *Section* 522, Civil Code of Practice, by the appellee against the appellant, in Jefferson Circuit Court, to try the title to the office of clerk of the Circuit Court of Jefferson county.

The cause came on for trial at the May term, 1871, of said court; judgment for appellee, and appeal by the appellant to this court. The questions raised in this case are virtually the same as those raised in the case of the *State of Arkansas vs. McDiarmid*, decided at the present term, and the decision in that case, is conclusive of this.

Let the judgment of the court below be affirmed with costs.

WHITE v. PRIGMORE.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Watkins & Rose, for Appellant.
A. H. Garland, for Appellee.

SEARLE, J.—The appellee filed his petition, in the Jefferson Circuit Court, alleging that he had been appointed circuit clerk of Jefferson county, and *ex-officio* recorder of said county, and that the appellant, the former clerk, etc., refused to turn over to him the books, papers, etc., of said office of recorder as required by law, and praying for a writ of *mandamus*, etc. At the May term, 1871, the court issued a peremptory *mandamus*, and appellant appealed to this court.

The questions presented, in this case, are virtually the same as those raised in the case of *Fitch vs. McDiarmid*, 26 *Ark.*, 482. That decision is therefore conclusive of this case.

The *mandamus* having been peremptorily awarded by the court below, the judgment in relation thereto is reversed and the cause remanded to that court, with instructions to dismiss the petition.

SHELTON v. LEWIS et al.

GUARDIANS—*Right of wards to lands purchased with their money.*—Where a guardian uses the money of his ward in the purchase of lands, the ward is entitled to the results of the purchase, whether the guardian purchased for himself or his ward, and whether he use the money merely as agent, and not as guardian.

SAME—*What proof necessary, etc.*—The proof must be full, clear and conclusive, and, in such case, the person entitled to the money, may, at his election, charge the trustee, guardian or agent personally, or follow the money into the land and claim the purchase as made in trust for him, and such trust may be established by parol evidence.

RIGHT OF WARDS—*As against subsequent bona fide debtors.*—The right of wards, to property purchased with their money, may be sustained against a conveyance in trust to secure *bona fide* debtors, notwithstanding such trustee and *cestui que trust* were ignorant of their existing equity at the time of the conveyance.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

O. P. Lyles, for Appellant.

The *question* in this *case* is, as to the rights of *prior* and *subsequent* incumbrancers to have satisfaction out of the land, according to their priorities.

The rule of law which governs this question is laid down in the following authorities: 2 *Story's Eq. Juris. Sec.* 837; *Berry vs. Mut. Ins. Co.*, 2 *John. C. R.*, 607, 611; *Haines vs. Beach*, 3 *John. Ch. R.*, 461-467; *Dews vs. Cornish*, 20 *Ark.*, 332; *Biscoe vs. Tucker*, 14 *Ark.*, 515; *Hannah vs. Carrington*, 18 *Ark.*, 86; *Clark vs. Carroll*, 18 *Ark.*, 209.

However numerous the encumbrances created on the land, in the nature of mortgages, they leave still in the mortgagor the *ultimate equity of redemption*, by which he may disencumber the mortgaged premises, and re-vest himself with the legal estate. See *Brown vs. Morrison*, 5 *Ark.*, 223; *Biscoe vs. Tucker*, 14 *Ark.*, 521.

In the eye of a court of equity the mortgagor, until a decree of foreclosure, continues the real owner of the estate. The equity of redemption is considered to be the real and *benefi-*

cial estate, tantamount to the fee at law. 4 *Kent*, 159, 160.

The mortgagor, so long as he has an equity of redemption, has an estate which he may convey in mortgage by successive deeds, which will take precedence, according to their order in time, provided the subsequent mortgagee had notice of the prior ones. 1 *Washburne on Real P.*, *page* 546, *sec.* 6; *Coote on Mortgages*, 34.

The Lewis heirs being then the mortgagees in place of Hopkins, and holding, as such, the legal title as security for the purchase money they have paid, and Asa Shelton occupying the shoes of Duncan holding the equitable interest in the land, it must be sold to pay the Lewis heirs their debt, and Mr. Shelton takes the residue of the proceeds as the second encumbrancer, by virtue of his deed of trust.

The Lewis heirs having been in possession of the premises, at an agreed amount of rent, must account for the rents as mortgagees, because they cannot make a profit to themselves. 2 *Story's Eq. Juris.*, *Secs.* 1016 *and* 1016 *a*; 4 *Kent*, 166, 168; 2 *John. Ch. R.* 30.

Watkins & Rose and B. C. Brown, for Appellees.

It is only because a mortgagee is considered as a purchaser, *sub modo*, that he ever receives protection. *Frisbee vs. Thayer*, 25 *Wend.*, 399; *Jones vs. Powles*, 3 *My. & K.*, 581; *Joyce vs. De Moleyns*, 2 *J. & L.*, 374; *Siter, Price & Co., vs. McClanahan*, 2 *Grattan*, 280, 301. *Willoghby vs. Willoghby*, 1 *Tenn. R.*, 763, 767.

That his trust being taken as a mere security for a pre-existing debt—he is not entitled to protection against the equities of complainants is definitely settled. *Notes to Barret vs. Norsworthy*, 2 *Eq. Lead. Cases*, 104, 105, 106; *Griffin vs. Marquardt*, 17 *N. Y.*, 28; *Van Hewsen vs. Radcliff*, *Ib.*, 580; *Cook vs. Cook*, 3 *Head.*, 719; *Brown vs. Vanlier*, 7 *Humph*, 239; *Pettigrew vs. Turner*, 6 *Humph.*, 440. To the last case, on account of its close analogy to this, we ask special attention.

But Shelton was not a purchaser. He was a mere volun-

teer, taking a mortgage for a pre-existing debt. As such he stood in the same position as Duncan, the mortgagor; he only had a lien on such interest as he had, and no more. All the authorities show this. *Dickerson v. Tillinghast*, 4. *Paige*, 215; *Donaldson v. Bank*, 1. *Du. Chg.*, 103; *Bowen v. Adams*, 1. *S. and Mar.*, 45; *Powell v. Jeffries*, 4. *Scam.*, 387; *Willis v. Henderson*, *Ib.*, 13; *Metropolitan Bank v. Godfrey*, 23. *Ill.*, 579; *Glineki v. Zawadski*, 8. *Flor.*, 405; *Baze v. Arper*, 6. *Min.*, 220. The doctrine of purchaser for a valuable consideration without notice does not apply between equities. *Pinson v. Ivey*, 1. *Yerg.*, 296; *Pillow v. Shannon*, 3. *Ib.*, 508; *Craig v. Leiper*, *Ib.*, 193.

W. I. WARWICK, *Special J.*—In this case there appears to have been a multitude of original and cross bills, answers, exceptions, etc., and much testimony, and inasmuch as we concur in the findings of the court below, we give them here as statements of this case, viz:

"Complainants, Edward B. Lewis, Phœbe and Eliza F. Lewis are, and were at the commencement of this suit, the sole remaining heirs at law of Jacob A. Lewis, deceased; that as such they and their late brother, Pearce A. Lewis, and their late sister, inherited a considerable estate, in money and slaves, from their said father and their grandfather Lewis; that the said Jacob A. Lewis, at the time of his death, left also surviving him, his widow, Mary B. Lewis, who afterwards intermarried with one Bryant Duncan, and soon after died, leaving all of the said children of the said Jacob A. infants, under the age of twenty-one years; that Bryant Duncan became and was by the proper court of Probate of Russell county, Alabama, where they then resided, appointed guardian of and for all of said children of said Jacob A., and continued so to be and to account as such with said court up to, and in the month of March, when he made a final settlement with said court, having in his hands as such guardian of said heirs of the said Jacob A. Lewis, near twenty-five thousand

dollars and a number of slaves; that in the early part of the year 1859, the said heirs being yet infants, the said Bryant Duncan removed with them and their property to Crittenden county, Arkansas, and there continued to reside with them until the time of his death; that prior to the commencement of this suit, the said Pearce A. and Mary L. Lewis departed this life, being then infants, not having been married or leaving any issue, and subsequent to the death of their said mother, Mary B.; that on the 27th day of November, A. D. 1858, the said Bryant Duncan purchased from John W. Hopkins the following described lands, lying and being situate in the county of Crittenden, to-wit: etc., etc. * * * * * for the sum and price of twelve thousand dollars, payable, one third on the first day of January, 1859, and one third in twelve months, and one third in twenty-four months from the day of said sale; that the purchase of said lands was made by said Duncan for the said heirs of the said Jacob A. Lewis; that said Duncan took the bond for title to said lands, to be made by said Hopkins, upon payment of the purchase money, to himself; that said Duncan paid to said Hopkins the first payment for said lands, of four thousand dollars; that afterwards, Coleman Boyd, and Tandy H. Trice became, by assignment, the owners of the two notes of said Duncan, given for the other payments of the purchase money of said lands, to whom the said Duncan also paid, as part of the purchase money, the further sum of $3,326 60; that said sum, so paid by said Duncan, of the purchase money for said lands, amounting together to the sum of $7,376 44, was with and out of the moneys of the said heirs of the said Jacob A. Lewis; that said Bryant Duncan, after the notes so given by said Duncan to said Hopkins, for so much of the purchase money of said lands, had come, by assignment, to said Boyd and Trice, and further to secure the payment thereof, to-wit: on the 7th day of March, 1860, the said Duncan, by his deed of that date, duly acknowledged, purported to convey to William C. Trice, all of said lands, in trust for the said pur-

pose; that the said Coleman Boyd & Co., on the first day of September, 1865, and to the November term of this court, 1865, filed their bill of complaint against Edward B. Lewis, as the administrator of the estate of Bryant Duncan, deceased, and the unknown heirs of the said Duncan, to enforce a vendor's lien upon said lands, accruing to them as the assignees of said two notes; that said Duncan, on or about the 4th day of February, 1864, departed this life intestate, and the said Edward B. Lewis became his administrator by appointment; that in said suit, so instituted by said Boyd & Co., said Edward B., Phœbe L. and Eliza F. Lewis, were admitted as parties, defendants, and therein filed their cross bill against said Boyd & Co., John W. Hopkins, and the heirs at law of said Duncan, setting up their claim to said lands, upon the ground that so far as paid for, had been paid for, by said Duncan, with their means and money and, in fact, been purchased for them, and praying that they be permitted to pay the residue of said purchase money and interest, actually due upon said lands, and the said John W. Hopkins required to make deed to them for the same, and that all claims of the heirs of said Duncan be divested out of them and vested in said complainants in said cross bill; that James Tappan was appointed administrator of the estate of said Duncan, in and for the purposes of said principal and cross suits; that in said suit, upon the original bill, it was by this court decreed that the said complainants in said cross bill, should pay to said Boyd & Co. the residue of said purchase money, and interest thereon, amounting to the sum of eight thousand five hundred and forty dollars; that upon the payment of the same, they should be and were subrogated to all their rights and benefit of lien for said purchase money, of and upon said lands, then held by said Boyd & Co.; that said complainants in said cross bill, did actually pay to said Boyd & Co., the said sum of $8,540 00; that upon said cross bill, it was decreed, by the court, that all or any right, title or claim of the heirs at law of the said Bryant Duncan, in and to said lands, be and the same were there-

by divested out of them and vested in complainants, Edward B., Phœbe L. and Eliza F. Lewis; and it was further thereby, by the court, decreed that the said John W. Hopkins should make conveyance of said lands to complainants; that afterwards, on the 8th day of December, 1866, the said John W. Hopkins, and his wife Elizabeth Hopkins, by their deed of that date, duly executed and afterwards recorded, did convey the said lands, by proper and appropriate description, to the said Edward B., Phœbe L. and Eliza F. Lewis. And the court doth further find that the said Bryant Duncan, being then and theretofore indebted to the said defendant, Asa Shelton, by promissory note, of date April the 7th, 1861, in the sum of eight thousand seven hundred and twenty-six dollars, and sixty-four cents, on the 10th day of April, 1861, by his deed of that date, commonly called a deed of trust, and afterwards duly acknowledged and recorded, purported to convey a part of the same lands to the defendant Paul Jones, in trust, to secure the payment of the said sum so due to the said Shelton, was contracted and due by the said Duncan prior to the execution of said trust deed to said Jones, and the said deed was executed to secure the payment of the same, and that said debt has not been paid in whole or in part."

The foregoing are the conclusions of fact, which the court below found, and which, on review, we find to be substantially correct.

Thereupon the court below rendered the following decree, viz: "It is therefore ordered, adjudged and decreed, by the court, that the said deed of trust, of date the 10th day of April, 1861, executed by the said Bryant Duncan, to the defendant, Paul Jones, to secure the said debt due to Asa Shelton, by said Duncan, purporting to convey the said lands hereinbefore recited, be and the same is hereby cancelled and annulled, and shall be forever held for naught, and the said Paul Jones and Asa Shelton, and all and every their heirs, assigns, agents or attorneys are, and every of them perpetually restrained, enjoined, and inhibited from, in any way,

executing, or attempting to execute the provisions of said deed against said complainants, their heirs or assigns." From this decree Asa Shelton appealed.

If the facts are correctly found, by the court below, the principles of law, applicable to them, are too well settled to require any discussion. It is objected by the appellant, that the certificate or authentication to the transcript of the proceedings had, in the Probate Court of Russell county, Alabama, is not in due form, in that it does not conform to the act of Congress of 29*th May*, 1790. The certificate is signed by "T. L. Appleby, Judge of Probate," and authenticated by the seal of his office, and after reciting that the transcript is a true, correct and perfect transcript of all the records, recites that he is the "Judge of said Probate Court, duly commissioned and qualified; that I am *ex-officio* clerk of said court, and the keeper of the records and seal thereof; that said court is a court of record, and this attestation is in due form." According to the rule laid down in *Catlin vs. Underhill*, 4 *McLean*, 199, we deem it sufficiently authenticated. This transcript shows that Duncan had been appointed guardian of the appellees, and that on his last settlement with that court, a large amount of money was in his hands, as such guardian. It is established by other testimony that, at the time of the marriage between Duncan and the mother of the appellees, and when appointed their guardian, he (Duncan) was a man of no property whatever, and insolvent. It is equally well settled by testimony that, when Duncan removed to Arkansas, he had no property or money, save such as remained of the estate of his said wards, and that he brought to Arkansas the identical negroes that belonged to the estate of Jacob A. Lewis. From the record, there can be no doubt that whatever of money was paid by Duncan on the lands, was paid out of money belonging to his wards. There is much proof of statements made by Duncan, in his lifetime, that he bought the lands for his wards, but, in our view, if he used the money, they are

equally entitled to the results of the purchase, whether he purchased for himself or them, and this would be true, if he had their money merely as agent, and not guardian. The rule is, that where one holds money of another, in any fiduciary character, and invests it in the purchase of land, taking the conveyance to himself, the person entitled to the money, may, at his election, charge the trustee personally, or follow the money into the land and claim the purchase as made in trust for him, and he may establish such trust by parol evidence. *Dyer vs. Dyer*, 1 *Eq. Lead. Cases*, 277. The proof, in such case, must be full, clear and conclusive, and such we deem it to be in this case. Duncan, when he purchased, obtained only an equitable title, viz: bond for title; and this, together with the possession of the premises, he held in trust for his wards, the appellees, and the purchase money not all being paid, they had an absolute right, on establishing their equity, to pay the residue and procure the legal title; for payment of part of the purchase money will create a trust to the extent of that payment. *Bottsford vs. Burr*, 2 *Johnson's Ch.* 405, 400; *Bank vs. Sweazey*, 35 *Maine*, 81; *Pierce vs. Pierce*, 7 *B. Monroe*, 433; 1 *Eq. Lead. Cases*, 276.

It is insisted, in behalf of appellants, that the deed of trust by Duncan to Jones, to secure the indebtedness due Shelton, was made without notice to either Jones or Shelton, of the equities of the appellees, and hence, they are entitled to relief. It must be borne in mind that Duncan himself had only an equitable title, and of this Jones and Shelton were bound to take notice, and hence, he could only convey an equity to Jones and Shelton, which equity was subsequent to that of the appellees. There is no principle better settled, in courts of equity, than, that where both parties claim by an equitable title, the one who is prior in time, is deemed the better in right. *Byers vs. McDonald*, 12 *Ark.*, 285; 7 *Cr.*, 18; 18 *T. R.*, 532; 7 *Wh.*, 46. The purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. 12 *Ark.*, 285; 7

Cr., 48; 7 *Peters*, 271; *Sugden*, 722; 10 *Pet.*, 212; 10 *How.*, 185; 2 *Eq. Lead. Cases*, 72, 73.

In the case of *Petigrew vs. Turner*, 6 *Humph.*, *R.* 440, and re-affirmed in *Brown vs. Vanlier*, 7 *Humph.*, 239, the court held, "that the right of wards to property purchased with their money, might be sustained against a conveyance in trust, to secure *bona fide* debtors, notwithstanding such trustee and *cestui que trust* were ignorant of their existing equity, at the time of the conveyance." It is conceded, by appellants, that "this is not a case in which the *question* of *bona fide* purchaser, for a valuable consideration without notice *arises* on this record," and insists that it is solely a question as to the rights of *prior* and *subsequent* incumbrancres to have satisfaction, out of the land, according to their privities.

In this connection, appellants insist that, at the time appellees procured the deed and legal title from Hopkins, they had notice of the equities of appellant, and that they cannot now avail themselves of the legal title against Shelton, and that Shelton stands before the court as *second incumbrancer;* that they hold the legal title in trust for Shelton, and that they have only a first lien for the residue of the purchase money paid out by them.

We do not so understand the law. It is true, that by decree of the court below, the Lewis heirs were directed to pay the residue of the purchase money to Boyd & Co., and were subrogated to the lien of Boyd & Co., and in this, we do not concede the decree correct, for the Lewis heirs, having the prior equity, and the result of the purchase from Hopkins by Duncan, being for their benefit, when they paid the residue of the purchase money, they could not be subrogated to any lien, because they, by that judgment, *extinguished* the lien for the purchase money of the land, on *their own property*. Suppose Duncan had, in his lifetime, paid the entire purchase money of the lands, out of the means of his wards, it could not be contended that when they obtained the legal title, in support of their prior equity, they or the land were bound to

discharge subsequent equities. To hold that because they themselves paid the residue of the purchase money, they hold the legal title, in favor of subsequent equities, would place them in a worse condition than if they had paid nothing. We understand the rule to be, that as between prior and subsequent equities to land, where either obtain the *legal title*, if the legal title be good, equity, which follows the law will not interpose to take it away from him, unless there is something unjust or unconscientious in his mode of obtaining it.

In 2d *Equity Leading Cases*, 73, it is said to be "plain that the favor shown by equity to purchasers for value, only extends to those who acquire a legal title to the thing purchased, or who buy under the belief that they are acquiring the legal title, and that the purchaser of an equity, who knows or has the means of knowing the nature of his purchase, must submit to the general rule under which the title of a vendee is measured, and limited to that of the vendor." *Roane vs. Chiles*, 10 *Peters*, 177; *Wailes vs. Cooper*, 24 *Miss.*, 208; *Kramer vs. Arthurs*, 7 *Barr.*, 165.

So, in this case, Shelton and Jones had ample means of ascertaining the title of Duncan, for an examination of the records of Crittenden county, at the time of the execution of the deed of trust, from Duncan to Jones, for Shelton's benefit, would have disclosed the character of Duncan's title, and that, at best, he could convey only the equity of an equity. That it was inconvenient for appellant to make such examination is no sufficient excuse, and he must suffer the penalty for his want of diligence.

Quoting again from 2d *Equity*, *Leading Cases*, 72, "the purchaser of an equitable estate or interest must stand or fall, in equity, by the estate of the seller, and can not rely upon *bona fides*, and the expenditure of money as a ground for protection against a prior or better right or equity. His conconscience may be clear, but he is presumed to have bought with full knowledge of the rule, which throws the risk of a purchase on the purchaser, and must submit to the conse-

quences of his ill fortune, or want of due care and diligence." 16 *Georgia*, 196; *Richardson's Equity*, 155; 7 *Cranch*, 48; 14 *Illinois*, 15.

Finding no substantial error in the record of the court below, the decree, of that court, is in all things affirmed.

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HEELER AND PETTUS v. GIST.

SWAMP AND OVERFLOWED LANDS—*Title in fee, in whom vested.*—The fee, in swamp and overflowed lands of the State, remains in the State until the execution of a deed by the Governor, when it passes, and the deed is conclusive evidence, in a court of law, of the title of the holder.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

Garland & Nash, for Appellants.

The rule that once obtained requiring a party, having a mere equity in land, to resort to a court of equity to attack a deed or patent, has been changed, and the case can be heard in a law court. *Trulock vs. Taylor*, 26 *Ark.*, 54.

Benjamin T. Du Val, for Appellee.

HARRISON, J.—This was an action by Andrew I. F. Gist, against John Heeler, to which W. W. Pettus was, on his application, made a co-defendant, to recover the possession of the east half of the north-east quarter of section thirty, in township five, range thirty west. The answer of the defendants was a general denial of the matters alleged in the complaint. The court, sitting as a jury, found: That the defendant Pettus, on the 31st day of December, 1857, attempted to

enter the tract of land, in controversy, which was a portion of the swamp and overflowed lands of the State, at the State Land Office, at Clarksville, but through mistake, applied for and entered the east half of the south-east quarter of the section, and that he afterwards, on the 1st day of September, 1860, made application to the Land Agent to change the entry, in accordance with his intention when the entry was made, and the agent made an alteration in his certificate, by erasing the word "south," and writing, in lieu of it, the word "north," so as to describe the land in controversy, and also made the following indorsement upon it:

"Corrected so as to agree with the plats and office records.

L. C. HOWELL, *State Land Agent.*

Clarksville District, Sept. 12, 1860."

The plaintiff, on the 20th day of January, 1868, entered at the same office, the north-east quarter of the said quarter section, the north half of the same tract. And on the 4th day of February, 1869, the south-east quarter of the quarter section, the south half thereof, at the office of the Commissioner of State Lands, and afterwards received, from the Governor, deeds dated respectively, the 4th and the 19th day of February, 1869, for both parcels; and that the defendants, at the commencement of the suit, were in possession of the land.

The deeds from the Governor conveyed the fee in the land, which until then, remained in the State, and are conclusive evidence, in a court of law, of the plaintiff's title.

If Pettus has an equitable right to the land, concerning which we express no opinion, a court of equity is the proper and only forum, in which to assert it. *Campbell vs. Garven*, 5 *Ark.*, 485; *Bacon vs. Tate*, 22 *Ark.*; *Masters vs. Eastis*, 3d *Port*, 368; *Bagnell vs. Broderick*, 2 *Peters*, 436; *Patterson vs. Winn*, 11 *Wheat*, 380; *Jackson vs. Lawton*, 10 *John* 23.

There is no error, therefore, in the judgment of the court below, and the decree is affirmed.

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PATTERSON v. TEMPLE.

LEGISLATURE—*When cannot create separate county courts.*—While the legislature may create judicial districts, and define the power and jurisdiction of the courts therein created, yet, it has no power to create, for a single specified county, two separate and distinct county courts, clothed with all the powers and duties appertaining to such tribunals, when the justices of the peace are selected from townships, whose area consists of less than six hundred square miles.

CONSTITUTIONAL LAW—*Act, approved March* 28, 1871, *unconstitutional.*—The Act, approved March 28, 1871, to "establish separate courts in the county of Sebastian," is in derogation of *Section* 12, *Article XV*, and *Section* 2, *Article X*, of the Constitution of the State of Arkansas, and is null and void.

CONSTRUCTION OF STATUTES—*Act, approved March* 16, 1869, *construed.*—The Act, approved *March* 16, 1869, *amendatory of an Act approved July* 21, 1868, *entitled "an Act to repeal Chapter* 44, *Gould's Digest,"* is not to be construed as an attempt, on the part of the legislature, to place a judicial construction on the Act of 1868, but the intention was, only, to allow a county seat to be removed by the expressed will of the electors.

COUNTY COURT—*Cannot set aside its judgment after lapse of term.*—A county court loses power over its judgments, on the lapse of the term at which they were rendered, and cannot set them aside at a subsequent term.

PROSECUTING ATTORNEY—*Cannot bring suit in behalf of the people.*—There is no law authorizing a prosecuting attorney to bring suit "in behalf of the people of the State of Arkansas," and a suit so brought should be dismissed for the want of proper parties.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

Gallagher, Newton & Hempstead, for Appellant.

For more than four years previous to the year 1860, Greenwood was the county seat of Sebastian county, as it was for many years afterwards.

By *Section* 20, *Chapter* 44, *page* 297, *Gould's Digest*, county sites, established over four years, cannot be removed but upon paying inhabitants for their lots, etc. This is still in force by *Article VI, Section* 15, Constitution of Arkansas.

In 1860, two Circuit Courts were established in Sebastian

county, one to hold at Greenwood—county site—the other at Fort Smith. *Acts of* 1860, *page* 432.

By *Act of* 1868, *page* 135, provision was made by the legislature for removal of county site. The proposition had to be submitted to the voters, and had to receive a majority of votes of qualified electors of the county. An effort was made to remove county seat from Greenwood to Fort Smith; it failed, so county court adjudged. Contestants appealed.

By *Act of the Legislature of Arkansas*, 1868 and 1869, *page* 71, the Act of 1868 was amended so as to admit county site removed, by vote of majority of qualified electors voting, and made to apply to elections held under said act of 1868. We say the legislature had no authority—but three members of the county court removed county seat to Fort Smith. This action was void, no notice was given, the term passed. See *Rose's Digest*, *page* 145; *Code*, *Sections* 570, 571 *and* 572.

On the 28th of March, 1871, the Legislature, by an Act, divided Sebastian county into districts, etc. It is considered, by appellee, that this act was void, if so, no court can be holden at Fort Smith. The county seat is still at Greenwood, and everything, judicial, rendered by any pretended court, at Fort Smith, is *coram non.*

Du Val & Cravens, for Appellee.

Did the court below err in sustaining the demurrer of appellee to the petition for *mandamus?* If the act of the General Assembly, approved *March* 28, 1871, to amend "an act to establish separate courts in the county of Sebastian," is constitutional, then there can be no question that it erred, but if unconstitutional, then there was no error. We submit that the law was unconstitutional.

The act in question purports to provide for two separate and distinct judicial districts, within the limits of Sebastian county, but in fact creates two separate and distinct counties within the circuit of one, which, by the pleadings, is admitted to have had less than the constitutional number of square

miles, (see transcript, page, —,) at the time of the adoption of the present Constitution of Arkansas. See *Section* 12, *Article* 15; 1 *Blk. Comm.*, 113; *Art.* 10, *Sec.* 2, *Const.*, 1868; *Fletcher vs. Oliver, sheriff, etc.*, 25 *Ark.*, 295.

BENNETT, J.—On the 17th day of April, 1871, Newton J. Temple, Prosecuting Attorney for the third judicial district, filed, in the Circuit Court of Sebastian county, an application for a *mandamus* to compel William Patterson, as Clerk of the various courts of said county, to omit removing any of the books, records, papers, etc., to Greenwood, in said county, as he was required to do, under the act of the General Assembly, approved March 28, 1871, alleging said act is void, because its various provisions are in violation of the Constitution of the United States.

Said application, also, alleging that Fort Smith is the only county site of Sebastian county, and the only legal place to hold courts.

Defendant filed an answer with a demurrer clause. The answer sets up the act of the General Assembly; denies the jurisdiction of the court, and denies that Fort Smith ever was the county seat of Sebastian county; sets forth the facts in relation to said county seat history, and filed copies, duly authenticated, of the orders and judgments of the County Court in relation to the same.

The plaintiff filed a demurrer to the answer of the defendant.

Upon the hearing, the court overruled the demurrer to the application, and sustained the demurrer to the answer, and granted *mandamus* as prayed for.

Defendant appealed.

The principal question in the case is, whether the act of the General Assembly, entitled an "act to amend an act entitled an act to establish separate courts in the county of Sebastian," is unconstitutional and void.

The act, above entitled, provides for two separate and dis-

tinct judicial districts within the limits of Sebastian county; provides for the holding of two separate and distinct Circuit Courts, one to be styled "the Circuit Court of the county of Sebastian, for the Fort Smith district," the other to be styled, "the Circuit Court of the county of Sebastian, for the Greenwood district;" and provides that judgments rendered in each shall only be liens upon the real estate in the district where such judgments and decrees are rendered.

It also provides for separate Probate Courts, and the organization of two County Courts; that papers and records of the estates of deceased persons, within the territorial limits of each district, shall be kept, either at Greenwood or Fort Smith. The fact, as to which place such record shall be kept, to be determined by the former residence of such deceased person; provides for the separate assessment of property, the separate levying and collection of taxes; provides for a division of the indebtedness of the county in proportion to the taxable property of each district; provides for separate and distinct records of all matters pertaining to the public welfare, in each district; also, provides that a change of venue may be taken from one district to the other in the same manner as though these districts were separate and distinct constitutional counties of the State.

It is claimed, upon the part of the appellee, that the act of the General Assembly has effectually and completely abrogated the corporate existence of the county of Sebastian, and has, in fact, created two counties, each of which is less in territorial area than six hundred square miles, and is therefore in derogation of *Sec.* 1, *Art.* 15, of the Constitution, which says: "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; nor shall any new county be hereafter established which shall contain less than six hundred square miles."

In the consideration of the case, now before us, we are to set out with the presumption that every State statute, the

objects and provisions of which are among the acknowledged powers of legislation, is valid and constitutional, and that presumption is not to be overcome unless the contrary is clearly demonstrated. *Fletcher vs. Peck*, 6 *Cranch*, 87; *Ex parte McCollum*, 1 *Cowen*, 564; *Morris vs. The People*, 3 *Denio*, 381.

According to our republican theory, the whole power of government resides primarily in the people of the State. This power is usually denominated legislative, judicial and executive or administrative; the power to make laws, to interpret them and judge of their application, and to execute or administer them when thus made and interpreted.

The people, by their organic or fundamental law, have transferred these powers and distributed them into three departments. By this organism of government, each department has annexed to it, in the exercise of its functions, certain restraints and limitations, a violation of which renders their acts, to the extent of the violation, inoperative and void. When the legislative power is exercised, (and it has its several duties marked out and prescribed by the law to which they owe their origin,) it is not only essential that the will of the law-makers be expressed in due form of law, but that they should have expressed their determination in the mode and within the prescribed limits, as pointed out by the instrument which invests them with that power.

With the foregoing consideration in view, we will proceed to the examination of the objections urged against the law in question, which are founded upon its supposed incompatibility with the Constitution, the first of which is stated as above.

Blackstone defines a county to be a civil division of a State or kingdom for political and judicial purposes, formerly governed in England by an earl or count, from whom it derived its name. 1 *Blk. Com.*, 113, 116.

Kent says: "A county is a public corporation, created by the government for political purposes, and invested with

subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are in general subject to the control of the Legislature of the State." 2 *Kent Com.*, 275.

The county court was sometimes, anciently, termed the county. *United States Digest—County.*

The territory of a State, for its more convenient jurisdiction and government, has been divided into counties, towns, and villages, to each of which has been delegated portions of the political and civil power of the State. They have been organized into separate and distinct communities or bodies politic, and are clothed with extensive authority, legislative, executive and judicial, for the purposes of local government. The amount of political authority so delegated, its distribution and arrangement in the different communities, vary. The powers and privileges conferred upon counties are more limited and simple in their operation than upon towns. But though the amount and distribution differs, the nature of the power conferred on each, and the object of granting them, are the same. They belong exclusively to the class that relate to the general concerns of the people, in their public, civil and political interests, in a word, to the *good* government of the place. It is only necessary to look into the internal organization of the counties, villages and cities, as defined and regulated by law, to confirm the general correctness of these observations. It will then be seen that in order to simplify and facilitate the administration and execution of these various powers, counties, as well as towns and cities, have been constituted bodies corporate, and expressly invested with all the essential attributes of the same. *Gould's Digest*, 287. The portion of sovereign authority, thus specially conferred upon these several civil divisions of the State, is granted by the Legislature, by general statutes, and is applicable to and is common to all countries. But, in each, a large mass of power has been left to the exercise of the discretion and judgment of the several heads of these bodies politic.

Thus, in cities, large discretionary power is vested in the mayor, aldermen and council; in towns, usually to trustees; in counties, in the county court. The county court represents the civil and political power of the county, its rights and obligations. It is through this medium that the county, in its municipal character, as a corporation, may be acted upon, for there is no other court or officer known in its organization that can or should represent it.

While the people, in their sovereign capacity, have not prescribed the area of a town or city, they have deemed it of sufficient importance to say that there should be no portion of the territory of the State created into a county, unless it contained at least six hundred square miles.

Under the general statute providing for the more efficient organization of counties, and defining who should be the representative of this political sub-division, it will be seen that a body consisting of the justices of the peace of the various townships within their territorial limits, or two of them, selected for that purpose, at an election in which all justices of the county may participate, and presided over by the judge of the county, shall be the head of the county.

Then, if a county is a public corporation, which the people, in their organic act, have said shall not consist of less than six hundred square miles, and within whose boundaries the people are invested with the powers of certain local matters, pertaining alike to all the persons within those defined limits, and to whose judgment and discretion the vital powers and interests of all the people, as their agent, the county court, are entrusted, can the General Assembly create, for a single specified county, two separate and distinct county courts, clothed with all the powers and duties appertaining to such tribunals, when the justices of the peace are selected from townships whose area is admitted to consist of less than six hundred square miles, as is the case now at bar? We think not.

The enactment, under consideration, attempts to divide

Sebastian county into two judicial districts, creates two Circuit, two Chancery, two Probate and two County Courts, and provides that each "shall be as independent of, and distinct from each other, and shall hold the same relation to each other as if they were courts of different constitutional counties of this State, and shall be deemed, for all purposes of this act, separate and distinct counties, with original and exclusive jurisdiction within their respective territorial limits."

Thus it will be seen that the Legislature is providing for all the attributes of a county, and creating all the essential features of these public corporations as effectually as though each sub-division was called Fort Smith and Greenwood counties. The individuality, so to speak, of Sebastian county, is entirely destroyed and obliterated, and is only recognized in the fact that the official existence of the sheriff, clerk, treasurer and county judge is allowed to remain as monuments to mark the spot where now lies the defunct body of Sebastian county.

And these are the only officers which the Legislature has said may perform the duties of their respective offices, the duties and powers of which are determined by the territorial limits of each of these two districts, as much as though they were two separate and distinct constitutional counties. The county judge must preside over the County Court of Greenwood district, consisted of only justices selected within the townships of that district, and at a different time and place from that of the Fort Smith district. The same in the Fort Smith district.

The sheriff is prescribed in his duties the same as though there were two counties. The clerk must keep two offices, one in each district, and all matters of public record pertaining to either must be kept separate and distinct. So with the treasurer; although nominally treasurer of Sebastian county, he is required to keep two offices, and all financial affairs of either must be kept apart. What more could have been

required had the General Assembly provided for the election of these officers in each district? While, in name, they may be officers of Sebastian county, they are, in fact, only sheriffs, clerks, treasurers, and judges of these two districts.

But, it may be said, the General Assembly can create judicial districts and define the powers and jurisdiction of the courts therein created. While we may accede to that proposition, taken in its general sense, we emphatically deny that it can do so for Sebastian county, as a county, and thereby destroy all its corporate existence in that indirect way, and virtually make two counties under the name of districts. That this was the evident intention of the legislature, there can be no doubt, as the act, in several instances, expressly states that these several subdivisions shall be considered as independent of each other, as "constitutional counties," thereby endeavoring to destroy the separate existence of Sebastian county, and deprive it of the power to act in its capacity as one of the counties of the State of Arkansas.

Again, *Sec.* 2, *Article X*, of the Constitution of the State of Arkansas, says: "Laws shall be passed taxing by a uniform rule all money credit, investments in bonds, joint stock companies or otherwise; and also all real or personal property, according to its true value in money. * * * * * Real estate shall be appraised at least once every five years." * * *

This court, in the case of *Fletcher v. Oliver*, 25. *Ark.*, 295, has said that "*taxing by an uniform rule* means by one and the same unvarying standard; uniformity not only in the *rate* of taxation, but uniformity in the *mode* of assessment, by which the value is ascertained. There must be an equality of burden. This uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform all over the State, if a county * * * * it must be uniform throughout the extent of territory to which it applies; the property within these legal subdivisions, established by law for the convenience of the people, must all pay homage to the one uniform rule."

The County Courts, of the respective counties, are the financial controllers of their respective counties. They are the only mediums through which a county tax can be levied or assessed on the property of the county. There cannot be two tax assessing or levying powers, within the limits of any one county, for county purposes. Yet this act declares "that the *County Court* of each district shall have the same and like duties and powers in every particular, in relation to the assessment, levying, adjustment, and correction of the tax list, and in all matters and things in relation to levying, assessing, and collecting the moneys of said districts, as is conferred upon *other constitutional counties.*" And further provides, that these districts shall only pay the county expenses arising within the limits of these respective districts, and all claims against each shall be audited, allowed and disposed of by the County Court of each district; even the maintenance and support of paupers, and the establishment and supervision of public highways, are made to depend upon the action of each of these separate County Courts, each of which is to act in like manner and form as required by law for other counties.

That these two tribunals, composed of separate individuals, and dividing the indebtedness of the county into two parts, in proportion to the property of each, each making separate items of indebtedness in their respective capacities, can audit, allow, and dispose of them, by one "uniform rule of taxation," would be to suppose an impossibility. The general tenor of the Constitution of the State, is in favor of general legislation, and to discontinue special enactments. In fact, in many instances, special legislation is expressly forbidden. And while constitutional restrictions are imperative, where expressly stated, we think the intention of the people may be looked to, in at least so important a matter as the one under consideration, and can say that the unity of a county cannot be so severed as to make two out of one, each being, in all respects, equal with the other, and they, in common, alike to all other counties of the State, without violating constitutional

restraints. In fact, the constitutionality of this act is admitted by counsel for appellant and appellee, but that fact would not warrant us in deciding it so. This duty is one from which any judge, conscious of the fallibility of human judgment, will shrink, when he can conscientiously and with due regard to his official oath, decline the responsibility. But being required to declare what the law is, in the cases which come before them, they must enforce the Constitution as the paramount law. Still, it may be said that parts of this enactment may be void, because repugnant to the Constitution, and the balance may be good law. Cooley, in his work on constitutional limitations, 177, says: "Whether the other parts of the statute must be adjudged void because of the association, must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder."

Now the objects of this law were to create two separate and distinct districts in Sebastian county, with all the powers and immunities of any constitutional county of the State, the area of each being less than six hundred square miles; which object, if carried out, would destroy the identity of Sebastian county. This, we say, cannot be done. Upon an examination of the whole act, each section is interwoven with the other in such a manner that no court could separate them without destroying the whole fabric and, with the fall of one, the whole enactment must be declared void.

Another question is then presented in the case, which we deem of vital importance to the people of Sebastian county. Where is the county seat of that county?

For many years prior to the 21st day of January, 1861, (more than six years,) the county of Sebastian was established in the State, and its county seat was located at Greenwood, which remained the county seat of said county, without any doubt or dissent, up to the month of April, 1870.

From the time of the location of the county seat of Sebastian county, at Greenwood, up to the 21st day of January,

1861, all the courts, circuit, chancery, county and probate, were there holden at the times and as required by law.

On the 21st day of January, 1861, the legislature of the State, by an act thereof, approved on that day, divided the county of Sebastian into two judicial districts, called respectively Greenwood and Fort Smith districts. *See Acts of the Legislature of the State*, 1860–1, entitled, "An Act to establish separate courts in the *county of Sebastian.*" Probate Courts of Sebastian county were to be holden at the times then prescribed by law. (*3d Mondays January, April, July, October. Gould's Digest*, 311, *Sec.* 11.) Probate Courts in the Fort Smith district, on the first Mondays of those months. (*Sec.* 9.) But County Court was holden at Greenwood, inasmuch as the same was retained as the county seat. And in fine, as to all matters not within the provisions of said act, the county of Sebastian retained its organization as an entire county. *Sec.* 2 of this act, in speaking of the place where the circuit, chancery and probate courts shall be held, says, that these courts, "in and for the Greenwood district, shall continue to be held *at the county seat at Greenwood.*" Up to the passage of the act of the Arkansas legislature, *approved the* 21*st of January*, 1861, there was but one place of holding any of the courts of said county, and that was at Greenwood, the county seat.

By an Act of the General Assembly, entitled "an Act to repeal Chapter 44, of Gould's Digest," it was, among other things, enacted that whenever one third of the qualified electors of any county should petition the County Court for the removal of the seat of such county to any other designated place, the court should order an election, etc., etc.; and if it should appear by such election that a *majority* of the *qualified electors*, of said county, are in favor of the removal of said county seat, then that court should appoint commissioners * * * * and that whenever such election should be so held, if successful, the county seat could not be again removed for the space of ten years, and in case the proposition did not receive such majority, then no other proposition for such

removal should be submitted for the space of five years thereafter. See *Acts of the Legislature of Arkansas, session of* 1868, 135, *approved July* 21, 1868.

Under the provisions of this Act, at the October term, 1868, (to wit: on the 12th day of November, 1868) a petition of many citizens was presented to the county court of Sebastian county, at Greenwood, the county seat, praying for an election to be ordered to remove the county seat of said county from Greenwood to Fort Smith, and the court being satisfied that said petition was signed by more than one-third of the qualified electors, ordered an election, under the above mentioned Act, last aforesaid, to take place on the 26th day of December, 1868.

Said election was accordingly held, and the same reported to said County Court, at its January term, 1869, and on the 12th day of January, the court found that the proposition, to remove the county seat of Sebastian county, did not receive the support and votes of a majority of the qualified electors of said county, and it was therefore lost; seven of the members of said court so deciding, and three voting contrary.

On the 12th day of April, 1869, upon a petition to have the County Court appoint three commissioners to select a site, in the city of Fort Smith, whereupon to locate county buildings, the court refused to appoint such commissioners, because a majority of the qualified electors of the county had not voted for the removal of the county seat.

By an Act of the Legislature of the State, entitled "an Act to amend an Act to repeal Chapter 44 of Gould's Digest, and for other purposes," approved March 16, 1869, it was among other things provided, that whenever one-third of the qualified electors of a county should petition for an election to remove the county seat, it should be ordered by the County Court; notice given and election held, and "if it shall appear by such election that a *majority* of the *qualified voters, voting* at such election in said county, are in favor of the removal of

the county seat of such county, then the County Court should appoint commissioners etc.;" and it was further enacted "that *any* election which may have been held, under the provisions of an act of which this act is amendatory, *shall be deemed* to have been held according to the provisions of this act, and shall be as valid as if this act had been in force at the time of holding this election." *Acts of session of* 1868 *and* 1869, 75.

On the 10th day of January, 1870, James E. Bennett, William Patterson and David A. McKibben presented a motion to the County Court of Sebastian county, which, by the court was sustained, and the court, in pursuance thereof, then and there declared the orders and judgments made and rendered, on the 12th day of January and 13th day of February, 1869, *null* and *void*, and then and there declared that under and by virtue of said election, had and held on the 26th December, 1868, the county seat was removed from Greenwood to Fort Smith, and proceeded to appoint commissioners to select suitable buildings, which were accepted, and the records and papers, etc., were removed to Fort Smith.

There can be no doubt the county seat of Sebastian county was at Greenwood up to the time of the enactment of 1860, which created the county into two districts; nor does that law attempt to say that Greenwood is not the county seat, but only provides that certain courts may be held at Fort Smith. Section two, on the contrary, says Greenwood is the county seat. Therefore, up to the time the proposition was submitted to the people by the County Court, under the Act of 1868, that question must be considered settled. But, by the facts as above stated, it will be seen that the County Court twice declared, in a solemn adjudication of the question properly brought before them, that the proposition of the removal was not carried by the people.

After nearly a year had elapsed, and both terms, at which these final orders were entered up, had finally adjourned, the County Court, composed of different justices of the peace from the previous County Court, attempt, in this summary

manner, to set aside their final orders, without notice, and say they shall be held for naught.

This court has repeatedly held that courts have no control over judgments and final orders, after the adjournment of the term at which such final order or judgment was rendered. *Smith vs. Dudley*, 2 *Ark.*, 66; *Walker vs. Jefferson*, 5 *Ark*, 23; *Ashley vs. Hyde*, 6 *Ark.*, 92. All proceedings had in the cause, subsequent to final judgment, after the close of the term, must be considered a *coram non judice*. *Mayor & Aldermen of Little Rock vs. Bullock*, 6 *Ark.*, 282.

A County Court loses power over its judgments on the lapse of the term at which they are rendered, and cannot set them aside at a subsequent term. *Reiff et al vs. Conner*, 10 *Arkansas*, 241.

If the rule, as laid down in the above cited cases, has been changed by the Code in *Section* 571, *page* 176, then a judgment or final order can only be set aside on notice, upon complaint filed, etc., as provided in *Section* 573, which was not done in the case before us. Again, if the action of the last County Court was based on so much of the Act of March 16, 1869, as made the provisions of that law apply to elections held under the law to which that was amendatory, it certainly cannot be upheld. That provision of the law, if good, must work a great hardship upon the voters of Sebastian county. It, in fact, is but downright fraud upon them. An election is held in pursuance of legislative authority, upon a proposition that requires a majority of *all the electors* in the county to carry it.

All persons are presumed to know the law under which they are required to act. At the election now under consideration, it was not required that a single vote be cast *against* the removal of the county seat at Greenwood, but there must have been a *majority of all the qualified voters* of the *county* who voted in favor of the removal. Those who were opposed to the removal could have stayed at home, or if voting, could have voted against, and either would have the

same effect. Not so under the amendatory law. Under that one, a majority of the votes cast were sufficient to carry the election. The elector who did not vote was one vote lost upon the proposition. Whatever may have been the intention of the Legislature in this respect, we can indulge in no presumption which would recognize the attempt of the Legislature to place a judicial construction on the Act of 1868. The intention, no doubt, of the Legislature, was to allow a county seat removed by the will of the electors. To construe *Section* 17, of the Act of March 16, 1869, so as to cause a removal, without the expressed will of the people, would place it in antagonism to the body of the Act, and it would be nugatory.

We are also of the opinion that all the proceedings of the County Court of Sebastian county, on the 10th day of January, 1870, in so far as it attempts to set aside the judgments or final orders of the previous County Courts, in relation to the county seat elections, and the assumption of jurisdiction of the matter, and making different orders, must be considered as null and void.

Thus, it must be seen that neither by the act of 1868, nor the subsequent act of 1869, amendatory thereto, was the action of the County Court of Sebastian county, in attempting to remove the county site from Greenwood to Fort Smith, of any validity whatever. Greenwood remains the county seat to-day.

Another question arises upon the face of the record, which we deem of sufficient importance to notice; in fact the solution of this question would have saved us the many pages of this opinion, but, the question in the case being one of great public interest to all the people of Sebastian county, we would have been guilty of dereliction of duty, if we had avoided an adjudication of it upon a technical question of practice as to who were the proper parties to have brought this suit.

The petition is styled *Newton J. Temple, Esq., prosecuting*

attorney for the State in behalf of the people, etc., vs William Patterson, as clerk of Sebastian county.

The petition then sets out and says: "Newton J. Temple, prosecuting attorney for the State of Arkansas for the fifth judicial circuit, in behalf of the people of the State of Arkansas, states, etc."

We know of no law that authorizes Newton J. Temple, as prosecuting attorney, to bring any suit "in behalf of the people of the State of Arkansas."

The State is not an infant, nor is it insane, so as to need a guardian to represent it in any of its courts. It can appear by itself as the "State of Arkansas," and sue and be sued, restrain and enforce, by its own name, any judgment for or against itself.

Therefore, the petition should have been dismissed for the want of proper parties in the court below. For this error, the judgment of the Circuit Court of Sebastian county is reversed and cause remanded, with instructions to dismiss the petition at the cost of the petitioner.

NORWOOD AND WIFE v. HOLLIMAN, Adm'r.

APPEAL FROM OUACHITA CIRCUIT COURT.

HON. GEORGE W. MCCOWN, *Circuit Judge.*

English & English, Leake and Garland for Appellants.
U. M. Rose, for Appellee.

MCCLURE, C. J.—This cause comes here on a question of law, and the same question having been decided in the case of *Norwood and wife v. Holliman, ad. ante,* the judgment of the Ouachita Circuit Court is affirmed.

BUCKNER v. SESSIONS et al.

FORECLOSURE OF MORTGAGE—*Where estate assigned, what averments, etc.*—In a bill to foreclose a mortgage, where the estate has been assigned, the mere allegation that the defendant is the assignee of the mortgage, is not sufficient; the mortgagor should be made a party, and the assignment should be as fully and distinctly stated as any other averment in the bill.

SAME—*Who necessary party.*—In a suit for foreclosure of mortgage upon real estate, the occupier of the premises must be made a party, and the omission to do so, without showing some adequate reason therefor, is not only a good ground of demurrer, but a valid objection at the hearing.

SAME—*Party wishing to redeem, etc.*—A party holding an outstanding title to mortgaged premises cannot affect the complainant's right to a foreclosure and sale by being made a party defendant and offering to redeem. If he wishes to redeem, he should file a cross bill for that purpose.

PRACTICE—*Where merits in bill, but want of proper averments.*—Where it clearly appears that there are merits and equity in a bill, the bill, for want of proper averments, should not be absolutely dismissed, but the court should direct the proper averments to be made, or dismiss the bill without prejudice to the complainant to file another bill.

APPEAL FROM CHICOT CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellant.

We submit:

First, There are no answers or denials from Sessions as to the debt due B. & Co., and this default admits it as alleged, and a decree *pro confesso* on that, binds them and all their privies: *Cunningham v. Steele*, 1 *Litt*, 58; 2 *J. J. Marsh*, 136; 6 *Mon.*, 192; 8 *Porter, Ala.*, 270; 4 *Hen & Munf*, 476; *Story Eq. Pls.*, (*by Redfield*) 789–94 *and notes.* The pretended liens of the appellees, Carlton & Hartsook, are subsequent to the Buckner claim, and they are in the wrong element in coming into this cause: *Whitaker ex., v. Griffin's admr. and heirs.*

Second, On the part of the appellant the exhibiting of the notes and the mortgage made his case, and the issue of payment made, by Carlton & Hartsook, put the burden upon them as they averred it: 6 *Paige*, 583; 3 *Dana*, 439.

The rules of evidence in equity are the same as they are in law: 17 *Mass.*, 303; 2 *Bibb.*, 5; *Gresley Eq. Ev.*, 1 *et seq.*

Third, If these appellees really had equities, and had any just suspicion that Buckner had not rendered a fair accounting, and was claiming unjustly what he was not entitled to, they should have so answered, and made their answers a cross bill, and asked to have these accounts properly stated, and B. come to a fair and full settlement of all matters as between the creditors of S. for themselves and all others, and not merely deny B.'s rights, and stand on their sales and purchases, and demur to B.'s showing. The court of equity in this inquiry would have taken the account, and marshalled these debts and paid them off in their regular order: 1 *Story Eq. Jurisp.*, 64–7, and cases cited in brief in the Richard Sessions ("*Luna*") case by us. The court would have seen that all necessary parties, with their claims and securities were before it: *Story Eq. Pls.*, 135, *et seq.* The court would shape and mold its process, and if needed, make a new writ to do justice between all parties: *Story Eq. Pls.*, 389–402. It would, having jurisdiction, see that justice was done at once, and without delay, without accumulation of costs, and without multiplicity of suits: *Authorities Sup.*; 12 *Peters*, 655–75.

Bell & Carlton, for Appellee.

We submit that, from the facts in the case, it is clear that Buckner, after the dissolution of the firm, had no right to make debts with the defendant, D. H. Sessions, and debit the firm of Buckner, Newman & Co. with them; for it is a principle of law that no one can be made a creditor of another, without their consent. *See Bertrand vs. Byrd*, 5 *Ark.*, 651.

Furthermore, there was no such firm in existence, according to the proof, as Buckner, Newman & Co., when the items of the account in Exhibits C and A, making the sum of four thousand two hundred and fifty-eight dollars and fifteen cents, that was transferred to Buckner & Co., were formed. Beyond all question, if those advances were made to D. H.

Sessions, they were made by Henry S. Buckner on his own responsibility, and the firm of Buckner, Newman & Co. had nothing to do with them. As to the decree, "*pro confesso,*" against D. H. Sessions, it is true that decree is conclusive, if this case was between Buckner and Sessions, but upon this submission, as against Carlton and Hartsook, the decree, *pro confesso*, is entitled to no weight. It is true, as to *final* decrees, *all parties to it are concluded* by the facts contained in it. That in decrees "*pro confesso*" the parties are not so concluded, but only in *final decrees. See Trammell vs. Thurmond*, 17. *Ark.*, *and Hannah vs. Carrington*, 18. *Ark.*, 85.

HARRISON, J.—This was a bill filed in the Chicot Circuit Court, to the October term, 1868, by Henry S. Buckner against William B. Street, by the description of *assignee* of Daniel H. Sessions, Placid Forestall, as administrator of Henry A. Rathbone, deceased, John S. Whitaker, Daniel J. Hartsook, and John R. Fowler, to foreclose a mortgage. The bill alleged, in substance, that Daniel H. Sessions was, on the 21st day of February, 1866, indebted to Buckner, Newman & Co., cotton factors and commission merchants in New Orleans, of which firm the complainant was a member, by two promissory notes of that date, for $17,448 50, and $5,482 05, respectively, each to become due in ten months after date, and bear eight per cent. interest after maturity, payable to his own order and assigned to them by his blank endorsement; to secure the payment of which, he executed to them a mortgage on two plantations in Chicot county, known as the Brinkly and Linwood plantations, of like date with the notes, which mortgage was, thereafter, duly recorded in said county, on the 16th of June following; that the firm of Buckner, Newman & Co. was, on the 31st day of August, 1866, dissolved, and upon a settlement between the members of the partnership matters, certain assets were set apart and transferred to the other members, in full satisfaction and discharge of their interests, and the remainder, including the notes and mort-

gage in question, were transferred and assigned to the complainant, and he was then the sole owner of the notes and mortgage. That it was also agreed between them, that he should assume the payment of the debts and liabilities of the firm, and the liquidation and settlement of its business; that only a part of the money, called for by the notes, had been paid, and that there remained due on them, on the 20th day of June, 1868, the sum of $10,031 60, and nothing had since been paid. The bill then charged that the said Hartsook claimed title to the plantations by a pretended sheriff's deed, which deed, if he had one, it averred, was subsequent to the mortgage; that the said Whitaker, also, set up some sort of claim to them, the real nature of which was unknown to the complainant, but which, if in fact he had any valid title or claim, was, like the other, acquired subsequent to the execution of the mortgage; that said Forestall, as administrator of said Rathbone, claimed a vendor's lien upon the Brinkley plantation, for what amount, or when or how created, was not stated; and that said Fowler was in the occupancy and possession of the Linwood plantation. Whitaker disclaimed any title or interest; Street, Forestall, and Fowler made no defense; Hartsook answered the bill. He claimed to be the owner of the plantations, by a purchase at a sheriff's sale, under an execution upon a judgment against Sessions, and a deed for the same from the sheriff; but whether the purchase or judgment was before or after the execution of the mortgage, was not stated. The notes and mortgage, he insisted, were given to Buckner, Newman & Co. merely as security for advances they had agreed to furnish Sessions in the year 1866, and that he had paid them for all that he obtained, and nothing was due upon the notes. Charles H. Carlton, claiming an interest in the suit, was, on his application, made a defendant, and answered the bill, and claimed also to be a purchaser at a sheriff's sale, made, as he alleged, under an execution upon a judgment recovered against Sessions, in the Circuit Court of Chicot county, on the 5th day of December, 1867,

and to have a deed for the property from the sheriff. He admitted the making of the notes and mortgage by Sessions, but asserted they had been paid, and offered, if anything was due, to pay the same and redeem the mortgage. Replications were filed to the answers, and the cause was heard at the April term, 1870. The court dismissed the bill for want of equity, and the complainant appealed.

We will state the substance of the evidence. Henry S. Buckner, complainant, deposed: That Sessions, being indebted to the house of Buckner, Newman & Co., at the date of the notes and mortgage, by an account of long standing, in the sum of $17,445 50, closed the same by the notes, mentioned in the bill, for that amount; the smaller note, or the one for $5,482 05, was given to be discounted to obtain advances and supplies for the year 1866, and the mortgage was given to secure their payment. The proceeds of the note was $5,125, which was placed to his credit and Sessions was paid the same in advances and supplies, as he applied for them. The firm of Buckner, Newman & Co. was dissolved in August, 1866, and at the time of the dissolution, Sessions had overdrawn the money to his credit, several hundred dollars. The deponent was charged with the liquidation and settlement of the business and Sessions continuing to draw on the house, he paid his drafts and charged them to the same account. In September of the same year, the deponent, with certain other persons, established the house of Buckner & Co., with which Sessions also had dealings that year, and at the end of the year, he owed that house $5,229 17, and Buckner, Newman & Co., or the deponent, $4,258 15. The latter account was then transferred to his account with Buckner & Co., but because of some dissatisfaction on the part of one of the parties, it was afterwards transferred back, and the account with that house was also transferred to the books of Buckner, Newman & Co., and Sessions' account with Buckner & Co. was cleared. In the early part of 1867, Buckner & Co., by directions from Sessions, paid

deponent the proceeds of certain assignments of cotton, amounting to $23,982 56, which satisfied his account, and the balance stood as a payment upon the notes. The witness exhibited, as a part of his deposition, a detailed statement of Sessions' account, embracing the transactions with Buckner, Newman & Co., those with himself, after their dissolution, and also those with Buckner & Co., showing the facts stated, and that, allowing interest on both, the debits and credits, there was due on the notes, on the 20th day of June, 1868, the sum of $10,031 60, no part of which, he said, had since been paid. Daniel H. Sessions deposed, that when he gave the mortgage, he and Buckner, Newman & Co., had an account of $17,445 50, of several years standing, and that they agreed, at the time, to make him advances, for that year, to an amount which would make his entire indebtedness about twenty-two thousand dollars. That he gave them his notes, but did not, according to his recollection, which, however, was not perfect, give any for the advances, and did not think he only gave one note for the account, and that he owed, on the notes, on the 20th day of June, 1868, as alleged in the bill, $10,031 00, no part of which had since been paid.

From the evidence in the case, which most conclusively establishes Session's indebtedness, we should have no hesitancy, were the bill properly framed, and all necessary parties before the court, in deciding that the complainant was entitled to the relief he prayed.

It is the general doctrine, of the Courts of Equity, that all persons, whose interest are to be affected or concluded by the decree, ought to be made parties to the suit. But Sessions, the mortgagor, was not made a party in the bill, nor was it shown, by any allegation or averment, that he had ever parted with his interest in the plantations. A transfer or assignment of the estate was not implied in the character in which Street was sued, and we are not able to understand from the loose and indefinite phrase, *as assignee of Daniel H. Sessions*, used in the bill, as descriptive of that, the interest he may

have had in it, and whether he was assignee in bankruptcy, or for the benefit of creditors, or was an absolute purchaser. The assignment, if there was any, should have been stated as fully and distinctly as any other allegation in the bill.

It is expressly required by *Sec.* 4, *Chap.* 17, *Gould's Digest*, that in a suit for a foreclosure of mortgage, upon real estate, the occupier of the premises must be made a party; and the omission to do so, without showing some adequate reason therefor, is held, not only a good ground of demurrer, but a valid objection at the hearing. *McLain & Badgett vs. Smith*, 4 *Ark.*, 244; *Fletcher vs. Hutchinson*, 25 *Ark.*, 30.

The occupant, Fowler, of one of the plantations only, was made a defendant, and it was not shown that there was no one in the occupancy of the other; this, therefore, was another defect in the bill.

The offer made by Carlton, in his answer, to redeem the plantations from the mortgage, if his title as purchaser, at sheriff's sale, had been proven, could not affect the complainant's right to a decree for a foreclosure and sale, if his case had been properly presented to the court. If he wished to redeem, he should have filed a cross bill for that purpose.

Though, for the reasons we have stated, no decree could, at the hearing, be rendered for the complainant, yet, as it clearly appeared that there were merits and equity in the bill, it should not have been absolutely dismissed, but the court should have directed, according to *Section* 155 of the Code, the proper amendments to be made, or have dismissed it without prejudice to the complainant's right to file another bill. The decree of the court below is therefore reversed, and the cause remanded to it with instructions to allow the complainant, if he wishes, to amend his bill, and to bring other parties, if necessary, before the court, and if in the further progress of the cause, nothing to the contrary is shown by the parties, who may hereafter be brought in, to render a decree in his favor for the balance alleged in the bill to have been due on the notes, upon the 20th day of June, 1868, with

eight per cent. interest from that date, and for a foreclosure and sale as prayed in the bill; but if the complainant should not see proper to amend his bill, to dismiss the same without prejudice to his right to bring another suit against proper parties.

McDERMOTT v. SCULLY.

COLLECTORS—*Authority of, to sell property for payment of taxes.*—The collector of taxes has not a general authority to sell property, liable by law to be sold for the payment of taxes, but to sell only at the time and in the manner prescribed by law.

TAX-TITLE—*Deed when void for want of recital, etc.*—Where the law requires an order of court for the sale of property for the non-payment of taxes, and that the sale be made at a specified time, the omission of the sheriff's deed to recite that the sale was made in pursuance of such order, or at the time required, renders the deed void, and such defect cannot be aided by evidence *aliunde.*

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

Clark & Williams, for Appellant.

The deed was properly executed. It is in due form and recites all the prerequisites necessary to be contained in a tax deed.

The statute, *Gould's Digest, Chap.* 148, *Sec.* 112, makes such deeds good and valid titles, in law and equity, and evidence of the *legality and regularity* of the sale of such lands until the contrary appears.

Ben T. Du Val, for Appellee.

The court did not err in excluding the deed from the jury.

The authority of the collector in the sale of lands for the non-payment of taxes due thereon is special, and he can only sell such lands as are liable by law to be sold for taxes, and only in the manner prescribed by law; the authority of the officer must be strictly pursued. *Hogins vs. Brashears*, 13 *Ark.*, 242. The recitals in the deed fail to show this.

HARRISON, J.—This was an action by William McDermott, against Michael Scully, to recover the possession of a parcel of land, containing five acres.

The answer of the defendant denied the plaintiff's title, and that he withheld the premises from him.

Upon the trial, the plaintiff offered in evidence a deed to him, for the land in controversy, from the sheriff and collector of taxes of Sebastian county, executed and acknowledged on the 26th day of February, 1870, but the court refused to allow it to be read to the jury.

The deed, among other things recited: That the north-west quarter of the north-west quarter of section thirty-three, in township eight north, in range thirty-two west, of which the parcel, in controversy, is a part, was in the year 1859, assessed in the name of James Watson, for taxation, as the property of a non-resident—that the taxes not having been paid within the time prescribed by law, the same was advertised for sale, on the 30th day of April, 1860, and on that day, ten acres, in the south-west corner of the tract, including the said five acres, was sold to George S. Birnie, for the taxes, penalty and costs, and that the said Birnie, afterwards, assigned the certificate of purchase to William McDermott, the grantee. The said deed contained no recital of any order of the County Court authorizing and directing the collector to make the sale on that day, but, it further recited that the said James Watson was, at the time of both the assessment and sale, a resident of the county, and that he had no personal property upon which the collector might have levied and distrained for the taxes. No other evidence being offered,

the verdict was returned for the defendant. The plaintiff moved for a new trial, assigning, as ground therefor, the exclusion of the deed from the jury, and his motion being overruled he appealed.

The collector of taxes has not a general authority to sell property, liable by law to be sold for the payment of taxes, but to sell only at the time and in the manner prescribed by law. *Black. on Tax Titles*, 46; *Hogins vs. Brashears*, 13 *Ark.*, 242; *Merrick & Fenno vs. Hutt*, 15 *Ark.*, 331; *Patrick vs. Davis*, *ib.* 366; *Bonnell vs. Roane*, 20 *Ark.*, 114.

By the law in force, when the sale was made, the second Monday in March was the time appointed in each year for the sale of land for taxes, and the collector had no authority to sell on any other day, unless, upon a failure to offer the lands of non-residents, the County Court, for good cause shown, should have ordered a sale of them on some other day designated by it. *Sections* 108, 136, *Chap.* 148, *Gould's Digest.* The deed, as we have said, contained no recital of such an order, and as it affirmatively appeared, upon its face, that the sale was made in violation of the statute, which required the sale to be on the second Monday in March, was void, and could not have been aided by evidence *aliunde*, if any had been offered at the trial. *Bonnell vs. Roane*, *supra*; *Hogins vs. Brashears*, *supra.*

The recital, in the deed, that the said James Watson, in whose name the land was assessed, was a non-resident of the county, and had no personal property to be levied on and distrained for the taxes due upon it, if true, could not obviate the objection to the sale, for the second Monday in March was the day fixed by law for the sale of the lands of residents as well as those of non-residents. As to that matter, however, the tax book was conclusive, and the statute required the collector to proceed against the land as it was assessed. *Merrick & Fenno vs. Hutt*, *supra*; *Kingsworthy vs. Mitchell*, 21 *Ark.*, 145; *Gossett vs. Kent.*, 19, *Ark.*, 602.

The deed was properly excluded from the jury, and the judgment is therefore affirmed.

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HECHT v. SPEARS, Adm'r.

VENDOR'S LIEN—*Nature of—Not transferrable or assignable.*—It is indispensably necessary to the existence of a vendor's lien that the parties should stand in the relation to each other of *vendor* and *vendee*; it arises out of, and is incident to the purchase, and is founded upon an implied trust between the vendor and purchaser, and the law does not authorize the vendor to transfer this lien with the note taken for the purchase money, even though he expressly professes to do so.

APPEAL FROM RANDOLPH CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

Watkins & Rose, for Appellant.

It is settled law that a vendor has a lien for the purchase money, though he make the purchaser an absolute deed, reciting the receipt of the purchase money; and this, as against the vendee or a person purchasing with notice that the purchase money is unpaid. *Scott vs. Orbison*, 21 *Ark.*, 202; *Harris vs. Hanks*, 25 *Id.*, 510. Also, that the *mere* assignment of the note, under such circumstances, does not carry with it the vendor's lien. *Shall vs. Biscoe*, 18 *Ark.*, 162; *Simpson vs. Montgomery*, 25 *Id.*, 372.

Whether the parties intended to abandon the lien, by the assignment, is a matter of fact to be gathered from the evidence and the nature of the transaction. *Griggsby vs. Hair*, 25 *Ala.*, 327.

The lien of the vendor is not confined to himself alone. 2 *Sto. Eq. Jur.*, *sec.* 1227, 1226.

It has been held in many States that the mere assignment of the notes carries the lien with it. *Lagon vs. Badollet*, 1 *Blackf.*, 416; *Roper vs. McCook*, 7 *Ala.*, 318; *Willis vs. Bryant*, 22 *Md.*, 373; *Wells vs. Morrow*, 38 *Ala.*, 125; *Rakestraw vs. Hamilton*, 14 *Iowa*, 147; *Adams vs. Cowherd*, 30 *Mo.*, 458; *Terry vs. George*, 37 *Miss.*, 539; *Murray vs. Able*, 19 *Texas*, 213; *McAlpin vs. Burnett*, *Id.*, 497; *Kern vs. Hazlerigg*, 11 *Ind.*, 443; *Moore vs. Raymond*, 15 *Texas*, 554; *Sanders vs. Aldrich*, 25 *Barb.*, 89.

BENNETT, J.—Levi Hecht brought his complaint, in chancery, against the administrator of John Dodd, deceased, and against the widow of Dodd and her husband, she having married after Dodd's death.

The complaint alleges that one Campbell had sold Dodd a tract of land, for which Dodd gave Campbell his note for five hundred dollars, for one-half of the purchase money; Campbell giving a deed for the land. Afterwards, Campbell transferred the note to Hecht, the complainant, by an indorsement in words and figures as follows:

"For value received, I assign and transfer the within note, together with the vendor's lien and my equities to and upon the following lands: South ½ of the southeast ¼ of section 31, township 19 north, range 3 east; and the northwest ¼ of section 6, of township 18 north, of range 3 east, to Levi Hecht. [Signed] C. F. CAMPBELL.

Randolph county, April 23, 1870."

The complainant seeks to have a vendor's lien declared and enforced.

Defendants demurred to the complaint—the demurrer was sustained and the plaintiff appealed.

It is settled law that the vendor has a lien for the purchase money, though he make the purchaser an absolute deed, reciting the receipt of the purchase money; and this, against the vendee or a person purchasing with notice that the purchase money is unpaid. *Scott vs. Orbison*, 21 *Ark.*, 202; *Harris vs. Hanks*, 25 *Ark.*, 510.

Also, that the mere assignment of the note, under such circumstances, does not carry with it the vendor's lien. *Shall vs. Biscoe*, 18 *Ark.*, 162; *Simpson vs. Montgomery*, 25 *Ark.*, 372. But the question arises in the case at bar, can the vendor's lien be transferred, by an express assignment, as legal rights may be?

It seems to be settled, that if a debt is secured by an express lien, as where there is a mortgage, or when the vendor has not parted with the legal title, an assignment of the debt

entitled the assignee to the benefit of the pledge. *Graham vs. McCampbell, Mass.*, 52; *Eckridge vs. McClure et al.*, 2 *Yerger*, 84; *Farmer vs. Hicks et al.*, 4 *S & M.*, 294; *Norvell vs Johnson*, 5 *Humph.*, 489.

But a vendor's equity or implied lien is not necessarily governed by the same principle. "The lien of a vendor for the purchase money," says Story, J., in *Gilman vs. Brown et al.*, 1 *Mason* 192, "is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law; whereas, the former is a mere creature of a court of equity, which molds and fashions according to its own purposes. It is, in short, a right which has no existence until it is established by a decree of a court in the particular case, and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although sometimes that appellation is loosely applied to it."

If then, a vendor's lien "is a right which has no existence until it is established by the decree of a court," how can it be assigned before its existence? That which does not exist cannot be parted with. A vendor's lien is a lien of a peculiar character. It is not like the common law lien of factors, innkeepers and others, associated with and entirely dependent upon actual possession of the property on which it is a tie; it is not like a general judicial lien, which springs into existence in favor of a party who obtains judgment, which enables him to take the lands of the defendants in execution, and continues, as such, until the judgment is satisfied; nor is it altogether like a common mortgage, although it operates and is treated in many respects as a mortgage. It differs from all these in this, that if it exists at all, it must originate with, and be an incident of the purchase itself. This doctrine, in relation to these liens, it is said, has been probably derived from the civil law as to goods. *Mackuth vs. Symmons*, 15 *Ves.*

344; *Walker vs. Priswick*, 2 *Ver.*, 622. And it seems that such a lien, upon goods, is a personal right which cannot be transferred to another. *Danbegny vs. Du Val*, 5, 7 *R.*, 606.

It is indispensably necessary to the existence of such a lien, that the parties should stand in the relation towards each other of *vendor* and *vendee* of *real estate*, the purchase money of which has not been paid. The pure relationship of debtor and creditor, or of borrower and lender, is incompatible with the existence of this species of liens.

In the case of the purchase of real estate, this lien arises as an incident thereto, and can only exist together with it. In the case of a loan, the debt is the principal, and the bond, note or mortgage are only the accidents to it. A purchase may be made or a debt may exist without an equitable lien or a bond, note or mortgage as its incidents. A bond, note or mortgage may, however, be executed, as being, in itself, the creator, evidence and incident of a debt; but a vendor's lien cannot be thus made and executed apart from, and independently of a contract of purchase. It is an incumbrance on land which can only be held by a vendor or his legal representative; and though assets may be marshalled, so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet, no third person can, as assignee of the vendor, derive any benefit from such lien, nor can it, like a bond or mortgage, be assigned, because it is not expressed in writing, or in any separate contract, but exists only as an inseparable equitable incident of the contract of purchase; and, as is seen from the above quotation from Judge Story, is only to be raised by construction of equity, in favor of the vendor only. "This lien would, no doubt, pass, on the death of the vendor, to his representatives, but it is not the subject matter of sale and transfer by contract. *Keith vs. Horner*, 32 *Ill.*, 526. "Such a lien is not assignable, even by express language." *Richard vs. Seammy*, 27 *Ill.*, 431; *Keith et al vs. Horner*, 32 *Ill.*, 526.

A vendor's lien being founded upon an implied trust,

between the vendor and purchaser, we are satisfied that the law does not authorize the vendor to transfer this lien with the note taken for the purchase money, even though he expressly professes to do so, and we are not inclined to make a law to enable him to so do.

The decree must be affirmed.

MILLER v. NEIMAN AND WIFE.

CLOUD UPON TITLE—*To remove, what bill must allege.*—A party, when asking for equitable relief in removing clouds from his title, must be in actual possession of the lands, or they must be unoccupied or not in the actual possession of another; otherwise his remedy is complete at law.

APPEAL FROM DREW CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellant.
English & English, for Appellee.

BENNETT, J.—This was a bill, in chancery, brought by Miller against Neiman and wife, in the Drew Circuit Court, to quiet title to lands. The cause was heard on the bill, answer and agreed statement of facts; the bill was dismissed for the want of equity, and Miller appealed to this court.

Miller was a non-resident and never in actual possession of the lands. They were sold by the collector of Drew county, on the 31st of May, 1867, for taxes of 1866, and purchased by German C. Berry.

The only evidence adduced on the hearing, as appears by the transcript, was an agreed statement of facts, which statement affords no proof whatever as to which party was in

actual possession of the land at the time of bringing the bill. If it is clearly shown that the defendant was in actual possession of the land, the plaintiff has an adequate and complete remedy at law. The bill does not allege that fact, but on the contrary does say, "that said lands are wild and unimproved and have never been held in actual possession by any one * * * * but that he had constructive possession of the same."

The answer of the defendant states that, after the sale and purchase of the lands, as mentioned in the bill, "the said German C. Berry took possession of them and exercised ownership over them and paid taxes on the same up to the time of his death, and that the said Stephen Berry, after the death of the said German C. Berry, took possession of said lands and held them up to the time of his death, after which defendants have held and possessed said lands, and still hold and possess them," in actual possession, and positively denies that the plaintiff has any right, claim, title, or possession in or to said lands.

A party, when asking for equitable relief in removing clouds from his title, must be in actual possession of the lands, or they must be unoccupied, or not in the actual possession of others; otherwise his remedy is complete at law.

In the case before us, the complainant alleges these lands are "wild and unoccupied," but the defendant positively denies that fact and puts the "*onus probandi*, upon the complainant to prove this allegation, which has not been done. Consequently the court below did not err in dismissing the bill.

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KIERNAN v. BLACKWELL, Adm'r., et al.

EQUITY PRACTICE—*When demurrer considered waived.*—Where a cause has proceeded to final adjudication, without judgment of the court upon demurrer filed in same, the demurrer will be considered to have been waived.

EXECUTORS—*What interest in intestates' lands.*—The executor has no interest in the lands of an intestate or control over them, save as it may be necessary to subject them to the payment of general creditors.

PURCHASERS—*When not relieved in equity.*—When the purchase money or notes, given for the purchase of land, have not been fully paid off, the purchaser can have no relief, in a court of equity, in seeking a decree for title.

FORECLOSURE—*Who necessary parties.*—It is error to render a decree for the sale of lands, or foreclosure for the purchase money, without making the heirs at law of the deceased vendee, parties defendant.

CHANCERY—*Should notice defect in parties.*—Where the heirs at law of a deceased vendee are not made parties defendants to a bill seeking a sale of land or foreclosure for purchase money, the court below, on its own motion, should notice this defect of parties; and this court, in chancery, will protect the estate and heirs at law, who are not made parties, whether the objection is or is not made.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. WILLIAM M. HARRISON, *Circuit Judge.*

Watkins & Rose, for Appellant.
Bell & Carlton and Garland & Nash, for Appellees.

WARWICK, *Spec. Sup. Judge.*—At the spring term 1867, of the Jefferson Circuit Court, Milley E. Blackwell, administratrix of the estate of James J. Blackwell, deceased, filed her bill of complaint, in chancery, against Bedelia F. Kiernan, Peter A. Finnerty and Anthony A. C. Rogers, complaining and representing that, on the 23d of December, 1859, her intestate purchased of said Bedelia F. Kiernan, certain lands, lying in the county of Jefferson, for which, by written contract, he was to pay her 113,000 pounds of cotton; that he executed to said Bedelia F. his four several bonds, in which he bound himself to deliver to her, or her agent, in the town of Pine Bluff, on the first day of January, 1861-2-3 and 4,

sixty-three averaged sized bales of cotton, of the aggregate weight of 28,350 pounds. That by written contract, under seal, between said intestate and said Bedelia F., a lien was retained on the lands for the purchase money, "as will more fully appear by reference to a certified copy of the deed, signed by Bedelia F., and the said James J. Blackwell, herewith filed and marked Exhibit "A," which exhibit is not in the record. The bill further avers that the first three writings obligatory were fully paid off and discharged by her intestate, and herself as the administratrix; that the fourth is in the hands of A. A. C. Rogers.

The bill then charges that the land did not belong, in point of fact, to Mrs. Kiernan, but to Peter Finnerty and were held by her to defraud the creditors of said Finnerty, and that said Finnerty pretended to, and did act, and was the agent of Mrs. Kiernan, and had power of attorney to receive the said cotton for her.

We do not conceive said Finnerty as having any interest in this suit, or a necessary party, and is not to be considered, except as the record shows him to have been the agent of Mrs. Kiernan.

The bill avers that the said Peter A. was the person from whom, on *final payment*, a deed should have been received, but does not aver any legal title in him to convey. The complainant avers payment of the last or fourth bond to Finnerty, as agent of Mrs. Kiernan, by receipt of cotton, at the gin house of complainant. The prayer of the bill is, that the bond in the hands of Rogers be cancelled, and that the said Kiernan, Finnerty and Rogers be divested of all title and interest in said lands, and the same be vested in the heirs of said Blackwell deceased, and other proper relief. At the fall term Messrs. Bell & Carlton, attorneys, entered the appearance of all of said defendants, (Kiernan, Finnerty and Rogers,) and filed a demurrer to the bill. This cause having proceeded to a final adjudication, without judgment of the court on demurrer, it must be considered to have been waived and cannot now be considered by this court.

At the same term, Rogers, by Bell & Carlton, his attorneys, filed his answer, admitting the purchase of the land; denying all knowledge of the payment of the three first bonds, and avering the fourth to be in his possession, and his property, and that he had brought suit to recover the same, in the Jefferson Circuit Court, denying that it (the first) had ever been paid.

Mrs. Kiernan filed her answer and made it a cross-bill against Mrs. Blackwell and Rogers, claiming the third and fourth bonds to be outstanding, unpaid and her property and, without making the heirs at law of James Blackwell, deceased, parties, prays that the amount due her be ascertained, and the same declared a lien on the lands, for foreclosure, etc. Rogers answered the cross-bill of Mrs. Kiernan, and in turn made it a cross-bill against Mrs. Blackwell and Mrs. Kiernan, claiming to own the fourth bond by purchase, etc., and without making the said heirs parties, he prays that it be ascertained what amount is due him on the said fourth bond; that it be declared a lien, and for foreclosure, etc. This is all of the pleadings that we deem it necessary to notice.

On the foregoing pleadings, testimony was introduced, which in the view of the case we have taken, need not be noticed. On the final hearing, the court found in favor of Rogers, on the fourth bond, due the 1st of January, 1864, and that there was due on the same $4000; declared the same to be a lien on the lands and ordered foreclosure and sale of the lands to pay the amount so found due.

We observe first: that on the final hearing at least a portion of the original purchase money was unpaid; hence Milley E. Blackwell could not have the relief she prayed for. Second: that neither Mrs. Kiernan or Rogers who, both claiming relief against the land for purchase money, do not make the heirs at law of James J. Blackwell, deceased, parties defendant, but proceed alone against the administratrix, and the court, without having them brought in, renders a final decree against Mrs. Blackwell, as administratrix, and

declares the sum found, due Rogers, a lien on the land and orders its sale. That in a proceeding to foreclose a mortgage or vendor's lien on lands, the heirs at law are necessary parties, without whom no final decree can be entered, seems to us not to require discussion.

The executor of an estate has no interest in the lands of an intestate, and no control over them, save as it may be necessary to subject them to the payment of general creditors. It was the duty of the chancellor, in the court below, to have noticed the defect of parties on his own motion; it is equally our duty in chancery to protect the estate and heirs at law, who are not made parties, whether the objection is or is not made.

The court erred in rendering a decree for the sale of the lands, without requiring the heirs at law of James J. Blackwell, deceased, to be made parties defendant. We cannot pass this case without noticing at least one point in the record, complained of by appellant. On the trial of the cause, the written statement of one Brewer, not under oath, was read in evidence, under an agreement signed by the attorneys for Mrs. Blackwell and Rogers, and against the objections of solicitors for Mrs. Kiernan. This statement was wholly against the interest of Mrs. Kiernan, and we know of no rule by which this statement could be considered as evidence against the objection of Mrs. Kiernan. The notes not having been fully paid, Mrs. Blackwell, the original complainant, could have no relief; the heirs at law of James J. Blackwell, deceased, not having been made parties, neither Mrs. Kiernan or Rogers could have had foreclosure. The court should have dismissed the original bill of Mrs. Blackwell, and also the cross bill of Mrs. Kiernan and Rogers. For these reasons, the decree of the court below is reversed, and the said original bill of Mrs. Blackwell, the cross-bill of Mrs. Kiernan, the cross-bill of A. A. C. Rogers, are severally dismissed without prejudice to the rights of either. Ordered by the court, that each of the several parties pay their own costs.

HOLMES & SALMON v. COOPER.

JUDGMENTS IN ATTACHMENTS.—*Liability of Securities.*—Under the act of *March 17th* (*Acts of* 1866–7) the liability of the securities, in an attachment bond, can only be for the amount of the appraised value of the property attached, and in case the verdict or damages found should be for an amount greater than the appraised value of the property, the court should render judgment against the principal and securities for the amount of the appraised value of the property, and against the principal for the balance.

APPEAL FROM PHILLIPS CIRCUIT COURT.

Hon. M. L. STEPHENSON, *Circuit Judge.*

Palmer & Sanders, for Appellants.

The only evidence, before the court, of the property seized by the sheriff, is his return. It is the *record* evidence of the fact, not to be contradicted. *Rose vs. Ford*, 2 *Ark.*, 26; *Dawson vs. State Bank*, 3 *Ark.*, 505; *Stewart vs. Houston*, 25 *Ark.*, 311; *Tucker vs. Bond*, 23 *Ark.*, 268; *Ayres vs. Dupuy*, 27 *Tex.*, 593; *Carr vs. Commercial Bank*, 16 *Wis.*, 50.

Estoppels are odious in law. 1 *Serg. and Rawle*, 444. They are not admitted in equity against the truth. The insertion of the recital in the bond of "1 Gin Stand $200 00," is clearly a mistake of the draftsman, as the whole record shows.

The transcript also shows another error, which is cause for reversal. The affidavit sets out the debt due, at seven hundred and fifty dollars. This verdict and judgment is for eight hundred dollars. This cannot be allowed. The sum sworn to, will be taken as the true sum due. *Heard vs. Lowry*, 5 *Ark.*, 522.

A. H. Garland, for Appellee.

A motion for new trial was made and overruled, but there is not an exception saved as to law or evidence, and nothing is presented for this court to review at all. *Rose Dig.*, *p.* 559, *Sec.* 45. New Trial.

If any point is made on the judgment being rendered

against the sureties, it is null and distinctly met by this court in *Ward vs. Carlton*, 26 *Ark.*, 662. *See act of* 1867, *March* 7. *Acts of* 1866–7, *p.* 294, *et seq.*

HON. W. I. WARWICK, *Special Judge.*—This is an action of covenant, commenced by attachment, under the act of *March* 17, *Acts of* 1866–7, and was commenced at the May term, 1868, of the Phillips Circuit Court. The attachment was levied upon certain property, and the property was appraised, as required by the act, at $750 00. Defendant to the suit, William A. Salmon, entered into bond, with L. H. Mangum and John D. Parish as securities, and the property was returned to him; all of which is made to appear by the return of the sheriff on the writ of attachment. The bond for the return of the property is in the sum of $1,500 00, being double the amount of the appraised value of the property levied upon, as appears from the sheriff's return, but in the recitals of the bond, among other property, is mentioned, "1 Gin Stand $200," as having been levied upon by the sheriff, which does not appear on the sheriff's return as having been levied upon, nor is it on the list, made out by the appraisers, accompanying the sheriff's return. The defendant filed a special plea, and, on trial of the cause, on the 1st day of July, 1871, the jury returned a verdict in favor of Cooper, for $800 00. Cooper, in his declaration, lays his damage at $1000, and in the affidavit for writ of attachment, made on the 3d of February, 1868, avers the defendant was indebted to him in the sum of $750 00. The court gave judgment on the verdict of the jury, for $800 damages, with a provision in the judgment, that if the same be made out of the securities, Mangum and Parish, they might satisfy the same by the payment of $750, as the appraised value of the property seized by the officer, in case the judgment and costs should exceed that amount.

Defendants filed a motion for a new trial, assigning five causes, which was overruled by the court; the first four of which cannot be reviewed by this court, inasmuch as the re-

cord does not show any of the evidence produced on the trial, or the instructions of the court. The fifth cause assigned is, "Because the judgment rendered on said verdict is unwarranted by law."

It is urged that the judgment against the defendant Salmon is excessive, for that the *affidavit* for attachment sets out the debt due at $750, which, it is insisted, must be taken as the true sum due. There appears, on the transcript, an entry of remittitur by Cooper of $50, in vacation. This being no part of the *record*, in this case, cannot be considered. The affidavit was made on the 3d day of February, 1868; the verdict of the jury and the judgment of the court on the 1st of July, 1871. The jury might well add interest to the amount due Cooper on the 3d day of February, 1868, and as the judgment does not exceed the amount stated in the affidavit in a sum greater than the legal interest, we find no error.

The Statute (acts of 1866–67, page 296, Sec. 5) under which the bond for the return of the attached property was given, is as follows:

"Whenever, hereafter, the defendant in any attachment suit shall give bond, whereby the attachment shall be dissolved, as now provided by law, and on the trial of such suit, judgment shall be given against such defendant, judgment shall also be entered against the securities in such bond, jointly with the principal, for the amount recovered of said defendant; *Provided*, that no greater amount shall be recovered of the said securities, than the appraised value of the property seized by the officer."

The liability of these securities is fixed by this statute, and not by any subsequent law, and could only be for the amount of the appraised value of the property. It is a general rule of law, applicable to this case, that the return of an officer is conclusive on all parties to the suit. In this case, the sheriff returns that he levied upon certain property; the list made by the appraiser describes the same property, and the aggregate value fixed at $750. No mention is made of the gin

stand, and we can but conclude that its recital in the bond is a clerical error. If actually levied upon, it might have been made to appear by amended return of the sheriff.

The judgment against Mangum and Parish, being for more than the appraised value of the property, is erroneous. The judgment of the court below is reversed, and the cause remanded, with instructions to the Circuit Court of Phillips county, upon the finding of the jury herein, to render judgment against the defendants, Salmon, Mangum and Parish, for seven hundred and fifty dollars, part of the plaintiff's damages so assessed, and against defendant, Salmon, for the further sum of fifty dollars, the balance of his damages so assessed, and his (appellee's) costs expended in the court below.

O'CONNER v. THE AUDITOR.

DONATED LANDS.—Lands were donated to W. C. afterward applied to the Auditor to purchase the same, tendering the taxes, penalty and costs due thereon; and also offered to return the donation deed, with the written statement of W. that he could not comply with its conditions, and that he relinquished to the State all his rights in favor of C. Held: That the Auditor could not accept a return of the deed and cancel the entry.

PETITION FOR MANDAMUS.

James H. O'Conor, for Petitioner.
Montgomery, Attorney General, for Respondent.

GREGG, J.—The petitioner applied to the Auditor of the State to purchase the west half of the northwest of section twenty, township three south, range three east, as forfeited lands, and tendered the amount of taxes, penalty and costs due the State thereon.

The Auditor refused to sell, because the lands had been granted to J. L. Waterhouse as a donation, and by the Auditor, under *Chapter* 101 *of Gould's Digest*, deeded to him; but the petitioner offered to return that deed, with a written statement from Waterhouse that he had not, and could not comply with its conditions, by paying for the improvements which were on the lands, and that he relinquished to the State all his rights in favor of the petitioner.

Upon this, the Auditor refused to cancel the deed, or sell and convey the lands to the petitioner, and to compel him to make such sale and conveyance is the object of this petition.

The chapter referred to provides for donation of certain State lands to citizens upon condition of settlement, etc. *Section* 19 provides that if any individual obtains a donation to a tract of improved lands, such person shall, within three months, pay to the owner of such improvements double the value thereof, and if he fails so to do, he forfeits his donation, and the owner of the improvements may purchase the lands, including his improvements, by paying all arrearages of taxes, etc.

Section 17 provides that donated lands shall not be exempt from taxes. *Section* 25 provides for the collection of taxes on such lands, and *Section* 26 makes them subject to the same penalties, forfeitures, etc., as other taxable lands.

These are the only methods pointed out by law for divesting the donee of title if he fails to comply with the conditions of his purchase, or to meet the accruing taxes.

The Auditor is not authorized to transact all manner of business for the State at discretion, but, like other State officers, he is empowered to do certain acts for and in the name of the State, but he is of the class of peculiar special agents who can exercise no authority except what is evidently embraced within the lawful grant.

Then, without authority of law, he could not accept a return of the deed and cancel the entry, nor could he do so

upon any written acknowledgment that the donee had forfeited his entry.

The owner of the improvements, upon filing the proper proofs, might be allowed to purchase the land by paying all taxes, etc., but if no such application is made, the lands must go upon the tax books, and take such course as other individual lands.

Therefore, without discussing the question of jurisdiction, we hold that the petitioner is not entitled to mandamus, and his petition is dismissed with costs.

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GRIDER AND WIFE v. CLOPTON.

FRAUD—*What amounts to.*—Representations to amount to fraud must be of a decided and reliable character, holding out inducements, to make the contract calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations, and in the absence of means of information to be derived from his own observation and information, and from which he could draw conclusions to guide him in making the contract, independent of the representations of the vendor.

SAME—*When recision of sale sought.*—When one seeks to rescind the sale of land, if the contract be executed and the conveyance made, and the vendee entered into possession, he is presumed to have examined the evidence of title, and if he was induced, by fraud, to accept the conveyance, if not evicted, he must show title paramount.

APPEAL FROM PHILLIPS CIRCUIT COURT.

HON. JOHN E. BENNETT, *Circuit Judge.*

U. M. Rose, for Appellants.

This bill should have been dismissed without prejudice, so that appellee might begin a new suit whenever he should acquire a title that would justify such a step. *See Wakefield v. Johnson*, 26 *Ark.*, 506.

Garland & Nash, for Appellee.

1st. The lien of the appellee for the unpaid purchase money was good—2 *Wash. Real. Prop.* 82, 92 *et seq.*

2d. As to the allegations of fraud, there is no averment that Burgett could not have ascertained the facts for himself, and hence these allegations are of no moment—11 *Ark.* 58 *et seq.*; *Adams Eq.* 179, 187; *Broom's Legal Max.* 693, 694.

3d. We submit upon the law and the facts of the whole case there is no good reason why the decree should not be affirmed. 1 *Sugd. on Vendors* 324, 328; 432 *and note*, 436; *See Folley v. Cowgill*, 5 *Biford* 20; *Morgan v. Shopp*, 7 *Porter (Ind.)* 540; *Diffindorf v. Gage*, 7 *Barb. (N. Y.)* 21; *Ib.* 66, 68; 10 *Hump. (Tenn.)* 579, 581, 84, 85, 86; *Hilliard on Vendors*, 329, 30, 31 *and* 32; 22 *Ark.* 464; 13 *Ib.* 499.

GREGG, J.—On the 14th day of December, 1865, H. Clopton sold and conveyed, by deed, to Nancy P. Burgett, one of the appellants, who has since intermarried with Jesse Grider, certain lands for the sum of $30,000; ten thousand of which was paid at the time, and the residue of $20,000 to be paid on or before the 1st of May thereafter, retaining a lien, by special stipulation in the deed, for the balance of the purchase money. The tract sold containing, in a connected body, the quantity of eight hundred and seventy-eight (878) acres. At the May term, 1867, Clopton filed his bill to foreclose his vendor's lien for the purchase money remaining unpaid, admitting subsequent payments to the amount of $8,500.

Grider and wife, by answer, cross bill and amended cross bill, assert that the lands were not sold to said Nancy P., nor had she anything to do with making the purchase, but that, although the deed was made to her, it was bought by her father, Isaac Burgett, since deceased. That her said father, being a man of large means, desired to make an investment for the said Nancy P.; that Clopton, knowing this fact, made divers representations in regard to his plantation, viz: that

it contained 500 or 550 acres of tillable land, an orchard of 25 or 30 acres of the finest description of fruit; that it was in a connected body; that it was equal in regard to fertility to any of the table lands of Phillips county, etc. That her said father, being then in ill health, was unable to examine said plantation, and did not examine it, but purchased it, relying solely on the representations of Clopton, taking the deed set out by Clopton, first paying him $10,000, and agreeing to pay the remainder as set out in the original bill. Avers that while it is true, that there are 550 acres of cleared land therein, yet that 150 of it is hill side, so washed by ravines and gullies, during the war, as to be wholly unfit for cultivation. Avers that the orchard does not contain the number of acres represented by Clopton, but only eighteen, nor does it contain the quality of fruit represented by him. Avers that her father was to pay the balance of said sum of purchase money out of his own means, and never consulted said Nancy P. about said purchase. They make Henry E. and Isaac Burgett, administrators of the estate of her said father, parties defendant to the cross bill, and aver that Clopton and the said administrators well knew that the same was intended to be and is a charge against the estate of her father. That Clopton well knew that the many representations he made in regard to the land, and on the faith of which her father purchased, were false, etc. They further aver that, the contract having been made with her father, and agreed to be paid out of his moneys and estate, if any sum is due on said lands, the same should in equity be paid by his personal representatives, Henry E. and Isaac Burgett, jr., out of the estate of said Isaac Burgett, deceased, and make said Henry E. and Isaac, parties defendant to their cross bill.

By amended cross bill, they further charge that, of the lands conveyed to her (Nancy P.) by metes and bounds, Clopton was not at the time of said sale and making of said conveyance, the owner, nor had he any title whatever thereto of about 26 acres; and also charge that he sold all the lands

contained in his enclosure, and did not convey, nor does the lands described, in the deed, cover 26 acres of the land he purported and represented he was selling, and pray answers from the administrators of the estate of her father, and from Clopton, and that Clopton be required to refund all moneys paid him on the purchase money, and the said sale be rescinded; that if that be not done, then that an abatement be made for the lands conveyed, to which he had no title, and also for the land that he represented he was selling, but did not convey, and that the residue of the purchase money be declared a charge on the estate of Isaac Burgett, deceased.

Henry and Isaac Burgett, administrators of Isaac Burgett, deceased, answer the cross bill of Jesse and Nancy P. Grider, and aver that, from their own knowledge, at the time of the sale of said lands, and while negotiations for their sale were pending, Nancy P. was a *femme sole* of full age; that, their intestate intending to give her the sum of $15,000, offered her the choice between taking that sum in cash, or he would invest it in part payment of the sum demanded by Clopton for his plantation, and that, after due deliberation, she chose the latter, and deny that the purchase was made without her knowledge. They also aver that their intestate never intended to advance to said Nancy P. or pay, of his own means, on said purchase, more than the sum of $15,000. This sum they aver to have been fully paid; first, by their intestate, in his lifetime, in paying the $10,000, at time of conveyance, and subsequently by themselves as administrators, out of the assets of the estate, by payment of $5,000 more, and that any additional sum over the $15,000 that has been paid, has been in pursuance of arrangement with said Nancy P. and not out of the estate.

They further say, in their answer, "that while they do not know that their said intestate, in buying said lands, as agent for his said daughter, Nancy P., did not depend upon the representations of said Clopton, they do not believe that he did, as they well remember to have heard him say, before said

trade was finally closed, that he had rode over said land, and had fully examined it; that part of it was sometimes washed, but that having cultivated hill lands in Missouri, he knew exactly how to manage it, and that he thought Clopton was mistaken in saying the orchard contained twenty-five acres; that he did not think it contained over twenty acres, if so much."

Clopton answered the cross bill of the Griders; denies the making of any false or fraudulent representations to Isaac Burgett, to induce him to make the purchase; denies that said Burgett relied upon any representation made by him, and avers that he (Burgett) rode over the place, examined every part of it, and particularly all the cleared lands, including the hill side and the orchard, and expressed himself well pleased with it, and that the purchase was made after full and careful examination of the lands, said Burgett relying upon his own judgment. He admits that in the description of the lands, set out in the conveyance, there is twenty-six acres described, to which he has no title, and that he represented himself to own and sell twenty-six acres which he did not, by his deed, convey, and offers to make good title to said twenty-six acres of land to said Nancy P. He avers that said Nancy P. was put in possession, and is now in possession of all the lands (878 acres) intended to be sold and conveyed; that in conveying to her the said twenty-six acres to which he had no title, he intended no fraud, and believed he was correctly describing the lands; that the same was a mistake, growing out of error in former descriptions, etc.

On the pleadings and proofs, the court decreed in favor of Clopton, and found due him the sum of $18,132 92, and that the same should be paid by Jesse and Nancy P. Grider, by a day named in the decree; declared the same a lien on the lands, and for their sale etc. From this decree Jesse and Nancy P. Grider appealed.

We have carefully examined the testimony in this case, and conceive it to be amply established by the pleadings and

proof, that Isaac Burgett, prior to the purchase of the lands of Clopton, made a personal examination of the place; that he saw the whole of it, at least, of all that had been ever cultivated. This is testified to by four witnesses, and nothing to the contrary appears in the record. That after he made this examination, negotiations for its sale and purchase were pending for several weeks. That he was a man of large experience in lands, and a successful planter, and one who, in matters of this kind, relied on his own judgment.

The testimony shows that Clopton, in his representations as to the number of acres of cleared land, never expressed himself positively, but thought there was 500 or 550 acres, and was willing, before its sale, to have the lands measured; so too, in regard to the orchard, he thought there was about 25 or 30 acres, and that it had always been called so by the overseers. In both of these points, Mr. Burgett seems to have made personal examination before the sale, and to have thought there was not so much of either as Clopton, so that he could not have been deceived by any representation Clopton made, or be said to have relied upon them.

The testimony also shows that he examined the hillside, saw its condition, and thought he knew for what purpose it was available. Nor do we find that the averments, set up in the cross bill of Jesse and Nancy P. Grider, of fraudulent misrepresentations on the part of Clopton, and that it was upon reliance upon the statements of his, that induced the purchase, to be sustained by the proof.

It is also affirmatively established by Clopton, uncontradicted by any proof, that the appellants were put into immediate possession of all the lands intended to be sold and conveyed, viz: the Clopton plantation, containing 878 acres; and have ever since been possessed of the same; that the description of the 26 acres, in Clopton's conveyance, to which he had no title, was a mistake, untainted by any fraud on the part of Clopton, and on the trial of the cause, Clopton, who had procured a perfect title, tenders and files with the exhibits,

a conveyance for the 26 acres omitted in the original deed, and which last named tract appears to have been at all times in the possession of appellants.

When the sale was finally closed, there were no notes or other obligations given for the purchase money, and the answers of Henry and Isaac Burgett to the cross bill of appellants, being directly responsive to inquiries of Jesse and Nancy P. Grider, disclose that their intestate purchased the place, as agent and in behalf of Nancy P., in pursuance of arrangements made with her, and that he intended to pay only the sum of $15,000 of his own means. In this, appellants seem to have acquiesced, for the administrators paid $5000 out of the assets of the estate, and the sums of money paid in excess of $15,000 ($3500) were paid by Henry E. Burgett out of his private means, as an advancement to his sister, the said Nancy P., and by arrangement with her.

The law applicable to this case is well settled, and does not require elaboration. Where a party seeks in equity to rescind a contract, for fraudulent representations made by the vendor, "they must be of a decided and reliable character, calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations, and must have been made in the absence of the means of information on the part of the purchaser, to be derived from his own observation and inspection, and from which he could draw conclusions to guide him in making the contract, independent of the representations of the vendor." *Yeates et al. vs. Pryor*, 11 *Ark.*, 58.

Where one has the opportunity to examine for himself and fails to do it, but purchases on the representations of another, if he be deceived, he must suffer from carelessness and want of care. So, in a case like the one at bar, where the means of information were not only accessible, but were availed of, and a personal examination made, equity will not allow him to say that he was induced to purchase on the statements and representations of the vendor. *Morgan vs. Snapp*, 7 *Porter*

(*Ind.*), 537; *Bolton vs. Branch*, 22 *Ark.*, 455; *Adam's Equity*, 179, 187.

So too, in regard to title, where one seeks to rescind the sale of land, if the contract be executed and conveyance made, and the vendee entered into possession, he is presumed to have examined the evidence of title, and if he was induced by fraud to accept the conveyance, if not evicted, he must show title paramount. In the case at bar, the failure to originally convey, was by mistake, and for only a small portion, and even were there title paramount, or had the appellants been evicted, equity would not rescind the contract, but would allow an abatement. In the case at bar, the vendor procures complete title, and to correct the mistake, tenders and exhibits a conveyance of the same to appellants. If, at most, appellants could have only asked an abatement for the value of the 26 acres, if Clopton could not have made good conveyance, they certainly cannot complain that a court of equity has permitted him to make them good title and enforced a performance of the contract.

Where the vendee accepts a deed, and possession, and has not been disturbed in his possession, and there has been no fraud, there can be no recision of the contract at his instance. *Bolton vs. Miller*, 15 *B. Mon.*, 626; *Sugden on Vendors*, 432 (*n.* 1).

All the questions raised by this record were fully discussed and settled in the case of *Yeates et al. vs. Pryor*, 11 *Ark.*, 583, and is followed as the law of this case.

The decree of the court below is in all things affirmed, and the case remanded to the Circuit Court of Phillips county for such further proceedings as are necessary to carry the decree into execution.

BENNETT, J., being disqualified, did not sit in this case.

HON. W. I. WARWICK, *Special Supreme Judge.*

YONLEY v. LAVENDER et al.

FEDERAL JUDGMENTS—*When against administrators.*—Where a judgment was obtained, in a court of the United States, against an administrator in his fiduciary character—execution sued out, lands belonging to the estate sold, and marshal's deed to purchaser; on ejectment brought by purchaser: *Held*, That a litigant obtaining a judgment, in a court of the United States, against an administrator in his fiduciary character, cannot proceed directly by execution against the estate, and any sale made or deed obtained, under such process, is invalid and worthless; but, the judgment creditor, as in cases of judgments in the State courts, is remitted to the court of probate there to receive payment or his *pro rata* out of the assets of the estate.

APPEAL FROM ARKANSAS CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Watkins & Rose, for Appellant.

On behalf of the appellant it is submitted: That the ruling of this court, in the case of *Hornor vs. Hanks*, 22 *Ark.*, 572, and upon which the court below based its decision, is incorrect, in principle, and annulled by other decisions of binding obligation.

As to the issuance and final control of the final process of the Federal courts, it is confessed that there are no acts of Congress by which any substantial element of power has ever been abdicated. The act of May 19, 1828, 4 *St.*, 281, and the act of August 1, 1842, 5 *Stat.*, 499, are the only legislation on the subject. The case of *Williams vs. Benedict*, 8 *How.*, 111, was a question of lien, and the court did not pass upon this question. Neither are the cases of *Peale vs. Phillips*, 14 *How.*, 374; *and the Bank of Tenn., vs. Horn*, 17 *How.*, 160, in point; the question considered being insolvency.

The decision in *Hornor vs. Hanks*, is in conflict with that of the *United States vs. Drennen, Hempstead C. C. R.*, 325, where the court held that "if a court is competent to pronounce judgment, it must be equally competent to issue execution to obtain its satisfaction;" saying that "a court with-

out the means of executing its judgments and decrees, would be an anomaly in jurisprudence, not deserving the name of a judicial tribunal. It would be idle to adjudicate what could not be executed; and the power to pronounce necessarily implies the power of executing." The court refer to the 14th section of the judiciary act, (1 *St.*, 81,) giving to the courts of the United States power to issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the *principles and usages of law.* This in 1789. The words in italics referred to the usages and principles of the law as then understood, the common law of England. *Smith's Constitutional Construction Sec.* 482. That executions by this law might and did issue against executors and administrators is a matter about which there is no controversy. Here, then, is an undeniable grant of power. The court, in the case of *Hornor vs. Hanks*, we respectfully submit, fail to show any revocation of this power.

Accordingly we believe that there is no case, except that of *Hornor vs. Hanks*, wherein it has been held in such cases that, after sale and deed made by the marshal, the proceedings could be attacked collaterally and regarded as absolutely void.

That the decision in that case is incorrect: See *Suydam vs. Broadnax*, 14 *Pet.*, 75; *Hyde vs. Stone*, 20 *How.*, 175; *Boyle vs. Zacharie*, 6 *Pet.*, 658; *Palmer vs. Allen*, 7 *Cranch.*, 550; *Wayman vs. Southard*, 10 *Wheat.*, 23; *Bank of the U. States vs. Halstead.* 10 *Wheat*, 53; *Beers vs. Houghton*, 9 *Pet.*, 362; *Ogden vs. Saunders*, 12 *Wheat*, 280; *U. States vs. Knight*, 14 *Peters*, 316; *McNutt vs. Bland*, 2 *How.*, 17; 1 *How.*, 306; 14 *Peters*, 74 *S. P*; *Bank of Hamilton vs. Dudley's Lessee*, 2 *Peters* 526; *Duncan vs. Dorst*, 1 *How.*, 306; *McKinn vs. Voorhees*, 7 *Cranch*, 279; *Payne vs. Hook*, 7 *Wal.*, 429; *Peck vs. Jenness*, 7 *How.*, 624; *Riggs vs. Johnson Co.*, 6 *Wal.*, 187; *Ableman vs. Booth*, 21 *How.*, 516; *Dodge vs. Wolsey*, 18 *Id.* 346; *Green vs. Creighton*, 23 *Id.*, 106; *Dupuy vs. Bemiss*, 2 *La. An.*, 513. But, furthermore, the proceeding in *Hornor vs. Hanks* was a *direct* proceeding.

The present proceeding is wholly collateral, and the appellant stands only in the light of an ordinary purchaser at such sales. The case, then, has no real application.

No court has gone further than this to uphold judicial sales when attacked collaterally. In *Adamson vs. Cummins*, 10 *Ark.*, 541, which is approved in *Hornor vs. Hanks*, the court held that "a judgment obtained in the Circuit Court against an administrator, as such, cannot be executed until the estate is settled in the Probate Court; but an execution issued on such judgment, before it is ascertained that there are assets to pay it, is irregular, *not void*. If the administrator permits a sale under execution to a person who has no notice of the irregularity of its issuance, such sale will not be set aside, though the execution may be quashed." This case has been often approved, particularly in *State Bank vs. Noland*, 13 *Ark.*, 304; *Newton vs. State Bank*, 14 *Ark.*, 15; *Byers vs. Fowler*, 12 *Id.*, 272; *Newton vs. State Bank*, 22 *Id.*, 28. There is no question but what this is the law, and if the court below had followed it, the appellant must inevitably have had judgment. The two cases cited in *Hornor vs. Hanks*, *p.* 587; of *Voorhees vs. Bank of the United States*, 10 *Pet.*, 439; *Huff vs. Hutchinson*, 14 *Howard*, 588, are emphatically to the same effect. These were cases at law. The court, in *Hornor vs. Hanks*, insisted that they had no application to that direct proceeding in equity. In this case they are exactly in point, and go along with the cases last cited.

Garland & Nash, for Appellees.

It is submitted on behalf of the appellees:

1st. That the deed from the marshal, (upon which appellant relies) fails to state the facts of advertising the lands for sale, and hence his deed is no evidence of title. That the deed should show upon its face, by way of recital, that the law of the State, regulating sales under execution, has been complied with in every particular. *See Gould's Dig.*, *p.* 510-11, *Sec.* 65; *Hardy vs. Heard et al.*, 15 *Ark.*, 184. That the duty upon the

sheriff to advertise before sale, is an essential element of title, is mandatory, and not merely directory. *See* 17 *Ark.*, 106; *Ib.* 546 *et seq.*; 22 *Ark.*, 19 *et seq.*; 14 *Ark.*, 39 *et seq.* So, also, are the decisions of other States on statutes like ours. 4 *Dev.*, (*N. C.*) 549; 1 *Watts & Serg*, 519; 4 *Yeats* (*Penn.*) 213; 1 *Brev.* (*S. C.*) 226; *Ib.*, 507; 4 *Blackf.*, 228; *Hayden vs. Dunlap*, 3 *Bibb*, (*Ky.*) 216; *Webber vs. Cox*, 6 *Monroe* 110; *Sanders heirs vs. Norton*, 4 *Monroe* 467; *Allison vs. Taylor's heirs*, 3 *B. Monroe*, 366. The sheriff has no discretion as to these matters, and his deed must show he has done them. *Casey vs. Gregory*, 13 *B. Monroe* 507; *Moore vs. Brown*, 11 *Howard*, 424; cited approvingly *in* 15 *Ark. Sup.*, 187; *Kane vs. Preston*, 22 *Miss.*, 133; 12 *S. & M.*, 147; 8 *Blackf.*, 180; 2 *Caine's Reps.*, 61; 14 *Barb.*, 10; 15 *Mass.*, 329–330.

That in sales of property, in the United States Courts, the laws regulating such things in the particular States are adopted as a part of the process act of the United States Courts. *Conklin's Treatise*, *p.* 431 (*4th Ed.*); *Brightly's Digest of Federal Courts*, *p.* 659; (11 *Process and return*;) *Ib.* 410; (*Execution*, *Sec.* 1 *et seq.*;) *Hempstead C. C. Rep.*, *p.* 726; *rule* 2 (*appendix*).

2d. On the proposition of law asked by the appellant, in the court below, we submit that the judgment and execution, under which the appellant bought, being rendered in a Federal court against an administrator, the sale was invalid, and nothing was conveyed by and under it. That after obtaining judgment in that court, the parties should have gone to the Probate Court for satisfaction, and could not sue out execution and sell from the Federal court. *See* 9 *Peters*, 62; 2 *Black.*, 599; *Brightly's Dig. Federal Courts*, *pp.* 811–22; 4 *Mason*, *C. C.*, 111; *Brightly's Dig.*, 451 *et seq.*; 3 *McLean*, *C. C.*, 174; *Brightly's Dig.*, *p.* 424, *Sec.* 180, 181, 182, *et seq.* But as decisive of this question, in all its length and breadth, the court is referred to *Hornor vs. Hanks*, 22 *Ark.*, 572, *et seq.* This is just the question there decided. And this court must overrule that case before Yonley's purchase can be upheld.

GREGG, J.—The appellee sued the appellant, in ejectment, in the Arkansas Circuit Court, for *Sections* 15 *and* 16, in township six north, of range six. The defendant, Anderson, answered that the *N* ½ *N E qr.*, and *S* ½ *S E qr.* of *Section* 16 belonged to him individually, in fee, and referred to his chain of title, etc. And he and the other defendants, Lavender, Pace, and Ross, jointly answered, denying the plaintiff's title to all the property claimed; and the issues, formed by consent of all the parties, were submitted to the court, sitting as a jury, upon an agreed statement of the facts to the following effect:

"In October, 1869, William H. Halliburton, who was the administrator of Alfred B. C. DuBose, was removed and the defendant, Lavender, was duly appointed administrator *de bonis non*, and that he is still such administrator and in that capacity, as proprietor, and the other defendants as lessees under him, held all the lands sued for, except the 160 acres owned by the defendant Anderson.

"That on the 3d of March, 1869, the appellant purchased these lands, at a marshal's sale, upon execution of a judgment of the Circuit Court of the United States, for the Eastern District of Arkansas, against William H. Halliburton, as the administrator of the estate of Alfred B. C. DuBose; that the two 80 acre tracts, claimed by Anderson, had been conveyed to him, etc.; that the value of the rents of that 160 acres was $500 per year, and of the remainder of the lands, from the 3d of March, 1869, to the time of trial, was $4325 00."

The proceedings and judgment in the United States Circuit Court, in favor of Auguste Gautier against said Halliburton, as such administrator, upon which said execution had been issued, and the execution and marshall's deed to the appellant, were all referred to and taken as evidence.

It is unnecessary to refer to the facts showing Anderson's title to the said 160 acres, as that is not urged here by the appellant.

The appellant moved the court below to declare two propositions of law.

"First: That said plaintiff, by his said purchase thereof at the marshal's sale, and the deed of conveyance therefor by the marshal to him, in execution of the judgment of said Circuit Court of the United States, set forth in the agreed statement of facts, became and is entitled by law to recover, in this action, the possession of so much of the lands and premises in controversy as were held and occupied, at the time of the commencement of this suit, by the defendants Lavender, Ross, and Pace, being all of said lands and premises, except the two eighty-acre tracts claimed by said Anderson and described in his answer, together with damages for the detention thereof, according to the value of the rents of the same, as agreed on."

The second proposition related to the 160 acres, to which Anderson has set up title.

The appellees asked the court, upon the agreed statement of facts, to declare the converse of the appellant's proposition to be the law of this case, as applicable to the facts, which the court did, and the appellant excepted.

The court found for the appellees and rendered judgment that they go hence and recover their costs from the appellant, from which ruling and judgment he appealed to this court.

The main proposition is to determine whether or not a litigant, who obtains judgment in a court of the United States, against an administrator in his fiduciary character, can proceed directly by execution against the estate, or whether, as in case of judgments in the State courts, he is remitted to the court of probate, there to receive payment or his pro rata out of the assets of the estate.

The appellees insist that the marshal's deed to Yonley fails to sufficiently recite the publication of notice of the sale. The facts, constituting notice, are not detailed as fully and accurately as they might have been, yet we are inclined to the opinion that publication of notice sufficiently appears, and we will direct our attention to the main proposition.

The spirit of our institutions is to secure the full and equal rights of all of the citizens of the government, and to avoid

prejudice or local influence, our political system is so organized that the complainant, who is remote from the forum, is, by the general government, furnished a court, the officers of which are not supposed to be within local influence. But, in this case, it is insisted the creditor, Gautier, claimed more than equal privileges with the inhabitants of the State, who alike were creditors of the deceased, and that he sought to subject the whole landed estate to the payment of his demand, while others had to appear before a legal trustee and accept a *pro rata* of the assets.

Appellant's counsel concede that in the case of *Hornor vs. Hanks*, 22 *Ark.* 572, this court passed upon this question; but we are asked to review that case, and to overrule the same, insomuch that it holds that the Federal Courts have not a discretionary power to enforce their judgments by direct execution against lands and tenements of a decedent in the hands of his representative for administration.

DuBose died before Gautier took any steps to enforce payment of his demand; the validity of that demand depended upon the laws when made, and whatever these laws were, they entered into and formed a part of the contract. When made, the creditor had a right to sue his debtor (upon the maturity of his demand,) and by judgment and execution compel payment out of his effects; but if the debtor died before judgment, he had no right to enforce his demand by execution, but he was required to authenticate and file his demand and accept payment or a *pro rata* from a trustee, into whose hands the estate passed for settlement with all creditors. And the law declared the manner of prosecuting claims by approval or by the judgment of a competent court, and this being the creditor's right, and his only right, and rights being reciprocal under the law, could he change that right by selecting a national forum, and deprive other creditors of equal privileges? Would this not be more of an invasion of a right than a regulation of the remedy?

If this is no answer to the argument that it is within the

power of Congress to allow the Federal courts to enforce their judgments, without regard to State laws or the interests of local creditors, it may serve to show what was the purpose and intention of Congress in not so declaring by law, and of the interpretation of congressional will by the courts, in so long observing the laws and practices of the States, in matters not made obligatory upon them by act of Congress.

Our whole system, State and national, is designed to work in harmony, to administer justice uniformly, and without a contest among the courts as to the right to sit in judgment or enforce their respective mandates in a proper manner. And if our State and national systems, as a whole, have not such uniformity, either by well defined limits, over which the one court cannot intrench upon the other, or if concurrent in power and right, a well understood practice that a subject matter once in hand, by either court, shall be there fully adjusted without interference by any other tribunal, confusion, a clash of power and uncertainty of result, would necessarily follow.

The system must be harmonious, otherwise, in cases like the one at bar, there would be a scramble between local and non-resident creditors as to who should first exhaust a decedent's assets; and if the State enactments should give greater facilities than the Federal tribunals, he, whose circumstances forced him into the courts of the United States, would lose all; and on the other hand, if the State administration should be proceeded in with that care and deliberation calculated to realize the very largest sums for the beneficiaries, he, whose accidental situation give him the privilege of the Federal courts, would press his demand, and, in haste, sweep the whole estate from other claimants equally meritorious. And should the race be equal, who is to determine between the respective officers, as to the right to hold and dispose of the effects subject to seizure?

By the laws of the State, the whole property and effects of DuBose had been seized; they were in the custody of the law

and being marshaled and disposed of for the benefit of creditors and distributees; was it then proper to arrest these effects, take them from a trustee, created by a competent State court, and expose them to sale for the benefit of a single creditor?

These lands were assets in the administrator's hands to pay debts. If not, it would only leave the appellant in the worse condition, because Gautier did not bring the heir or any one interested before the court to obtain a judgment against DuBose's estate, and, of course, such judgment could not be enforced against these lands, if they were not properly represented by the administrator. All parties recognized the administrator as the trustee of the estate; Gautier claimed nothing of Halliburton or Lavender, as individuals; he claimed against them as appointees of the State court. All the authority he had, for bringing and maintaining his suit, was derived from his recognition of the appointment under State law, and if State law was not competent to confer power and obligation upon such trustee, Gautier had no right to sue him as such; and if the State law was valid to constitute such trusteeship, (and such validity is admitted) is not State power competent to prescribe the manner in which such assets shall be distributed? And if the Federal courts, (which have no Federal authority for the administration of estates) will recognize the State law in the appointment of an administrator and his responsibility to answer for the estate, will they not also recognize State authority in the distribution of the estate? In other words, if the rules and practice of the Federal courts require them to hold the State laws binding for one purpose, in administration, will they not be binding for all purposes connected therewith? If Gautier's rights in recovering judgment are determined by State law, are not his rights, in satisfying that judgment, measured by the same rule?

Whether or not this execution should issue directly against the estate, is not a mere regulation of the remedy, but it very materially changes the rights of those interested in DuBose's

estate; it places Gautier's claim above a limitation that governs all others.

In the case of *Ross et al. vs. Duval et al.*, 13 *Pet.*, 60, it was said, the act of 1789, so far as process was concerned, related to the laws then in force only, and the 34th *section* had no application to the conduct of an officer in the service of an execution. In Virginia there was no rule of court regulating executions, but upon a State act, which disallowed executions after a certain date, although a regulation of execution, the Court held that it amounted to a limitation and, under the 34th section, was a rule of decision for the Court. The Court further said: "In giving effect to this statute, no principle is impugned which is laid down in the case of *Wagram vs. Southard*; the State law, which the court held, in that case, not to apply in Federal Courts, was a law that regulated proceedings on executions; it was a process act, and not an act of limitation."

In the case of the *Bank of Tennessee, etc. vs. Horn*, the Bank had a suit pending, and Carney, the debtor, transferred his property, by an order of the proper State Court for the benefit of creditors, under the State insolvent laws; the Bank obtained judgment after the cession had been accepted and a syndic appointed by the creditors. The Bank took execution, sold the lots and bought them in and took possession, and Horn, who had purchased under the syndic, brought ejectment, and by a judgment of the United States Court ejected the Bank, which judgment was, on appeal, affirmed. 17 *How.*, 160.

In this case, the lots were placed in the hands of a trustee, for the benefit of creditors, and they were held not subject to execution upon a judgment in the Federal Court. See also *Magill vs. Amour*, 11 *How.*, 142.

State acts, subsequent to 1789, which merely regulate process, are not binding upon the Federal Courts, unless adopted by them, but with the laws of the States, operating upon the contract of parties, it is different.

Section 34, of the act of Congress of September 24, 1789, enacts "that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law, in Courts of the United States, in cases where they apply.

By this section of the acts of Congress, State laws are the rules of decision; a litigant's rights are determined by the local laws and, in the case at bar, the local laws allowed no execution; in case of a debtor's death, his death was a limitation upon all executions; the assets of his estate were seized in trust for all creditors, publicly sold and distributed *pro rata* upon claims of the same grade, and the law of the place, when and where the contract was made, limited the creditor to this satisfaction, and consequently this was the extent of his rights under such contract, a limitation upon his demand, and not a mere regulation of process.

And this construction, we think, not inconsistent with the rulings of the Supreme Court of the United States in the cases referred to. That of *Sugdon vs. Bodnax*, held that a State law could not deprive a Federal Court of jurisdiction to try a case wherein the plaintiff was a non-resident.

In the case at bar, no one questions the right of the Federal Court to try the matter in controversy, and determine the rights of the parties.

In the *U. S. Bank vs. Halstead*, 10 *Wheat*, 21, it was held, simply, that the Federal Courts were not bound to follow the process acts of the States, subsequent to 1789, and to the same effect is the ruling in the case of *Wagram vs. Southard, and Riggs vs. Johnson County*, 6 *Wal.*, 187.

The argument, of the appellant, that the United States Circuit Court has made no rule adopting the practice of this State, and that the court has discretionary power to issue process in its own favor, and having exercised that discretion, its power cannot be questioned, would be sustained by these cases, if the question as to the form of process was the real

issue in this case; but we think, like the case of *Ross et al. vs. Duval et al., ubi. sup.*, it involves largely the right of recovery, and that right, though interwoven with the process of the court, is nevertheless the rule of decision, and the court could not legitimately, under an assumption of regulating its own process, deprive parties of the right they had under the law of the contract. Rights are not unfrequently prescribed by declaring what remedy a party may have. Statutes of limitation only effect or cut off the remedy, yet State limitation acts are laws in Federal Courts. *McClung vs. Sullivan*, 3 *Pet.*, 277.

Stress is placed upon the case of *Payne vs. Hook*, 7 *Wal.*, 429: We see but little in this case not contained in some of the cases already referred to. In this, it is held that the laws of Missouri, divesting her courts of equity jurisdiction in cases of administration of estates, and conferring exclusive jurisdiction on Courts of Probate, could not divest the Federal Courts of their chancery jurisdiction in such cases; that they have, under the United States Constitution, an equitable jurisdiction similar to the High Court of Chancery of England, and that that jurisdiction cannot be defeated by State laws, and that "It is well settled that a Court of Chancery, as an incident to its power to enforce trusts and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands."

The courts retain their jurisdiction intact, without regard to State enactments, yet they determine the controversies, and award the parties their rights as they exist under the State laws, wherein the contract was made, and in the case of *Payne vs. Hook*, we see no intimation that Payne was to be adjudged any greater rights in the estate than any local creditor, or that the assets should be executed, in his favor, in a manner different from that in which they were to be disposed of for the benefit of all other creditors. The court took jurisdiction over Hook as the administrator, not to

destroy or divest the trust estate in him, but to compel him to faithfully carry out that trust and award Payne the rights to which he was lawfully entitled under the trust the law had reposed in him.

In the case of *Green vs. the Lessee of Neal*, 6 *Pet.*, 297, the Supreme Court of the United States, after quoting many former decisions, say: "Quotations might be multiplied, but the above will show that this court has uniformly adopted the decisions of the State tribunals respectively, in the construction of their statutes; that this has been done, as a matter of principle, in all cases where the decision of the State court has become a rule of property. In a great majority of cases, brought before the Federal tribunals, they are called on to enfore the laws of the States; the rights of parties are determined under those laws, and it would be a strange perversion of principle if the judicial exposition of those laws, by the State tribunal, should be disregarded," etc. See also *Jackson vs. Chew*, 12 *Wheat*, 153.

In *Mutual Insurance Society vs. Watts*, 1 *Wheat* 270, the Supreme Court said: "This court uniformly acts under the influence of a desire to conform its decisions to those of the State courts over their local laws," etc. See also *McKeen vs. Delancey's Lessee*, 5 *Cranch*, 32; and *Shelby vs. Grey*, 11 *Wheat*, 361; *Hornor vs. Hanks*, 22 *Ark.*, 572; and cases there cited. In 11 *Wheat*, 367, it is said: "The statute laws of the State must furnish the rule of decision to the Federal Courts, as far as they comport with the Constitution of the United States, in all cases arising within the respective States," etc.

It is clear that State laws cannot destroy or impair the jurisdiction of the Federal Courts to try suits between all proper parties, and that the Federal Courts are not bound to follow the mere Practice Acts of the States, subsequent to 1789. But the laws of the States, prescribing or limiting the rights of parties to a controversy, are the rules by which the Federal Courts will determine and enforce individual rights, and that the statutes of Arkansas, requiring such

creditor to file his demand in the court of probate, and accept an equitable allowance with all other creditors, is a law limiting his rights and not merely a rule of practice for the courts. And by such law Gautier, in case of DuBose's death, took nothing, by his contract, greater than his right to enforce his demand against the estate upon an equality with other claims of the same grade, and to receive his pay or a pro rata from an administrator or executor, into whose hands the estate passed in trust for the benefit of creditors and heirs or legatees. And as the process, under which the appellant purchased, showed fully upon its face that it was without force and authority of law, he should have taken notice that a purchase and deed thereunder was invalid and worthless.

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

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VINSANT, Adm'x v. KNOX.

PROBATE COURTS—*Acts during rebellion void.*—The granting of letters of administration by a Court of Probate of this State, acting under authority of the convention of 1861, or while the State was in rebellion, and all acts and proceedings, thereunder, were null and void; and the statute of *non claim* did not commence to run, against the demands of creditors of such estate, until the granting of letters by a lawful court.

CONSTRUCTION OF CONSTITUTION—*Chapters of the Digest.*—Section 2, Article XV of the Constitution, gave no power to the revisers to prepare new laws, or to alter or amend old statutes, any further than was necessary to render them consistent among themselves, and in harmony with the new Constitution.

SAME.—The "Chapters of the Digest" were not such a revision, etc., as was contemplated by the Constitution, and, therefore, derive no force therefrom.

SAME—*What Chapters valid.*—The "Chapters of the Digest" that are valid, derive their validity from having been legally enacted by the General Assembly, as other original statutes, and of such statutes, sections from one to ten inclusive, of the Chapter entitled "Circuit Courts," and Chapters entitled "corporations and organization of municipal corporations," "regulating the assessment and collection of revenue," "robbery," "forgery and counterfeiting," "enticing females to houses of ill fame," "trespass on personal property," "violating the grave," and "profane cursing and swearing," were only so enacted and valid.

APPEAL FROM CRAWFORD CIRCUIT COURT.

Jesse Turner and *Wassell & Moore*, for Appellants.

Whether the decision in *Hawkins vs. Filkins*, 24 *Ark.*, 286, or that of *Penn vs. Tollison*, 26 *Ark.*, 515, was the true interpretation of the law is immeterial. But we maintain that the Supreme Court, having by its decision in 1866, recognized and given effect to the action of the judicial department of the State government during the rebellion, their interpretation of the law was authoritative and supreme, giving a rule of action which was binding upon individuals and courts alike, in all cases affected by it, until overruled and another interpretation of the law given.

It is said, that although the claim may be barred under the decision in *Hawkins vs. Filkins*, it is revived and new life im-

parted to it, by the decision of *Penn vs. Tollison*. But this cannot be so. A claim barred by the statute of *non claim*, which is a special Act of Limitation, is barred forever. The courts have been exceedingly strict in enforcing an observance of this statute; so much so, that if an administrator were to allow, and the Probate Court were to allow and class a claim not exhibited until after the expiration of *two years* from the grant of administration, the act of the administrator, and of the court, would be not merely voidable but absolutely *void;* and if the estate of a deceased person were sold under an order of court to pay such barred claim, the sale would be absolutely void. See *Angell on Lim.*, 160 *and* 161, *5th edition;* 13 *Mass. R.*, 203; 3 *New Hamp. R.*, 491; 13 *Id.* 192; 16 *Id.* 172; 15 *Id.* 6; 15 *Id.* 58; 10 *Ala.*, 17. See also 17 *Ark. R.*, 533; 18 *Ark. R.*, 334. If then the rule, in reference to demands, barred by the statute of *non claim*, is so inflexible in its operation, we submit, with great confidence, that the appellee's claim is not only barred by the statute of *non claim*; but otherwise stale and obsolete from lapse of time, and ought not to be enforced.

The court also erred in assigning the claim to the fourth instead of the fifth class of claims. See new *Digest Chapters* ——, *page* 38.

H. F. Thomason, for appellee.

It is maintained on behalf of appellee, that the supposed proceedings of the Crawford Probate Court, in the appointment of an administratrix, etc., in April 1862, was *coram non judice*. See *Constitution* of 1864, and also of 1868. See also the case of *Latham vs. Clark*, 25 *Ark. R.*, 574, and authorities there cited, and which, by implication, overrule the case of *Hawkins vs. Filkins*, relied upon by appellant.

SEARLE, J.—The appellant's intestate, Isaiah Vinsant, deceased, and one Marzahl, the latter as principal and the former as security, on the 20th of June, 1860, made and deliv-

ered their writing obligatory to the appellee, by which, eighteen months after date, they jointly and severally promised to pay her five hundred dollars, etc. On the 9th of March, 1871, the appellée exhibited her account for allowance, founded on said writing obligatory, to the appellant, as administrator of the estate of the said Vinsant. The account was examined and disallowed; whereupon it was filed in the office of the clerk of the Probate Court of Crawford county. At the April term of said court, 1871, the cause coming on for trial, the appellant filed her special plea in bar of a recovery, stating in substance, that on the 14th of April, 1862, letters of administration were in due form of law granted to her on the estate of Isaiah Vinsant, deceased; that she immediately thereafter entered upon the duties of said administration and continued in the discharge of them, by virtue of said letters, until the December term, 1870, of the Crawford Circuit Court, when, by the ruling of said court, it was decided that said grant of administration was invalid, because of the existence of the rebellion at the time it was granted; that, in consequence of said ruling, she applied for and obtained letters of administration anew on said estate, bearing date the 30th of January, 1871, and that she is still acting as administratrix of said estate. She further averred that, although letters of administration, on said estate, were granted to her by competent authority, on the said 14th day of April, 1862, the appellee wholly failed to exhibit her said demand, properly authenticated, within two years from said grant of administration, and that, in consequence thereof, the said demand was barred by the statute of *non claim*. To this plea, the appellee filed her general demurrer, which was sustained by the court, and the claim was allowed and assigned to the fourth class of claims against said estate.

From this judgment an appeal was taken to the Crawford Circuit Court. At the June term, 1871, of said court, the cause was tried *de novo*, and the judgment of the Probate Court in all things affirmed. To this decision the appellant excepted and appealed to this court.

The first question, presented by the pleadings in this case, is, was the demand of the appellee barred by the statute of *non claim?*

If the grant of administration to the appellant, on the 14th of April, 1862, was authorized by law and conferred power upon the administratrix to administer the estate of Isaiah Vinsant, deceased, the appellee's demand was barred beyond question. If the grant of such administration was not authorized by law, and conferred no power upon the administratrix to administer said estate, then there was no legal administration upon said estate until the grant of letters on the 30th of January, 1871, and the appellee's claim was filed in time and properly allowed. Was the grant of administration on the 14th of April, 1862, legal and valid? The determination of this, determines the question above propounded, as to whether the appellee's claim was barred by the statute of *non claim.*

The case of *Hawkins vs. Filkins*, 24 *Ark.*, 286, decided at the December term, 1866, of this court, assumed, substantially, that the government of the State continued to exist, *de jure*, from the time the State attempted to secede, until suspended by the action of the State Convention of 1864, and that, as a consequence, the action of the State government, during the period, in its several departments, not effecting the integrity of the Union, was authorized by law and of binding force. The court, accordingly, decided that the judgment rendered in that case, by the Circuit Court of Pulaski county, was valid, though it was rendered after the act of secession and pending the rebellion. But this assumption was totally overruled at the December term 1870, of this court, by the cases of *Penn vs. Tollison* and *Thompson vs. Mankin.* These latter cases declare, in substance, that *all the* action of the several departments of the so-called State government, under Confederate rule, was absolutely null and void. How do these decisions effect the question under consideration?

It is contended by appellant's counsel, that, by the decision of *Hawkins vs. Filkins*, the grant of administration in 1862,

by irresistible implication, was valid and conferred upon the appellant authority to administer the estate of her intestate; that consequently the appellee's claim, not having been filed for allowance within two years, after this grant of administration, was barred, and that the decisions of *Penn vs. Tollison* and *Thompson vs. Mankin*, did not revise the claim or prevent the bar. The appellant's counsel is right in this, if the decision of *Hawkins vs. Filkins*, in addition to the disposition of that particular case, also, settled, for the time being, the law in all like cases. We are not prepared however to concede this. The rulings of the court, in that case, were absolutely overruled by the cases of *Penn vs. Tollison* and *Thompson vs. Mankin*. They are virtually pronounced as never having been the law. It would, therefore, be improper for us *now* to regard them as having any validity in the determination of cases coming before the courts for adjudication. The overruling of them was, perhaps, in some respects, not unlike the repealing of an unconstitutional legislative enactment. It certainly would not be contended that any rights could be acquired generally, under and by virtue of an unconstitutional law, that would remain after the repeal of such law.

Likewise, we conceive that it will not be contended that persons, other than parties to that suit, acquired any rights under and by virtue of the decision of the case of *Hawkins vs. Filkins*, which remain and which we are bound to recognize. The parties in the case of *Hawkins vs. Filkins*, and such other cases as may have been determined in accordance with the rulings in that case, are alone concluded by the decisions in those cases. The appellant, therefore, in this case, could acquire no rights under and by virtue of the rulings and assumptions of the court in the case of *Hawkins vs. Filkins*, that would stand after such rulings and assumptions were overruled by the recent decisions. The recent decisions must be regarded as enunciating the law, not only as it stood at the time and since they were made, but as it stood from the time

of the attempted secession of the State in 1861, anything in the case of *Hawkins vs. Filkins* to the contrary notwithstanding. The appellant's letters of administration, therefore, issued in 1862, were not issued according to law, and the appellee's claim, having been filed within two years after the grant of administration in 1871, was properly allowed.

It is further insisted that the court erred in assigning appellee's demand to the fourth instead of the fifth class of claims against the estate of the deceased. The demand was assigned in accordance with *Section* 99, *Chapter* 4, *Gould's Digest.* It is contended, by appellant's counsel, that it should have been assigned in accordance with *Section* 1, *Chapter* 4, entitled, "Allowance of demands against estates," found under the head of "Estates of deceased persons," in the "Chapters of the Digest," passed by the General Assembly, in its session of 1869, which required demands of this character to be assigned to the fifth class of claims. The court below, in making the assignment under *Section* 99, *Chapter* 4, *Gould's Digest*, must have regarded it as unrepealed and in force, while, at the same time, it must have regarded *Section* 1 *of the Chapter*, entitled, "Allowance of demands against estates," in the "Chapters of the Digest," as a nullity; for it is directly repugnant to the former and, if valid, would certainly operate as a repeal of it, in which case the classification should be made in accordance with its provisions. The validity of this section, (Section 1 of "Allowance of demands against estates,") is assailed upon the ground, that it was not enacted, or did not become a law in the manner prescribed by the Constitution, and upon no other ground, we believe. We will therefore direct our inquiries particularly to this question, and while doing so, we are not unconscious of its more than usual importance; for its decision involves not only the case before us, but a multitude of others; not only this section, but the chapter in which it is found, and, indeed, in a great measure, all the chapters of the so-called "Chapters of the Digest."

It was provided in *Section* 11, *Article XV*, of the Constitu-

tion of the State, that "This Convention shall appoint not more than three persons, learned in the law, whose duty it shall be, to revise and re-arrange the statute laws of this State, both civil and criminal, so as to have but one law on any one subject; and also three other persons, learned in the law, whose duty it shall be, to prepare a Code of Practice for the courts, both civil and criminal, in this State, by abridging and simplifying the rules of practice and laws in relation thereto; all of whom shall, at as early a day as practicable, report the result of their labors to the General Assembly for their adoption or modification," etc. Under this section these persons were appointed, and the so-called "Chapters of the Digest," including the chapter and section specially under consideration, were a product of their labors. The duties and powers defined and conferred upon the revisers, were defined and conferred by the above section alone; and the first question presented is, Are the so-called "Chapters of the Digest" such a revision of the statute laws of the State as is contemplated by said section? The answer can be arrived at definitely and satisfactorily only, by ascertaining the construction that should be placed upon the words and clause, "to revise and re-arrange the statute laws," etc., found in said section, and by ascertaining, also, the character of the "Chapters of the Digest" in relation thereto. The important word in this clause is, "to revise." We do not propose to enter into an extended discussion as to the various shades of meaning that have been given to this word by lawyers. It is sufficient to say that, as a legal term, it has not been uniformly used to mean precisely the same thing. Our purpose, we think, will be sufficiently accomplished, by taking the brief legal definition of the word, as given in Webster's Dictionary. The meaning there given is, "to review, alter, and amend." Now we conceive that there is nothing in this definition that would signify an act of absolute origination. The acts expressed by the word, must relate to something already in existence. And strictly, with such a reference, is the word used in the section

or clause under consideration. For the duty of the revisers shall be, "to revise and re-arrange the statute laws of this State," etc. We certainly cannot force such a construction from this clause, as would make it the duty of the revisers to originate statute laws for the "adoption" of the legislature *in any manner by which it might see fit to assent to them*, or to *prepare* bills for the legislature to enact into statute laws. An assumption of the former, it seems to us, must be upon the ground, that the Constitution created a body other than the legislature, with legislative powers, and this would be absurd. An assumption of the latter renders the words of the clause meaningless; for, preparing new bills, certainly is not altering or amending old statutes. The revisers, then, were simply "to review, alter and amend," and re-arrange such statute laws as were in existence at that time. More clearly does this appear from the further clause in this section, giving both the reason and the object of the revision, namely, "so as to have but one law on any one subject." This, we conceive, is the natural meaning of the clause, and we should warp it to no other. Our opinion, in brief, therefore is, that the clause, taken as a whole, simply means such a modification and amending of the statute laws then in existence, in addition to their re-arrangement, as would render them consistent among themselves, and in harmony with the new Constitution of the State, nothing more, nothing less. And when so modified, amended, and re-arranged, when so made consistent with themselves, and harmonious with the Constitution of the State, they were to be "reported" to the General Assembly, for its "adoption or modification."

Very different from this was the "Act providing for the revision of the laws of the State of Arkansas," approved October 26, 1836. By the 1st section of this Act, it was provided, "that the Governor shall appoint, by and with the advice and consent of the Senate, two competent persons to revise and arrange the statute laws of this State and prepare such a code of civil and criminal laws as, in their opinion,

may be necessary for the government of the State, and the persons so appointed shall make their report at the next session of the General Assembly, whether it be a regular or a called session." Under this section, something more than the revision and arrangement of the statute laws was contemplated. The revisers were "*to prepare* a code of *civil and criminal laws*," etc., and great latitude was given them in the preparation of their work. In accordance with these provisions, the revisers, not only revised and arranged the statute laws of the State then in force, but they filled up, so to speak, the chasms that existed in the body of the laws, then in force, on account of their crude, imperfect and meager condition, by preparing and throwing in new laws, the whole constituting a complete code of civil and criminal law; and "the statutes," to use the language of the learned editor, Mr. Pike, in his preface to the revised statutes of 1838, "so revised and presented, were referred to appropriate committees, reported to one or the other House, and passed separately, and with such amendments as seemed proper." We have carefully examined the revised statutes of several other States, and find, universally, that when the revisers went beyond the mere arrangement or digestion of the statute laws, that is, when they so altered and amended them as substantially to make them new, or other than what they were before, and not for the purpose of classification or having "but one law on any one subject," or when, in order to complete and perfect the system, they prepared entirely new laws, such altered, amended or new laws received the legislative sanction by being regularly enacted in accordance with the requisites of legislation. In the case at bar, it seems the revisers went beyond what was required of them, strictly speaking, by Section 11, Article XV, of the Constitution. This section provided for the re-arrangement and digestion of the statute laws, and more than that, it provided for the "*re-arrangement* and *revision* of the statute laws, so as to have but one law on any one subject," and not more than that.

Now, were the "chapters" before us, merely a re-arrangement or digest, (using this term in its restrictive sense) of the statute laws, a single legislative Act adopting them in a body, would have been sufficient. So likewise, no doubt, were they even a revision of the statute laws, * * * * "so as to have but one law on any one subject," this would have been sufficient. But as they do not come within either category, this mode of adopting, if it had been pursued, would have been insufficient. For, in the execution of their trust, the revisers, not so much "re-arranged and revised the statute laws of the State, * * * so as to have but one law on any one subject," as they undertook and did prepare entirely a new code of laws, as the most superficial observer will perceive upon a bare inspection of the so called "Chapters of the Digest." In this they did, without express authority, what the revisers of 1836 were expressly authorized to do. Hence, as the statutes of the latter were "passed separately" and regularly, so much the more the statutes of the former *should* have been, though the revisers presumed to act from constitutional authority. By way of more explicit illustration, let us take the section especially under consideration.

This section changes the classification of demands against the estates of deceased persons. Now, were those changes necessary for the re-arrangement of the laws or to render consistent such classification with other statutory provisions, or to make "but one law on any one subject," the revisers, in making them, acted strictly within the scope of their authority; but this certainly will not be contended. Those changes, therefore, were without authority, and effected such an alteration of the chapter, as necessitated its separate and regular passage by the Legislature to validate it. Hundreds of other such instances, in the "chapters," might be given in illustration of the subject; besides, whole chapters were changed *in toto*, as for instance, the chapters entitled "change of venue in criminal cases," "circuit courts," "how suits may be brought against the State," etc., etc. In fact, almost every chapter is

either new *in toto*, or affected by these alterations and amendments, in a manner not contemplated by the section providing for the revision. Our opinion then emphatically is, that the work of the revisers, thus accomplished, in order to be valid as laws, should have been regularly and by titles separately enacted, by the General Assembly, as original statute laws. There was certainly as much necessity for it as in the case of the revised statutes of 1838. It is true that the word "adopted" is used in the section of the constitution, providing for the revision of the statutes, etc., as expressing the manner by which the statutes, as revised, should receive the legislative assent. This is a very indefinite term. It may be taken to mean an assent, otherwise than by a formal passage of the statutes separately as laws, as for instance, by a single legislative enactment, applicable to the whole work of the revisers, however many subjects it might contain, and which, perhaps, would have been sufficient as hinted above, and not obnoxious to that provision of the Constitution, which declares that "no act shall embrace more than one subject, which shall be embraced in its title," (*See section* 22, *Art. V.*, *Constitution*), had they (the "chapters") been prepared strictly in the manner contemplated by the section providing for the revision. But, since they were not so prepared, but one mode of "adoption" could be applicable to them, namely, the formal passage of each chapter separately, as ordinary bills. And the General Assembly seems to have partly, at least, taken this view, for it made no attempt to adopt the chapters by a single act, applicable to the whole. In further elucidation of these questions, let us briefly glance at the mode by which the Codes of Civil and Criminal Practice of this State received the legislative sanction. The same section that provided for the revision of the statutes, etc , also provided for the preparation of Codes of Practice, etc., as will be seen by an examination of said section. And the word "adopted," as used in the section, applies equally to the Codes as prepared and the statutes as revised. Accordingly,

the Codes having been prepared in the mode contemplated by this section, were each entitled and adopted by the General Assembly by a formal act, applicable to the whole; *See pages* 17 *and* 257, *Codes of Practice*; from which it appears that the General Assembly, in its action upon the Code, is in accord with the views above expressed. The following is a brief summary of our conclusions, thus far, from the above reasoning:

First. Section 11, *Art. XV.*, of the Constitution, gave no power to the revisers to prepare new laws, or to alter and amend the old statutes any further than was necessary to render them consistent among themselves and in harmony with the new Constitution.

Second. The "Chapters of the Digest" was not such a revision, etc., as was contemplated by this section, and, therefore, derives no force therefrom.

Third. If valid, they must derive their validity from having been legally enacted by the General Assembly, as other original statutes.

From these conclusions we are now prepared to consider the second principal question suggested, namely, were the so-called "Chapters of the Digest" legally enacted?

Chancellor Kent divides municipal law into written and unwritten, or statute and common law; and he defines written or statute law to be the express written will of the Legislature, rendered authoritative by certain prescribed forms and solemnities. 1 *Kent, Com.*, 456. All those rules and solemnities, whether derived from the common law or prescribed by the Constitution, which are of the essentials of law making, must be observed and complied with, and, without such observance and compliance, the will of the Legislature can have no validity as law. Nothing is law simply and solely because the Legislature wills that it should be. They must enact, and express their determination to that effect, in the mode expressly pointed out by the Constitution, which invests them with the power, and under all the forms which that

instrument impliedly recognizes and renders essential. *Cooley's Con. Lim.*, 130.

Nevertheless, "whenever," to use the language of Judge Cooley, "the Legislature is acting in the apparent performance of its legal functions, every reasonable presumption is to be made in favor of its action; it will not be presumed, in any case, from the mere silence of their journals, that either House has exceeded its authority or disregarded a Constitutional requirement in the passage of legislative acts, unless when the Constitution has expressly required the journals to show the action taken." *Cooley's Con. Lim.*, 135; *Weller vs. State*, 3 *Ohio, N. S.*, 475; *McCulloch vs. State*, 11 *Ind.*, 424; *Supervisors vs. People*, 25 *Ill.*, 181. Keeping in view the above definition of statute laws, and general rules for their passage, we will now direct our inquiries immediately to the question under consideration.

It is required by the Constitution (*Sec.* 21, *Art. V.*) that "Every bill and joint resolution shall be read three times on different days in each House, before the final passage thereof, unless two-thirds of the House, where the same is pending, shall dispense with the rules." Upon careful examination of the journals (required to be kept, of the proceedings of each House, by *section* 16, *Art. V.*, of the Constitution), we find the entries, relating to the readings on the passage of the "chapters" under consideration, very meager. It appears, from these entries that most of the chapters were read a *third* time by title in each House, the rules being dispensed with. Some of the remainder were so read in one House and not in the other, while none passed these readings regularly, or even by title in both Houses, the rules being dispensed with. The "chapter" entitled "Allowance of demands against estates," especially under consideration, was read a third time by title in both Houses, the rules being dispensed with. *See Senate Journal of* 1868-9, *page* 507, *and House Journal of the same date, page* 619. There is no entry of a first and second reading in any manner. That bills, etc., should be read three

times on different days, or that the rules should be dispensed with by a two-third vote if they are not so read, are requirements that should be observed. But there is no Constitutional provision that their observance should be evidenced by an entry upon the journals. If there were such a provision, the failure of the journals to show the observance of these requirements would doubtless render invalid the legislative acts. But in the absence of such a provision, it must be presumed that these requirements have been complied with, whether evidenced by an entry upon the journals or not so evidenced, the bills having been put upon their final passage and passed. For every reasonable intendment is to be taken in favor of the regularity of such proceedings as are not required to be evidenced by entries upon the journals, when not so entered. However, there is much reason for regarding these requirements as merely directory in their character, and that their observance by the General Assembly is secured by their sense of duty and their official oaths, and not by any supervisory power of the courts; any other conclusion, we are inclined to think, would lead to very absurd and alarming consequences. Indeed, it might be affirmed that it would go very far towards rendering almost every law of the State invalid. We are of opinion, therefore, that those "chapters" that have been placed upon their final passage and passed, are not invalidated by the silence of the journals in relation to the readings.

It is further required by the Constitution, (*Sec.* 21, *Art. V.*,) that "No bill or joint resolution shall become a law, without the concurrence of a majority voting. On the final passage of all bills, the vote shall be taken by *yeas* and *nays*, and entered on the journal." All acts, etc., must receive a majority of the members voting. This is a test absolutely essential of their validity. Without such majority they would be absolutely null and void. And it is of such paramount importance, that the yeas and nays, as taken, must be entered upon the journals. The obvious reason of this is, that the fact of

their having passed by the requisite majority be made a matter of record; and such record is conclusive of the fact. From all of which it will be seen that those requirements are essentials of the utmost importance. They are strictly mandatory and must be complied with. By an examination of the journals in reference to those requirements, as they relate to the "Chapters" under consideration, we find the following facts, to-wit: All the "Chapters," including the one especially under consideration, were placed upon their final passage, either together or separately, and the votes thereupon taken by yeas and nays and entered upon the journals in both houses, with the exception of the chapters upon "arson," "assault," etc., "bribery," etc., "kidnapping," "maiming," "obscenity," "perjury," etc., "principals and accessories," "rape," etc., and "sabbath breaking." As to these latter chapters, there is nothing whatever in the Senate journal, showing that they were ever passed. This certainly would invalidate them.

One other question we deem it proper to notice in this connection, and that relates to the manner in which most of the "Chapters," including the one especially under consideration, were placed upon their final passage and passed in the House, as evidenced by the entries in relation thereto, in the House journal. We find in said journal (*page* 619) these entries: "The following chapters of the revised and digested statutes were severally read a third time, viz: "Apprentices," "Privilege from arrest," "Attorney General, Prosecuting Attorneys and County Attorneys." * * * * On motion of Mr. Whitson, *Ordered*, that the several chapters be placed upon their passage. The question being put, Shall the chapters pass? it was decided in the affirmative—yeas, 53, nays, none. And the yeas and nays were entered upon the journal. Another batch of chapters were severally read and passed in the same way, as appears from the journal, page 866. Still another batch of the chapters were severally read and passed in the same way, as appears from the journal, page 985. Still another batch of the chapters were read a third time and passed

in the same way, as appears from the journal, page 713. These several batches included all the "Chapters of the Digest," with the exception of the one, entitled, "Regulating the assessment and collection of the revenue." From all of which it appears that these chapters, excepting the chapters in the last batch mentioned, which were read together, were separately read a third time, but it does not appear that they were separately placed upon their final passage and passed. Indeed it may be contended from the language used in the journal, that the chapters of each batch were passed together, or by one vote. Now there may be a question as to whether this would render them invalid. There is no express provision in the Constitution, that each bill or act should be separately placed upon its final passage, and that the separate vote on each should be entered upon the journals. The words of the Constitution in relation to this matter are: "On the final passage of all bills, the vote shall be taken by yeas and nays, and entered on the journal." Now it will be observed that there is nothing here that would indicate that each bill should be passed separately. Nevertheless, we are constrained to say that each bill should be, for this is a well settled rule of legislation. Yet we are not prepared to say that laws would be void on account of a disregard of it. Nor do we deem it necessary to settle or determine this question, in this case. For we are strongly inclined to the opinion, that, though the entries in the journal would seem to indicate otherwise, the House observed the rule and passed each chapter separately. This, at least, must be the presumption, as the Constitution does not require, expressly, the separate entry of each date upon the journals, in the passage of each bill.

The Constitution further requires that "No act shall embrace more than one subject, which shall be embraced in its title." (*Sec.* 22, *Art. V.*) We do not propose to discuss the import of this requirement, or to consider the construction placed upon it, or similar ones, by the courts of other States. The whole subject is fully and lucidly considered in *Sedgwick*

on Statutory and Constitutional Law, page 50; *Cooley's Constitutional Limitations, page* 141, *and Potter's Dwarris, page* 108. We refer the profession to those works and to the authorities there cited. It is sufficient for us to say, that we are in accord with the great body of those authorities, and must regard this requirement with such reasonable restrictions, as have been laid down in those authorities, as imperative. Considering this requirement with reference to the Chapters under consideration, these questions are suggested: 1st, Were the Chapters acts within the meaning of this requirement? The General Assembly regarded and acted upon them as such, and that is sufficient for us. 2d. Were they sufficiently designated by title? From an examination of the journal, we find that each chapter was denominated in the readings of the General Assembly, by words designed to indicate generally the subject matter of the chapter; for example, chapter 4, under the head of "Estates of deceased persons," was denominated by the words, "Allowance of demands against estates." These denominations were called titles by the General Assembly, and read as such in the passage of the chapters. That this was a very informal and imperfect method of entitling laws, we must admit. But that the acts themselves are void on that account, we are by no means prepared to concede. So far, otherwise, we must regard them as a substantial compliance with the constitutional requirement, and therefore as good, if they sufficiently meet the requisite, namely: that they properly indicate the subject matter, respectively, of the chapters.

We are of opinion, from a careful examination, that this compliance is substantially satisfied in the chapter especially under consideration, and indeed in all the chapters.

It is further provided by the Constitution (*Sec.* 27. *Art V*), that "The style of the laws of the State shall be, 'Be it enacted by the General Assembly of the State of Arkansas.'" We find, from an inspection of the enrolled bills in the office of the Secretary of State, that the General Assembly strictly

complied with the above provision, in a manner about which there could be no question, in relation to but three of the chapters; namely, a part of the one entitled "Circuit Courts," another entitled "Corporations and organization of Municipal Corporations," and the third, entitled "Regulating the Assessment and Collection of Revenue." These have the enacting clause, and have it properly prefixed. Seven of the chapters, entitled "Robbery," "Forgery" and "Counterfeiting," "Enticing Females to Houses of Ill Fame," "Trespass on Personal property," "Violating the Grave," "Obscenity," "Profane Cursing and Swearing," have the enacting clause prefixed before the title of the chapter, on a separate piece of paper of smaller size, but similarly attached with the other pieces of the bills. The question arises here, as to whether the manner, in which the style seems to have been attached to these chapters, should be regarded as proper evidence that the style was actually used by the General Assembly in the passage of these chapters? In answer to this question, it must be observed that the original bills, in their passage through the two houses of the General Assembly, were in the charge and keeping of its sworn officers; and that when the work of the Legislature was completed upon them, they passed into the keeping of the Secretary of State. Their custody is of so sacred a character, therefore, that it cannot be presumed that they have been altered or in any manner tampered with, unless the contrary should clearly appear.

The attaching of the style to the bills or chapters, on a separate piece of paper, cannot be regarded as necessarily implying that the bills or chapters were tampered with. It must, accordingly, be presumed that the style was properly observed by the General Assembly. We now come to a consideration of the other chapters of the Digest, with reference to the requirement of a style. We find from an examination of the enrolled bills, on file in the office of Secretary of State, that all the other chapters, including the one especially under consideration, and sections eleven, twelve, thirteen and fourteen,

of the chapter entitled "Circuit Courts," which sections were passed separate and at a different time from the other sections of the chapter, seem to have been passed without the enacting clause. Now if the requirement of an enacting clause be imperative, these latter chapters and sections are void. If directory, otherwise. Let us briefly direct our inquiries to the solution of this somewhat difficult question, difficult because of the meagerness of the authorities throwing light upon it. In the making of laws there are certain requirements that relate more especially to the *mode* of making them, as for example, that they should be read three times upon different days, or the rules be dispensed with, etc. As to those requirements, some of them have been regarded by the courts as being directory merely. But a distinction, we think, is to be made between those requirements which relate more especially to the authority by which laws are made. The law-making power is vested in the General Assembly as constitutionally constituted. That the authority to enact laws, alone resides in that body, is a legal truism. Now all requirements, especially those of a constitutional character, relating to the legislative authority, strictly speaking, and designed directly to evidence the legislative will to make a law, must be regarded as absolutely essential and imperative. For example, that a bill to become a law must receive a majority of the votes of the General Assembly, and that this must be evidenced by the entry of the yeas and nays upon the journals of each house, are essentials relating to the authority by which the law is enacted and the requirement of their observance is imperative. Likewise, that the legislative act, when made, should be a written expression of the legislative will, in evidence, not only of the passage, but of the authority of the law-making power, is nearly or quite a self-evident proposition. Likewise, we regard it as necessary that every act, thus expressed, should show on its face the authority by which it was enacted and promulgated, in order that it should clearly appear, upon simple inspection of the written law, that it was

intended by the legislative power which enacted it, that it should take effect as law. These relate to the legislative authority as evidences of the authenticity of the legislative will. These are the features by which courts of justice and the public are to judge of its authenticity and validity. These, then, are essentials of the weightiest importance, and the requirements of their observance, in the enacting and promulgation of laws, are absolutely imperative. Not the least inportant of these essentials is the style or enacting clause. So the framers of the Constitution must have regarded it, or they would not have so positively required it in the fundamental law of the land. It is this that most directly expresses the legislative will to make the law, while the same is in process of passage through the General Assembly, and that most solemnly indicates the authority from which it derives its sanction, when it has passed and become a rule of action for the people. Accordingly, great importance was attached to the style of these laws in England, from times of great antiquity; See *Potters Dwarris on Statutes and Constitutions*, 99; 1 *Coke upon Littleton*, 99. Not less importance has been attached to the style in the United States; See *Constitutions of the United States and of the several States.* So uniformly has the style, in the enactment of laws, been observed, both in England and the United States, that the courts have very seldom had occasion to consider the subject. We have been able to find but two cases where this subject has come under the notice of the courts, namely, *Irwen vs. Buck*, 40 *Miss.*, 292, *and State vs. Delesdunn*, 7 *Texas*, 94. In the former case, the court held, substantially, in relation to a provision similar to our own, that it was directory so far as the *precise words required*, were considered.

But from the tenor of the decision, we infer that it was the opinion of the court that a substantial compliance with the constitutional requirement was imperative, that some expression was necessary to declare the legislative will in the enactment of laws. From the above considerations, we are

constrained to hold that *Section* 27, *Article* V, must be substantially complied with, and consequently any act or law without the enacting clause, is null and void. This would render invalid all the so called "Chapters of the Digest," including the chapter especially under consideration, and the four sections of the chapter entitled "Circuit Courts," above mentioned, with the exception of those to which the enacting clause appears, as above pointed out.

It is further provided by the Constitution (*Sec.* 35, *Art. V.*) that "every bill and concurrent resolution, except of adjournment, passed by the General Assembly, shall be presented to the Governor for approval before it becomes a law. * * * If any bill be not returned by the Governor, within three days (Sunday's excepted) after it has been presented to him, the same shall become a law, in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevents its return, in which case it shall not become a law. The Governor may approve, sign and file in the office of Secretary of State, within three days after the adjournment of the General Assembly, any Act passed during the last three days of the session, and the same shall become a law."

Most of the "Chapters" were presented to the Governor for his approval, and approved in a manner about which there can be no question. The remainder were presented, it seems, in batches, or attached together in continuous transcripts, for his approval. Three of these batches were composed of chapters which passed the General Assembly before the last three days of its session. Whether approved or not would make no difference, as they were not returned to the House, where they originated, with the Governor's objections; *section* 35, *Article V, Constitution.* If not invalid on other accounts, they would become law under the Constitution. The fourth batch was composed of two chapters, namely, "obscenity" and "violating the grave." These were passed during the last three days of the session, and the latter alone received the signature of the Governor, in approval, within

three days after the adjournment of the General Assembly. As to the proper approval of the latter there can be no doubt. But there may be a question as to whether or not the other chapter could be regarded as approved. The two chapters are in one continuous manuscript, and it is possible that the Governor, when he signed the one, purposed, by the single signature, the approval of both. This, we think, was no approval of the first. The one to which his name was directly signed was alone approved. The constitutional requirement is, that "every bill * * * must be presented to the Governor for his approval," etc. This clause, we think, indicates a several approval. That each bill must be separately signed, we can have no doubt. Any other practice would lead to confusion and uncertainty.

The result of the foregoing considerations shows that the following chapters alone were passed by the General Assembly, with those forms and solemnities necessary to make them valid as laws, namely: Sections from one to ten, inclusive, of the chapter entitled "circuit courts," and chapters entitled "corporations and organization of municipal corporations," "regulating the assessment and collection of revenue," "robbery," "forgery and counterfeiting," "enticing females to houses of ill-fame," "trespass on personal property," "violating the grave," and "profane cursing and swearing."

It is hardly necessary to add, in conclusion, that portions of this opinion are dicta, as this is at once apparent. This must occasionally be the case, in undertaking to consider all the questions involving the validity of so large and various a body of laws, as the so called "Chapters of the Digest," in the adjudication of a single case, an undertaking we could not be induced to enter upon, had it not been for the public exigency demanding a determination of the validity of these chapters. Nevertheless, though some of these questions are not directly involved in the determination of the case at bar, we have bestowed the same care, in their investigation and disposition, as though they had been so.

Finding that the Chapter, entitled, "allowance of demands against estates" is void, we are of opinion that the court below did not err in assigning the demand, in this case, to the fourth class of claims in accordance with Chapter IV, Gould's Digest.

Finding no error in the rulings and judgment of the court below, its judgment is affirmed.

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HARRISON v. TRADER AND WIFE.

MARRIAGE CONTRACT.—The husband is liable for the debts of his wife, created *dum sola*, and no contract entered into between the parties, in contemplation of marriage, can change the responsibility and obligation of the husband in this respect, so as to effect the rights of parties outside of the marriage agreement.

ERROR TO PHILLIPS CIRCUIT COURT.

HON. J. M. HANKS, *Circuit Judge.*

Watkins & Rose, and *J. C. Palmer* for Appellant.

It is submitted on behalf of the appellant: That the law being, that the husband shall be liable for the debts of the wife, created *dum sola*, it could only be changed by the law making power. *Story on Contracts, Section* 83; *Chitty on Contracts*, 38; *Higason vs. Collins*, 8 *Ark.*, 241; *Lamb vs. Belden*, 16 *Ark.*, 539; *Dobbin vs. Hubbard*, 17 *Ark.*, 194; *Tyler on Infancy and Coverture*, 332.

English, Gantt & English, for Appellees.

BENNETT, J.—This is a suit brought by the indorsee of a bill of exchange for $2500, drawn by Ella K. Newsome, a

feme sole, and Thomas S. N. King, on Bartley Johnson & Co., New Orleans, La., on the 13th of March, 1861, and payable to said Ella K. Newsome, or order, on the 20th day of November thereafter, and indorsed by drawees to plaintiff, accepted and protested for non-payment. Defendant, Ella K., subsequently married W. H. Trader, and this suit is brought against husband and wife.

The suit was commenced, by attachment, on the 14th day of February, 1867. At the May term of the court, defendants made their appearance. At the next term of the court, defendant Ella K. filed a plea of general issue, and defendant William H. filed a plea of general issue, and a special plea to the effect that defendants, contemplating marriage, in consideration thereof, and prior thereto, made a marriage contract, which was duly acknowledged and recorded, wherein it was stipulated that the property of neither of said defendants should, after marriage, be taken for the debts of the other. To this plea, plaintiff demurred, which was overruled by the court. Plaintiff electing to rest on his demurrer, and declining to plead over, the court gave judgment for defendants.

Plaintiff brings error.

The only question presented in the case for our consideration, as raised by the demurrer, is: Can a contract, entered into between a man and woman, in consideration or contemplation of marriage, change the liability of the husband for the debts of the wife, created *dum sola*, so as to affect the rights of third parties.

The rule of the common law throws upon the husband the burthen of his wife's debts, contracted by her *dum sola*, whatever may be their amount, and makes him liable for them during the coverture. *Welden vs. Welden*, 7 *Ohio, St. R.*, 30; *Buckner vs. Smyth*, 4 *Dessau*, (*S. C.*) 371.

The principle upon which the husband is liable for the debts of the wife, contracted *dum sola*, is not that he received property by her, for the circumstance of his having received property from her does not increase his liability, nor the fact

that he received no property by her diminish such liability. Nor is the liability based upon the idea that he is a debtor; but the real ground of this liability is, that the wife, by her marriage, is entirely deprived of the use and disposal of her property, and can acquire none by her industry. The personal property of the wife passes absolutely to the husband, and he is entitled to the use of her real estate during coverture, and her person, labor and earnings belong unqualifiedly to him. *Tyler on Infancy* and *Coverture, page* 332-33.

Marriage is a good consideration to sustain a contract made in contemplation of it, or, as Chancellor Kent says, "Marriage has always been held to be the highest consideration in law." *Strong vs. Arden*, 1 *John's Ch. R.*, 271.

But a contract made upon such consideration will only be enforced in equity upon those who came within the scope of the consideration of marriage. 2 *Story's Eq. Jur.*, *Sec.* 986.

While, as between husband and wife, the contracts entered into between themselves before marriage, in reference to the property of one another, by means of which they may change and control the general rules of their nuptial state, may be held good, they cannot change or vary the terms of the conjugal relation itself, nor can they add to or take from the personal rights or duties of husband and wife. In the case of *Moore vs. Craig*, 5 *Bos. & Pull.*, *N. R.*, 148, it was held that no agreement between the husband and wife can alter the state of liability or non-liability which the law imposes upon each.

The ground, upon which the plea in the case before us is sought to be supported is, that the defendants mutually agreed, before marriage, that the property of one should not be taken to pay the debts of the other. While a calm, dispassionate investigation of many authorities shows that the common law disabilities of the wife have been more carefully pruned than those of the husband, and that he is obliged to pay her ante-nuptial debts, it would seem but reasonable and just that if she retains her property to her own exclusive use

and control, notwithstanding the marriage, this liability on his part should not continue. But as the law remains unchanged in this regard, we cannot hold otherwise than that a compact, no matter how solemnly entered into between a man and woman, that would attempt to, and which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which creditors, third parties and the public are interested to preserve, is invalid. In the language of Lord Chief Justice Kenyon, in the case of *Marshall vs. Mary Ruttan*, 8 *Tenn. R.*, *page* 547, "How can it be in the power of any persons by their private agreements to alter the character and conditions which, by law, result from the state of marriage while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition; or how can any power, short of that of the Legislature, change that which by the common law of the land is established."

The law being that the husband shall be liable for the debts of the wife created *dum sola*, it could not be changed by the individual acts of the man and woman, so as to affect the rights of parties outside of the marriage agreement.

The demurrer was improperly overruled. The cause is remanded with instructions to sustain the demurrer, and to proceed with the case in accordance with law and not inconsistent with this opinion.

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WELCH v. HICKS.

COURTS—*When proceedings presumed regular.*—Where the record is silent, or it is not otherwise made to appear, the regularity of the proceedings of the court below will be presumed.

SALES—*When by order of court.*—Under the provisions of the Code, all sales, made by order of a court, should be on credit.

VENDOR'S LIEN—*To enforce, what petition should allege.*—A petition, to declare a vendor's lien and sale, should allege a conveyance or tender of conveyance before suit brought.

APPEAL FROM PRAIRIE CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

E. W. & D. Gantt, for Appellant.

First. The affidavit by the attorney to the bill is not within the purview of *Section* 603 *of Code.*

Second. The proof of publication fails to show who "John G. Price" was, which was absolutely necessary. *Saffold vs. Saffold et al.*, 14 *Ark.*, 408.

Third. There was no attorney, appointed by the court, to defend for the appellant, as required by law. *Code, sec.* 603, *Sub. Div. First.*

Fourth. The court erred in decreeing a sale for cash. *Code, Sec.* 407.

English & English, and Bronaugh & England, for Appellee.

First. It is no valid objection to the bill, that it does not allege that appellee demanded the purchase money and tendered a deed before suit. *Duncan vs. Clements*, 17 *Ark.*, 279; *McDaniel vs. Grace*, 15 *Id.*, 488; *Lewis vs. Davis*, 21 *Id.*; *Prewitt vs. Vaughan*, 21 *Id.*, 417.

Second. The objection, that the affidavit is defective, comes too late. *Code, Sec.* 159; *Gould's Digest, Sec.* 13, *Chap.* 28, *and Sec.* 1, *Chap.* 8; *Saffold vs. Saffold et al.*, 14 *Ark.*

GREGG, J.—The appellee sold the appellant certain lands in

Prairie county, and received part payment and took a note for the remainder, and gave bond for title.

After the note fell due, he filed a bill to have his vendor's lien declared and the lands sold to pay the remainder of the purchase money.

The appellant made default; a decree was rendered for the appellee, from which Welch appealed to this court, and he assigns as error that the bill was verified by the attorney's affidavit, and the publication of notice by John G. Price's affidavit; that the court failed to appoint an attorney for the appellant, and rendered a decree of sale for cash in hand.

To the first objection it is sufficient to say it comes too late in this court. *Sec.* 159, *Civil Code.*

If the court did not judicially know the journal made official by law, the record states that it appeared to the court that the notice had been duly published; that would raise a sufficient presumption that that court had found the publication duly proved and defeat such objection here; as a further answer, the Code does not prescribe the manner of making proof of publication, and the law specifies in which it shall be made, which differs from the former statute.

Where the record is silent, the presumption is that the court below, or the clerk of that court, appointed for one constructively notified, and hence the third objection is valueless, unless the record affirmatively showed that no attorney was appointed. Lastly it is urged that the court ordered the lands sold for cash, when they should have been sold on time. Under the head of "Judgments in general," *Sec.* 405 of the Civil Code declares, "It shall not be necessary, in any action upon a mortgage *or lien*, to enter an interlocutory judgment * * * but final judgment may be given in the first instance." *Sec.* 406 declares, upon a foreclosure of a mortgage, a sale shall be ordered. *Sec.* 407 declares, that "Sales of personal property, made by order of court, shall be on a credit of three months; sales of real property on a credit of not less than three nor more than six months, or on installments equivalent to not

more than four months credit; the whole to be determined by the court," etc. *Sec.* 408 declares, that "In an action on a mortgage *or lien*, the judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally." These provisions being enacted under the general head above stated, and *Secs.* 405 *and* 408 expressly embracing *other liens* as well as mortgages, and *Sec.* 407 declaring in general terms that *sales of real property, made by order of court, shall be on a credit*, etc., we are of opinion the legislature intended no exception to the rule, but that all sales, by order of court, should be on a credit. The petition, in this case, does not allege a conveyance or an offer to convey the land before suit brought, and the court are of opinion it falls within the ruling in the case of *Wakefield vs. Johnson, Adm'r*, 26 *Ark.*, 506.

The decree of the court below is reversed, the cause remanded with directions to allow the plaintiff to amend his petition to show an offer to convey before suit, and if he cannot so amend, that his petition be dismissed without prejudice.

UNDERWOOD v. SLEDGE.

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JUDGMENTS—*When may be set aside, etc.*—A court has control over its orders or judgments during the term at which they are made, and, for sufficient cause, may modify or set them aside at that term, and when so set aside, the parties are remitted back to such rights and remedies, the same as though no order had been made or judgment rendered in the first instance.

APPEAL FROM PHILLIPS CIRCUIT COURT.

HON. JOHN E. BENNETT, *Circuit Judge.*

Garland & Nash, for Appellant.

1st. The County Court has control over its judgments during the whole of the term at which they are rendered. 2 *Ark.*, 66; 6 *Id.*, 92; 10 *Id.*, 241; 5 *Id.*, 25; *Code, page* 176, *Sec.* 571.

2d. Presumption in law is in favor of the finding of the County Court. 23 *Ark.*, 14; *Ib.* 208.

3d. Section 13 of the law, (new Digest, p. 166) places the matter of appointing county attorneys with the County Court, and unless there is a plain abuse of this authority, there is no relief. 5 *Ark.*, 309; 6 *Id.*, 431; 10 *Id.*, 442.

4th. The matter complained of was subject to review by appeal, and therefore mandamus would not lie. 11 *Ark.*, 605; *Code, p.* 25, *Secs.* 19–24; 25 *Ark.*, 615, and cases cited.

5th. This is not a proceeding to put in motion the discretion of a ministerial officer, as was *Marbury vs. Madison*, 1 *Cranch*, 134; but it was one to review and control the exercise of a discretion in the court below, and this cannot be done by mandamus. *Moses on Mand.*, 15; 25 *Ark.*, *sup.*

Palmer & Sanders, for Appellee.

Appellee relies upon the case of *Marbury vs. Madison*, 1 *Cranch*, 137, where the right of an appointee to his office is fully discussed, to sustain his claim.

GREGG, J.—It appears, from the record, that on the 28th of

November, 1870, a majority of the County Court of Phillips county passed an order to appoint an attorney for that county, and elected the appellee, who was a member of the court, to fill the office and fixed his salary at fifteen hundred dollars per annum; that the appellee was present and active, voted to have such attorney elected and for the salary of the amount stated; did not vote for himself to fill the office, but no one else was put in nomination; that the appellant refused to vote for him and entered a protest.

Two days after, and during the same term, that court made and entered of record an order, "That the order made, on the previous day of the present term, appointing a county attorney and fixing his salary, be and the same is rescinded; and for naught held as though no action had been taken therein."

And, on the first of December, and during the same term, the appellee appeared in the County Court and moved the court to grant him a certificate of election as such county attorney; the court overruled his motion and declared their approval of the last order, vacating the one by which an attorney's salary was created and under which the appellee was elected. The appellee then presented his petition to the Circuit Court for a *mandamus* to compel the County Court to grant him such certificate.

The appellant, as presiding judge of the County Court, appeared in the Circuit Court and filed his answer to the petition, setting up the facts as stated, which were, in substance, the same as the allegations in the petition, to which response the appellee interposed a general demurrer, and the court sustained the demurrer and ordered that a peremptory *mandamus* issue, and that the county of Phillips pay all costs, from which judgment and order Underwood appealed to this court.

It is well settled, in this State, that a court has control over its orders and judgments during the term at which they are made, and, for sufficient cause, may modify or set them aside. *Ashley vs. Hyde & Goodrich*, 6 *Ark.*, 100; *Ashley vs. May*, 5 *Ark.*, 408, *and other cases*; *Civil Code, sec.* 571, *p.* 176.

The question presented is, whether the appellee, by the order and election, had a vested right.

It is certainly good policy in the law to allow courts an hour's reflection; time to revise hasty action, correct mistakes and review such error as they may have fallen into for want of sufficient consideration, and to this end they have, during their respective terms, to make up their records and fully consider the propriety of their judgments, and to review and correct any mistakes, errors, or indiscretions into which they may have fallen during the term, and when such revision is had, the action of the court and the record stands precisely as if no such former mistake or erroneous judgment had ever been given or entered.

In an action of debt, the judgment of a court of competent jurisdiction is a determination of the party's right; it vests in him the property of the judgment, and authorizes him to enforce a payment of the amount; yet, if during the term, the court, for sufficient cause or even without cause, sees fit to set aside such judgment, its benefits are lost to him in whose favor it was rendered.

The presumption must be indulged in, that judges, sworn administrators of the law, will deliberate and ultimately determine according to the very right in causes.

In the case at bar, without attempting to discover the undefined extent of a vested right in an office, we may well conclude the appellee had nothing better than the judgment of a court of competent jurisdiction, creating an office, fixing its salary and appointing him to fill the same, and we see no principle of law that gives him any more sacred right, in that $1500 00 salary, than any litigant would have in a $1500 00 judgment for his debt, and no reason why the court, in the exercise of its best judgment and sound discretion, might not set aside and vacate any such order or judgment; and when an order or judgment of a court is set aside, at the same term of the court at which it was rendered, the whole suit or matter stands precisely as if no such consideration had

been had or entered of record, and all parties interested are remitted back to such rights and remedies as they had before the making of the orders or judgments so vacated. It, therefore, follows that the application of the appellee for a certificate of his appointment, as county attorney, being made, without authority of law, and after the order first aforesaid had been vacated and set aside, should have been refused.

The judgment is reversed and the cause remanded with directions to overrule the demurrer and dismiss the appellee's petition.

HUGHES, Adm'r v. PIKE.

Adams obtained a decree in chancery for the payment of money, or in default thereof, for the sale of lands. Afterwards, without payment, on supposed equitable grounds, by agreement with the judgment debtor and by consent of the Probate Court, an order was made in the Probate Court directing the administrator to enter satisfaction of the decree on the chancery record, and releasing him, as such administrator from responsibility for the amount of the decree. On application of administrator *de bonis non*, to enforce the decree; *Held*, That the Probate Court had no authority to make such order, and the administrator was accountable for the amount of the decree.

APPEAL FROM MONROE CIRCUIT COURT.

HON. JOHN E. BENNETT, *Circuit Judge.*

J. E. Palmer, for appellant.

It is well settled that "an agreement without consideration is utterly void." *Story on Contracts, Sec.* 427; *Chitty on Contracts*, 26, 27; *Parsons on Contracts*, 853; *Ib. note b. c. to page* 355; *Hill vs. Roderick*, 4 *Watts & Serg.* 221; *Railroad vs. Brinkerhoff.* 21, 139 *Wend.*; *Underwood vs. Mulligan*, 10 *Ark.*, 254; *Bomeford vs. Grimes*, 17 *Ark.*, 567; 19 *Ark.*, 67.

A fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. *Hopkins vs. Lee*, 6 *Wheaton*, 109; *Voorhees vs. Bank U. S.*, 10 *Peters*, 449. How does appellee make himself a party to the order of the Probate Court, so as to bring himself within the rule, or reason of the rule? There were no facts to be tried, there was but one party, and there was no one bound by the decision of the court. There was no *res judicata*.

The doctrine of estoppel does not apply to this case. *Steph. Pl.* 238; *Co. Litt.*, 352, *a*; 3 *Blk.*, *Com.*, 303; 1 *Serg. & R.* 444.

English, Gantt & English, for Appellee.

First. The validity of the contract having been submitted to the court for arbitration, its award was binding. *Coffin vs. Cotton*, 4 *Pick*, 454; *Bean vs. Farman*, 6 *Pick*, 269; *Alling vs. Monson*, 2 *Conn.*, 692.

Second. The Probate Court had jurisdiction of the subject matter submitted, and its decision was in the nature of a final judgment and valid; and if erroneous, the error could not be corrected in a collateral proceeding, but only by appeal. *Sturdy and wife vs. Jacoway*, 19 *Ark.*, 514; *Fleming vs. Johnson et al.*, 26 *Ark.*, 421.

Third. A waiver or compromise of litigation is a good consideration for a contract. 1 *Pars. Cont'r.*, *p.* 140–44.

GREGG, J.—It appears of record, that at the September term, 1867, an administratrix of the estate of William Harvick, obtained a decree for the payment of six hundred dollars and the foreclosure of a mortgage, on certain real estate, made to secure the payment of the writing obligatory for that sum.

The decree was very irregular; it is in form final, yet it requires a further report to be made, and it fails to describe the lands ordered sold, etc., but sufficient appears to show the determination of the court.

At the November term, 1870, the appellant, as administra-

tor *de bonis non* of said estate, appeared and filed his application to have the decree enforced, showing that it was in no way satisfied, etc. The appellee was notified, and he appeared and resisted the enforcement of the decree, and showed that in 1868 he told the appellant that if he did not abandon said decree and have it satisfied, he would have him enjoined from enforcing it, and that appellant said he would satisfy the decree if the Probate Court would authorize him so to do, and relieve him from liability; that his "object was simply to discharge his duty in the premises."

That the appellant, in person, went before the Probate Court and represented that the decree had not been paid off, and that the new Constitution of Arkansas prohibited the collection of notes, judgments or decrees, wherein the consideration was the sale of slave property, and asked for an order directing what to do. And, by consent of the court, in his own handwriting, entered up an order directing himself to enter satisfaction of said decree on the chancery record of the county, and releasing him from all responsibility, as such administrator, for the amount of the decree.

The matter being thus presented to the court, the chancellor refused the application, and adjudged that the appellant was barred from further proceeding on said decree, and that he pay costs. From which, the administrator has appealed to this court.

The question now is, whether the action of the appellant, as such administrator, and of the Probate Court, amounted to a satisfaction of the decree, or estopped the administrator from further claim thereto?

It is clear there was no defense, in law, sufficient to deprive the heirs of Harvick of their right to the amount of this decree, and it is quite clear from the record, that the administrator was not faithfully discharging his trust. It was far from his duty to be petitioning the Probate Court in a manner that amounted to about the same as asking that the decree be released to the appellee. And if this sum had been lost

to the estate, when he was sanctioning and conniving at such proceedings, he certainly ought to have been held personally liable therefor. But we are of opinion that his promise to enter satisfaction of the decree, even under the sanction of an order of the Probate Court, was no satisfaction. Had he improperly procured such order, and released the decree, he would have been liable to the estate; if the court had made such order without his procurement, it would have been without authority of law, and he was not bound to obey it. It would, in fact, have been his duty to disobey it, and it was and is his duty to be vigilant in collecting and taking care of the estate, and not to barely perform such duties as the law forced him to do, as his own language intimates. This proceeding, therefore, was not a satisfaction of the decree, nor was the Probate Court, as contended for, an arbitrator between the parties.

No award was made and no judgment sought of any competent court. The appearance before the Probate Court was *ex parte*, and to ascertain if that court would order the administrator to satisfy a decree in chancery, by which both appellee and appellant were to be discharged from responsibility at the cost of the estate. While it is clear that the administrator had no right to give away or thus waste the assets of the estate, it is equally true that the Probate Court had no authority to require him to do so; and certainly no power to adjudicate upon the validity of the decree in chancery, and any promise the administrator may have made to cancel that decree, was not only wanting in consideration, but was without authority in law to bind him, and in violation of his duty as such trustee. A mere offer to perform, what another may consider just between disputants, is no sufficient consideration, in law, to compel an individual to abide such finding; much clearer is it insufficient to compel a trustee to misapply or waste the *cestui que trust's* estate.

In the case of *Underwood vs. Milligan*, this court said: "As Marshall had no power, as administrator, to enlarge the lia-

bility of his intestate, or bind the assets in his hands by any agreement of his, the proof of this agreement did not establish the account sought to be recovered of Milligan, as administrator *de bonis non*," *etc.*, 10 *Ark.*, 256.

We are of the opinion that the decree was not satisfied; that there was no judgment vacating it; that Hughes' promise, as administrator, to satisfy the decree, was without consideration, contrary to his duty and void; that he, as such administrator, should be charged with the amount of the decree; that the Chancery Court erred in overruling the application to have said decree enforced. Its order and decree is therefore reversed, and the cause remanded, with directions to refer the matter to a master, and ascertain the amount due upon the original decree in favor of said estate, and order the same paid by a day certain, and in default thereof, that the lands referred to, in the decree, be sold to satisfy such demand.

COOKSEY v. McCRERY.

CONFEDERATE MONEY — *Not a valid payment.* — The payment in confederate money is not a valid discharge or payment of a debt or obligation. (*Thompson vs. Mankin*, 26 *Ark.*, 586, *and Vinsant vs. Knox, page* 266. *Approved.*)

APPEAL FROM DALLAS CIRCUIT COURT.

HON. E. J. SEARLE, *Circuit Judge.*

English, Gantt & English, for Appellant.
Gallagher, Newton & Hempstead, for Appellee.

GREGG, J. — The appellee brought his suit to the March term, 1868, of the Dallas Circuit Court, upon a bond, executed by the appellant to Benjamin E. Williamson, on the 27th of June, 1867, for the sum of $400, conditioned, that whereas said Williamson had purchased certain Internal Improvement Lands from the State, and executed his note in the sum of $200 therefor, and that the said Cooksey should well and truly pay off said note and safely indemnify said Williamson from any damage or loss, and transferred to him the certificate of purchase.

And he alleged, as a breach, that the said appellant did not indemnify and save the said Williamson from damage, but neglected and failed to pay off said note when the same became due and payable, or thereafter, but that on the 20th day of February, 1863, said Williamson died, and afterwards letters of administration were granted N. A. Williamson and J. D. Bellah, and that in November, 1863, said note was presented to them as such administrators, and they paid off the same, and that thereafter their letters of administration were revoked and letters *de bonis non* granted to appellee, and that he, as such administrator, had sustained damages to the amount of $400.

At the April term, 1870, the appellant appeared and filed four pleas. The first, that the plaintiff had not been damaged. The second, that the appellant was ready and willing to pay

off and discharge said writing obligatory when the same became due, but the same was then in the hands of the officers of the government of the State of Arkansas, then in rebellion against the government of the United States, and that, while said writing obligatory, in said bond referred to, was in the hands of said officers, then in rebellion, said plaintiff paid off the same to them. The third, that on the 18th of November, 1863, the plaintiff paid off said writing obligatory, to the officers of the State, then in rebellion, in confederate money, Arkansas war bonds or Arkansas treasury notes, which money had been issued and put in circulation to carry on war against the United States; and thus said writing came into the hands of said plaintiff, contrary to public policy. The fourth, a general averment of payment in confederate money, to officers engaged in rebellion, etc.

The pleas were all duly sworn to. At the September term, 1870, the court sustained a demurrer to all the pleas, and the appellant declining to plead further, a jury was empaneled and assessed the appellee's damages at three hundred and fifty-nine dollars, whereupon the court rendered judgment for the penalty of the bond and ordered execution for the amount of damages so assessed, from which ruling and judgment this appeal is prosecuted.

The first plea seems to be but a general issue. The appellee alleged, that by reason of the appellant's failing to comply with the conditions in his bond, he was damaged in the sum of four hundred dollars; the plea avers that the appellee had not, at any time since the making of the bond and conditions therein, been in any manner damnified by reason of any matter or thing in said condition mentioned. This appears to us a traverse of the breach alleged, and we see no sufficient reason why the demurrer should have been sustained to this plea.

The second plea avers that the writing obligatory was not paid to any one entitled to collect the same, but was paid to pretended officers of the State, then engaged in rebellion.

The handing of money over to persons not authorized to receive it, is certainly no valid payment of a debt.

The third and fourth pleas aver that the payment made was in confederate notes, or Arkansas war bonds or treasury notes, issued in aid of the rebellion against the United States.

Under the decisions of this court, these pleas, if true, necessarily defeated the appellee's right of recovery. *Latham vs. Clark*, 25 *Ark.*, 574; *Jordan vs. Walker*, 26 *Ark.*, 1; *Penn vs. Tollison*, 26 *Ark.*, 545; *Booker vs. Robins & Page*, *Ib.* 660, and other cases.

The record further shows that N. A. Williamson and J. D. Bellah, who, it is alleged, made the payment, were not legally authorized to do so; *Thompson v. Mankin*, 26 *Ark.*, 586; *Vinsant vs. Knox*, decided at present term; and hence, if paid by them, it was of their own choice and not binding upon the appellant, and for that reason the appellee's demurrer should have been held to reach back and defeat his declaration.

For these reasons the judgment must be reversed and the cause remanded to be proceeded in according to law and not inconsistent with this opinion.

SEARLE, J., being disqualified, did not sit in this case.

HON. S. R. HARRINGTON, *Special Supreme Judge.*

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TINER, Adm'r. v. CHRISTIAN, Adm'x.

ADMINISTRATION—*When attorney's fees allowed.*—To entitle an administrator to charge his intestate's estate with attorney's fees, the fees should accrue in obedience to the order or sanction of the Probate Court.

JUDGMENTS—*What grounds of reversal.*—When the Circuit Court, on appeal, fails to pass upon a point which should have been decided, yet, when the decision, if made, would have been adverse to the appellant and not prejudicial to his rights, such failure cannot be considered as a good ground for reversal.

PROBATE COURTS—*Have no cognizance of vendor's lien and partnership.*—Probate Courts have no jurisdiction to enforce a vendor's lien or adjudicate and settle partnership claims.

DOWER—*Not allowed in proceeds of lands sold, etc.*—The widow is not entitled to dower in the *proceeds* of the sale of lands, whereof her husband died seized, made by the administrator, under order of the Probate Court, but she must look to the *specific* estate.

ADMINISTRATION—*Misapplication of effects, etc.*—The misapplication by an administrator of the effects of an estate, in distribution, will be rectified by the court, and such misapplication will not have the effect to deprive him of the commissions allowed, by law, for such sums of money as were *lawfully* expended in the settling of such estate.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

W. D. Moore and English, Gantt & English, for Appellant:

First. The court below erred in not allowing attorney's fees as legitimate costs of administration; See *Secs.* 194-5-6, *Chap.* 4, *Gould's Dig.* That the court should have considered the question of attorney's fees; See *Sec.* 201, *Chap.* 4, *Gould's Dig.* As to the matter of bill of exceptions: See *Dempsy vs. Fenno*, 16 *Ark.*, 491.

Second. That the widow was entitled to dower in the lands, under *Sec.* 1, *Chap.* 60, *Gould's Dig.*, and she could "follow it wherever it might be found, and subject it to her lien." *Hill ad'r., vs. Mitchell*, 5 *Ark.*, 608. The mere conversion did not bar or destroy her right, previously vested, which was a charge upon the lands. *Menifee vs. Menifee*, 8 *Ark.*, 9;

Bob vs. Powers, 19. *Ark.*, 440. She is entitled to dower in the personalty, regardless of the solvency of the estate; *James vs. Marcus*, 18 *Ark.*, 422; and if personally sold, to one-third of the proceeds, *ubi supra.* Why should not same rule apply where lands are sold? *Rose's Dig.*, *p.* 291–2. As to the question of vendor's lien, the court properly refused to consider it. *Adams on Eq. p.* 126.

Third. As to the right of the administratrix to commissions, etc., See *Secs.* 122–3, *and Chap.* 4, *Gould's Dig.*, and even if the effects of the estate had been misapplied, the creditors had their remedy; See *Secs.* 146–7–8, *Chap.* 4 *and* 127, *Gould's Dig.*

Watkins & Rose, for Appellee.

The memorandum filed showing the rulings of the judge, not being embraced in a bill of exceptions, is no part of the record. *Sawyers v. Lathrop*, 9 *Ark.*, 68; *Berry vs. Singer*, 10 *Id.* 489, *Byrd vs. Brown*, 5 *Id.*, 710; *Cox vs. Garvin*, 6 *Id.* 431.

The widow has no dower in lands not paid for. *Thorn vs. Ingram* 25 *Ark.*, 52. The sale by the administrator could not affect the widow's dower in the lands in specie, and she could have no claim on the money. Neither has a widow any dower in partnership property; certainly not before the partnership debts are paid. *Sumner vs. Hampton* 8 *Ohio*, 358.

BENNETT, J.—Mary K. Christian, as administratrix of Joseph D. Christian, deceased, surviving partner of Christian & Norris, filed in the Circuit Court of Ashley county, at its September term, 1869, her petition against Benjamin Tiner, as administrator of A. J. Buffington. The facts, as stated in the said petition, were agreed to by the attorneys, which were substantially as follows:

"That Tiner, as administrator of Buffington, under an order of the Court of Probate, of Ashley county, sold certain lands belonging to the estate of said Buffington, in Ashley county, for $700 00 which sale was reported for confirmation.

That said Christian, as administratrix, as aforesaid, prayed said Probate Court to order said Tiner, administrator, to appropriate said $700 00, first, to the payment of the legitimate costs of administration, not including, as legitimate, any charges for attorney's fees, and the balance to the payment, so far as it would go, of a demand due the petitioner, as administratrix of said Joseph D. Christian, against the estate of said A. J. Buffington, of the fourth class, amounting to the sum of fifty-two hundred ($5200) dollars. That in proof of said petition for said order, it was proven that the claim was due for a part of the purchase money for the interest of said A. J. Buffington in the lands sold by Tiner, as administrator, aforesaid; that said interest in said lands was sold by Joseph D. Christian to said Buffington, for the purpose of forming a partnership, etc.; that said interest in said lands was held by said Buffington, as a partner, and for partnership purposes; that Edna C. Buffington, the wife of said A. J., was the administratrix of said A. J. Buffington prior to said Tiner; that she had paid, in full, all the debts and demands probated against said estate, of the fourth class, except the demand due the petioner, on which she had paid nothing, etc. That the said Probate Court made the order in accordance with the prayer of said petition; that, at a subsequent day of said court, Tiner moved to set aside said order as to the exclusion of attorney's fees as legitimate costs, etc., that the court overruled the motion, to which Tiner excepted and prayed an appeal to the Circuit Court, which was granted; that afterwards, said Tiner, on a day of the same term of said Probate Court, moved the court to set aside the order to appropriate the balance of said $700 to said debt, due said Christian, as administratrix, and for cause shown. That by the last account current of said Edna C. Buffington, confirmed by the Court of Probate, the sum of about $600 was due her as commissions, as administratrix of said A. J. Buffington, and that said Edna C. Buffington was entitled to dower in said $700, as the widow of A. J.; that the Probate Court sus-

tained the motion of said Tiner, and set aside its previous order, to which Christian, administratrix, excepted and prayed an appeal to the Circuit Court, which was granted.

The court house at Hamburg, Ashley county, having been burned, sometime previous, all the original papers in the above cause were destroyed."

The above was agreed, by all the parties, should be taken as the substance of the proceedings and evidence in the cause, upon which papers it was submitted to the Circuit Court, and on motion the cause reinstated. Upon the hearing, the court found in favor of Christian, and ordered Tiner to pay over to her the $700, after deducting the legitimate costs of administration, without deciding directly as to whether attorney's fees for services rendered the estate were legitimate costs or not. Tiner excepted and appealed to this court.

From the above agreed statement of the pleading and facts, the following points were raised for the consideration of the Circuit Court:

First. Are attorney's fees legitimate costs of administration, and should the Circuit Court have considered this question, in reviewing the proceedings of the Probate Court, when presented in the record?

Second. Have Probate Courts jurisdiction in matters relating to a vendor's lien, or to the settlement of partnership debts or property, so as to determine the right of a widow to dower in the property said to be encumbered by the lien, or said to be partnership property?

Third. Was Edna C. Buffington, the widow of A. J. Buffington, entitled to dower in the $700, the proceeds of the sale of certain lands owned by said Buffington, and of which he died seized?

Fourth. Was the administratrix of the estate of A. J. Buffington entitled to commissions on the administration of said estate, if she had misapplied the effects of the same?

As to whether attorney's fees are legitimate costs of administration, *Sections* 194-5-6, *Chap.* 4, *Gould's Digest*, say:

"Where it shall become necessary, in the opinion of the Probate Court, for any executor or administrator to employ an attorney to prosecute any suit brought by or against such executor or administrator, the attorney so employed shall receive as a compensation for his services eight per centum, etc."

"The same compensation may be allowed for defending suits when, in the *opinion of the court*, the employment of an attorney may be indispensibly necessary to do justice to the estate."

"Such attorney's fees shall be paid as expenses of administration; but no *attorney's fees* shall be allowed any executor or administrator unless for the prosecuting or defending a suit *under the direction of the court.*"

Thus it will be seen, attorneys may be employed to prosecute or defend suits brought by or against executors and administrators, but no allowance of fees shall be made, unless for the prosecuting and defending suits under the direction of the court. The record, in the case before us, does not disclose what amount of attorney's fees were asked to be allowed, or for what the services were rendered, or that they were ordered or sanctioned by the Probate Court. But, on the contrary, the record shows that the prayer of the petitioner in the Probate Court was, "that Tiner appropriate said $700, first, to the payment of the legitimate costs of the administration, *not including as legitimate costs any charge for attorney's fees,*" etc., and that said court entered up an order in accordance with the prayer of the petition.

While the record is somewhat vague, yet the conclusion is inevitable that the attorney's fees were not made in obedience to any sanction of the Probate Court, and no administrator would have been justified in charging the estate with them. It is true the Circuit Court should have decided explicitly upon this point, as well as all others involved in the case; yet, not having done so—unless we go upon the general presumption that such was the case, and that presumption is

very strong outside of the opinion of the judge filed in the case, which is no part of the record—when the decision, if made at all, would have been adverse to the appellant, and not prejudicing any of his rights, cannot be considered as good ground for reversal.

As to the question of vendor's lien, claimed by Christian, the court very properly refused to consider it. A vendor's lien is only an imperfect one, recognizable and enforcible only in a court of equity. *Adams on Equity, sec.* 126. The same may be said as to the land sold being partnership property, and held for partnership purposes.

The record does not show that there were any former debts outstanding against the firm of Christian & Buffington, or any other firm of which Buffiington had been a partner. The creditors of a firm have a proper tribunal wherein to adjudicate their claims; it cannot be done before the Probate Court. There was nothing to prevent the widow asserting her right to dower by reason of partnership debts. Was Edna C. Buffington, the widow of A. J. Buffington, entitled to dower in the $700, the proceeds of sale of certain lands owned by said Buffington, and of which he died seized? We think not.

In the case of *Hill's admr's. vs. Mitchell et al.*, 5 *Ark.*, 608, the court say: "The widow has dower for life of one-third of the real estate owned by her husband at any time during coverture, whether unsold at his death, or sold or alienated by him without her consent in legal form; and also for life, of one-third of all slaves possessed by him at his death absolutely. * * * * Her dower in each is carved out of the specific estate of which he was possessed; and if she has been deprived of it, she can follow it wherever it may be found, and subject it to her lien, unless by her own laches she has abandoned or waived her right. But she has no dower in the *choses in action* of the husband, though she has in his *money or cash in hand.*" Again, in the case of *James vs. Marcus et al.*, 18 *Ark.*, 422, the court say, in the language of the

statute: "That the widow is entitled to dower in all personal property (except choses in action) of which the husband dies seized and possessed, regardless of the solvency of the estate or demand of creditors." A different rule as to "choses in action," however, prevails at present, by direct legislative enactment: *Act February* 21, 1859. Had the money been in the hands of the administrator as a part of the effects of the estate of Buffington, at the time of his death, there could have been no doubt of her right to dower. But it having been created by the sale of land belonging to the estate, after the death of Buffington, the widow must look to the specific estate from which it was derived, viz: the land sold, for her dower right. The appellants say, "if the administrator had sold personal property without alloting to the widow dower therein, she would have been entitled to one-third of the proceeds of the sale," and then ask the question, "why should not the same rule apply in case of lands?" and then say, "there is no reason why it should not." We think there is a very great reason why it should not.

Our statutes, and the ruling of this court, have said the widow shall be endowed absolutely of one-third of all personal estate owned by her husband at his death, and shall only be entitled to *dower*, during life, of one-third of his real estate. In one case she holds absolutely, in the other, only a life interest. If the doctrine of the appellants were true, a widow would only be obliged to have the administrator to convert the real estate into cash, by order of the court, and assign her one-third of it, and she become the absolute owner of it, thereby defeating the object of the law and defrauding heirs, etc.

To the right of the administratrix to commissions, even if she had misapplied the effects of the estate, we have no doubt. Yet it was the duty of the Probate Court to have reviewed her account current, and rectified all errors of misapplication, etc., and if she had paid one creditor to the exclusion of another, the court should have made a *pro rata* distri-

bution according to law. The administratrix was only entitled to credit herself with such sums of money as were *lawfully* expended in settling such estate, and her commissions as allowed by law. See *Sections* 120, 122, *Chapter IV, Gould's Digest.*

The record and agreed statement of facts, as presented, are so vague and indefinite as to make it very hard to arrive at the exact points upon which either the Probate or Circuit Court ruled, but the final judgment being that the $700, being the money arising from the sale of lands of the estate, should be paid to Christian, "after deducting the legitimate costs of administration," was not in accordance with law; it should have been that "it should have been applied to the payment of the debts of the estate." And if all claims had been paid that had been allowed in the various classes, as provided in the statute, except those in the fourth class, those demands should be paid in proportion to their amounts, which apportionments should have been made by the Probate Court, if there had not been enough assets to have paid all.

The judgment of the court below is reversed, and the cause remanded with instructions to proceed with the case in accordance with law, and not inconsistent with this opinion.

CHECK v. BERRY, as Adm'r, etc.

APPEALS—*When taken before adoption of Code.*—Where an appeal was taken before adoption of the Code of Practice, the provisions of the Code, in relation to bringing appeals into this court, do not apply; the law in force at the time of granting the appeal will govern.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

HON. J. M. HANKS, *Circuit Judge.*

O. P. Lyles, for Appellant.

U. M. Rose, for Appellee.

HARRISON, J.—The appeal in this case was taken at the May term, 1868, of the Circuit Court of Crittenden county, and a recognizance entered into for a stay of execution; but no transcript of the record and proceedings in the court below was filed in this court until the 24th day of January, 1871, and the appellee has filed a motion to dismiss the appeal because the transcript was not filed within the time prescribed by law.

The appeal having been taken before the adoption of the Code of Civil Practice, its provisions in relation to the manner of bringing appeals into this court, have no application to the case; it must be governed by the law then in force. *Sedgwick Statute Law*, 188, 202; *Couch vs. McKee*, 6 *Ark.*, 484.

The law in force, at the time the appeal was taken, required all appeals taken thirty days before the first day of the next term of this court, to be returnable to such term; and those taken less than thirty days to the second term thereafter, and that the transcript of the record and proceedings should be filed, at least, ten days before the commencement of the term. *Section* 23, 24, *Chapter* 134, *Gould's Digest.*

This court then did not acquire jurisdiction of the appeal, by the filing of the transcript, after the time prescribed, and the only order we can make in the case is to direct it to be stricken from the docket. *Clay, adm'r. vs. Notrebe, exr's.*, 11 *Ark.*, 631.

If the appellee wishes to have the benefit of his decree, now suspended by the recognizance, he must produce to us, in pursuance of the statute, a certificate from the clerk of the court below, of the taking of the appeal and giving of the recognizance, and move that it be affirmed.

The motion is overruled.

BOURLAND et al. v. NIXON.

PLEAS—*Pendency of another suit, etc.*—Plea of the pendency of another suit, in a tribunal having concurrent jurisdiction, must distinctly aver that the same parties and the same subject matter are before it, otherwise the plea is demurrable.

APPEAL FROM FRANKLIN CIRCUIT COURT.

HON. WILLIAM N. MAY, *Circuit Judge.*

Garland & Nash, for Appellants.

First. Appellee had full and complete remedy by execution, after order of payment and refusal to pay. *Gould's Digest, Chapter* 4, *Sections* 143–47.

Second. The whole matter was pending in another court, the Chancery, which takes jurisdiction for all purposes, and the court first taking jurisdiction retains it; therefore the *sci. fa.* should have been dismissed. 5 *Ark.*, 424; 21 *Id.* 367; 10 *Peters*, 400; 25 *Ill.*, 107; 24 *Howard* (*U. S.*) 450; 3 *Wall*, 334.

Third. All the pleas in the court below, not being disposed of, the case must be reversed. 6 *Ark.*, 447; *White vs. Reagan*, 25 *Ark.*, 622.

Clark & Williams, for Appellee.

First. As to the question raised by the 8th plea, whether a

note given or a judgment upon a note given for a negro slave can be recovered. *See Jacoway vs. Denton*, 25 *Ark.*, 625.

Second. We submit that all the other pleas are too plainly frivolous and destitute of any shadow of defense, to require notice; and there being no error in the record and proceedings, the judgment should be affirmed. *Gould's Dig.*, *Chap.* 4, *Sec.* 201; *Chap.* 40, *Secs.* 27, 28; *Dempsey vs. Fenno*, 16 *Ark.*, 491.

BENNETT, J.—Nixon, who had a claim, proved in due form before the Probate Court, against the estate of John M. Davis, deceased, got an order of payment against the administrator. But payment was not made when demanded. An execution was issued against the administrator which was returned "not satisfied." A *sci. fa.* then issued against the administrator and his securities, to show cause why they should not be made to pay the claim.

The securities appeared and filed what purported to be twelve pleas. All except the 2d, 6th, 8th, and 11th, were of so frivolous a character, as to demand no consideration from this or any other court. The 2d plea, that no demand for payment of money was made before execution was issued, was not sustained by the evidence introduced before the court sitting as a jury. The 6th plea, that of payment, was not attempted to be sustained on trial. The 8th, that the consideration of the note, upon which judgment was rendered, was a negro slave, if true, could not avoid the claim, as a negro has been held to be a good consideration for a contract. *Jacoway vs. Denton*, 25 *Ark.*, 625.

The only plea having even the semblance of merit, was the 11th, stating there was another suit pending for the same subject matter in the Chancery Court.

While we may admit that the court, first obtaining jurisdiction of the cause, should have the right to decide every issue arising in the progress of the cause, at the same time it is confined in its operations to the parties before the court, or

who may, if they wish to do so, come before the court and have a hearing on the issue so to be decided. But it is not true that a court having obtained jurisdiction of a subject matter of a suit, thereby excludes all other courts from the right to adjudicate the subject matter, when other persons are parties to it—or upon other matters having a close connection with them before the court. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. The limitations to this rule, if we may call it one, must be much stronger and must be applicable under many more varying circumstances, when persons, not parties to the first, are prosecuting their own interests in other courts. *Buck vs. Colbuth*, 3 *Wall.*, 344.

A person pleading the pendency of another suit, in another tribunal having concurrent jurisdiction, must distinctly aver that the same parties and the same subject matter is before it, otherwise the plea would be bad. The plea filed in the cause, now under consideration, did not do this, therefore there was no error in sustaining the demurrer.

No error appearing in the record or judgment of the court, it is in all things affirmed with costs.

RECTOR et al. v. DU VAL et al.

POSSESSORY TITLE—*Determined by weight of evidence.*—Where, under the pleadings, possession of land is the matter in issue, and each party claims the benefit of limitation upon a possessory title, the rights of the parties will be determined by the evidence.

APPEAL FROM PULASKI CHANCERY COURT.

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

Gallagher & Newton and J. M. Smith, for Appellants.

That the deed from Field to Rapley, and mortgage from Rapley to the Bank was not intended, and did not pass the title out of Field—and for construction of these deeds. *See Guthrie vs. Field,* 21 *Ark. Rep.,* 385, *and Trapnall et al. vs. Benton et al.,* 24 *Ark.,* 389, *and this last case is applicable to the present one throughout.* That possession gave Field title, and limitation would bar Rapley and his heirs as to deed of 1837. *See Hinton vs. Fox,* 3 *Litt.,* 380; *Hanie vs. Hall,* 5 *Hemp.,* 290; 6 *J. J. Marsh,* 536; *Hide vs. Hide,* 1 *B. Mon.,* 177; *Trapnall et al. vs. Benton et al.,* 24 *Ark.,* 384, *et seq.* That the recitals in the mortgage deed concluded Rapley and all claiming under him, and that he is estopped thereby. *See Sayles vs. Smith,* 12 *Wend.,* 58; 12 *Ill. R.,* 357; *Bush vs. Marshall,* 6 *Hump.,* 284; *Jerry vs. Bank of Orleans,* 9 *Page C. R.,* 649. That the deed of 1837 was not to Rapley in trust. *See Clogett vs. Hall,* 9 *Gill & J.,* 80; *Dickerson vs. Dickerson,* 2 *Minn.,* 279; *Steen vs. Steen,* 5 *John. Ch. cases, and Gould's Dig., Statute of Frauds, Sec.* 12.

2d. That the Borden deed did not affect the lands in controversy, is defective and void, and the onus of showing regularity is on the party claiming thereunder. *See Lafferty vs. Cowen,* 3 *Sneed,* (*Tenn.*) 221–231; *Hobart vs. Frisbee,* 5 *Cowen,* 592; *Clemens vs. Runnells,* 34 *Miss.,* 579.

That the court of equity, in this case, on bill for partition and general relief, or even for partition alone, has full power

to settle the rights of all the parties. *See Trapnall et al. vs. Benton et al.*, 24 *Ark.*, 401; *Ashley et al. vs. Rector et al.*, 20 *Ark.*, 359; *Blakeny et al. vs. Ferguson et al.*, 20 *Ark.*, 547; *Drennen, Adm'r, et al. vs. Walker et al.*, 21 *Ark.*, 539.

U. M. Rose and Clark & Williams, for Appellees.

Though the recital of consideration in a deed may be explained by parol testimony, yet this cannot be done for the purpose of defeating the conveyance: *Vaugine vs. Taylor*, 18 *Ark.*, 65.

And no parol condition, reservation or defeasance can be proved to defeat the grant. *Rogers vs. Sebastian County*, 21 *Ark.*, 440.

As to possession by Field after conveyance, unless the possession was clearly shown to be hostile, he would be held to occupy in right of his vendee, and the statute of limitation would not run. *Jackson vs. Thomas*, 16 *J. R.*, 292; *Floyd vs. Mintsey*, 7 *Rich*, 181.

As to cutting of wood on the land, the possession of the father was the possession of the son, and cannot be disturbed so that it shall enure to himself. *Danley vs. Rector*, 10 *Ark.*, 211; *Dodd vs. McCraw*, 8 *Id.*, 83; *Prater vs. Frazier*, 11 *Id.*, 249; *Rector vs. Danley*, 14 *Id.*, 304.

To defeat the deed of 1837, it is shown that Field afterwards mortgaged the same lands with much other property, real and personal, to Rapley and Johnson, and Rapley and Rector. But this proves nothing, since the acceptance of these mortgages would not divest the title of Rapley as by estoppel. This is well settled. *Harding vs. Springer*, 2 *Shipley* 407; *Ham vs. Ham*, *Id.*, 351; *Housatonic Bank v. Martin*, 1 *Metc.* (*Mass.*) 294; *Parker vs. Locks and Canals*, 3 *Id.* 91. A grantee may show that his grantor had no title. That is done every day. *Gaunt vs. Wainman*, 3 *Bing.*, *N. C.* 69; *Small vs. Proctor*, 15 *Mass.*, 499; *Averill vs. Wilson*, 4 *Barb.* 10; *Sparrow vs. Kingman*, 1 *N. Y.*, 242; *Gardner vs. Green*, 5 *R. I.* 104. If the mistake in the deed of Borden was mutual, the deed

was not void. *Hill vs. Bush*, 19 *Ark.*, 522; *Byers vs. Fowler*, 14 *Id.* 86; but if void, it would still be admissible to explain the holding, and make good a title by limitation. *Cofer vs. Brooks*, 20 *Ark.*, 542. Any claim by Field was clearly barred by *Sections* 1, 2 *and* 5, *Chapter* 106, *Gould's Digest.*

GREGG, J.—The minor heirs of Jane E. Rector, by their guardian, Henry M. Rector, brought their bill of complaint, in the Pulaski Chancery Court, against DuVal and wife, and others, who, with themselves, are alleged to be heirs at law of William Field, deceased, and prayed a decree settling the rights of the parties, and for partition of the north part of the east half of the south east quarter of section ten, and the north part of the south-west fractional quarter of section eleven, in township one north, of range twelve west, and certain lots in the city of Little Rock, of which, it is alleged, Field died seized and possessed.

The complainants do not set out the title of Field. The defendants admit the ownership of the city lots, as charged in the bill, and that, in 1837, Field was seized in fee of the lands described; but they charge that on the 25th of August, of that year, he and his wife Mildred, by deed absolute, conveyed said lands to Charles Rapley, who took possession of the same, and that, thereafter, they remained in his possession until 1848, when they were levied upon and sold to satisfy certain judgments and executions against said Field and Rapley; that, upon such sale, the lands were bought in by F. W. Trapnall, and at his written request, by Borden, the sheriff, deeded to said Rapley, in trust for the use of Ann B. Rapley (trustee's wife), DuVal and wife, in right of the wife, and Ben. Johnson Field, with power in the trustee to make division; and that partition was agreed upon and made by said Rapley, DuVal and William Field, the father of Ben. J. Field, who was then a minor living with his father, and that from the year 1848, the said trustee and beneficiaries held and controled said lands; that, by a clerical misprision, said lands were

misdescribed in said trust deed; that William Field had control of and cut wood on his minor son's share up to within a few years of his death, which took place in 1861.

The complainants admitted the execution, in due form, of the deed of August 25, 1837; but they alleged that that deed was made without consideration, other than as security for Rapley to mortgage the lands to the Real Estate Bank, upon which he could borrow money, and that the title and possession were to be and remain in Maj. Wm. Field for all purposes, except so far as the same might be affected by such mortgage; that said Field did remain in possession thereof, (except about twenty or thirty acres, alleged to have been afterwards sold to Rapley), and that in 1843 and 1844, Field mortgaged the same, and did other acts of ownership up to or near the time of his death, and that complainants knew nothing of said sheriff's deed until since the war.

The substance of the proof was to the following effect:

Brown testified that he knew the land; heard it stated in the family that Maj. Field had given some of that land to Ann B. Rapley, some to Ben. J. Field, and some to Judith Ellen DuVal; that Mrs. Rapley and her husband were in possession of their part in 1841, but the other was, at that time, in Maj. William Field's possession; he claimed it and cut wood off of it; afterwards, DuVal got wood off of part of it; none of it was ever fenced except part of Rapley's, etc.

Danley says that in 1848, and since, he saw William Field's slaves getting wood on the lands.

Scott testified he had resided here twenty-nine years; was formerly a slave of William Field; that he knew when the defendant, DuVal, was married; that Field claimed that land, and that about a year after DuVal's marriage, he and Wm. Field, and his son Ben. Johnson Field, went on the land and measured off some on the south side for Mrs. Rapley, and then divided the balance of the land by running a line north and south, through the center of the tract, and DuVal got

the north-west part of the tract, and Ben. J. Field the north-east part, and Mrs. Rapley the south part; that, after that time, DuVal had possession and got wood off of his part, and Maj. Field got wood, up to 1860, off of Ben. J. Field's part; Ben. was then a minor living with his father. The witness and Ben. J. Field run the same lines over again in 1861; there were no improvements only on Rapley's part, etc.

James Martin testified that he was the administrator of Charles Rapley's estate; he is a surveyor, he knew the lands, gave a description of them, etc.

Henry M. Rector testified that he was son-in-law of Maj. Field, and knew the lands in 1838, and that Field then owned them. He was often over the lands with Maj. Field, up to 1858; that about 1837 Field gave or sold Rapley some lands in the bottom adjoining these, and he thinks about eight or ten years subsequently, Rapley wanted to build, and he understood from the parties, Field sold Rapley some off of the south end of the tracts herein described, which was thereafter in Rapley's possession up to 1863; that he always understood the lands to be in Maj. Field's possession. But it was often spoken in the family that he designed to give some portion of these lands to DuVal and wife, a portion to Ben Field and a portion to Mrs. Rapley, but witness never knew what portion, when or how it was to be given. That DuVal frequently said a portion of it was his; Ben Field and Mrs. Rapley also claimed a portion. That Maj. Field always spoke of these lands as his, and he saw Field's hands getting wood east of the center of the tract. Rector further stated, with some detail, the real and personal property by Field given to his different children, and showed that the complainants and their mother had received less than some others; that the estate of Field, at the date of his death, was not worth very many thousand dollars and that, in his opinion, the lands in controversy, in 1848, were worth from five to seven thousand dollars, and that now they are worth from twenty-five to thirty thousand dollars.

Ben. T. DuVal testified that Rapley lived on his lands as early as 1842; that he did not positively know who had the other lands in possession up to 1848, but that soon after the making of the deed from Borden, as sheriff, the south part was by Rapley, Maj. Field and witness, set apart to Mrs. Rapley; the north-west part to witness and wife, and the north-east part to Ben. J. Field. No measurement was then made, and no one, to his knowledge, made any claim or exercised any acts of ownership over it from 1851 to 1865. That he had wood cut off of his part, and all that time paid taxes, intended for, and to go on that land, and that Maj. Field paid no taxes thereon after 1848, but there was a mistake in the description on the tax books, as on the Borden deed, until 1862; that after 1848, Maj. Field exercised no acts of ownership over the north-west part, claimed by DuVal; that he went with DuVal on the land and pointed out a site for him to build when he had spoken of building, and also pointed out where the line would run, dividing Ben. Field's lands from DuVal's; that Maj. Field and Rapley both considered that these same lands were conveyed in trust by the Borden deed, and that in 1862, Rapley, as such trustee, conveyed to DuVal and wife the part claimed by them, and that all DuVal's claim and acts of ownership were under the Borden deed of trust and the agreement made in 1848, made between those then interested, in accordance with what was understood to be the Borden deed; that so long as the Major was able to do any business, Ben. J. Field was a minor, living with him, and the Major had control of his lands.

Ben. J. Field testifies that he lived with his father; that after 1848, the father forbid his hands cutting wood on the lands claimed by DuVal, said that belonged to DuVal, etc., and in 1863, Rapley offered to deed witness his part, and said he held his lands in trust, etc.; none of the lands were improved, only a part of Rapley's.

Thomas C. Peek testified that in 1861, Rapley pointed out his north-west corner and said he wanted to give witness' wife,

who was Rapley's daughter, some land near there; this was on the south and joining what, in the families of Field and Rapley, was known as DuVal's land, etc.

Mrs. Ann B. Rapley testified that she was the daughter of William Field, who died in November 1861. Upon marriage, her father set apart to each daughter a portion of land and a slave, or the value of one, and in 1847, when her sister Ellen, married DuVal, the lands herein claimed were intended to be divided; twenty acres, near the Rapley house, to be witness' and the remainder to be equally divided between her brother Ben. and sister Ellen, after witness' share was taken off; the west half was to be Ellen's, and the east half Ben's. After the division of the lands, her father exercised no control over them, only to haul wood off of Ben's and some off of hers, and during that time Ben was a minor, and lived with the father, and was under his control; that she heard the father one time suggest to Ellen that she had better use her wagon, team and servant to haul wood off of her lands, if for no other purpose than to get pocket money, and when Mr. Allis wanted a right of way for a plank road across that land, he referred him to Mr. DuVal as the owner.

Mr. Rapley held these lands in trust for the parties named, and after we were separated in the war, he expressed regret that the deeds had not been made to them respectively. He was then in bad health and wished the matter settled, and after we removed to Camden, he and wife made a deed to DuVal, and she understood that deed to convey the west half of the land referred to, as having been designated for him and Ellen. The ownership of these lands was frequently discussed in the family of Maj. Field, and was never controverted; never heard of any objection until at Camden. Mr. Rapley said Governor Rector would object, but that he would carry out the trust; that her father's agreement for this division was after DuVal's marriage, and that witness' twenty acres were set apart some time after that. That she does not know of any survey being made when the lands were divided

between herself, brother Ben, and sister Ellen; she was never present at any survey, but she walked over the lines dividing and bounding the different tracts with the father many times.

Upon this proof, the court found that William Field did not die seized of the lands in controversy; that there was therefore no equity in the original bill and decreed the same be dismissed and the complainants pay costs, from which the complainants appealed to this court.

William Field's title to the lands in controversy and his conveyance of them to Rapley in 1837, is not questioned; and from the evidence, there seems to be but little doubt, for sometime after this, Field was assuming to own and control most of these lands, at least such of them as were not in Rapley's possession.

The deed made by Borden, as sheriff, in 1848, to Rapley as trustee, seems not to be controverted, only by the complainants, through their guardian denying any knowledge of it; but as the lands in controversy are not properly described therein, the burden is thrown upon the defendants, if necessary for them to maintain title under that deed.

The possession of the land is a matter in issue under the pleadings, and each party claims the benefit of limitation upon a possessory title.

It being admitted that Major William Field, in 1837, was seized and possessed of all these lands, it is then shown by deed that he conveyed them to Charles Rapley; here ends the possession by deed. With this proof alone the complainants could not hope to recover, but to sustain their case they enter upon a wider field, and attempt to show, by parol, that Major Field executed that deed as a security merely, and that he continued the owner and in possession of the land. They show that Rapley mortgaged the land, and produced unwritten proof that conduced to show that Field held possession of the lands. But the ground of establishing title by parol evidence was readily occupied by the defendants, and while the complainants proved by some witnesses that

Field claimed the lands and cut wood thereon, they showed that the lands were principally uninclosed and wild, and that so much as was inclosed was held adversely by Rapley, and the defendants proved by a greater number of witnesses, and by those most intimate with Major Field and family that, subsequent to 1848, he did not claim the lands as his own, and to say the least of the evidence, it tended to show that by his connivance and consent, if not procurement, these lands were deeded to Rapley in trust for his wife, DuVal and Ben Field, with a mistake in description. Leaving this deed out of view, if it was competent for the plaintiffs to show seizen in Field by parol, it was equally competent for the defendants to rebut that showing by like proof, which they certainly did.

To show that the title was not in Rapley, under the deed of 1837, the plaintiffs refer to the fact that though the executions, under which the sale and deed of 1848 were made, were, in part, against both Rapley and Field, that deed only transferred Field's interest in the lands. If this is worth anything as an argument, it proves too much, because the deed of 1848 does not convey the lands, as described in the deed from Field to Rapley, or in this suit, and if the plaintiffs admit that it was a conveyance of the same land, but a mistake in description, that at once defeats their claim.

Rapley's long possession is conceded; but if he took no title under the deed of 1837, under the plaintiffs' assumption Rapley had no title under the deed of 1848. Then as to those lands not in actual possession, he only claimed them, cut wood, etc., and the proof showed as much on DuVal's claim, and if this give title to Rapley by adverse holding and limitation, it just as effectually secured DuVal in the part he claimed. What is admitted for the one is proved for the other.

Now, if it be conceded that the defendants did not sufficiently show a levy, sale and conveyance of these lands in 1848, there is still no written evidence of title in William Field, and the weight of parol evidence is certainly against seizen in him, at the time of his death.

And the complainants cannot ask to admit unwritten evidence to defeat the conveyance made by Field, without also admitting like evidence to defeat a subsequent title claimed to be in him, and the weight of such evidence herein is easily seen.

Brown, Scott, Ben. Field, DuVal and Mrs. Rapley, all testify that it was known and understood in the family, that these lands, in 1848, passed to Rapley, DuVal and Ben. Field; that Rapley and DuVal exercised certain acts of possession and ownership over their respective shares, and while Major Field obtained firewood off some of the lands, there is no act of his shown inconsistent with the claim of his minor son, Ben., and Governor Rector seems to be the only near relation of Major Field's family who did not know of the division of the tract between the parties claiming, and the parties who did claim title; yet he knew that DuVal claimed some land, and that it was often talked of in the family that the three were to have some portions of the lands, but he was not advised that the lands had been given, marked out or conveyed.

It has been more than twenty years, as testified to, since DuVal assumed ownership and paid taxes for his share. The testimony of the family, and the servants of the family, is strong to show that Major Field, for some reason, (and we must suppose it was one satisfactory to himself) attempted to have the title of those lands settled in the defendants, as members of his family, and, it is sufficient to say, that the proof of title in them is much more conclusive than that going to show title in Major Field at the time of his death.

We, therefore, find no error in the decree of the Chancery Court, and the same is in all things affirmed.

SMITH v. CHILDRESS.

EVIDENCE—*Discretion of court in admission of.*—Whether or not to permit the recall of a witness, and what length after his first examination, and whether testimony is cumulative or not, are matters within the sound discretion of the court, and this court will not interfere with the exercise of that discretion, unless its exercise has been clearly to the prejudice of the party.

PAROL TESTIMONY—*When admissible.*—Parol testimony is admissible to show for what purpose, as for collection, a note was assigned, but not to vary the effect of the assignment.

INSTRUCTIONS—*When presumption in favor of.*—Where an instruction has been asked and refused, and the record states the instruction was given in a modified form, but how modified is not set forth, it will be presumed that as modified it embodied the law.

APPEAL FROM INDEPENDENCE CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

U. M. Rose, for Appellant.

The first instruction asked for by the plaintiff was precisely the law (*see Tr.*, *p.* 60), and should have been given. *Dickinson vs. Burr*, 15 *Ark.*, 372; *Taylor vs. Coolidge*, 17 *Id.*, 457.

A. H. Garland, for Appellee.

First. The matter of permitting a witness to be recalled is within the sound discretion of the court, and will not be interfered with unless it clearly appears that discretion was abused. 1 *Greenlf. Ev.*, 467, 21 *Ark.*, 559.

Second. The whole case was one of fact for the jury, and being twice disposed of against the appellants, and on an instruction given by the court, this court will not disturb that finding. *Rose Dig.*, *p.* 559 (*new Trial*), *sec.* 45, 18 *Ark.*, 298; *Ib.*, 396; *Ib.*, 453; 19 *Id.*, 117; *Ib.*, 559; 21 *Id.*, 306.

SEARLE, J.—Henry C. Smith brought his action before a justice of the peace, in the county of Independence, against Robert A. Childress, on a note given by the latter to Carragan and Hendsen, and by them assigned to Smith. The de-

fendant pleaded a set-off, and judgment was rendered in his favor for $17 33, from which the plaintiff appealed to the Independence Circuit Court. The cause was tried *de novo* in said Circuit Court, and judgment again rendered for defendant. The plaintiff asked for a new trial, which was refused, upon which he appealed to this court.

1st. It is alleged, as the first ground upon which the motion for a new trial is based, that the court erred in refusing to permit the plaintiff, who had once been examined and cross-examined in the case, to be re-called for the purpose of a re-examination. It may be laid down as a general rule, that it rests in the discretion of the court before whom a trial is had, whether or not to permit the re-examination of a witness after the lapse of some time since his former or first examination, or after other witnesses have been examined, and this court will not interfere with the exercise of such discretion, unless its exercise has been clearly to the prejudice of the opposite party. *People vs. Mather*, 4 *Wend.*, 229; *Burr & Co. vs. Daugherty*, 21 *Ark.*, 561. What the witness proposed to testify to, in his re-examination, is set forth in the second. A careful examination thereof, in relation to the issues being tried, convinces us that it was quite immaterial. Its refusal, therefore, was not in prejudice of the plaintiff's rights, and was no sufficient ground for a new trial.

2d. It is set forth, as the second ground of the motion for a new trial, that the court erred in refusing to permit a witness other than the plaintiff, to testify to certain facts which the plaintiff himself had testified to.

It appears that, upon the note sued on, a written assignment had been endorsed in words and figures as follows: "For value received, I assign the within note to W. P. Byers.—H. C. Smith." And that this endorsement had been erased, or an attempt had been made to erase it. The plaintiff had testified, on the trial, that he assigned and delivered the note to Byers without a consideration and for the purpose of collection merely; that he was, during all the time the note was in the

possession of Byers, the beneficial owner thereof; that Byers, failing to make the collection thereupon, returned it to him, and that he (plaintiff) made the erasure of the endorsement. Now the plaintiff proposed to introduce another witness to testify to the same facts. Upon the objection of the defendant, the court refused to permit this further testimony.

We cannot presume that this refusal was upon the ground that the testimony was inadmissible, for the testimony of the plaintiff, relating to the same facts, had been received. If the refusal *was* upon the ground of inadmissibility, the court erred, for, these facts, or testimony in relation thereto *was admissible*, not to vary the effect of the assignment, but as testimony to prove that the plaintiff had never parted with his beneficial interest in the note, by the assignment, and his right to sue thereupon, when the note came back to his possession. The refusal to permit the witness to testify to these facts, more likely, was upon the ground that such testimony was mere cumulative and therefore unnecessary. Now, though great latitude is allowed to the discretion of courts trying cases, in the introduction and examination of witnesses, yet the exercise of their discretion should never be to the prejudice of the parties. This clearly appearing, the court will interfere with and correct it. If the further testimony offered were merely cumulative and nothing more, the court might not have improperly exercised its discretion in refusing it. But it must be observed that the plaintiff alone had testified to these facts, and being a party in interest, his evidence could not have that weight with a jury that the evidence of a disinterested witness would have. The further testimony offered, as to the same facts, though cumulative in character, was not only proper; but may have been quite necessary to corroborate what the plaintiff had testified to. Its rejection, therefore, was quite clearly prejudicial to the plaintiff's rights, was erroneous, and sufficient ground for a new trial.

3d. The third ground, of the motion for a new trial, is the refusal of the court to give the instruction to the jury asked

by the plaintiff. The instruction asked to be given is as follows: "If the jury find from the evidence that the plaintiff, before the commencement of this suit, assigned and delivered the writing obligatory sued upon to William P. Byers, his agent, for the purpose of collection, and that afterwards, and before the commencement of this suit, the said William P. Byers re-delivered the said writing obligatory to the plaintiff, in such case, the plaintiff could sue in his own name, striking out the endorsement, or showing that the endorsement was merely for collection." This instruction was undoubtedly the law and should have been given. *Dickinson vs. Burr*, 15 *Ark.*, 374; *Taylor vs. Coolidge*, *Id.* 437. The record states that the instruction was given in a modified form. But how modified is not set forth. It must be presumed that, as modified, it embodied the law; and the exception taken to the refusal of the court to give it in its original form, can be of no avail to the plaintiff here.

4th. The court, upon its own motion, gave the following instruction: "If the jury find, from the evidence, that the note sued on was assigned to William P. Byers or any other person, by the plaintiff, you will find for the defendant, unless you also find from the evidence that such assignment was made merely for the purpose of collection. A written assignment, when found to be ambiguous or uncertain, may be explained by parol evidence, but it cannot be changed or varied. The erasure of an assignment does not change the legal effect thereof." To the giving of this the plaintiff excepted and made it the last ground of his motion for a new trial. This instruction is, indeed, obscure and ambiguous, and was well calculated to mystify the minds of the jury and mislead them. Taking the whole together, we ourselves are unable to glean any certain meaning from it. The effect of it may have been to cause the jury to exclude from their consideration the note sued upon altogether. The giving of it, therefore, was clearly erroneous.

For the errors indicated, the judgment of the court below

is reversed and the cause remanded with instructions to try the same anew and in a manner not inconsistent with this opinion.

WITHERSPOON & GILLIAM v. NICKELS, Sheriff, etc.

A. owned a steam saw mill on the land of B. After assessment to A. for taxes, A. sold the mill to C. On bill by C. to enjoin the collection of the tax, on the ground that the mill was a fixture and assessed with the land—*Held*, That the mill was not a fixture, but if assessed with the land, and not as the personal property of A., the plaintiff's remedy, for any injury he might suffer from the sale, was in law and not by injunction.

APPEAL FROM HOT SPRING CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

J. L. Witherspoon, for Appellants.

First. This is not an excessive valuation, which could be corrected by the board of equalization; but even if the board had the power, this court would interfere to prevent "an irreparable injury." *Section* 294 *of Code.* A sale for taxes, *illegally* assessed, will be restrained by injunction. *Burnett vs. Cincinnati*, 3 *Ohio R.*, 73.

Second. That it was the intention of the Legislature to make mills taxable, and sold as real property. See *Revenue Act of* 1869, *Sections* 2, 61, 118, 119, from which it appears the assessment was illegal and erroneous.

A. H. Garland, for Appellee.

First. The general proposition is beyond question that the collection of taxes cannot be enjoined. 23 *Ark.*, 138; 6 *Pickering*, 98; 3 *Mass.* 309; 6 *Id.* 44; 11 *Id.*, 365; 4 *Johnson's Ch'y*,

354; 6 *Id.*, 28; 4 *Barb. (Sup. Ct.)* 9; 9 *Paige*, 378; 26 *Wendell*, 130. If the court interferes at all, it will only be to prevent a multiplicity of suits, but not where one party sues alone for his own taxes, and that too, when he has had his day, in court, to correct the assessment. 18 *Ark.*, 380; 23 *Ark.*, *Sup.*; 23 *Wis.*, 549; 27 *Georgia*, 354.

Second. The mill here alluded to is not real estate, it is no part of the realty; it was not a fixture, and therefore it was taxable independently of the land on which it was situated. *Hensly vs. Brodie*, 16 *Ark.*, 511, *and cases cited*; *Hull vs. Alexander*, 26 *Iowa*, 569.

HARRISON, J.—The appellants sought to enjoin the appellee, who was sheriff and *ex-officio* collector of taxes of Hot Spring county, from selling a steam saw and grist mill, levied on for the taxes for the year 1870.

The mill was situated upon the land of Valentine Brown, and was attached to the soil, but it belonged, when the assessment was made, to Charles Trickett, from whom the appellants afterwards purchased it, and was afterwards assessed as his personal property. The appellants claimed that the mill was a fixture, and as such, its value was included in the assessment of the land. Though a structure such as this, apparently possesses the stability and permanency pertaining to real estate, it is not necessarily a fixture, and part of the realty; for as the court remarked in *Fuller vs. Taylor*, 39 *Maine*, 522, "there can be no doubt that one may own a building standing on the land of another, with his consent;" and in that case, it was decided that a dwelling house erected on the land of another, with the previous knowledge and consent of the owner of the land, remains the personal property of the builder. And in *Ashmen vs. Williams*, 8 *Pick*, 402, it was held that a town house, erected on land of the town, under a contract with the builder, that the town should occupy part of it at a certain rent, and should have the right to purchase the house at an appraised value, was the personal property of

the builder. *Curtis vs. Hoyt*, 19 *Conn*, 154; *Russell vs. Richards*, 10 *Maine*, 429; *Hilburne vs. Brown*, 12 *Id.*, 162; *Hensly vs. Brodie*, 16 *Ark.*, 511; *Hill on Fixtures* 18; *Green. Cruise's Digest*, 43.

The appellants' assumption that the mill was a fixture, is inconsistent with and repugnant to their ownership of it. If a fixture, it necessarily belonged to the owner of the land, as a part of it; and it may be laid down as a self-evident proposition, admitting of no exception, that the title to the land cannot be in one person, and that to the fixture in another.

But if the mill had been assessed with the land, and not as the personal property of Trickett, and no taxes were due upon it, a court of law would afford the appellants an adequate remedy for any injury they might suffer by the sale of it, and equity has no authority to interfere, by injunction, to prevent it.

Decree affirmed.

HERNDON v. GOFF et al.

FORCIBLE ENTRY AND DETAINER.—Under *Section* 497 of the Code of Practice on traverse of the verdict of a jury, on appeal to the Circuit Court—*Held*, That the jury in their verdict could not pass upon the question of misjoinder of parties or upon the constitutionality of the law.

APPEAL FROM ARKANSAS CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

A. H. Garland, for Appellant.
Pindalls, for Appellees.

GREGG, J.—This is a suit of forcible entry and detainer, brought, by the appellees against the appellant, before a jus-

tice of the peace under *Section* 497 of the Civil Code of Practice.

The appellants plead the general issue, a trial was had before a jury, a verdict and judgment rendered in favor of the appellees.

The finding was traversed, and an appeal taken to the Circuit Court, wherein another jury trial was had with like result. The appellant then moved for a new trial, which motion was overruled; he filed his bill of exceptions and appealed to this court.

Two grounds were assigned for a new trial:

First. That the jury found for the plaintiffs contrary to the law and the evidence.

Second. That the court erred in refusing instructions asked for by the defendant.

The evidence was sufficient to sustain the verdict.

The first instruction asked by the defendant was: "If the jury believe from the evidence that there are improper parties to this suit they will find for the defendant."

His fourth instruction was, that "An action of forcible entry and detainer can in no sense of the word be matter of contract, and any law giving magistrates jurisdiction of said action, is unconstitutional and void, and if the jury find from the evidence that this suit was brought before a justice of the peace, they will find for the defendant."

His sixth instruction was, that "The proof must correspond with the allegations made in the complaint, and if the jury believe from the evidence that the relationship of landlord and tenant does not exist between the plaintiffs or any one of said plaintiffs and the defendant, they will find for the defendant."

All other instructions asked for by defendant were given, and we are of opinion that the court did not err in refusing the three above quoted.

Whether or not the parties to the suit were misjoined, was not a fact to be found by the jury upon the issue before them.

And if there was some improper party plaintiff, as the appellant seemed to urge by his sixth instruction, it should have been determined at a different time and in a different manner, and not by a response from the jury upon the traverse before them.

If the appellant had desired to test the constitutionality of the law, he should have plead to the jurisdiction of the court or moved in arrest of its judgment.

These being the only grounds assigned for a new trial, the court did not err in overruling the motion.

LEE v. BLACK et al.

APPEALS—*When no final judgment, etc.*—Where the record shows no final judgment or decree, in the court below, the appeal will be dismissed.

APPEAL FROM INDEPENDENCE CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

Montgomery & Warwick and Whipple, for Appellant.

U. M. Rose, for Appellees.

HARRISON, J.—This was an action of trespass, for assault and battery and false imprisonment, by James Lee against Thomas Black, Jesse Hinkle, George W. Gray, Roland Landers, Rutledge Smith, Joseph Walker, Bailey Brooks, Nicholas Mosier, Elisha Arnold and Hartwell Walker. All the defendants, except Elisha Arnold and Hartwell Walker, appeared and pleaded jointly the general issue, and also the statute of limitations.

The plaintiff filed three replications to the latter plea, to each of which a demurrer was sustained, and judgment was

rendered thereon against him. The plaintiff then took an interlocutory judgment, by default, against Elisha Arnold and Hartwell Walker, with an order for an inquiry of damages at the next term, and at the same term (November term, 1867) appealed to this court.

The appeal was prematurely taken; there was no final judgment to appeal from. *Sec.* 80, *Ch.* 133, *Gould's Digest*, says: "Where there are several defendants in a suit, and some of them appear and plead, and others make default, the cause may proceed against the others, but only one final judgment shall be given in the action." See *Bailey vs. Ralph*, 4 *Ark.*, 591; *Bevins vs. McElroy*, 11 *Id.*, 23. As no appeal will lie to this court except from a final judgment or decree, the appeal must be dismissed.

TURNER v. THE STATE.

SUITS—*Cannot be brought against the State.*—Under *Sec.* 45, *Art. V*, *State Cons't*, before suits can be brought against the State, the General Assembly must direct by law in what manner and in what courts suit may be brought.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

E. W. & D. Gantt, for Appellant.

Montgomery, Attorney General, for Appellee.

SEARLE, J.—Benton Turner brought his action against the State of Arkansas, in the Pulaski Circuit Court, for services rendered as detective, etc., in the employ of Powell Clayton, as Governor of the State of Arkansas.

The defendant demurred to the complaint; the demurrer was sustained and the plaintiff appealed to this court.

It is entirely unnecessary for us to notice the questions raised by the demurrer, among which the chief one is, as to whether the plaintiff could recover against the State for such services as he alleges in his complaint, as we are of opinion that the court below had no jurisdiction to try the case.

It is provided, in the Constitution of the State, that, "The General Assembly shall direct by law, in what manner and in what courts suits may be brought by and against the State;" See *Sec.* 45, *Art. V, Constitution.* Comment upon this section is unnecessary to show that before suits can be brought against the State, the General Assembly must first provide by law the manner and the courts for bringing of the same. To meet the requirements of this provision, the General Assembly of 1869, attempted to enact into law the chapter of the so-called "chapters of the Digest," entitled "How suits may be brought against the State." This chapter, together with many others of the so-called "chapters of the Digest," was declared by this court to be invalid, the same not having been passed in accordance with those rules and solemnities required by the law and the Constitution of the State; See *Vinsant vs. Knox*, decided at the present term.

This action, having been brought under this chapter, was improperly brought, gave the court no jurisdiction and should have been dismissed.

The cause is remanded to the court below with instructions there to dismiss the same for the want of jurisdiction.

RUSSELL v. UMPHLET.

ADMINISTRATOR—*Ad litem—Not bound by decree.*—An administrator *ad litem*, not being obligated by bond or affidavit, is without authority of law to bind any one in interest, and no decree can be properly made against him.

DOWER—*Mode of relinquishment.*—To relinquish the wife's dower, the conveyance must be of her own free will; she must understand the nature and effect of the deed, and in the absence of her husband, openly confess to an officer authorized by law to take the acknowledgement, that the conveyance is without undue influence and for the purposes specified.

APPEAL FROM CONWAY CIRCUIT COURT.

HON. W. N. MAY, *Circuit Judge.*

T. D. W. Yonley, for Appellant.
Wassell & Moore, for Appellee.

The appellee having only a *dower* interest, the form of the mortgage is defective. There is no *relinquishment of dower clause* in the mortgage, and the acknowledgement is fatally defective as to appellant. *Gould's Dig., Ch* 37, *Sec.* 21.

The mortgage was not entitled to be recorded; See *Section* 22; nor to be offered in evidence; See *Sec.* 26, *Gould's Dig.*

GREGG, J.—On the 13th of January, 1868, the appellee and Lewis B. Umphlet, who was then her husband, but since has died, signed and delivered to Barnes & Brother a deed of mortgage on block 18, in the town of Lewisburg, to secure the payment of two writings obligatory for $1147 $\frac{91}{100}$, and interest on that sum.

The writings and mortgage were duly transferred by assignment to the appellant, and he brought this suit against appellee, Barnes & Brother, and O. Conlee, who is alleged to be in the possession of the premises, for foreclosure, etc.

The bill, after alleging the execution of the obligations and mortgage deed, alleges the death of Lewis B.; that he died without heirs, leaving the appellee, his widow; that in said mortgage deed she did not formally relinquish dower, but

virtually and in effect she did do so, and that she had often admitted such fact; that as such widow, she was exercising ownership over the premises and collecting rents therefrom, and that the amounts so secured was wholly unpaid, and that no administration had been had on Lewis B. Umphlet's estate.

The appellee answered that she and her husband signed the deed of mortgage, but that she signed it in the presence of her husband and only under his coercion and undue influence, and did not relinquish her right of dower or of homestead in the premises, and that she was entitled to hold the same in right of dower and homestead. That the said Lewis B., did die without heirs, and that she is his widow; that he died seized of no other real estate, except the premises in controversy, which she is using as a homestead, and that she has no other homestead; but she makes no response to the charge of renting to O. Conlee.

A general replication was entered to the answer.

The court assumed to appoint W. S. Hanna, an administrator, *ad litem;* such appointee was obligated, by neither bond or affidavit; he was without authority of law to bind any one in interest, and no decree could properly be made against him, and hence his appointment was, at least, useless.

Barnes & Brother and O. Conlee made default and a decree *pro confesso* was taken against them.

A witness to the deed, and the justice, who took the acknowledgment, gave their depositions, testifying that they went to the house of Umphlet; that in the presence of each other Umphlet and wife signed the deed; he acknowledged it, and, while he was still in the room, the justice asked the appellee, "If she signed the mortgage of her own free will and accord," and she responded, "I have signed it."

In the justice's certificate of acknowledgment, he states that the appellee and her husband acknowledged that they had executed the deed for the purposes therein mentioned, but does not state that she was examined separate from her

husband or that she declared that she had executed the deed of her own free will and without undue influence, or any other words to that effect.

Upon this proof and the pleadings, the court found for the appellant $1463 50 against the administrator *ad litem* and Barnes & Brother, and that the deed of mortgage created a lien upon the block described, but subject to a right of dower and homestead in the appellee, and decreed that said sum be paid by a day named, and in default thereof, that said block be sold subject to such homestead and dower rights; that the possession be retained by the appellee, and if she abandons such possession, that one-half of the rents and profits be paid to her as dower.

The decree herein is rendered against Lucien J. Barnes and David H. Barnes for the $1463 50, when the suit was brought against Lucien J. and *Casius M. Barnes*, and the record does not show that any process was ever issued against or served upon any one of the Barnes', nor did either of them ever enter an appearance in that court. It need hardly be stated, that the court below should have obtained jurisdiction of these parties betore rendering a decree affecting their interest.

It is well understood that allegations in the bill, which are admitted in the answer, need no proof, and it is equally well settled that where the answer admits facts stated in the bill, and makes other allegations to avoid a recovery, such new matter must be proved by the defendant or admitted by the complainant, to the same extent that the plaintiff must prove original allegations denied by the defendant.

There are several modes in which a man's lands may be alienated, but that the widow may be protected against the sole acts of an improvident husband, the law prescribes *the mode* in which a *feme covert* must convey; such conveyance must be of her own free will; she must understand the nature and effect of the deed, and in the absence of her husband, openly confess to an officer of the law that the conveyance is without undue influence, and for the purposes specified.

In this case, it appears that the wife was neither out of sight or hearing of her husband, and an acknowledgment, even if formally made, while thus exposed to his influence, would not have been binding; but no such acknowledgment is shown by the certificate, and if we take the testimony of the subscribing witness, it is further from appearing; hence, there was no relinquishment of any of her rights.

As this deed of mortgage was executed by Lewis B. Umphlet before the adoption of the present Constitution, her rights must be determined by the law as it then existed, and the facts as they are made to appear to the court.

That Lewis B. Umphlet was her husband; that he owned the premises; that he made the mortgage; that she did not relinquish any of her rights, and that he died without issue, leaving her surviving, appear by admission or proof. But that she is still the widow of Lewis B.; that she is occupying the premises as a homestead, and that she is entitled to dower, or not otherwise endowed, are material facts not alleged in the bill and put in issue by the replication to her answer, and there is no proof in the record before us to support what seems to be the finding of the court.

If she is in possession and use of the premises as a dwelling house and appurtenances, she is clearly entitled to hold the same until dower is assigned her out of Lewis B. Umphlet's estate. And if there is no administrator and no heir claiming the estate, who can assent to or make an assignment of dower, one, holding a lien against the real estate, might go into a court of equity, and upon proper allegations and proofs, that court would determine the rights of all concerned, and decree accordingly. *Story Eq'y. Pleadings, Sections* 175, 196; *Fitzgerald vs. Beebe*, 7 *Ark.*, 319.

The decree is reversed and the cause remanded with directions to allow the parties to amend their pleadings, if they desire so to do, and to take testimony and, upon a re-hearing, to decree according to law and not inconsistent with this opinion.

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MCNEIL v. GARLAND & NASH.

STATUTE OF LIMITATION—*Burden of proof, etc.*—Where a plea of the Statute of Limitation, in bar of the right of action, is traversed, the burden of proof is on the plaintiff to show both a cause of action, and the suing out of process within the period mentioned.

SAME—*When runs against professional services.*—The claim of an attorney, for professional services, is not barred by the statute, so long as the debt which he seeks to recover for his client remains unpaid, or until final judgment thereon, unless the relationship sooner ceases by mutual agreement, or is otherwise dissolved.

RUNNING ACCOUNT—*What Constitutes.*—To constitute a running account there must be mutual credits between the parties, or an existing credit on one side, which constitutes a ground of credit on the other, or there must be an express or implied understanding that mutual debts shall be a satisfaction or set-off *pro tanto* between the parties.

APPEAL FROM PRAIRIE CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Clark & Williams, for Appellant.
Garland & Nash, for Appellees.

BENNETT, J.—Appellees brought suit against appellant, in the Prairie Circuit Court, for professional services as attorneys. Appellant's answer to the complaint contained what might be taken as a plea of payment and a plea of the statute of limitations. The appellees filed a replication to the plea of limitations, that the account sued on was a mutual, reciprocal and continuous running account with the defendant and that the last item therein was within three years next before the commencement of this suit.

Trial by jury and verdict for the plaintiffs.

The defendant moved for a new trial for the following reasons:

First. The verdict is not sustained by the evidence.

Second. The verdict is contrary to law.

Third. There was error in the law which occurred at the trial and was excepted to.

Fourth. Surprise, which ordinary prudence could not have guarded against.

As to the third cause, there was so much indefinitness about it as to render it entirely nugatory. And the fourth cause has no foundation in the record. What there was to surprise the defendant during the trial is hard to determine.

The only question that arises, on the first and second causes, is as to whether the demand, taken as a whole or as separate causes of action, was barred by the statute of limitations.

The demand, sued on, is an open account for services rendered to appellant, by appellees, as attorneys. The bill of particulars is in words and figures as follows, to-wit:

PHILLIP MCNEIL, DR.		TO GARLAND & NASH.
Feb., 1866.	Retainer and counsel	$ 50 00
July 15, 1866	Trip to his residence, two day's attendance to business	200 00
Aug. 28, 1866.	Prairie Circuit Court, Desmuke vs. McNeil	50 00
Aug. 28, 1866.	McNeil vs. Hinton & Nichols	50 00
May, 1868.	Harris vs. McNeil	150 00
	Total amount	$550 00
	CR.	$50 00

When the statute of limitations is set up in bar of a right of action, by the plea that the action did not accrue within six years, which is traversed, the burden of proof is on the plaintiff to show both a cause of action and the suing out of the process within the period mentioned in the statute. 2 *Greenleaf on Evidence*, 384; *Hurst vs. Parker*, 1 *B. & Ald.*, 92; *Taylor vs. Spear*, 6 *Ark.*. 382; *Guthrie vs. Field*, 21 *Ark.*, 386.

The suit was commenced the 3d of August, 1870.

The appellees proved, on the trial, that the services were rendered, as stated in the bill of particulars, except the first, but did not definitely prove the time of rendition. The dates of the items in the account are not conclusive upon either party. The plaintiffs had a right to prove that the services,

for which the charges are made, were rendered or concluded within three years before the suit was brought, although stated differently in the account current.

The statute of limitations does not commence to run against the claim of an attorney at law for professional services, so long as the debt which he seeks to recover for his client remains unpaid, or until final judgment therein, unless the relation of client and attorney sooner ceases by mutual or other agreement, or the professional relationship dissolved. *Angell on Limitations, p.* 136; *Foster vs. Jack*, 4 *Watt's R.*, 334; *McCoon et al. vs. Galbreath*, 29 *Penn.*, 293; *Hale's Exr's. vs. Lewis*, 11 *Texas*, 359; *Walker vs. Goodrich*, 16 *Ill.*, 341.

Taking the entry of the final judgment, in the case, as the usual termination of the relation of attorney and client, what does the proof disclose as to the facts?

There is no evidence whatever as to the first item as stated in the bill of particulars. As to the second, the testimony of witness, Bronaugh, is all the light as to the time of performance; he says: "Sometime in the year 186—, Mr. L. B. Nash, of the firm of Garland & Nash, came through Brownsville, Prairie county, Arkansas; when he met with him he (Nash) stated he was going to the residence of McNeil to attend to some business for him. Witness did not remember at what season of the year it was. The next evening he (Nash) returned, on his way back to Little Rock."

This was all the testimony as to the time when the services, as charged in the second item, were performed. Even admitting that they were performed, as stated in the bill of particulars, there is no proof of the time of rendition, and if the time, as stated, is the correct time of rendition, this item was barred by the statute of limitations. This all applies to the three next items. As to the last one, the appelles, in addition to the general testimony applicable to others, introduced the record and final entries in the cause of McIntosh for the use of *Harris vs. McNeil*, in the Prairie Circuit Court, wherein it appears that the final judgment in the

case was rendered on the 8th day of May, 1867. Another judgment, as appears from the record, was entered up in the case of *McNeil vs. McIntosh*, on the 12th day of October, 1869. This case was not stated upon the bill of particulars, nor was it proven to have been attended to by Garland & Nash. The last item, then, was the only one that came within the time prescribed by law for the prosecution of such suits. But it is claimed by the appellees that this was a mutual, running account, of such a nature as comes within the rule that items within three years draw after them other items beyond that period. This, we think, is erroneous.

To constitute such an account there must be a mutual credit, founded on a subsisting debt on the other side, or an expressed or an implied agreement for a set-off of mutual debts. *Angell on Lim.*, 138, and authorities there cited.

A natural equity arises when there are mutual credits between the parties, or when there is an understanding that mutual debts shall be a satisfaction or set-off, *pro tanto*, between the parties.

The only thing the appellees can claim that their account was a "mutual open account current," was the fact of the payment of fifty dollars by the appellant. But it has been well settled, that when payments have been made by one party, for which credits are given by the other, it is an account without reciprocity and only upon one side. *Angell on Lim.*, 138; *Ingraham vs. Sheward*, 17 *Serg. R.*, 347; *Prenalt vs. Runyon*, 12 *Ind.* 174; *Peck vs. N. Y., etc., Steamship Co.*, 5 *Bos. N. Y.*, 226; *Weatherwax vs. Casomnes & Co.*, 17 *Cal.*, 344.

The items, in the account before us, are all on one side, there being none on the other, except a credit of payment. We think the term "mutual open account current" means something more than charges on one side and credits of payment on the other.

There being no mutuality in the account between the parties, the statute cuts off so much as accrued more than three years before the commencement of the suit, unless otherwise taken out of its operation.

In a review of the whole case, the verdict of the jury was not warranted by the law and evidence; therefore it is reversed, the cause remanded with instructions to sustain the motion for a new trial, and proceed with the case in accordance with law.

CLONINGER AND WIFE v. RHODES et al.

APPEAL FROM POPE CIRCUIT COURT.

HON. W. N. MAY, *Circuit Judge.*

Clark & Williams, for Appellees.

HARRISON, J.—The appeal in this case was taken in the court below, on the 13th day of October, 1870, but the appellant has filed no transcript of the record and proceedings of the cause, in this court. The appellee has filed a motion to dismiss the appeal. The appeal is dismissed.

EVANS v. WALKER, Adm'r, etc.

APPEALS—*When dismissed.*—When, on appeal, the transcript is not filed within the time prescribed by law, the appellee, on filing a certified copy of the judgment and order of appeal, may have the same dismissed.

APPEAL FROM PRAIRIE CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Clark & Williams, for Appellee.

HARRISON, J.—At a former day of the present term, the appellee filed a motion to dismiss the appeal in this case, because no transcript of the record and proceedings had been filed in this case.

He filed with his motion a certified copy of the judgment, and order of appeal, from which it appears that the appeal was taken in the court below, on the 10th day of April, 1869. According to section 862, of the Code, the transcript should have been filed within ninety days after the appeal was granted. None having been filed even up to this time, the motion should be sustained and the appeal dismissed.

JONES, Ex parte.

CONSTITUTIONAL LAW—*Act January* 21, 1861.—There is no prohibition, either in the Constitution of 1836 or 1868, against the exercise of the power, by the Legislature, of establishing more than one place for holding Circuit Courts within the limits of any county in the State, and the act of the 21*st of January*, 1861, entitled "An act to establish separate courts in the county of Sebastian," so far as it designates Fort Smith as the proper place to hold a Circuit and Probate Court, is valid. 27 349 60 158

COURTS—*Action of, when void.*—The holding of a court at a time or place, other than that prescribed or authorized by law, and all proceedings thereunder are *coram non judice* and void.

PETITION FOR HABEAS CORPUS.

U. M. Rose, for Petitioner.

Under the Constitution of 1836, the Circuit Courts were regarded as the principal courts of assize of their respective counties—had jurisdiction throughout the county for which it was held, and held at the county seat. No other Circuit Courts were known, and we should give to the language the same meaning which it had in the minds of those who used it. *State vs. Scott*, 9 *Ark.*, 270; *Allis, ex parte* 12, *Id.*, 101. The Constitution of 1868 did not continue in force any law which was opposed to the Constitution of 1836, though it might not come in conflict with its own provisions. *Const.*, 1868, *Sec.* 16. The act of 1860, was therefore, not made good.

The words "Circuit Courts," in the Constitution of 1868 have the same meaning as in that of 1836. *Const.* 1868, *Art. VII. Sec.* 1.

The unity of a county as a *quasi* municipal corporation as much requires that there shall be but one Circuit Court for that county, as that there shall be but one County Court. Two Circuit Courts exercising the same supervisory control of it over one County Court, would subject the latter to a state of misery forbidden by the Constitution. *Const.* 1868, *Art.* 1, *Sec.* 7.

The greater part af the acts of 1860, and 1871, being mani-

festly unconstitutional, the whole must fall. *Leach vs. Smith*, 25 *Ark.*, 256; *Patterson vs. Temple, MS. opinion.*

Montgomery, Attorney General, for the State.

The court held at Fort Smith, at which the prisoner was convicted and sentenced, being held within the jurisdiction of the judge holding the same, was a *de facto* court if not *de jure.*

When a person voluntarily submits to the jurisdiction and does not attempt to question the authority, the action of the court is valid. *Rives vs. Pettit*, 4 *Ark.*, 582.

BENNETT, J.—On the 24th day of May, 1872, James N. Jones filed, in this court, a petition for a writ of habeas corpus, alleging he was illegally detained by George S. Scott. The writ was issued. The return upon it states that the petitioner is held by him as keeper of the State penitentiary, by virtue of the commitment and order of the Circuit Court of the county of Sebastian, held at Fort Smith, on the 16th day of October, 1871.

To which return the petitioner files a general demurrer.

The legality of the commitment and order of the Circuit Court is only questioned by the demurrer, upon the ground that the court was not held at the time and place prescribed by law.

On a previous day of this term, in the case of *Patterson vs. Temple, MS. opinion*, we had occasion to review the various laws of the General Assembly, the acts of the people and the proceedings and orders of the County Court of Sebastian county, since July 21, 1868, in relation to their county seat matters.

In that case, we decided that Greenwood was the county seat of Sebastian county, and that the act of the General Assembly, approved March 28, 1871, was unconstitutional and void.

These being the only points raised, in the record of that

case, this court did not feel warranted in going further, but left the questions of time and place of holding the various courts in that county, as it was by law declared previous to that time. On the 21st day of January, 1861, the General Assembly approved an act entitled "An act to establish separate courts in the county of Sebastian." This enactment provides that for the purpose of holding Circuit and Probate Courts, Sebastian county shall be divided into two judicial districts, and what shall be the jurisdiction of these courts within those limits, and what shall be the jurisdiction of them generally, throughout the county. This act provides for the putting of these separate courts into active operation. It also disclaims any intention, by expression or implication, to make any division of the county otherwise than for the purposes named, and says: "As to all matters not within the provisions of this act, the county of Sebastian shall be one entire and undivided county." It does not disturb the Circuit or Probate Courts, previously established at Greenwood, the county seat, only so far as it, in part, restricts their territorial jurisdiction. It does not undertake to disturb the unity of the county as a *quasi* municipal or political corporation. It does not interfere with any of its corporate powers or the authority that had charge of the fiscal affairs of the county. It does not attempt to institute the mode whereby the citizens of one portion of the county may be taxed more, and in a different manner than the other. It does not purpose to divide the debts and responsibilities of the whole county, and apportion them to be paid by certain localities, as was the case in the act of March 28, 1871. But this act merely, in effect, establishes a Circuit and Probate Court at Fort Smith, and defines their territorial jurisdiction. Could the General Assembly do this as far as the Circuit Courts were concerned, and not violate any constitutional provision? We think it could.

We find by reference to *Section* 1, *Art.*, 6, *of the Constitution of* 1836, "That the judicial power of this State shall be vested

in one Supreme Court, in Circuit Courts, in County Courts and in justices of the peace. The General Assembly, * * * when they deem it expedient, may establish Courts of Chancery."

Section 3, of the same Constitution, defines the general jurisdiction as to subject matter of Circuit Courts, but is silent as to territorial limits, and provides that this court should be held "at such place, in each county," as might be by law directed. *Section* 5 says, Circuit Courts shall exercise a superintending control over the County Courts, and over justices of the peace, in each county, in their respective circuits, etc. *Section* 6 gives to Circuit Courts chancery powers.

It is conceded to be a correct doctrine that every enactment of the State Legislature is presumed to be constitutional and valid; that before it can be pronounced otherwise, that clause of the Constitution must be clearly designated with which the act of the Legislature conflicts, since the Legislature, representing the people, have, as a rule, power to pass any and all acts except those prohibited by either the State or Federal Constitution. *State vs. Ashley*, 1 *Ark.*, 513; *Eason vs. State*, 11 *Ark.*, 481; *Leach vs. Smith*, 25 *Ark.*, 251.

Under the Constitution of 1836, Circuit Courts were emphatically State Courts, having general jurisdiction, and were tribunals for the general administration of justice. They were not restricted in their operations to any prescribed territorial limits as far as that Constitution was concerned. True, it is rare (and we know of no instance) to find more than one Circuit Court, or court of general assizes established within a county, throughout the States of the Union, unless it has a large number of inhabitants within its limits, and where one such court could not transact the business which would naturally arise without great delay and injustice.

While we may not wish to encourage the policy of establishing more than one place for holding Circuit Courts within the limits of any county in this State, thereby subjecting sparsely settled communities to the great burden of paying

for the expense of such courts, yet, should the law-making power think the due administration of justice demands such a course of action, we can find no constitutional provision, either in the Constitution of 1836 or 1868, that would prohibit them from so doing, but public policy would seem to demand that they hesitate long and deliberate well before taking such a step.

The act under consideration, so far as it designates Fort Smith as the proper place to hold a Circuit and Probate Court, is valid.

It appears, affirmatively, by the record which is filed with the petition, that James N. Jones, the petitioner, was convicted of larceny and sentenced to the penitentiary at a term of the Circuit Court begun and held at Fort Smith, in that county, on the 16th day of October, 1871, it being the third Monday after the fourth Monday in September of said year. This was not the time for holding Circuit Courts at Fort Smith.

By an act of the General Assembly, approved February 4, 1869, we find the Circuit Courts of the Fifth Judicial Circuit shall be held as follows, to-wit: In Sebastian county (Fort Smith district), on the fifth Monday after the fourth Mondays in March and September. How does this affect the rights of the petitioner?

In the case of *Brumley vs. State*, the court say: "The meeting together of the judge and officers of court at the place, but not at the time fixed by law for holding the court, was not a court under our Constitution and law, but was a mere collection of officers, whose acts must be regarded as *coram non judice* and void." *Brumley vs. State*, 20 *Ark.*, 78; *Dunn vs. State*, 2 *Ark.*, 229.

In the case at bar, the judge was clothed with no judicial authority; there was no court, consequently no judgment.

The defendant, James N. Jones, will be discharged from the custody of the keeper of the penitentiary, and remanded into the charge of the sheriff of Sebastian county, to be proceeded against, according to law, for the offense of which he is charged.

STOW, Ex parte.

PETITION FOR HABEAS CORPUS.

U. M. Rose, for Petitioner.

BENNETT, J.—There is no difference between the questions presented in this petition, and those in the case of Jones, *ex parte*, just decided, with the exception that he was convicted at a term of the Circuit Court, begun and held at Fort Smith, in the Fort Smith district of Sebastian county, in the State of Arkansas, on the 30th day of April 1872, it being the second day of the April term of said year, at 10 o'clock A. M.

It appears, from the transcript of the case filed, that the regular Circuit Judge, Hon. E. D. Ham, was not present at the time prescribed by law for opening the regular spring term of the Circuit Court, at Fort Smith, in the Fort Smith district, viz: on the fifth Monday after the fourth Monday in March, which would have been on the 29th day of April, 1872. It also appears that in obedience to *Sec.* 9, *Art.* 7, *of the Constitution* of the State, the attorneys of said court elected T. H. Barnes, Esq., as a Special Judge, to hold the court, who was qualified and presided at the trial of the petitioner.

These proceedings, together with all the subsequent ones, appearing to be regular and at the time and place prescribed by law, the judgment and commitment are good and binding.

Therefore, defendant Stow will be remanded back into the custody of George S. Scott, the keeper of the penitentiary, to serve out his sentence according to law.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

JUNE TERM, A. D. 1872.

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STEPHEN TRIMBLE v. THE STATE.

GAMING—*Who liable for.*—Wherever a gambling table or gambling device is kept, set up or exhibited within the State, all, whether proprietor, clerks, servants or agents, who aid or assist in the keeping, setting up or exhibition, are liable to indictment and punishment.

SAME—"*Keno,*" *a gaming device.*—The game called and known as "*keno,*" is a game at which money or property may be won or lost, and is a gaming device within the meaning of the statute.

APPEAL FROM DREW CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Montgomery, Attorney General, for Respondent.

BENNETT, J.—Appellant was indicted in the Circuit Court of Drew county, on the 13th day of April, 1871, for exhibiting a certain gambling device, which was adapted and designed for the purpose of playing a game of chance called "*keno,*" at which game money could be lost or won.

April 15th, the appellant appeared in court, in obedience to the summons issued upon the indictment, and moved the court to quash it; which motion was overruled. Verdict of guilty. Motion for new trial overruled. Appeal taken.

The motion contained the following grounds for a new trial:

First. Because the court erred in overruling his motion to quash the summons herein, whereby he was surprised.

Second. Because the verdict was contrary to law and evidence.

Third. Because the court overruled the defendant's offer to introduce the evidence of Richard F. Banks, herein.

Fourth. Because the court overruled the instructions asked for by the defendant.

Fifth. Because the court gave the instructions asked for by the State.

Sixth. Because the judgment was not responsive to the verdict.

Why the appellant moved to quash the summons does not appear in the record. The defendant was charged with a misdemeanor, and that was a public offense for which he was liable to immediate arrest and prosecution. The summons, while not in the exact words of a warrant of arrest, yet, it had performed the office of one, and, by its authority, had brought the defendant into court to answer the charge of the grand jury. This was sufficient. This cause, therefore, was no ground for a new trial.

Was the verdict contrary to the law and evidence?

In reviewing this question, we shall take into consideration the second, third, fourth and fifth causes assigned for a new trial, which only raise the question: Is a clerk, servant or employe, equally responsible with the owner of the device?

During the trial, the appellant offered to prove that he was acting in the capacity of a clerk or servant for another person, and was not proprietor of the gambling device. The only object of the proof was to avoid the offense as charged in the indictment, as shown by the instruction asked for by the defendant, which was as follows: "If the jury believe, from the evidence, that the defendant was merely an employe, clerk

or servant in the house where the gaming device was charged to have been exhibited, and had nothing to do with the profits, hazards or chances of the game, and was on wages from the main proprietor, they will find the defendant not guilty."

This instruction was properly overruled. The defendant might keep the keys and have the actual use of the building, admit or exclude visitors, receive money for admission and do every act incident to the keeping of it as a place of public resort for gaming, and still be only a clerk, servant or agent for another. We do not conceive that the statute, under which he is indicted, makes it necessary, in order to charge one with the offense therein prohibited, that he shall directly receive the gain or reward to his own use; although it is obvious that a man would not be likely to be employed to keep such an establishment unless it yielded some gain or profit, and though a clerk, it may be reasonable to infer that his payment came out of these gains.

But a far more satisfactory reason why a clerk, servant or agent for a gambler, in a gambling house, should be liable equal with the proprietor is, that the criminality of the acts prohibited, is in opening and keeping a place of public and common resort, to which access can be had for the purpose of gaming. Thus offering temptations to the idle and dissolute, and endangering the quiet and peace of neighborhoods and communities.

This is the mischief intended to be prohibited, and is as much fostered and created by him who, *de facto*, sets up, keeps or exhibits any gaming table or gambling device, and suffers persons to resort there, whether he does so from his own will or by the procurement of another, and whether for his own emolument or that of another. *Commonwealth vs. Drew*, 3 *Cush.*, 279.

The terms used in the statutes, "every person who shall set up, keep or exhibit any gaming table or gambling device * * of any description, * * * be the name what it may, adapted,

devised or designed for the purpose of playing any game of chance, or at which money or property may be won or lost, shall be deemed guilty of a misdemeanor," etc., manifestly characterized that such gambling devices were dangerous to the morals and peace of the community. The design of the statute was to suppress all such institutions, and we may safely say, that no gambling table or device has ever been invented, by man, that is more pernicious in its influences than that of "*keno*." It is very simple. A child can learn it as well as a grown person. This very simplicity is what renders it so dangerous to the laboring man or mechanic, who, having a few dollars in his pocket, wishes to try his luck, and not having time to learn the principles of other games, trusts blindly to "keno." Like lottery, this game possesses an unusual attraction, owing, no doubt, to the fact that sometimes fifty dollars may be won in five minutes by an outlay of as many cents. It is, however, an hundred chances to one that the player will come nearer losing that amount in trying to win a "*pot*."

If the law was, as asked for by the defendant, that the clerk or agent of the owner could exempt himself from the penalty of the law, by showing that he had kept the gambling table or device for the use and benefit, and by the authority of another person, it would let in all the mischief intended to be prevented by the statute.

A person, residing out of the State and beyond the jurisdiction of its laws, by taking the lease of rooms and employing unconscionable and unscrupulous clerks and agents, might wholly defeat the salutary object of the law; but such is not the intention. Wherever a gambling table or gambling device is kept, set up or exhibited within the State, all, whether proprietors, clerks, servants or agents, who aid or assist in the keeping, setting up or exhibition, are liable to indictment and punishment.

As to the instruction given on the part of the State, it certainly was law and properly given. It left the jury to deter-

mine, from the evidence, whether the defendant did exhibit such a gambling device as was charged in the indictment. The jury found he did, and properly so, from the evidence as shown on the record.

The witness, Henly, said he saw the defendant on or about the 7th day of April, 1871, assist in the exhibition of a game of "*keno*;" that said game of "*keno*" is a game at which money or property may be lost or won, and that money was lost and won at such exhibition.

Witness, Kidd, said he had seen the defendant, at the time charged in the indictment, exhibiting a device called *keno*. *Keno* is a game at which money or property can be won or lost, and money was lost at that time, but none was risked by the defendant or by the owner of the device. The owner made nothing but commissions.

It was also agreed by the counsel for the defendant and the prosecuting attorney, that *keno* is played by a device containing figures, and the players pay an equal amount for the cards, which are numbered and registered; the first number registered completing a line of figures gets all the money paid for the cards bought, except a commission of ten per cent., which goes to the keno keeper. This was all the evidence.

The two witnesses swore positively that the defendant assisted in, and did exhibit this game of *keno*, and that such game is one at which money may be lost and won. The jury could not have found any other verdict and had any regard for their oaths.

As to the sixth cause assigned for a new trial, upon an examination of the record, it will be seen that the judgment is in almost the exact words of the verdict. No judgment could have been more responsive to a verdict.

No error appearing, the judgment is affirmed.

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PORTIS v. THE STATE.

"KENO"—*A gambling device, etc.*—All persons who play at the game commonly called and known as "*Keno*," are guilty of gambling; and the person who sets up, keeps or exhibits this apparatus, contrivance or machine, is guilty of setting up, keeping or exhibiting a gambling device, and is liable to the penalties of the statute.

MISCONDUCT OF JURY—*When defendant cannot complain.*—Where misconduct on the part of jurors has been of injury to a party, it is the duty of the court to set aside the verdict, but the defendant cannot complain where the act or misconduct would have been for his benefit.

APPEAL FROM JEFFERSON CRIMINAL COURT.

HON. I. MCL. BARTON, *Criminal Judge.*

J. A. Williams, for Appellant.
Montgomery, Attorney General, for Appellee.

BENNETT, J.—This is a conviction for exhibiting a gambling device.

The record presents three questions for adjudication. 1st. Did the indictment allege a public offense? 2d. Did the defendant exhibit a gambling device? 3d. Was there such misconduct on the part of the jury, trying the case, as to warrant the court to set aside the verdict?

Did the indictment allege a public offense?

The indictment accuses James M. Portis of the crime of exhibiting a gambling device, committed as follows, viz: "The said James M. Portis, in the county aforesaid, on or about the 3d day of January, 1871, did then and there unlawfully set up and exhibit a certain gaming bank or gambling device adapted, devised or designed for the purpose of playing a game of chance or at which money or property may be won or lost, and property was won or lost at the time of said exhibition, which said gaming bank or gambling device aforesaid, is commonly called "keno."

This kind of a gambling bank or gambling device is not specifically named in the statute, nor is it known judicially to

the court. Therefore, in order to determine that it falls within the denunciations of *Sec.* 1, *Art.* 3, *Chap.* 51, *Gould's Digest*, which denounces heavy penalties against those convicted of its violation, it should appear that the table, device, bank or machine is such as is used for gambling for money or property. The statute denounces, by name, the setting up, keeping and exhibiting, for instance, a faro bank, at which money can be lost and won. Thus a legal signification is given to a device or table of that kind and is specifically prohibited. But not so with "keno." This only, if at all, is denounced under the general prohibition. The indictment must show that it comes under this general prohibition.

The indictment under consideration shows that the words of the statute were literally followed.

An indictment based upon a statutory offense is good if it follows the statute. *People vs. Beatty*, 14 *Cal.*, 566; *Spratt vs. The State*, 8 *Miss.*, 247; *State vs. Ward*, 9 *Texas*, 370; *Cram vs. State*, 14 *Ib.*, 634; *Reeves vs. State*, 9 *Ib.*, 447.

The demurrer was properly overruled.

Did the defendant exhibit a gambling device?

The scheme is denominated "keno," a gaming bank or gambling device, at which money or property may be won or lost. It is an invention or device of modern date, ingeniously contrived to evade the law against gaming and lotteries. The plan is thus described by the witnesses: "The keeper of the game has a globe; there are put in it ninety balls, each numbered, from one to ninety, and then there are two hundred cards, with fifteen numbers on each card, five numbers in each row; then each player buys a card which contains the fifteen numbers, for which he pays the keeper of the game fifty cents, and others do likewise until several cards are sold; the roller, as he is called, turns the globe over and takes out one of the balls and calls out the number of such ball, and if any one of the players have a number on a card which they have purchased, corresponding to the number so called out, such player puts a check on such number on his card, and so

on, at each call by the roller, until one of the players has five checks in a row on his card, and then he has made what they call "keno," and then the game stops. The globe, from which the balls are taken by the roller, sits upon a table, in one end of which is a drawer from which change is made by the collector, and *chips*, frequently issued in lieu of money, redeemable by the collector; and the person who collects the money from the parties who have bought cards, takes up the card that has "*kenoed*" and calls its number, and if it is pegged, its number is also called by the roller. The collector then calls out the numbers on the card that are contained in the row that has "*kenoed*," and as he calls a number, the roller examines the balls that have come out, and if the numbers called out by the collector, as being on the card, correspond with the balls that are out, the collector announces that "*keno is correct*," and the money that has been paid for the cards sold, is paid over to the holder of the lucky card."

Is this a gambling device? Gaming is the risking of money, between two or more persons, on a contest or chance of any kind, where one must be *loser* and the other *gainer*. Some games depend altogether upon skill, others upon chance, and others are of a mixed nature. Billiards are an example of the first, lotteries of the second, and backgammon of the last. 2 *Bouvier's Law Dic.*, 553.

Device is something formed by design, and has reference to something worked out for exhibition or show.

A gambling device may then be defined to be an invention to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind.

The denunciations, however, of the statutes are against banks and devices constructed for and used for gambling purposes, and not against such as are constructed and used for purposes of amusement, as chess, and backgammon, etc. It was the great evils of gaming tables and the thousand and one gambling devices that are constantly being invented to evade and cheat the law, it was intended to suppress. These

statutes should be liberally construed by courts of justice in aid of the legislative intention, so, if possible, to rid communities of these growing corruptions and to check these pernicious practices.

This "keno" institution, with its globes, balls and cards, so far as the court is advised, was not invented for the purpose of innocent amusement or pleasant pastime, but is set up, kept and exhibited to induce numerous persons to buy the use of cards at a small sum of money, with a chance, by the aid of the other appliances of this device—(the balls, globe and lackey who turns them), to win a much larger one, the sum total of each one's contribution. While the keeper or exhibitor is certain to get the per centage for the use of his device, yet he, by its assistance, determines the question as to whether A or B shall take all the money, less the per centage, or whether they shall lose what they have contributed for the use of the cards. It is not that species of gaming called a lottery. A lottery, says Webster, is a "distribution of prizes by chance." The prizes have an existence before tickets are sold; but in "keno," each player puts up his fifty cents to make an aggregate sum, which is the amount played for.

The description given of this game, by the witnesses, makes it purely a game of chance; for each person putting up money, in effect, bets that the card he has selected contains the numbers which will entitle him to the money of the others engaged in the game, and this bet is determined by the device exhibited. According to every correct idea of legal construction, this is gaming, and all players are guilty of gambling, and the person who sets up, keeps or exhibits this apparatus, contrivance or machine, is guilty of setting up, keeping, or exhibiting a gambling device, and is liable to the penalties of the statute.

The evidence, as is disclosed by the record, is positive and clear that the defendant did exhibit this gambling device as charged. Both law and evidence fully sustain the verdict.

Third. Was there such misconduct on the part of the jury trying the case, as to warrant the court to set aside the verdict?

During the trial, one of the jurors sitting in the case, and while a recess was had, said to one Bluther, that if he (Bluther) would give him (the juror) fifty cents, he would hang the jury so that the defendant would get clear of "keno." Where misconduct on the part of jurors has been of injury to a party, it is the duty of a court to set aside the verdict. It was misconduct on the part of the juror to offer to hang the jury for the defendant for money. But it appears he did not do what he offered to do, but decided according to the law and the evidence, and no injury resulted from the act. If he had done what he offered to do, the State and not the defendant, would have been the injured party, and the defendant cannot complain of an act that would have been for his benefit. This juror should have been heavily fined, but his act created no cause for a new trial.

No error appearing in the record, the judgment of the Criminal Court of Jefferson county is in all things affirmed.

HOWELL v. GRAVES et al.

CONVERSION—*Recovery where tort waived.*—Where defendant converts property of plaintiff to his own use, and plaintiff waives the tort and elects to sue on an implied promise, he can only recover the amount actually received by the defendant.

PRACTICE—*Where nature of action resembles form under old system.*—Where the action in its nature, under the Code of Practice, resembles the *form* of an action under the old system of practice, the law for the introduction of evidence and the giving of instructions to the jury under the old system, will ordinarily be observed.

APPEAL FROM YELL CIRCUIT COURT.

HON. WILLIAM N. MAY, *Circuit Judge.*

W. C. Ratcliffe and T. D. W. Yonley, for Appellant.

We submit that the court erred in giving the second instruction of the plaintiffs, as the evidence clearly shows that the appellees were not partners, in respect to the transaction or cause of action upon which the instruction was based; See *Oliver vs. Gray*, 4 *Ark.*, 425; *Kent. Com. vol.* 3., *Sec.* 24; *Champion vs. Bostwick*, 18 *Wend.*, 175; *Louis vs. Marshall*, 12 *Cowen.*, 69; *Story on Partnership*, *Secs.* 27–29.

A. H. Garland, for Appellees.

There being some evidence to sustain the finding, the court will not interfere on the facts. *Rose Dig.*, 559, *new trial*, *sec.* 45.

That appellant should be held to account for the non-performance of his contract. See *U. S. vs. Kulle*, 9 *Wall.*, 83; 3 *Howard*, 578; 11 *Howard*, 162; 4 *Wall.*, 185; 2 *Parsons' Cont.* 636—675.

SEARLE, J.—Jacob Graves and Jonathan Shoemaker brought their action against John B. Howell, in the Yell Circuit Court, to the May term thereof, 1871, for the recovery of the value of certain cotton alleged, in their complaint, to

have been delivered by them to defendant to be by him sold at Little Rock, Arkansas, etc.; and also for the recovery of the value of certain bagging and ties alleged to have been delivered by them to him.

The defendant answered, setting up several matters in resistence of said demands.

The issues were tried by a jury and verdict and judgment rendered for the plaintiffs to the full extent of their demands.

The defendant moved for a new trial on the following grounds:

Because the verdict of the jury was contrary to the evidence.

Because the verdict was contrary to the instructions of the court; and

Because the court improperly instructed the jury.

The motion was overruled; to which defendant excepted and filed his bill of exceptions, setting forth all the evidence and the instructions of the court, and instructions asked to be given and refused, a transcript of which is before us as part of the record in the case.

It is scarcely necessary to notice the first and second grounds of the motion for a new trial. Our attention will be directed chiefly to the third.

It seems that in the fall of 1864, the plaintiffs picked and baled seven bales of the defendant's cotton, near Lewisburg, Arkansas, and received for their labor one undivided third thereof; that in the winter of 1864-5, they contracted with defendant to ship their said cotton to Little Rock; that defendant accordingly shipped it together with two other bales belonging entirely to them, to Little Rock, and placed it in the hands of one Tucker, as his own, to be by him shipped to some eastern market; that it was shipped to Memphis and Philadelphia and sold for less than it would have brought at Little Rock, and that defendant paid plaintiffs three hundred dollars upon their cotton. It was further in evidence (though the evidence on these points was very conflicting) that the plaintiffs, upon defendant's undertaking to ship their cotton,

instructed him to sell it at Little Rock, on his arrival there; that upon his return to Lewisburg and stating to the plaintiffs what he had done with their cotton, they disavowed his acts. At least these latter facts were found by the jury, which was competent for them to do from the conflicting evidence in relation thereto.

The defendant asked the following instruction: "If the defendant converted the property of the plaintiffs to his own use, and they have waived the tort, and elected to sue in assumpsit or on an implied promise, they can only recover the amount actually received by him, and if this amount has already been paid to them, the jury will find for the defendant;" which was refused; and in lieu thereof, the court gave the following instruction: "If the jury believe, from the evidence, that the plaintiffs were entitled to one-third of the proceeds of seven bales of cotton, and were the owners of two other bales of cotton, and that said cotton was placed in the hands of the defendant, as their agent, for shipment to Little Rock on the contract between the parties, that the said defendant should sell the same at Little Rock, and that the said defendant, in defiance and violation of said contract, shipped the cotton to another point, and by said violation of the contract, the plaintiffs were losers to the amount sued for, they must find for the plaintiffs."

The complaint alleges no conversion. After setting forth the value of the cotton, it simply, in effect, asks for a judgment for money had and received. The conversion which the evidence, though conflicting, seems to disclose, and which the jury found as the basis of their verdict, was waived. The plaintiffs, consequently, could only recover what the defendant actually received for the cotton, or what the cotton actually sold for. *Bowman vs. Browning*, 17 *Ark.* 600; *Hudson vs. Gilliland*, 25 *Ark.* 100; *Pratt vs. Cork*, 12 *Cal.* 90.

The complaint must be framed with precise reference to the specific remedy invoked, as prescribed in *Section* 101, *Code of Civil Practice: Smith vs. Knapp*, 30 *N. Y.* Where an

action in its nature, under our code system of practice, resembles any *form* of an action under the old system of practice, the law for the introduction of evidence, and proper to be given in instructions to the jury under the latter system, will, ordinarily, be observed in the former, though the code abolishes all forms of actions but one. In order to recover the value of the cotton when it should have been sold according to the instructions of the plaintiffs, the complaint should have alleged the conversion and asked a judgment for damages, and the measure of damages would have been the value of the cotton, ascertained by the jury, at the time of the conversion.

The court erred in relation to the above instructions, in giving the one and refusing the other.

As to the bagging and ties sued for, it appears from the evidence that the same were furnished the defendant by one of the plaintiffs alone; notwithstanding which, the court instructed the jury that "If they found the bagging and ties were furnished the defendant by the plaintiffs, or either of them, they will allow the plaintiffs the full value thereof."

This was certainly erroneous; the plaintiffs were not partners in, or joint owners of the bagging and ties. Plaintiff, Shoemaker, was sole owner of them. The joinder of the plaintiffs, therefore, for the recovery of the value thereof, was improper, and the court should have, instead of giving the last above mentioned instruction, ordered the complaint amended by striking out this cause of action.

For the errors above pointed out, the judgment of the court below must be reversed, and the cause remanded for a new trial, to be had according to law, and not inconsistent with this opinion.

NORDMAN v. CRAIGHEAD, Guardian, etc.

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PLEADINGS—*Practice changed by Code.—Sec.* 48, *Chap.* 28, *Gould's Digest* is repealed by the substitution of the amended *Section* 148 of the Code of Civil Practice, and is applicable to proceedings both at law and in equity.

SAME—*Requisites of.*—The pleading must contain the facts constituting the cause of action, or grounds in defense when matter in the answer or reply is relied on; and the pleader should file with, and refer to, in his pleadings, in a manner sufficiently explicit to identify them, such writings as are relied on, and which may not be, strictly speaking, evidence.

SAME.—So much of the deed or writing relied on and referred to as may be necessary to show the character and purpose of such reliance, must be set forth in terms or substance in the pleading.

PRACTICE—*When motion, not demurrer, proper.*—When a deed or writing constitutes no part of the averments of the pleading, a failure to file it cannot be reached by demurrer.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

A. H. Garland, for Appellant.

The complainant failed to file with his bill the original deed, or a copy of the same, or to state that he could not procure said deed, or a copy thereof, on which he relied; his bill should have been dismissed. *Sec.* 48, *Chap.* 28, *Dig.*; *Sec.* 148, *Ark. Code*; 11 *Ark.* 121; *Hill, use, etc. Wintersmith vs. Barrett, etc.*, 14 *B. Mon.* 86; 2 *Metcf. Ky.* 88; 25 *Ark.* 30. The assignment of the notes to complainant did not convey the equitable lien of the vendor. *Moon & Cail vs. Anders*, 14 *Ark.* 365; *Inglehart vs. Armiger*, 1 *Blande, Chancery, Md.* Nor is there any allegation in the bill that he became subrogated to the personal or equitable rights of the vendor.

B. S. Johnson, for Appellee.

SEARLE, J.—John P. Craighead, appellee herein, as guardian, etc., filed his complaint, in equity, in the Jefferson Circuit Court, against Eugene Nordman, appellant herein, to en-

force a vendor's lien for the purpose of securing the payment of two promissory notes, etc. The complaint avers, among other things, that one Owen sold, by deed of conveyance, to the said Nordman, certain described real property; that a part of the price of said property was paid down; that notes were executed and delivered to the vendor for the balance; that a special lien was reserved in said deed to secure the payment of said notes; that the notes were assigned, together with said vendor's lien, to said complainant, and that a copy of said deed would be filed, if necessary, etc.

At the May term, 1871, of said court, the same being the return term, the said Nordman filed a demurrer to the complaint upon the following grounds, namely: 1st, That the complaint sets up the fact of the existence of a certain deed to the land referred to therein, and does not make the same a part thereof. 2d, That it does not appear from said complaint that said deed referred to therein is filed and made a part of the same.

The demurrer was overruled; a decree rendered, as prayed for, and appellant appealed to this court. Two questions, we presume, were intended to be raised by this demurrer, namely: 1st, Should the deed, or a copy of the deed relied upon, as containing the reservation of the lien averred in the complaint, have been filed? and, 2d, Should it have been made a part of the complaint?

These questions will be considered together. Before our present system of civil practice went into operation, there was the following provision, applicable entirely to proceedings in equity: "If either party shall rely on any record, deed or writing, the substance thereof shall be stated in his bill, answer or plea in the same manner as is required in pleading at law; and he shall file with his bill, answer or plea, as exhibits, an authenticated copy of such record, and a true copy of such deed or writing, and hold the original subject to the order of the court and inspection of other parties, in term time, if within his power." *Sec.* 48, *Chap.* 28, *Gould's*

Digest. Under this section, where the pleader relied upon any record, deed or writing, the pleading should exhibit an authenticated copy of such record, or a true copy of such deed or writing, and it seems, under the old practice, such exhibitions made such copy a part of the pleading, and a failure to make such exhibition rendered the pleading bad upon demurrer. Such, at least, seems to have been the ruling of this court. *Brodie et. al. vs. Skelton*, 11 *Ark.* 121; *Fletcher vs. Hutchinson*, 25 *Ark.* 31. But this section has been repealed by the substitution of the amended *Section* 148 *of the Code of Civil Practice*, which is as follows: "If either party shall rely upon any deed or other writing, he shall file, with his pleading, the original deed or writing, if in his power, or a copy thereof. If he cannot procure such deed or writing, or a copy thereof, he shall so state in his pleading, together with the reasons therefor, and if such reasons are sufficient, he may file the best evidence of the contents of such deed or writing in his power," etc. This section is substantially the same as *Section* 48, *Chapter* 28, *Gould's Digest*; and had our system of practice not been changed, we would not hesitate in applying the rulings of the court, upon this latter section, to the section under consideration. But our laws of civil proceedure having been completely changed by the substitution of the "Code of Civil Practice," the provisions of this section must be applied and enforced in a manner not inconsistent with other provisions and requirements thereof. In relation to the *application* of the provisions of this section, and the rules relating thereto, we have derived much light from the decisions of the "Court of Appeals" of Kentucky, applying the provisions of a similar section in their "Code of Practice," of which ours is almost a *verbatim* copy.

The provisions of this section, though applicable to proceedings at law, are intended to apply chiefly to proceedings in equity. Their obvious object is to compel the pleader to file with his pleadings such writings as are relied on by him, and which may not be, strictly speaking, evidence, or the

foundation of the action or defense. If they are not referred to, or relied on in the pleading, but are such as may be properly introduced, in evidence, the pleader need not file them with his pleadings: *Ruggles, etc. vs. Moore*, 18 *B. Mon.* 824.

The pleading must contain the facts constituting the cause of action, or grounds of defense when new matter in the answer or reply is relied upon: *Secs.* 109-116, *Code of Civil Practice; Hill etc. vs. Barrett etc.*, 14 *B. Mon.* 86; *Collins vs. Blackburn, Ib.* 254.

So much of the deed or writing relied on, and referred to, as may be necessary to show the character and purpose of such reliance, must be set forth either in terms or substance in the pleading: *Dodd vs. King*, 1 *Met.* 430; *Riggs vs. Motly*, 2 *Met.* 88; *Ruggles vs. Moore*, 18 *B. Mon.* 824. The obvious reason of this, as well as of the filing of the writing, is to give the opposing party that knowledge of the true character of the demand or defense necessary to enable him to properly resist it. But the setting out, in the pleadings, of the matters relied on, in the deed or writing, does not dispense with the necessity of the filing of the same. Not only should such deeds or writings be filed, but they should be referred to in the pleading, and referred to in a manner sufficiently explicit to identify them. In proceedings in equity, exhibits referred to in the pleadings and filed become a part of the record, but not, however, as allegations or averments in the pleadings: *Strother vs. Lovejoy*, 8 *B. Mon.* 139; *Harman vs Wilson*, 1 *Duval* 322, and the authorities cited above. We regard these rulings as applicable to the section (148) under consideration, and as explicit, reasonable and just.

In the case under consideration, the notes sued upon were the foundation of the action; the deed is simply relied upon in evidence of the vendor's lien, avered in the complaint to have been reserved therein to secure the payment of the notes.

The complaint sufficiently contains the facts, constituting the cause of action. It sets up properly that part of the deed

upon which the plaintiff relies for relief. It also sufficiently refers to the deed. But the plaintiff, instead of filing it, or a copy thereof, merely proposed in his complaint to file it if necessary. The deed, or a copy thereof, should have been filed.

One other question is here suggested, and that is, could the failure or omission to file the deed or a copy thereof be reached by demurrer? This question has almost been sufficiently answered by our above observations. The office of a demurrer, under the Code of Civil Practice, is to state objections apparent upon the face of the complaint or pleading: *Sec.* 114, *Code of Civil Practice*; *Coe vs. Beckwith*, 11 *Abb.* 299; 19 *How.* 399; 31 *Barb.* 339. The deed, in its nature, being no part of the averments of the complaint, a failure or omission to file it, or a copy thereof, could not be reached by demurrer.

The appellant's remedy for the failure of the appellee to file the deed, or a copy thereof, was by a rule of court to be granted upon his motion therefor, compelling him to file it, or show cause why he could not: *Ruggles vs. Moore*, 8 *B. Mon.* 824. The court, therefore, did not err in overruling the demurrer.

The decree of the court below must be affirmed.

H. & W. BLUNT v. WILLIAMS.

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COVENANT—*Plea of performance.*—To breach assigned for non-payment of money, a plea of performance, by giving note and due bill, should allege that the same were accepted by the plaintiff as a payment or satisfaction of his claim.

PRACTICE—*Exceptions, when not considered.*—Exceptions taken to the rulings of the court below, but not incorporated in a motion for a new trial, will not be considered.

PARTNERS—*When may sue each other.*—A partner may sue a co-partner on an express agreement, and an action of covenant may be maintained by one partner against his co-partner.

DEPOSITIONS—*General objections to.*—A general objection to a deposition is not sufficient to reach an irregularity, and will not be considered as extending to formal defects.

ERROR TO JEFFERSON CIRCUIT COURT.

HON. WILLIAM M. HARRISON, *Circuit Judge.*

Watkins & Rose, for Appellants.

The declaration is insufficient, and the demurrer to defendant's plea reaches back to these defects. *See Rose Dig. Tit. Demurrer, page* 269, *section* 34.

There was no covenant to pay $4000 for the entire interest of Williams, only permission given to buy at a certain price, and no breach could be assigned: 10 *Johns.* 575; 2 *Hayer.* 127; 7 *Cowen* 662.

The declaration, not averring that the plaintiff sold and delivered up the said entire half interest to the defendants, is materially defective, and shows no cause of action as to that: 1 *Bibb.* 465.

There are two distinct breaches assigned, and entire damages assessed, for one of which breaches the plaintiff had no cause for action: *Hardin* 489, 2 *Mon.* 87.

The court erred in not awarding a repleader: *Gerritt vs. Fain*, 3 *Pick* 124; 14 *Raym'd* 167.

It was a partnership matter, of which the court had no jurisdiction: *Parsons on Cont. page* 139, *note Z.*

Covenant will not lie on a contract under seal, which has been materially varied by a subsequent parol agreement: 6 *Port.* 201; 6 *Mis.* 29.

Bell & Carlton, for Appellee.

WHYTOCK, *Special J.*—This is an appeal from the Circuit Court of Jefferson county, from a judgment rendered in that court against the defendants, H. W. & Wm. N. Blunt, on the 15th day of October, 1867. Motions for a new trial, and in arrest of judgment, were made and overruled. The action was brought upon a contract, or articles of agreement, under seal, bearing date March, 1866, executed by all the parties, and by which the plaintiff, Williams, agreed to sell to the Blunts a half interest in the lease and outfit of a plantation, known as the McKinsey place, for the sum of $3000, to be paid for by the Blunts as follows: "One thousand in cash, and the balance on the return of Wm. W. Blunt from Maryland, or until the first of April" then next. The contract also provided that the Blunts should be responsible for the balance of the rent due, amounting to the sum of $1150. It was further covenanted that the Blunts should have the privilege, on the return of W. W. Blunt from Maryland, or until the said first day of April, of buying the entire interest of Williams, by paying on or before the 15th of June, in addition to the said sum of $3000, the sum of four thousand dollars.

The declaration substantially sets forth the facts, and alleges that the defendants elected to take the entire interest in the plantation, according to the terms of the contract. It further alleges general performance of the contract on the part of the plaintiff, breaches of the same by the defendants, and non-payment of either the sum of $3000 or the $4000.

To this declaration, the defendants filed a plea setting up that they had complied with the conditions of the contract by executing a due bill for $1000, and their note for $4000, payable on or before the 15th of June, 1866. A general demurrer seems to have been interposed to this plea, and the

demurrer was sustained. The defendants thereupon filed an amended plea, alleging a payment of $2000, the execution of their due bill for $1000, their note for $4000, and the giving by the plaintiff of his receipt in full satisfaction of all his interest in the plantation. This last plea also sets forth a subsequent contract, executed in lieu of the former. A demurrer to the amended plea was interposed and overruled. A trial was had, and a verdict rendered for the defendants. This was afterwards set aside, a new trial ordered and at the October term of the Circuit Court, a jury being called, the plaintiff obtained judgment for the amount of $5420.

The defendants moved in arrest of judgment: First, Because the declaration showed no breach; that it appeared upon its face that, as a court of law, the court had no jurisdiction, and that the court erred in sustaining the demurrer. The motions in arrest, and for a new trial, were overruled, and exceptions taken.

Upon the trial, the defendants asked certain instructions, which the court refused to give, and to which refusal the defendants excepted.

The first question presented is, was the demurrer to the first plea properly sustained? There is no averment in the plea that the due bill and note were accepted by the plaintiff as a payment or satisfaction of his claim. The plea was a bad one, and the demurrer to it properly sustained: 5 *T. R.* 280, 1 *Taunt* 428; *Drake vs. Mitchell*, 3 *East* 251.

Certain instructions were presented to the court, which were refused, and exceptions taken, but as they were not incorporated in the motion for a new trial, as required by the ruling of this court, they cannot be considered: *Nevill vs. Hancock*, 15 *Ark.* 511; *Moss vs. Smith*, 19 *Ark.* 683; *Graham vs. Roark*, 23 *Ark.* 19.

The objection that a resort should have been had to a court of equity, is not a sound one. Granting that the parties were partners, the contract in question did not involve a consideration of partnership accounts. A partner may sue a co-part-

ner on an express agreement, and an action of covenant may be maintained by one partner against his co-partner: 1 *Parson's Con.* 164 (*5th Ed.*), *Collyer on Part.*; *Glover vs. Tuck*, 24 *Wend.* 152.

The averments in the declarations are not, perhaps, so clear and specific as the rule of good pleading requires, but we think the cause of action is so set forth as to be understood. We also think the breaches sufficiently stated, no special demurrer to them having been interposed.

The defendants objected to the deposition of the witness R. N. Williams, but failed to point out the grounds of objection. A general objection to a deposition is not sufficient to reach an irregularity, and will not be considered as extending to formal defects: *Blackburn vs. Morton*, 18 *Ark.* 384.

The defendants, likewise, excepted to the ruling of the Circuit Court, refusing to permit the witness, Shegog, to detail statements of the transaction made to this witness by one of the defendants, when the plaintiff was not present. We think this evidence was properly excluded.

The judgment of the Circuit Court is affirmed.

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

HON. JOHN WHYTOCK, *Special J.*

BRITT et al v. HAMILTON & CO.

APPEAL FROM LITTLE RIVER COUNTY.

HON. E. J. SEARLE, *Circuit Judge.*

Garland & Nash, for Appellants.
Gallagher, Newton & Hempstead, for Appellees.

HARRINGTON, *Special J.*—This case was appealed, in the court below, on the 12th day of February, 1869, but the appellants have never perfected their appeal by filing a copy of the record in this court.

The appellees now file a transcript of the proceedings in the case, and ask that it be dismissed.

The appeal is dismissed.

SEARLE, J., did not sit in this case, being disqualified.

HON. S. R. HARRINGTON, *Special J.*

CARLLEE v. CARLTON et al.

CONFEDERATE MONEY—*Illegal consideration.*—A promise or contract, the consideration of which, in whole or in part, is based upon Confederate money, is void.

APPEAL FROM MONROE CIRCUIT COURT.

HON. JOHN E. BENNETT, *Circuit Judge.*

Watkins & Rose and Wassell & Moore for Appellant.
Clark & Williams, for Appellee.

HARRINGTON, *Special J.*—This was a bill for the specific performance of a contract for the conveyance of land, determined in the Monroe County Circuit Court.

The material facts in the case, as they appear from the record, are: That in August, 1864, one C. W. Richardson and wife sold to C. C. May a certain tract of land in Monroe county, Arkansas, containing three hundred and twenty acres, for the sum of three thousand seven hundred dollars, acknowledging payment in full, and giving a bond in the sum of seven thousand four hundred dollars to execute a deed whenever called on so to do.

Sometime after, and before such deed had been executed, Richardson died, and the bond for the deed having been assigned by May to Charlotte C. CarlLee, the appellant, she brought her suit against Robert C. Carlton, as administrator, and others, as heirs, of said Richardson, to compel the making of a deed according to the terms of said bond.

The appellees demurred to the bill of complaint; setting up that upon the face of the bill it appeared that the consideration, upon which the contract in said bill set forth was based, had not been paid, nor any part thereof, and for other good cause, etc.

The court sustained the demurrer, the appellant excepted, and the case is here upon appeal.

The bond for title, upon which this action is brought, after

citing the obligation, the sale and description of the land, proceeds as follows, to wit: "Now the said C. W. Richardson and P. P. Richardson, his wife, acknowledge that they have received of C. C. May thirty-seven hundred dollars in eleven notes of the Confederate States, for $100 each, drawing two cents per day; eight hundred and seventy-seven dollars in Missouri State money, and the balance in Confederate money, $1460 50, making in all, interest, etc., thirty-seven hundred dollars, the full amount C. C. May was to pay for said lands."

Does this constitute a consideration requiring or admitting the enforcement of a contract based upon it?

This court has repeatedly held that contracts made in consideration of Confederate money were void: 25 *Ark.* 246-274; 26 *Ark.* 1-36-160-446.

But the counsel for appellant urge that the phrase, or language, "Missouri State money," must be construed to mean "coin of the United States," and that therefore the contract does show a valuable and lawful consideration; while the counsel for appellees claim that the currency actually paid and referred to in the bond as "Missouri State money," was a Confederate issue, and is subject to the same rule as Confederate money.

In the absence of all proof, we will not attempt to say what was actually paid and designated "Missouri State money," nor, indeed, is it material in determining the question before the court, what it was that was thus paid and designated.

The language used in the bond shows that the contracting parties did not consider themselves contracting in the lawful currency of the nation. They have dropped that familiar and important phrase, "lawful money of the United States," and say "bound unto the said C. C. May in the sum of seven thousand and four hundred dollars, current money of the State of Arkansas," and acknowledge payment for the land in Confederate and Missouri State money, in the full sum to be paid, of which sum twenty-eight hundred and twenty-three dollars were paid in Confederate money.

It is evident that the parties considered this Confederate money a valuable consideration in the contract, and it cannot, therefore, be claimed that the appellant had made such payment, adequate and in full, as to entitle her to the specific performance sought in the bill, even were the eight hundred and seventy-seven dollars, designated Missouri State money, admitted to have been coin of the United States.

Beside, the courts refuse to enforce contracts based upon Confederate money, not because of its being an inadequate consideration, but because of its being an illegal consideration, and the law holds a promise void if any part of the consideration be illegal, to the same extent as though the entire consideration were illegal: *Parsons on Contracts*, 456; 6 *Dana* 91; 11 *Wheat*, 258; 26 *Vt.* 184. And the consideration in this case having been mainly Confederate money, and illegal, the contract was void, and the demurrer was properly sustained.

BENNET, J., did not sit in this case.

HON. S. R. HARRINGTON, *Special J.*

UNDERWOOD et al. v. WHITE.

MANDAMUS—*What petitioner must show.*—The petitioner, seeking mandamus, must show a clear legal right to the subject matter of his petition; and the writ will not be issued to admit a person to office while another is in under color of title.

APPEAL FROM PHILLIPS CIRCUIT COURT.

HON. JOHN E. BENNETT, *Circuit Judge.*

Palmer & Sanders, for Appellants.

The court erred in granting the writ of mandamus, because:

First. The Board of Equalization had and exercised a legal discretion.

"*Mandamus* will not lie where an inferior tribunal, having a discretion, has exercised it." *Ex parte Barrett*, 2 *Cow.* 458; *Ex parte Nelson*, 1 *Cow.* 417; *Gray vs. Bridge*, 11 *Pick.* 189; *Ex parte Bailey*, 2 *Cow.* 479; *Ex parte Benson*, 7 *Cow.* 363; *Lamar vs. Marshal*, 21 *Ala.* 722; *People vs. Judge of Wayne Co. Court*, 1 *Maine*, 359; *The State vs Washington Co.* 2 *Chand.* 247; *Regina, vs. Justices of Derbyshire*, 14 *Eng. Law and Eq.*, 428; *Williamson Ex parte*, 8 *Ark.* 424; *Gunn vs. County of Pulaski* 3 *Ark.* 427; *Brem vs Arkansas County*, 9 *Ark.*, 240; *Notes to Kentucky Code. Sec.* 526.

Second. Petitioner's rights, as claimed, were not clear and legal.

"*Mandamus* will only lie where a party has clear legal rights, and no other specific remedy." *Napier vs. Poe*, 12 *Geo.*, 170; *Swann vs. Work*, 24 *Mis.*, 439; *Railroad Co. vs. Clinton*, 1 *Ohio State R.* 77; *State vs. the Justices of Moore*, 2 *Iredell*, 430; *State vs. the Justices, Dudley Geo.*, 37; *Going vs. Mills*, 1 *Ark.*, 11; *Ex parte Jones*, 1 *Ala.*, 15; *Spraggins vs. County Court of Humphries, Cooke*, 160; *People vs. Corporation of Brooklyn*, 1 *Wend.*, 318; *Marbury vs. Madison*, 1 *Cranch*, 137.

Third. Petitioner had a specific remedy, clearly pointed out by chapter 12, of title X of the Code of Practice.

"*Mandamus* will not lie where there is another specific remedy for the party complaining." *Justices vs. Munday*, 2 *Leigh.* 175; *State vs. Dunn, Minor*, 46; *State vs. Holliday*, 3 *Halst.* 205; *Commissioners vs. Lynch*, 2 *McCord*, 170; *Boyce vs. Russell*, 2 *Cow.*, 444; *Ex parte Nelson*, 1 *Ib.*, 417; *People vs. Brooklyn*, 1 *Wend.*, 318; *State vs. Bruce, Const. Rep.*, 165, 175; *Morris vs. Mechanics*, 10 *Johns*, 484; *Board of Commissioners vs. Hicks*, 2 *Carter*, 527; *Williamson Ex parte.* 8 *Ark*, 424; *Cheatham ex parte*, 6 *Ark.*, 437; *Goheen vs. Meyers*, 18 *B. Mon.* 426.

Fourth. The rights of a person not before the court were affected.

"If it appear that the rights of persons not before the court will be effected, a writ of *mandamus* will not be issued." *Commissioner of Land Office vs. Smith*, 5 *Texas*, 471.

Garland & Nash, for Appellee.

It is submitted: That the law of July 23, 1868, was a general law on the subject of filling vacancies, where, under the new Constitution, the old officers went out before the time for which they were elected expired, and that it repealed the former laws providing therefor. *Sedgwick Construc.*, 41, 121; *Pulaski Co. vs. Dower*, 10 *Ark.* 589.

There was no vested right in Robinson to this office. 9 *Ark.* 270; 23 *Missouri*, (2 *Jones*) 22; *Conner vs. Mayor*, 1 *Selden*, 285; 4 *Elliott's Debates, page* 150, 2*d part*, 1*st edition; R. M. Charlton Rep.* 400-5; 3 *Kent*, 362, 1*st edition*; 7 *Hill*, 81; 2 *Denio*, 272.

The appellee only asked to have the oath of office administered.

To compel the administration of an oath to a party holding office, by *mandamus*, has been done almost from time immemorial. 6 *Bacon Abridgement, page* 500 (*mandamus*) *C*; *The People vs. The Board, etc.*, 26 *N. Y., Reps.* 316; *Harwood vs. Marshall*, 9 *Indiana*, 83; *Benton vs. Wilson*, 4 *Texas*, 400; *Greene vs. the African, etc., Society*, 1 *Serg. & Rawles*, 254; *Douglass. Reps.* 158; 2 *Binney*, 441-8; 5 *Ib.*, 486; 2 *Serg &*

Rawles, 141; 10 *Barr Reps.*, 357; 15 *Penn*, 251; *State vs. Common Council*, 9 *Wisconsin*, 254; *Moses on Mandamus, page* 149-151; *Tapping on Mandamus, page* 172-76-86.

HARRINGTON, *Special J.*—The appellee, as assessor of Phillips county, brought his action in the Phillips County Circuit Court, by petition for *mandamus*, to compel the appellants, Samuel J. Clark, county clerk, Frank Trunky, county surveyor, and Q. K. Underwood, county judge, as members of the Board of Equalization of real property for said county, to allow him to be sworn and qualified as a member thereof, and to sit and act with, and as a member of such board.

The court granted the order prayed for; the appellants excepted to the judgment, and appealed to this court. The law constitutes the county clerk, county assessor, county surveyor and county judge a board for the equalization of real property of their county: *Sec.* 66, *Act Approved April* 8, 1869.

If, therefore, the appellee were the assessor of Phillips county, he was clearly entitled to the privileges sought by his petition; and if his title to the office were undisputed, the proceedings in the court were proper.

But the petition of the appellee discloses the fact that one H. B. Robinson also claimed to be assessor of said county, and the record in the case shows that he was then performing the duties of said office, and was in possession of the same, at least, under color of right.

The right, therefore, to sit as a member of the board of equalization, is altogether subordinate; the main question being title to the office of assessor; this being established, the right to sit and act as a member of the board of equalization of real property, would follow as a matter of course.

The practice is well settled, that the petitioner seeking mandamus, must show a clear legal right to the subject matter of his petition; that a conflict of title to office being presented, cannot be determined by mandamus; the proper office of this writ being to enforce the performance of a duty, and

not to establish legal rights; that it will not be issued to admit a person to an office while another is in under color of right. See *Fitch vs. McDiarmid*, 26 *Ark.*, 482, and the authorities there cited.

The facts of record, in the case, do not bring the appellee within the rule; the mandamus, therefore, was improvidently and erroneously awarded; the judgment will be reversed, and the cause remanded with instruction to dismiss the petition.

BENNETT, J. did not sit in this case.

HON. S. R. HARRINGTON, *Special Justice.*

CASSELBERRY et al v. FLETCHER et al.

SWAMP AND OVERFLOWED LANDS.—C. resided on the lands and had done so more than twenty-five years; he took a contract to levee the lands and performed the work. H. went to the Swamp Land Office and entered the lands; two days after this, C. entered the same lands, as part pay for the levee he had contracted to construct across the lands; a contest was had before the land agent, a patent issued to H. and none to C. *Held*, on bill by C. to enjoin suit in ejectment by H.: That under *Section* 13, *of the Act of January* 6, and *Section* 4, *Act of January* 11, 1851, the equitable title of C. was superior to the prior legal title of H. and a perpetual injunction would be awarded.

APPEAL FROM MISSISSIPPI CIRCUIT COURT.

HON. JOHN E. BENNETT, *Circuit Judge.*

Adams, Dixon & Pike, for Appellants.

The land in controversy in this suit was, and is admitted to be included in the Act of Congress, 28th September 1850. Other provisions of the Act provide for the location, report

and confirmation of said lands, and patents therefor to the State, and especially by Section 2 of said Act of Congress it is provided, "and on that patent the fee simple to said lands shall vest in the State of Arkansas, subject to disposal of the Legislature thereof: *Provided*, however, that the proceeds of said lands, whether from sale or *direct appropriation in kind*, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

By Section 4, of the Act of the General Assembly of the State of Arkansas, passed and approved on the 6th of January, 1851, it is provided, "That the payment for making said levees and drains shall be made *in the lands reclaimed*, or in the proceeds of the sales thereof, at the price previously fixed upon said lands by the commissioners," and by the thirteenth section of the same Act, it is, among other things, provided, "that all persons * * * * *who shall reside on*, or who shall have improved the same (that is any of said lands so granted), *shall have the exclusive right of purchase thereof*, to the extent of their claims, *for the period of twelve months from and after the date* of the patents issued by the United States to this State, at the price previously fixed upon the same, not to exceed one dollar and twenty-five cents per acre;" and by Section 4 of the Act of said General Assembly, of date the 11th day of January, 1851, it is also provided:

"That any person owing lands on the *banks* of any river, in any swamp and overflowed land district, shall have the preference of taking the contract to levy such lands; *Provided*, he takes the contract at the lowest bid, and such person so contracting, shall have the preference to take in pay for executing his contract any lands, swamp or overflowed, *lying in the rear or adjacent to his own lands*."

These are the provisions of the statutory law applicable to this cause, and upon which, under the facts and the general principles of equity, it must be determined.

It is perfectly manifest that the whole scope and purpose of

all these legal provisions are, and were, to secure the reclamation of the swamp and overflowed lands of the State, to protect and save to the citizens their estate, and *homes*, and the benefits arising from the proposed work, and thereby to enlist them in the more hearty and efficient prosecution of the labor of erecting the levees.

In the first place, the lands were to be reclaimed. Next, the compensation for the necessary labor should be made with the lands themselves. Next, those *actually residing and having their homes upon the lands*, should have the exclusive right to purchase the same for the space of twelve months after the *date* of the *patents* from the United States to this State therefor. And lastly, that lands adjacent to private lands should be saved to their owner, if he should take the work at the lowest bid.

The court will take judicial cognizance of the fact that the lands in controversy in this suit were not patented by the United States to this State prior to the 27th day of September, 1858; such patents for the lands in the township and range in which these lands lie bearing dates respectively the 27th day of September and the 10th day of November, 1858.

We therefore, and we think justly, contend that complainants are entitled to the relief asked, and the provisions of both the thirteenth section of the Act of the 6th January, 1851, and of fourth section of the Act of 11th January, 1851, the proof, under both, as we think, being ample and conclusive.

John C. Palmer, for Appellees.

The first point upon which appellees rely is, that the rights of the parties having been settled by the swamp land agent, his decision cannot be attacked except upon an allegation, sustained by proof of fraud. By section 41, chapter 101 of the Digest, the swamp land agents were vested with full

authority and jurisdiction to settle and adjudicate contested pre-emptions, and no authority is given to any tribunal to revise their decisions. The authority of a Court of Chancery to interfere in cases of this sort, is confined to clear equity jurisdiction.

The bill in this case charges fraud. The injunction was granted on this allegation, and complainants are entitled to no relief unless fraud is proved—the answer especially denying fraud. *Borden et al vs. State*, 11 *Ark.*, 547; *Wynn vs. Morris et als.* 16 *Ark.*, 414; *Lytle et als. vs. the State*, 17 *Ark.*, 608; *McIver vs. Williams*, 24 *Ark.*. 33; *Paty vs. Harrell*, 24 *Ark.*, 40; *Schaer vs. Gliston*, 24 *Ark.*, 137; *Branch vs. Mitchell*, 24 *Ark.*, 149.

It is well settled that when the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and where no appeal is allowed, or revising power given by law, such adjudication is final and conclusive upon all other courts and persons, until *successfully impeached upon the charge of fraud. Lessee of Rhode vs. Selin*, 4 *Wash. C. C. Rep.*, 721; *Voorhees vs. U. S. Bank*, 10 *Pet.*, 478; *United States vs. Arredondo*, 6 *Pet.*, 729; *Wilcox vs. Jackson*, 13 *Pet.*, 511; *Borden et al. vs. State*, 11 *Ark.*, 547; *Foley vs. Harrison*, 11 *Howard U. S. R.*, 448; *McGee vs. Wright*, 16 *Ill.*, 557.

GREGG, J.—On the 5th of May, 1868, the appellants filed their bill in equity, in the Mississippi Circuit Court, in which they allege that, in 1838, one Howe proved up a pre-emption to the southwest quarter of section 3, in township 15, north of range 13 east, under the act of Congress of 1833, and that the same, in 1843, by transfer and assignment, came into the hands of Isaac S. Casselberry, the father of complainants; that the same was never offered for sale by the United States government, and in 1850 it was granted to the State of Arkansas as swamp and overflowed lands; that said Isaac S. and family have, ever since, had actual and continuous possession of said lands, and that under the act of the Legislature

of 1851, they, or the said Isaac S., had a preference right to purchase said land, and pay for the same in levee work, and that he took, and caused to be completed, a levee contract on said lands; that said Isaac S. died in 1852; that in June, 1852, said complainant, as administrator, proved up a pre-emption right, in the proper swamp land office, and on the 28th of March, 1853, purchased said lands and paid in levee work then done, and procured a certificate. That Elliott Hickman, the father of the appellees, well knowing the rights of the complainants, in collusion with or fraud upon the land officers, and in fraud of the rights of the complainants, entered said lands, and procured a deed therefor; and that he, at the November term, 1868, of the Circuit Court of that county, brought an action of ejectment against the complainants. They prayed for an injunction perpetually restraining all proceedings in ejectment; that the heirs of Elliott Hickman be divested of title, and that title be vested in complainants, as the widow and heirs of said Isaac S. Casselberry, and for general relief. Sarah Hickman, Francis Fletcher and Juda Murphy answered and denied that Howe ever proved up a pre-emption right, or that any was transferred, but avered that a pre-emption right was proved up by one Baker, and afterwards, in 1839, assigned to Elliott Hickman. They admit the possession of Casselberry, and that the lands were granted to the State as alleged, the representative character of the complainants, and the death of the said Isaac S., but deny that the complainant, Martin Casselberry, as such administrator, ever proved up a pre-emption under State laws.

They aver that they do not know of his levy contract, and ask that he be held to proof, etc. They aver that Elliott Hickman proved up a pre-emption under State laws, and entered the land long before Casselberry, and that upon a full and fair trial before the State Swamp Land Agent, at Helena, a certificate of entry was granted to him and refused to said Casselberry, and that a deed therefor was duly granted to him by the Governor of the State.

Depositions were taken and certificates procured by the appellants to show the performance of the levee contract, and the application to purchase the lands in such work, and that the lands were taken in part payment for such levee work within a few days after Hickman's purchase. The appellees took no depositions.

The record entry, preceding the decree, states, "That it is agreed that Elliott Hickman's entry is the oldest by at least two days, and that all questions as to pre-emption, either by authority of the United States or the State of Arkansas, are withdrawn and not to be considered, except as to the claims of the complainants under section 4 of the act of January 11, 1851, and the exclusive right of purchase secured by section 13 of the act of the 6th of January, 1851, to persons other than those claiming benefits of pre-emption under acts of Congress."

By the admissions of the parties, in the pleadings, by the evidence and admissions stated upon the record, the case may be stated thus: Casselberry resided on the lands, and had done so more than twenty-five years; he, through his son, Martin, took a contract to levee the lands, and performed the work.

Elliott Hickman went to the swamp land office and entered the land; two days after this Casselberry went and entered the same lands as part pay for the levee he had contracted to construct across the land; a contest was had before the land agent; a patent issued to Hickman and none to Casselberry.

Complainants claim that their rights under *section* 13 of the act of *January* 6, and *section* 4, act of *January* 11, 1851, are superior to those of appellees.

Appellees claim that said acts conferred no rights or privileges upon Casselberry over other citizens, and that Hickman complied with all the necessary requirements of the swamp land laws, and obtained the patent, and that his entry was prior in time and should prevail.

It is insisted by the appellees that the appellants acquired

no preference under the *4th section* of the act of the *11th of January*, 1851, because there was no sufficient title in them, or their ancestor, in the front lands upon the bank of the river; that the levee was made upon the lands in controversy, and not on adjacent lands in front as required by the statute, etc.

It is very clear that the general policy of the land laws, both national and State, has been and is to favor the actual settler; to prefer those who, with their families, push forward to clear up the forests. Such being the general policy of the government, a court of equity, where the language of the statute will justify, should so construe it as to carry out that public policy.

These lands being granted to the State, the object was to reclaim them by the necessary levees and drains, and in addition to the favor due the occupant, it may well have been supposed that the actual settlers' personal interest would secure more faithful work than would likely be had at the hands of one whose pay was his only interest, as to results. With such objects in view, we can see no reasonable intent to exclude one, the title to whose possession might be acquired and the lands protected by such work; and we think it not unreasonable to hold that the man who owned the possessory right and had the occupancy and control of the lands to be reclaimed, was within the intent and meaning of the act referred to, and an equitable and liberal construction of the act in favor of those evidently intended to be benefitted by it, embraces the lands occupied, as well those more remote from the levee; and Martin Casselberry being the administrator and an heir of Isaac S., certainly had a right to complete the purchase in behalf of the representatives of the said Isaac deceased.

By *section* 13 of the act of *January* 6, 1851, it is provided "that all persons * * * * who shall reside on or who shall have improved such lands, shall have the exclusive right to purchase thereof, to the extent of their claims, for a period

of twelve months from and after the date of the patents issued by the United States, at the price fixed upon the same," etc.

It is insisted, however, that this section was modified and limited by the act of the 12th of January, 1853. That is true, but under the latter act the settler had the same right of pre-emption, only he was liable to lose the same if he did not make his entry or prove up his pre-emption before the day fixed by the land agent for the public sale of the lands.

In this case, many years of continuous and uninterrupted possession of the lands, is alleged in the complainants and admitted by the defendants; showing clearly a right of pre-emption in Casselberry, and that right certainly entitled him to this preference, if not forfeited by his act or negligence.

This occupation and all facts necessary to vest in Casselberry a right of pre-emption, being admitted in the pleadings or shown in evidence, those disputing that right should have shown wherein it had lapsed or been forfeited.

In the case of *Hempstead v. Underhill's Heirs*, 20 *Ark.*, 351, the court said, "Section 10 of this act" (the act of the 12th of January, 1853) "declares that every head of a family who may hereafter settle upon *or who is now a settler upon any of the undisposed of swamp lands and overflowed lands, shall have a pre-emption right thereto, in exclusion of all persons whatsoever up to the day of such sale*, and shall have a right to enter any of the legal subdivisions as above recited, * * * * * but if such settler fail to make such entry before the day set apart for such sale then the right of entry shall be lost, and the lands offered for sale to the highest bidder," etc.

In a subsequent paragraph of the same case, this court said: "Moreover, neither *the petition nor* the *mandamus* nor the *response* states *the time at which the appellant received the maps and plats* at his office, or the day upon which *he made his first public sale*, under the act of the 12th of January, 1853, consequently we have nothing before us from which we can determine with any legal certainty, nor had the court

below, *that the entries of Fitzgerald and Norwood were not made before the day of sale*, and within the period limited by the statute in question."

In the case now before us, without referring to the confirmatory historic fact of sale, the record presents neither averment or proof, tending to show that these lands had been offered for sale before the entry made by Casselberry, and as the admissions and testimony show satisfactorily his occupancy of the lands, his agreement and completion of the levee contract, and his entry of the land in payment for the work done under such contract, it seems to create in his favor equities, not to be defeated by a legal title, that can only claim priority in time.

In the case of *Branch vs. Mitchell*, 24 *Ark.*, 447, this court said: "Under the act of the 11th of January, 1851, Mitchell had the right, in preference to all others, to take the contract in question, for levying in front of these lands * * * but according to the argument he must go on and complete the levees before he could select any of the rear lands, and in the meantime, Jordan, or any other person might purchase these lands, as swamp lands, from the State, or buy them of the United States, and so defeat his pre-emption right altogether; that would make the right truly a visionary and unsubstantial thing. Either he could make the selection at any time, as the work progressed, and so prevent any sale of the same lands to others, or *he could require the commissioners not to sell any of the rear lands which he might have a right to take in preferment to other persons.*"

Further, they say, "No matter at what date he selected the lands, if he finished the work in whole or in part, and the commissioners approved of and received it, and the amount due for it were enough to pay for the lands, they became his, and his title, if necessary, as against any intervening purchaser or claimant, would relate to the 11th of January, 1851, on which day the right of preference, in building the levee and taking these lands in payment, vested. And it is quite

clear *that having the right of pre-emption of the land, and having taken the contract to build the levee, and commenced the work, he could not be ousted of his right of pre-emption by a purchase made by any other person even from the State, though he did not select the lands until after such purchase.*"

If these rulings be correct, upon the whole record before us, the complainants ought to have recovered.

In our opinion Casselberry had a preference right in the levee contract. The work was done and accepted for the land, and that gave a paramount title, and the swamp land department should have so decided.

All are presumed to know the law. Hickman, knowing of Casselberry's possession and claim of title, must therefore have known he had a preference right, and knowing of this right, it was a fraud on his part to attempt to enter these lands from under the occupants, who were then completing payment for them, and courts of equity will not encourage such practices.

We hold that the equitable title of the appellants is superior to the prior legal title of the appellees, and a decree according to the prayer of the bill will be rendered in this court.

BENNETT, J., did not sit in this case.

HON. J. R. HARRINGTON, *Special Judge.*

McSTEA, VALUE & Co. v. MASON, Adm'r.

PRACTICE—*Presumption in favor of judgment.*—Where the record, on appeal, is so imperfect as not to show the facts or rulings upon which the finding of the court below was based, and no effort is made by the party aggrieved to perfect it, the presumption will be in favor of the correctness of the judgment. [27 395 | 58 401]

APPEAL FROM POPE CIRCUIT COURT.

HON. W. N. MAY, *Circuit Judge.*

Garland & Nash, for Appellants.

Although a record is not as full as it might be, yet if there is enough presented in and by it, to place this court in possession of the points involved, that is quite sufficient, and this court will proceed to consider and determine the case; *Nichols vs. State Bank,* 3 *Yerger, Tenn.,* 107; *Stamps vs. Bush,* 7 *How., Miss.,* 255; *Jordan vs. Adams,* 7 *Ark.,* 348. The original note was brought on the record by the appellee's motion, under a sufficient showing why the appellants did not get a *certiorari* to perfect the record, and the court will consider the note a part of the record. *Rose's Dig., p.* 632. The endorsement on note shows it was presented and filed within two years after the granting of letters. *Brown vs. Merrick & Fenno,* 16 *Ark.,* 612, *et seq., and cases cited;* and the opening order in the transcript shows the case came on to be tried within two years after grant of letters—this does away with the plea of nonclaim. 16 *Ark., sup.*; 18 *Ark.,* 334, *and cases cited,* 13 *Ark.,* 276–9.

Clark & Williams, for Appellee.

The case is exactly within the case of *Dillard vs. Parker et al.* decided at the last term of this court, and the case of *Taylor vs. Spears,* 8 *Ark.,* 429.

The court will not reverse the case upon a question of *testimony* so long as a material portion of the testimony is left out.

BENNETT, J.—The transcript in this case is very imperfect. As far as is shown, no effort has been made to perfect it. The cause is submitted on the papers as they are. From them it would *seem* that the appellants presented, at *some* term of the Probate Court of Pope county, a claim for classification and allowance against the estate of S. D. Lewis, deceased. The administrator, at the July term, 1867, of the Probate Court, pleaded the statute of nonclaim and payment. On these issues the Probate Court found for the appellee. The appellants appealed to the Circuit Court, and finding no error in the findings and judgment of the Probate Court, affirmed the judgment. From this judgment of affirmance the appellants again appealed to this court.

There is nothing in the record to show what was the date of the account, note or claim presented for allowance. Nor is there any evidence to prove the payment of it. We cannot determine whether the court erred in finding for the appellee on the plea of nonclaim or not, but the presumptions are in favor of the judgment. The rule is that the party complaining must place the facts or rulings before us, by which they may have been aggrieved, otherwise the proceedings and judgment must be upheld as valid.

There is enough in this record to show a judgment has been rendered, and until the contrary is made to appear, it must be presumed that the evidence warranted its rendition.

Judgment affirmed.

PHILIP TRIMBLE v. THE STATE.

APPEALS—*Practice on.*—Where no error appears upon the face of the record, and no exceptions taken, motion for a new trial, or in arrest, in the court below, the judgment will be affirmed.

APPEAL FROM DREW CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Montgomery, Attorney General, for Appellee.

BENNETT, J.—This was an indictment for exhibiting a gambling device known and called "*Keno.*" The appellant was tried and found guilty. Judgment was pronounced, from which an appeal was granted.

The record shows no exceptions were taken during the trial. No motion for a new trial, or in arrest of judgment, was made. All the proceedings appear to be regular and in accordance with law. The indictment is good, and charges a public offense with sufficient certainty.

Judgment affirmed.

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THE STATE v. HIXON.

QUO WARRANTO.—Relation admitted that respondent was regularly elected, qualified and commissioned sheriff of Johnson county; but avers that afterward, and before the expiration of his term of office, by act of the legislature in creating a new county, and changing the boundary lines of Johnson, respondent's place of residence, which was in Johnson, became, and was included within the territory of the new county, whereby respondent became a non-resident of Johnson, and that, by reason thereof, his office became forfeited. *Held* on demurrer: That the non-residence of itself did not work a forfeiture, and the relation, to be sufficient, should have alleged such acts done by respondent as absolutely worked a forfeiture of office.

PETITION FOR QUO WARRANTO.

Montgomery, Attorney General, for the State.
Cravens and May, for Defendant.

We submit:

First. This court has no jurisdiction of the subject of the action. *See State vs. Ashley et als.*, 10 *Ark.* 280.

Second. The rule should disclose the grounds upon which the information was granted, which it does not do. *See Tidds Practice, 3d American, from the 9th Lond. Ed., vol.* 1., *page* 657; *Chap.* 2, *Civil Code.*

Third. That the defendant, under the Constitution and laws of the land, is entitled to hold the office until January 1, 1873. *See Sec.* 16, *Art.* 15; *Const; and Secs* 3 *and* 18, *same Art.*

Fourth. That this suit should not have been brought in the county of Pulaski. *See Acts Gen. Assembly*, 1871, *amendatory of Sec.* 484, *Civ. Code.*

BENNETT, J.—On the 14th day of December, 1871, at the suggestion of the Attorney General, a rule to show cause was awarded against Pleasant Hixon, the defendant, why a writ of *quo warranto* should not be issued against him.

On the 8th day of January, 1872, a demurrer to the information of the Attorney General was filed.

There are four causes assigned in the demurrer. The first

three are all to the effect that this court has no jurisdiction; the second is that the information shows no cause of action.

The question of jurisdiction has been fully settled in the cases of *Price et al. vs. Page, Treasurer*, 25 *Ark.*, 557; *State vs. Johnson*, 26 *Ark.* 281. Nothing further need be said on that point.

As to the question, "That the information shows no cause of action," the relation sets out the fact that the respondent did, on the 22d day of March, 1871, and has ever since usurped the office of sheriff of Johnson county, and he claims to have, hold, assume and enjoy the same without lawful authority.

The relation then admits that the respondent was regularly elected, commissioned and qualified as such sheriff, at an election held in 1868. But it avers that on the 22d day of March, 1871, there was passed by the General Assembly, and approved by the Governor, an act entitled "An act to establish the county of Sarber, and for other purposes," and that, by virtue of this act, the original lines of Johnson county were changed, and that the place of residence of said Pleasant Hixon was, on said 22d day of March, 1871, has ever since been, and is now, in that portion of the territory formerly embraced in the said county of Johnson, but is now within the boundaries of the county of Sarber, and that he, Pleasant Hixon, is not a resident of Johnson county.

From the above recital of allegations, we are led to ask, "Does it work a forfeiture of the office of a sheriff of a county, when, by an act of the Legislature, the lines of his county are so changed as to place his residence within the limits of another county?"

The Constitution of this State, by implication at least, authorizes the General Assembly to create new counties, and to change or alter the boundaries of old ones. The only limit to this power is a prohibition against creating a new county of less, or the reduction of an old county to less than an area of six hundred square miles. The Legislature, in creating the county of Sarber, did not transcend its legitimate powers, as far as appears in this case.

The relation of the Attorney General shows that the respondent, Hixon, was elected, regularly commissioned and qualified to the office of sheriff of Johnson county, in 1868, and does not allege that his term of office has expired by limitation. But it is asserted that non-residence has worked a forfeiture of the same.

The Constitution of 1868 provides for the election of the State, executive, judicial and legislative officers, naming the office by special designation, and for "all county officers" in general, leaving the people to determine what county offices were to be filled. This same instrument also provides that "all laws not in conflict with this Constitution, shall remain in full force until otherwise provided by the General Assembly, or until they expire by their own limitation."

The Constitution of 1868, failing to specially define the duties of a sheriff, or declaring what acts performed or what duties unperformed, will work a forfeiture, and create a vacancy, it is necessary to go behind it and examine the statute and constitutional laws left in force regulating this office.

The Constitution of 1836 was much more full, complete and definite in relation to designating "county officers," and defining their duties than the Constitution of 1868.

Sec. 17, *Art.* 6, says: "The qualified voters of each county shall elect one sheriff, etc., * * * * for the term of two years. They shall be commissioned by the Governor, reside in their respective counties during their continuance in office."

Chap. 160, *Sec.* 1, *Gould's Digest*, says: "The qualified voters of each county in this State shall, on the first Monday in August, 1846, and every two years thereafter, elect one sheriff, who shall hold his office for the term of two years, and until his successor be elected and qualified."

The Legislature, acting under the Constitution of 1836, did not deem it necessary to specially declare, in the enactment, that it was requisite for a sheriff to reside in the county, inasmuch as it was a constitutional requirement that he should do so. The clause in the present Constitution, continuing all

laws, not conflicting with it, in force, would not only continue the law itself, but all its incidents with it. *Chapter* 160, *Gould's Digest*, in relation to sheriffs, must, therefore, be construed in connection with that part of the Constitution of 1836, as relates to the same subject matter.

We find it then necessary that a sheriff should reside in the county in which he is elected, during his continuance in office, by the laws now in force. Even if there was no positive enactment, common sense and reason would say sheriffs must reside in the counties where they are performing the duties and exercising the functions of that office. A sheriff is an officer of great antiquity, and now, as anciently, the custody of the county is in his charge and keeping, the peace of these communities, in a great measure, is in his hands; with power to summon *posse comitatus*, to apprehend felons, rioters and other public offenders, to execute writs and process, it would be a violent presumption to presume a non-resident, who, perhaps, had no interest in common with the other citizens, should have this great power conferred upon him. Neither the letter nor the spirit of our law will warrant such a conclusion.

But the question arises: Can a sheriff be deposed from office until charged before some competent tribunal, and offered an opportunity to disprove the alleged neglect of official duty?

Mr. Justice Walker, in the case of the *State vs. Carnall*, 10 *Ark.* 162, says: "The summary mode which has been resorted to, in this instance, however it might tend to facilitate the collection of the revenue, by stimulating the officer to a prompt discharge of his duty, must yield to the constitutional rights of the citizen and officer; not that he has a right to retain his office for a moment after he has violated the law, but that before he shall be deprived of it, he shall be heard, in defense, before a competent tribunal."

This decision was rendered in a case where a sheriff failed to return and file, in the office of the clerk of his county, the original assessment list of taxable property, as required by

law. The statute provided that such a failure forfeited his office, and upon proper certification of that failure, the Governor should declare his office vacant. All of which was done. Yet the court says, "a sheriff could not be deposed from office until charged before some competent tribunal, and offered an opportunity to disprove the alleged neglect of duty. The privilege is so reasonable and just in itself, indeed so indispensably necessary to the protection of the rights of the citizen, that independent of the safeguards thrown around him by the Constitution, we would reluctantly see them invaded."

Upon general principles, without constitutional authority, we find, in order to create a vacancy in an office, it requires an *act done*, or the *exercise of power* to work a forfeiture and determine the title to an office: 2 *Blk.* 156; 4 *Kent Com.* 127. When the organic law is silent as to the mode of declaring a forfeiture, and what shall be deemed a vacancy, the Legislature possesses the inherent power to prescribe the means to ascertain the same, but the justice of the common law will not permit an investigation of facts which may be followed by the loss of a right, or by the infliction of a penalty to be conducted *ex parte*: 4 *Blk. Com.* 282, 1 *East* 638; 2 *Kent Com.*, 297.

We, however, find that it is provided in *Sections* 12 *and* 13; *Chapter* 160, *Gould's Digest*: "If any sheriff shall fail or refuse to perform any duties required by law to be performed by him, he shall be deemed guilty of a misdemeanor in office, and on conviction thereof, shall be removed from office."

"When any sheriff shall be found guilty of a misdemeanor in office, the court before whom the trial may have been had, shall declare the office of such sheriff vacant."

It will thus be seen that the legislature has furnished a complete and adequate redress for any omission or commission upon the part of a sheriff. Giving the officer, in the spirit of the common law, a tribunal before whom he may be heard before he can be summarily deposed from office.

But it may be alleged, that this is a proceeding to try the right of Hixon to the office of sheriff of Johnson county.

Quo Warranto is the proper remedy to try the title to an office. To test the validity of the election, commission and qualification of an officer, but when these are all admitted, as is the case before us, there is nothing to test unless it be the expiration of the term of office, or the forfeiture of it by some act done by the incumbent. It is not alleged by the Attorney General that Hixon's term of office has expired, even if it was, we judicially know that it has not. The only question then in the case is, has Hixon been guilty of such an act as works a forfeiture of his office. The operation of the act must, *ipso facto*, work an actual forfeiture. If it does not, but is merely a misdemeanor in office, and the law providing the mode in which a vacancy may be declared, *quo warranto* will not lie. *Lord Bruce's case*, 2 *Strange*, 819.

Now what is the respondent guilty of as alleged in the relation of the Attorney General? That he is a non-resident; not made so by his own act, but by the Act of the Legislature. Nowhere in the Constitutions of 1836 or 1868, or in the statutes do we find that this act in and of itself works a *forfeiture*. If there is no forfeiture there can be no vacancy. Non-residence is not of so high a grade of official offense, as *ipso facto*, to incur the penalty of forfeiture of office.

A person who persists in exercising the duties of a sheriff of a county for an unreasonable time, while he remains a non-resident of it, may perhaps be found guilty of a misdemeanor in office, but it is not until conviction thereof, before a competent tribunal, can he be removed from his office.

After admitting the regularity of the election, commission and qualification of Hixon as sheriff, in order to have made the relation sufficient in law, the Attorney General should have alleged such acts done by him as absolutely worked a forfeiture of his office. The acts done do not do this, therefore the relation is imperfect.

Demurrer sustained.

FARRIS & DUNN v. KING, et al.

SPECIFIC PERFORMANCE—Where lands were conveyed by deed absolute, but the conveyance was intended to secure the payment of a note, and the vendee gave an obligation to re-convey on payment: *Held*, on payment of the note, the reconveyance should be made.

APPEAL FROM CALHOUN CIRCUIT COURT.

HON. G. W. MCCOWN, *Circuit Judge.*

Garland & Nash, for Appellants.

HARRISON, J.—In this case the appellees, the widow and heirs at law of James King, deceased, filed their complaint in equity for the specific performance of a contract to convey a tract of land and to quiet the title to the same.

They alleged that James King, in his life time, conveyed the land to Anderson P. Farris, to secure the payment of a note for $355 91, but by an absolute and unconditional deed—taking from him, however, at the time, an obligation, for a reconveyance, of the following tenor:

"MILLER'S BLUFF, ARK., February 2, 1857.

This is to certify to all whom it may concern, that I, A. P. Farris, agree to convey to James King the south-east quarter of the south-west quarter of section number seven, in township fifteen south, of range number fourteen west, containing forty acres; also, the north-west quarter of south-east quarter of section number seven, same range and township as above stated.

The condition of the above obligation is such, that the said James King agrees to pay to the said A. P. Farris, by the first day of January, one thousand eight hundred and fifty-eight, the just and full sum of three hundred and fifty-five $\frac{91}{100}$ dollars, with interest thereon at the rate of ten per cent from the first January, 1857, on said note; then I, A. P. Farris, agree and bind myself to make good the title to said King, otherwise this is void.

Given under my hand and seal.

A. P. FARRIS, [*Seal.*]

Test: HAMILTON HUNTER."

And that, after giving this security, he became further indebted to Farris in the sum of $179 09; that he paid Farris the note, and also the subsequent debt before the former fell due—$254 00, on the 10th day of October, 1857, and the remainder of the indebtedness in the sale to him of another tract of land, called the "Graham place," and that after his death, which occurred in November, 1857, Nancy King, his widow, not knowing that the note had been entirely paid, to relieve the land from the incumbrance, let Farris have 6500 pounds of seed cotton, raised by King that year, worth $200.

They then charged that notwithstanding the note had been paid, Farris had not reconveyed the land, either to King in his lifetime, or to his heirs since his death, but had sold and conveyed it to his co-defendant, Joseph B. Dunn.

The defendants, admitting the conveyance from King, and that Farris gave the obligation for a reconveyance, denied that the conveyance was made as a security for the note, and averred that it was an absolute sale. They denied that the obligation was given at the time of making the conveyance, or had any connection whatever with it, and asserted that it was not given until several days thereafter, and in pursuance of a subsequent agreement to let King have the land back. They denied that any part of the note had been paid, and that any part of the consideration for the "Graham place," which, they alleged, was purchased before the conveyance of the land in controversy, was a payment on the above mentioned indebtedness. The $254 King paid, and the seed cotton delivered by his widow, they claimed were paid and delivered towards the satisfaction of the latter debt, which they insisted was much larger than as stated by the plaintiffs, and exceeded the value of the cotton and the money received.

The court decreed that the deed to Dunn be set aside, and that Farris should convey the land to King's heirs.

With the exception of the deeds referred to in the pleadings, the only material evidence in the case was the testimony of John C. King and Julia Morrison, two of the plaintiffs, read on behalf of the plaintiffs.

Although, from the view we take of the evidence, it is of no importance to determine whether the conveyance was a sale or merely a mortgage, we think it is clearly shown to have been the latter.

John C. King, who was then twenty-one years old and a member of his father's family, and well acquainted with his business, testified that he never heard of a sale of the land but knew that his father conveyed it to Farris to secure the payment of the note, and that Farris gave the obligation to convey the title back to him when the note should be paid. The place, it seems, was his homestead; he was residing on it at the time of his death, and that year raised a crop on it, and his widow and family continued to reside there after his death. It is, therefore, unlikely that he should have sold it and bought it back within six days. (The deed was dated the 27th day of January, 1857, but not recorded until the 6th day of February.)

Then the amount of the note $355 91, manifestly, had no reference to the value of the land as ascertained by the usual and ordinary methods of estimation, and was not such a round or even sum as is usually paid for real estate, and it drew interest from the first day of January, a date anterior by a month and a day to the alleged purchase. But, as we have remarked, it is unnecessary to decide whether it was a mortgage or sale. Farris was bound to convey the land back to King upon the payment of the note, and such payment is clearly shown by the evidence.

John C. King testified that he was present when the $254 was paid, and he saw the amount credited upon the note, and that Farris afterwards told him that that payment, together with the cotton which he received from his mother, would pay the note and leave a balance sufficient to purchase supplies for her family for a year. Julia Morrison testified that she heard Mrs. King tell Farris that she was letting him have the cotton to pay for the land, and that he told her it would be sufficient for the purpose, and there would be something over to buy groceries for the family.

The statement of John C. King, that when the money was paid it was endorsed as a credit upon the note, could, if untrue, have easily been shown to be so by the production of the note which, if unpaid, should have been in Farris' possession; but it is somewhat remarkable, and it is a circumstance that must weigh against the defendant, that he neither produced the note nor testified himself in the case.

The decree of the court below is affirmed.

SYKES v. LAFFERRY.

CONSIDERATION—*Waiver of right, etc.*—Where a party has a valid, subsisting claim or legal right and waives it, at the instance or request of another, such waiver is a sufficient consideration to sustain a promise made thereon. [27 407 / 77 34]

APPEAL FROM JOHNSON CIRCUIT COURT.

HON. W. N. MAY, *Circuit Judge.*

Clark & Williams, for Appellant.

The consideration for the note was the debt of Draper to Sykes, and not that of Lafferry to Draper, or rather it was a new debt, the consideration of which was the discharge of the old debt; 1 *Parsons on Cont.*, 221. It was a case of new parties by novation; *Id.* 217, and authorities cited. Such cases are not within the statute of frauds; the original debt did not remain, but was discharged; 3 *Parsons Conts.*, 20–23–24; *Nelson vs. Boynton*, 3 *Met.*, 396; *Williams vs. Leper*, 3 *Burr.*, 186; *Real Estate Bank vs. Rawdon*, 5 *Ark.*, 558.

But if a collateral agreement, and within the statute of frauds, as undertaking to pay the debt of another, still the note being given would be a compliance with the statute;

Packhard vs. Richardson, 11 *Mass.*, 122; *Violett vs. Patton*, 5 *Cranch*, 142; *Taylor vs. Ross*, 3 *Yerg.*, 330.

E. H. English, for Appellee.

The case should be dismissed for want of jurisdiction—the suit being for the "recovery of money," and the amount not exceeding fifty dollars. *Secs.* 15, 16 *and* 17, *Ark. Code; Ky. Code* (*Myers*), *Sec.* 16 *and notes.*

This court will not reverse the finding on the mere weight of evidence. There must be a total want of evidence to justify a reversal. 23 *Ark.*, 51; *Ib.*, 112; 19 *Id.*, 119.

The transaction was the mere assignment of an open account, and the execution of a note for the *same indebtedness*, and for the same consideration. *McDaniel vs. Grace*, 15 *Ark.*, 466; *Rose Dig.*, 182, *Sec.* 6.

GREGG, J.—On the 29th of May, 1866, appellant sued appellee on a note for $30, and obtained judgment in a justice's court, from which the appellee appealed to the Circuit Court, and judgment was there rendered in his favor for want of jurisdiction, which judgment was reversed on appeal to this court. 25 *Ark.*, 99.

The cause being remanded, in September, 1868, a trial was had in the Circuit Court upon the merits, and a finding and judgment for the appellee, and the case is again before this court upon an appeal.

The appellee set up a failure of consideration as a defense to the action.

The following facts appear: Lafferry, the appellee, bought a mare of one Draper, for which he agreed to pay $50; he paid $20. Draper owed Sykes, the appellant, $30. The three met together and Lafferry agreed to pay Sykes the $30, instead of paying it to Draper; and Sykes agreed to surrender his claim on Draper and take the amount on Lafferry, for which Lafferry executed to him the note on which this suit is founded. Draper left, and soon thereafter the true owner

came and obtained the mare, and it was found that Draper had no title to the mare.

On this state of facts was there a consideration for the note?

It appears that the appellant had a valid and subsisting claim against Draper, and he surrendered that for the claim on the appellee. Parsons, in his work on *Contracts*, *Vol.* 1, 444, says: "In general, a waiver of any legal right, at the request of another party, is a sufficient consideration for a promise," etc. *Underhill vs. Gibson*, 2 *N. H.*, 358; *Holmes vs. Dana*, 12 *Mass.*, 191.

In *Farmer vs. Stuart*, 2 *N. H.*, 100, the court, speaking of the consideration, say: "In respect to this part of the case, it is contended, first, that there was no consideration for the agreement; but, as a consideration is sufficient, if injurious to the promissee, whether beneficial or not to the promissor, this objection appears to be ill founded; because, the consideration, in this case, was the relinquishment or forbearance of a right which the plaintiff possessed," etc. *Chit. Con.*, 30; *Stebbins vs. Smith*, 4 *Pick.*, 98; *Smith vs. Weed*, 20 *Wend.*, 184.

If Lafferry had given his note to Draper for the mare, he having no title, there certainly would not have been a sufficient consideration, and Lafferry might well have set up such defense; but when Lafferry, by agreement with both Sykes and Draper, made full payment to Draper, and to extinguish his indebtedness to Sykes, gave the note in suit, he thereby formed a new obligation, and in Draper's stead became liable to Sykes for the amount of his debt. This note was not given for the mare. Draper had satisfaction for the mare, and the note was given for his indebtedness to Sykes, and, as disclosed in evidence, without Sykes knowing what consideration there had been for Lafferry's promise to Draper; and hence the consideration was good.

It is recognized law, that where one of two innocent parties must suffer loss it should fall upon him whose action pro-

duced the result. But it is not necessary to rest this case upon this ground, because the authorities, above cited, clearly hold that where one waives a right at the instance of another, it is a sufficient consideration to sustain a promise to pay.

The judgment is reversed and the cause remanded.

LOFTIN et al. v. EDGAR, Administrator, etc.

APPEAL FROM CRAIGHEAD CIRCUIT COURT.

HON. WILLIAM C. HAZELDINE, *Circuit Judge.*

U. M. Rose, for Appellants.

First. The chapters of the Digest not being law, the Circuit Court had no jurisdiction, and its judgment is a nullity. *Levy vs. Shurman*, 6 *Ark.*, 182; *Derton vs. Boyd*, 21 *Id.*, 267.

Second. The answer was evidently good. If the administrator had illegally squandered the assets, or had claims allowed which were not valid, he and his sureties would be liable for the devastavit, and he could not ask for a sale of the land. *Mooers vs. White*, 6 *Johns. Ch.*, 360; *Gilchrist vs. Rea*, 9 *Paige*, 66; *Renwick vs. Renwick*, 1 *Bradf.*, 234; *Biles Estate*, 2 *Brews. Pa.*, 609; *Martin vs. Rellehan*, 3 *W. Va.*, 480.

GREGG, J.—On the 27th day of May, 1870, the appellee filed his petition, in the Craighead Circuit Court, praying an order for the sale of 740 acres of lands, held by him as administrator of the estate of Robert W. Loftin, deceased, to pay debts probated against said estate.

The appellants, as heirs of the deceased, appeared, and, on their petition, were made parties defendant, and filed a demur-

rer to the complaint. The plaintiff amended by filing what was termed a general statement. After which a demurrer was still interposed, but the court overruled the demurrer, and the defendants filed their answer, in which they alleged that the appellee had received effects more than sufficient to pay all debts that had been probated against the estate.

Secondly. That the debts were not over $700 00, and that the assets amounted to $2500 00.

Thirdly. That all debts classed had been paid.

Fourthly. That he had made a detailed statement of his appointment as administrator, the assets that came to his hands, the payment of $156 00, for board and tuition and other fraudulent settlements, etc.; that he had obtained credits for certain sums paid, etc., and fraudulently procured himself appointed guardian to prevent resistance to false and fraudulent settlements, etc.

The respondents, as a counter action, averred that the plaintiff had assets of the estate in his hands to the amount of $1500, over what was necessary to pay all debts, etc. The answer was duly sworn to.

The plaintiff demurred to the answer, and the record says the court sustained the demurrer in toto.

The appellants said nothing farther, and the court gave judgment for the appellee, and ordered the lands sold as prayed for.

Appellants moved for a new trial and in arrest of judgment, which motions were overruled, and they appealed.

The answer was a sufficient response to the petition. It alleged an illegal expenditure of money, and the amount and manner of such expenditure. It gave the amount of debts and assets and showed and averred that the personal assets were largely more than the debts, etc., and it should have been held good.

This proceeding was an attempt to sell lands of the estate under what was known as the "Chapters of the Digest." As the Chapters relating to administration, were not law—see

Vinsant vs. Knox, page 266, 27 *Ark.*, the Circuit Court had no jurisdiction thus to intermeddle with an estate in the course of administration, and the demurrer to the petition should have been sustained.

The judgment is reversed and the cause remanded with directions to sustain the demurrer to the petition, and dismiss the cause.

HECHT v. WASSELL, Assignee.

BANKRUPTCY.—After property was attached and sold, assignee in bankruptcy, appeared by attorney and moved to be substituted as defendant; also filed motions to have attachment dissolved, and the proceeds of the sale turned over to him. *Held*, That the facts set up in the motions were matters in abatement and should have been pleaded in an issuable shape, and verified by the claimant.

APPEAL FROM RANDOLPH CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

Byers and Watkins & Rose, for Appellant.
Wassell & Moore, for Appellee.

GREGG, J.—Appellant sued Tisdale & Wells in debt by attachment. The writ was levied upon personal property, which, by order of the Circuit Judge, was sold. Some motions and orders were made, after which John Wassell appeared by attorney and stated, by motion, that Tisdale & Wells had become bankrupt, and that he was their assignee in bankruptcy, and moved the court to substitute him as defendant. Wassell then filed his motion to dissolve the attachment, because the same had been sued out within four months before the filing of the petition in bankruptcy, and he also

filed a motion to have the proceeds of the sale of the goods attached turned over to him as such assignee; which motions were also made by an attorney, and neither of them sworn to.

The plaintiff moved the court to strike the motion to dissolve the attachment from the files, because it was a nullity, etc. The court refused to strike out Wassell's motion and, against the plaintiff's objection, sustained the same, and also sustained the motion to order the proceeds of the attached property turned over to Wassell. To all of which the plaintiff excepted. The court rendered final judgment, and the plaintiff below appealed to this court.

This suit had been brought and was regularly pending against Tisdale & Wells. If they had so gone into bankruptcy as to deprive Hecht of any advantage he might claim over other like creditors, who had failed to sue, it was matter in abatement, and instead of a general vague motion, it should have been properly pleaded and verified; and likewise, in the other motion, when Wassell came before the court and averred that the defendants had become bankrupt, and that he was their assignee in bankruptcy and entitled to the funds attached, he presented substantive and material facts to abate the proceedings against the defendants; and, to have a large amount of funds turned over to him, such facts should have been plead in an issuable shape, and verified by the oath of the claimant, and it was error to sustain these respective motions, and for such error, the judgment of the Randolph Circuit Court is reversed and this cause remanded, to be proceeded in according to law.

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CHAPLIN v. HOLMES.

MARRIED WOMEN—*When may sue alone.*—Where the action concerns the separate property of a married woman, she may sue alone.

CLOUD UPON TITLE—*In proceedings, affidavit not required.*—In a proceeding to remove cloud or doubt from title, the affidavit required by the statute to be filed before action for the recovery of land, or the possession thereof, is not required.

SAME—*What complaint must allege.*—The party must allege, in his complaint, either that he is in possession, or some other fact, which renders it impossible for him to vindicate his title at law.

SAME—*Color of title in defendant.*—The complaint should allege, by way of recital, or otherwise, such facts, under which defendant claims, as would give defendant some color of title, or such *prima facia* evidence of title as to require proof of extraneous facts to avoid them.

COUNTY COURTS—*Action of, when void.*—The holding of a county court at a time other than that prescribed or authorized by law, and all proceedings thereunder, are *coram non judice* and void.

APPEAL FROM CHICOT CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellant.

The demurrer should have been sustained. The statute is positive in requiring the affidavit to be made. *See Gould's Dig., Chap.* 106, *Secs.* 6-9; and this statute has been sustained and enforced in such a case as this: *Craig vs. Flanigin,* 21 *Ark.,* 319. This decision standing, the case should be reversed: *Pope vs. Mason,* 23 *Ark.,* 644.

English, & English, for Appellee.

First. A married woman may sue alone where the action concerns her separate property. *See Code, Sec.* 42. And, independent of the Code, she may bring a bill respecting such property: *Story Eq. Sec.* 63.

Second. It was not necessary in a bill of this character for complainant to aver that she was in actual possession of the lands. The averment of title was sufficient: *Bonnell vs.*

Roane, 20 *Ark.*, 120, and cases cited; *Ringold vs. Waggoner*, 14 *Ark.*, 69; *Mitchell and Wife vs. Etter et al.*, 22 *Ark.*, 178; *Shell et al. vs. Martin*, 19 *Ark.*, 139.

Third. As to the statute of limitations, it will not avail by demurrer, unless it appears from the face of the bill that the remedy or relief sought is barred: *Story Eq. Pl.* 503-506-751. It will not apply where it appears from the bill that the complainant is a married woman. *See Acts* 1868, *Sec.* 57, *p.* 277.

Fourth. As to the objection that no affidavit was filed before the issuing of the writ, it is sufficient answer to say that the want of affidavit is never grounds for demurrer to a pleading. See cases collected in *Rose's Dig. p.* 621.

HARRISON, J.—This was a complaint in equity, in the Chicot Circuit Court, by Rebecca A. Holmes, the wife of Newland Holmes, against Hanson W. Chaplin, the object of which was to set aside and cancel two tax deeds, and remove the clouds of the same from her title.

The substance of the complaint was, That she is the owner of certain lands in Chicot county, as her separate property, which were assessed in the year 1866, in the name of John B. Robinson, a non-resident; that the taxes not having been paid, nor the lands offered for sale, on the second Monday in March, 1867, the judge, and other members of the County Court, assuming to hold a special term of the court on the third day of June, 1867, passed an order that the collector of taxes should offer the lands for sale on the 26th day of August, following; that in pursuance of such order, they were offered by the collector, on that day, and bought by the defendant for $128, the aggregate sum of the taxes, penalty and costs, which the defendant paid, and he received, from the collector, a certificate of purchase; that on the 29th day of May, 1868, the collector made the defendant a deed for the lands, falsely reciting therein, a sale for the same taxes and at the same sum, on the 15th day of April, 1867; that the plaintiff not having redeemed the lands within one year from the day of sale, the

collector, upon the application of the defendant, on the 30th day of December, 1868, executed another deed to him for them, in conformity with the sale.

The complainant further alleged that the plaintiff had tendered to the defendant the money which he paid for the lands, and one hundred *per centum* thereon, with interest on the whole sum from the sale, and that he had refused to receive the same; and then charged that the deeds were clouds upon her title, and prayed that they should be cancelled and the clouds removed.

The defendant demurred to the complaint, and assigned the following grounds therefor: 1. That the plaintiff's husband was not made a party to the suit. 2. That she did not, before the commencement of the suit, file with the clerk an affidavit that she had tendered to the defendant the full amount of all taxes and costs which he had paid on account of the lands, with interest on the same, at the rate of one hundred *per centum*, the amount first paid, and twenty-five *per centum* per annum upon all costs and taxes paid upon them since, and the value of the improvements the defendant had made, and that the same had been refused. 3. That it was not alleged or shown in the complaint that the plaintiff was in possession of the land; and 4. That there was no equity in the complaint.

The court overruled the demurrer, and rendered a decree in accordance with the prayer of the complaint.

The first objection raised by the demurrer may be readily disposed of. The Code of Civil Practice, *Section* 42, expressly provides that a married woman may sue alone, where the action concerns her separate property.

The second is equally as untenable. If such an objection could, in suits of the nature of the present, the object of which is not the recovery of the land or the possession thereof, but simply to clear the title from doubt and clouds, in any manner avail, it certainly could not by demurrer, which will only lie for objections apparent upon the face of the com-

plaint, either from the matter inserted or omitted therein, or from defects in the frame or form thereof: *Story Eq. Plead., Sec.* 448. But it will plainly be seen, by a reference to the statute, that such an affidavit is required only in actions for the recovery of the land, or for the possession thereof: *Sections* 6-9, *Chap.* 106, *Gould's Digest.*

The third, according to the decision in *Apperson & Co. vs. Ford et al.*, 23 *Ark.*, 74, and *Danley vs. Byers et al., ante*, was well taken. We do not wish to be understood, however, as deciding that a party, out of possession, can in no case, or under no circumstances, maintain a suit to dispel clouds from his title; we only mean to assert the very plain proposition that he must allege, in his complaint, that or some other fact which renders it impossible for him to vindicate his title by an action at law.

The fourth and remaining ground of demurrer is the general one of want of equity in the complaint.

Were the complaint not liable to the objection just noticed, it does not, we conceive, present a case for relief, or show that the deeds operate as an injury to the plaintiff.

The power of the collector to sell land for taxes, not being a general authority to sell, but only at the time and in the manner prescribed by the statute, a sale at any other time or in any other manner would be a nullity. *Black on Tax Titles*, 46; *McDermott vs. Scully, ante*, and the cases there referred to. By *section* 136, *Chapter* 148, *Gould's Digest*, it is provided that if, from any cause, the collector should fail to sell on the second Monday in March, the County Court may order him to sell on some other day, to be fixed by it. Did the court make such an order? To answer this question we must first determine whether a County Court can be held at other times than those fixed by law for the terms thereof, or, in other words, can there be a special or called term of the County Court?

The terms of the County Court of Chicot county, as established by the Legislature, are held on the third Mondays in

January, April, July and October, and no provision is made for holding any other, or a special or called term. In *Dunn vs. The State*, 2 *Ark.*, 229, it was held that the law having fixed the time for holding the Circuit Courts, they could not be held at any other, except in the special cases expressly provided for; a doctrine as applicable to the county as the Circuit Courts—*expressio unius est exclusio alterius.*

There being then no authority for holding a special term of the County Court, the order or proceeding under which the sale was made was *coram non judice* and void.

The complaint, except as we have stated, contains no allegations in respect to the recitals in the deeds, and although copies of them are filed as exhibits, we may not refer to them to ascertain what they recite. *Newman's Plead. and Practice*, 250; *Allen and Wife vs. Shortridge*, 1 *Duval*, 34; *Hill vs. Barrett*, 14 *B. Monroe*, 83. If they contain only such as are consistent with the facts alleged, they are void upon their face, and give no color of title to the defendant, and there is nothing in the complaint which even tends to show that they do. To operate to the detriment of the plaintiff they must contain such *prima facie* evidence of title as to require proof of extraneous facts to avoid them.

Chancellor Walworth, in *Van Doren vs. Mayor, etc., of New York*, 9 *Paige*, 389, said: "A valid legal objection, appearing upon the face of the proceedings through which the adverse party can alone claim any right to the complainant's land, is not in law such a cloud upon the complainant's title as can authorize a court of equity to set aside or stay such proceedings. That can never be considered a legal cloud which can not for a moment obstruct the unaided rays of legal science, when they are brought to bear upon the supposed obscurity. But where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, as where the defendant has procured and put upon record a deed obtained from the complainant by fraud, or upon an usurious consideration which requires the estab-

lishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere and set it aside as a cloud upon the real title to the land." *Livingston vs. Hollenback*, 4 *Barb.*, 9; *Van Rensalaer vs. Kidd*, *Ib.*, 17; *Simpson vs. Lord Howden*, 3 *My. & Craig*, 97.

The demurrer should have been sustained and the complaint dismissed. The decree is reversed.

STATE v. JENNINGS.

CORPORATIONS—*Nature and powers of.*—Corporations having municipal powers are mere tenants at will of the Legislature, so far as the officers thereof are concerned, and the General Assembly may incorporate a place, add to, qualify or abolish its municipal powers without its consent. 27 419 / 58 116

STATUTES—*Construction of.*—In the construction of a statute, where the court finds, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the same statute, if, upon a review of *the whole act*, the real intention of the Legislature can be collected from the larger and more extensive expressions used in other parts, effect will be given to the *larger* expressions. 27 419 / 74 34

SAME—*Act of April* 9, 1869.—The act of the General Assembly of April 9th, 1869, entitled, "An act to regulate the incorporation and organization of municipal corporations," was intended to make uniform rules and regulations for all the cities and towns of the State, and repeals the act of July 23d, 1868, entitled, "An act for the incorporation of cities and towns." 27 419 / 82 306

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PETITION FOR QUO WARRANTO.

Montgomery, Attorney General, Yonley & Warwick, for the State.

U. M. Rose, for Defendant.

To sustain the position that the incorporation of Camden, under the act of 1868 is still in all respects valid, I refer to the

following cases: *Hughes vs. Farrar*, 45 *Maine*, 72; *Walworth vs. Whittaker*, 17 *Wis.*, 193; *Janesville vs. Markoe*, 18 *Id.*, 350; *Crosby vs. Patch*, 18 *Cal.*, 438; *Shinn vs. Commonwealth*, 3 *Grant (Pa.)*, 205; *McLaughlin vs. Hoover*, 1 *Oregon*, 31; *Nixon vs. Piffet*, 16 *La. An.*, 379; *DePauw vs. New Albany*, 22 *Ind.*, 204; *Mullen vs. People*, 31 *Ill.*, 444; *Elliott vs. Lochnane*, 1 *Kansas*, 126; *State vs. Morrow*, 26 *Mo.*, 131; *People vs. Gibb*, 7 *Cal.*, 356; *Grace vs. Donovan*, 12 *Minn.*, 580; *Wood vs. United States*, 16 *Peters*, 342; *Daviess vs. Fairbairn*, 3 *How.*, 636; *Hardin vs. Gordon*, 2 *Mason*, 540.

McCLURE, C. J.—The only question presented by the demurrer, to the response of the defendant, is, whether the act of April, 9, 1869, entitled "An act to regulate the incorporation and organization of municipal corporations," repeals the act of July 23, 1868, entitled "An act for the incorporation of cities and towns."

The defendant urges that the repealing section of the act of April 9, 1869, does not describe cities acting under the act of July 23d, 1868, and because it is not so described, that the city of Camden is not bound to conform to the first recited act.

The fifth section of the act of April 9, 1869, reads as follows:

"All corporations which existed *when the present Constitution took effect*, for the purpose of municipal government, and described or denominated in any law *then in force*, are hereby organized into cities of the first and second class, as the case may be, and incorporated towns, with the territorial limits respectively prescribed or belonging. * * * * All acts now in force for the organization or government of *any such* municipal government or corporation shall be, and they are hereby repealed."

At the adoption of the present Constitution the city of Camden was being operated under a special charter granted by the General Assembly, on the seventh of December, 1846;

but *before* the passage of the act of April 9, 1869, she surrendered her special charter and accepted the municipal powers granted by the act of July 23, 1868.

Right at the threshold of this case we are confronted with three well established rules of construction as applicable to this case:

First. That repeals by implication are not favored.

Second. That where two statutes can be construed together, the latter will not be construed a repeal of the former, and

Third. That the mentioning of one class, and silence as to another, evidences an intention that the unenumerated class should be excluded.

These are all general rules, and, when applied in proper cases, have but few, if any, exceptions. There is, however, another well known rule which is as imperative as those mentioned, which must not be lost sight of, and it is, that where the Legislature take up a *whole subject* and cover the entire ground of the subject matter of a former statute, and evidently intended it as a substitute, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new. *Pulaski County vs. Downer*, 10 *Ark.*, 589.

There is no express language repealing the act of July 23, 1868, in the act of April 9, 1869, and it is here conceded that cities, acting under the act of July 23, 1868, are not specifically described. The question now arises, did the Legislature intend to fix one certain and uniform rule for *all* the cities and towns within the State, or did it intend that the city of Camden should retain its then organization, and that all the others should conform to the act of April 9, 1869?

Counsel are in error when they suppose that citizens and officers of any particular locality have a special right to any specific form of municipal government. Corporations having municipal powers are mere tenants at will of the Legislature, so far as the officers thereof are concerned; creditors, and persons having vested rights *in property*, stand upon a differ-

ent footing. The General Assembly may incorporate a place without its consent, and without its consent add to, qualify or even abolish its municipal powers. The English doctrine, that the king cannot force a new charter upon a municipal corporation, has no application in this country, nor is the power of the Legislature, in this respect, measured by any such rule. *Clinton vs. Cedar Rapids R. R. Co.*, 24 *Iowa*, 445.

All law writers agree that the *intention* of the Legislature should prevail. The *intent* may be gathered from the text and body of the law *itself*; or it may be gathered from the condition of affairs existing at the date of the enactment; the evil sought to be remedied and such other facts and circumstances as may have become a part of the history of the country. Guided by these general rules, let us examine the question at bar.

The first General Assembly which assembled under the provisions of the present Constitution found it enjoined upon them to enact a general law for the incorporating and regulation of municipal corporations, and an effort to comply with that injunction was made by the act of July 23, 1868. If a lawyer will take up that act and examine it he will find many powers conferred upon municipal corporations which are directly in conflict with the Constitution of the State. He will find many things which will convince him that the act was hastily and unadvisedly drawn—that it was imperfect and incomplete. He will also find that no attempt is made to "restrict the power of taxation, assessments, borrowing money, contracting debts, or loaning the credit" of towns and cities, as it is provided that the Legislature shall do by *Section* 49, *Article V., of the Constitution.*

With this knowledge and these facts in view, we are as much called upon to decide whether the Legislature intended to *include* Camden within the provisions of the act of 1869, as we are to determine whether it intended to *exclude* it. In the first place, Camden is the *only* city in the State which accepted the provisions of the act of July 23, 1868, *before* the passage of

the act of April 9, 1869. The action of the city of Camden was of record in the Secretary of State's office, and it will be presumed the General Assembly was cognizant of this fact. The city of Camden *being the only city* organized under the act of July 23, 1868, it appears to us that if the Legislature intended to save and except it from the operation of the general law, that words to that effect would have been used in the act disclosing such an intention. It is as easy to presume this as to presume that it did not intend to disturb the municipal government of Camden, because no specific mention was made of the city which had accepted the provisions of the act of July 23, 1868.

There is another rule of construction which we think applicable to this case, and it is, where the court find, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the same statute, if, upon a view of *the whole act*, they can collect, from the larger and more extensive expressions used in other parts, the real intention of the Legislature, it is their duty to give effect to the *larger* expressions. *Mason vs. Finch*, 2 *Scam.* 223.

Now let us apply this rule to the case at bar. The defendant insists upon a strict and literal construction of the statute, and he does so because the Act in one place *seems to limit itself* to "corporations which existed *when the present Constitution* took effect." But we understand, from the rule first laid down, that if, upon a view of the whole Act, we should come to the conclusion that the more extensive expressions gave the true meaning of the Act, rather than the limitations of a single section, it would be our duty to so declare.

Section 2, of the Act of April 9, 1869, declares that "*all* cities which, at the last federal census, had or now have a population exceeding five thousand inhabitants, shall be deemed cities of the first class." It also declares that "*all* cities which, at any future federal census, * * * shall be found to have a population exceeding five thousand inhabitants, shall thereafter be deemed cities of the first class."

And it further declares that "any incorporated town which, at any future federal census * * * shall be found to have a population exceeding twenty-five hundred, and less than five thousand, shall thereafter be deemed a city of the second class;" and section five provides, that towns having a less population than twenty-five hundred, shall be incorporated towns and governed as prescribed therein.

Here we find a well defined intention to classify *all* the towns and cities in the State into cities of the first class, cities of the second class and incorporated towns, and also the means by which they shall be advanced from one grade to another. These different classes exercise different municipal powers, commensurate with the wants and necessities of each, according to the population. We can see nothing in the classification which convinces us that Camden was not to recognize these different gradations. On the contrary, when we come to examine *the whole Act*, the impression is left on the mind that the General Assembly was attempting and intending to make uniform rules and regulations for *all* the cities and towns, according to the population thereof. A further examination of the Act of April 9, 1869, discloses the fact that many of the obnoxious provisions of the Act of July 23d, 1868, are not incorporated in the later Act. In addition to this, the power of taxation is restricted and limited according to the grade of the city or town, as the case may be; and the power to contract debts, and the loaning of their credit is fully protected, as it is contemplated by the Constitution the General Assembly shall do. In short, the Act of April 9, 1869, seems to be as complete a revision and substitute for the Act of July 23, 1868, as it is for the cities and towns which had charters at the adoption of the present Constitution.

This being true, the demurrer to the response is sustained and a judgment of ouster ordered.

McCREARY, Adm'r v. THE STATE.

27 425
56 498

REAL ESTATE BANK—*Act of January* 16, 1861, *constitutional.*—The Act of the Legislature of January 16, 1861, entitled "An Act to aid the foreclosure of the stock mortgages, given to secure the stock subscriptions to the Real Estate Bank of the State of Arkansas," was intended to furnish a remedy different from that which existed when the obligations were entered into, and although it changed the remedy effecting the enforcement of existing obligations, by abridging the pleadings, simplifying the issues and regulating the mode and manner of the proceedings, yet it did not impair the obligation of contracts, or infringe upon the existing rights of the parties, and is in none of its provisions or requirements unconstitutional.

SAME—*Holford Bonds*—The bonds known as the "Holford Bonds," were not intended to be embraced within the provisions of the Act of 1861, and a suit under that Act, so far as they are concerned, to recover the amounts received upon the five hundred hypothecated bonds, cannot be maintained.

APPEAL FROM PULASKI CHANCERY COURT.

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

Gallagher & Newton, Garland & Nash, for Appellants.

First. There is no equity in the bill.

Second. The State of Arkansas shows no right in herself to proceed in behalf of the creditors and the bondholders of the Real Estate Bank. Or, in other words, as appears here, she fails to show any legal interest in the suit as a party complainant, and failing in that, she has no case. *Cummins vs. James*, 4 *Ark.*, 616; *Roane vs. Lafferty*, 5 *Ark.*, 465; *Robinson vs. Denton*, 6 *Ark.*, 283; *Bingham vs. Calvert*, 13 *Ark.*, 401; *Story's Eq. Pls.*, 76, 137, 153–4. Under no pretext can this stand as a creditor's bill, and on no other ground can a bill, seeking to do what this does, be brought. *Story's Eq. Pls.*, 79–126.

Third. The *State* does not show that she has paid the debt, or any part thereof, covered by the mortgage now sought to be foreclosed; nor does she show that she has secured the payment thereof. Under the charter of the Real Estate Bank the *State* became, by issuing her bonds to secure the

capital of the bank, a mere security. (*See Act of 26th October*, 1836, *Sec.* 10, *et seq.*) And, necessarily, before she can obtain a foreclosure here, she must show she either paid the debt of the *bank* or a part of it, or that she has provided some means by which to pay. *Wright vs. Morley*, 11 *Ves.*, 22, *note* 4; *Clifford ex parte*, 6 *Ves.*, 805; 6 *Penn.* (*Barr*), 504–5; 2 *Binney*, 382; 9 *Watts*, 451; *Dixon on Subrogation*, 122–135, *note*; 2 *Bouvier Law Dict.* (*Subrogation*), 536–7; *Comegs vs. State Bank*, 6 *Ind.*, 357; *Richmond vs. Maston*, 15 *Ib.*, 134; 2 *Jones Eq.* (*N. C.*), 414; 4 *Ib.*, 262; 33 *Ala.*, 261; 5 *Sneed* (*Tenn.*), 86; 4 *Ib.*, 482; *Lee et el. vs. Griffin et al.*, 31 *Miss.* (2 *George*), 632; *Bibb vs. Martin et al.*, 14 *S. and Mar.*, 87; 2 *Tucker's Com.*, 492; *Duncan vs. Biscoe*, 2 *Eng.* (7 *Ark.*), 192–3; 24 *Ark.*, 567–8; *Nichols vs. Dunn*, 25 *Ark.*; 2 *Am. Lead. Cases*, 98–100, 130–4; *Pittman on Principal and Surety*, 125–141. And the doctrine is well and lucidly expressed in 2 *Wash. Real Prop.*, 166, 198, 201. To the same effect, in all its length and breadth, do we find the following: *Burge Suretyship*, 322, 356; 1 *Pothier Obl.*, 240, 301, 306, 327, 342; *Ib.* (*Art.* 2), 348, 413; 2 *Ib.*, (*No.* 11), 60–70; *Lindley Juris.* (*appendix*), 246; 1 *Domat*, *b.* 3, *Tit.* 1, *Sec.* 6, *Arts.* 2, 3, 4, 6, 7, 8, *p.* 697 *et seq.*

Fourth. The State has failed to bring before the court the bondholders and creditors, or to show who and where they are; and as part of this we may discuss the fifth cause of demurrer, which is, the State fails to produce the claims or debts in court. The decree here should merge the present claims or debts, and for the future protection of the debtors against suits, the claims and claimants all must be before the court. These bonds must be brought up and re-delivered before any adjustment can be had, and so long as even one claim is out no complete account can be had, no decree rendered. *Whitney vs. Peay*, 24 *Ark.*, 27. Under a law enacted for the benefit of the State, and upheld by the courts (*Platenius vs. State*, 17 *Ark.*, 518; *S. C.*, 20 *How.*, 527–532), this principle was enforced, and it is not to be supposed that the court will permit the State to avoid the precedent—a prece-

dent, too, so well recognized everywhere. *Beebe vs. R. E. Bank*, 4 *Ark.*, 516; *Wymack's case*, 5 *Co.*, 74, *b.*; *Stephen's, Pls.*, 701; 2 *Sand. Pl. and Ev.*, 740; *Browning vs. Wright*, 2 *Bos. and P.*, 13; *Story's Eq. Pls.*, *sec.* 137; *Porter vs. Clements*, 3 *Ark.*, 364. And if there is one party or claimant not thus before the court, the suit cannot be maintained. *City of Georgetown vs. Alexandria Canal Co.*, 12 *Peters*, 91–100; *Story Eq. Pls.*, *secs.* 99, 126, 153, 156; 1 *Turner & Russ*, 297; 3 *Y. & Coll.*, 597; *Palmer vs. Dutcher*, 7 *Paige*, 437; *State of Ohio vs. Ellison*, 10 *Ohio*, 456; *Murphy vs. Jackson*, 5 *Jones' Eq.* (*N. C.*), 11; *Calvert on Parties*, *sec.* 10, *p.* 225; 5 *Paige*, 539; 6 *Id.*, 583–98; 1 *Daniel Ch. P.*, 240–75, 462.

Sixth and Seventh. The State fails to show how she has disposed of the fund seized by her, on her complaint against the trustees; and she does not offer to turn this fund over to the creditors towards the payment of these debts. 1 *Story Eq. J.*, 64*e*, 301; *Hill on Trustees*, 522*; *Adams Eq.*, 220*; 33 *Penn.*, 351; 32 *Id.*, 495; *McKinney vs. New Eng. Manufacturing Co.*, 1 *Stock.* (*N. J.*), 371; *Russell vs. Clark's Ex.*, 7 *Cranch.*, 69; *Findley vs. Bank*, 10 *Ohio* (*Wilcox*), 59; *Index to* 1, 2, 3 *and* 4, *Ohio* (*Wilcox*), *p.* 889; *Brightly's Digest Federal Courts*, *p.* 280, *et seq.*; and see, especially, *King vs. Robinson*, 2 *Rich.* (*S. C.*), *Eq. Rep.*, 157, 192.

This is not all, the law demands absolutely the fund first taken should be exhausted, or used for its proper purpose before any further recovery can be had. *Adams sup.*; *Goss vs. Lester*, 1 *Wisconsin*, 43; *Hays vs. Ward*, 4 *Johns. Ch.*, 123; 2 *Spence Eq. Juris.*, 845; *Caulfield vs. Maeguire*, 2 *Jo. & Lat.*, 141 (*Irish Chancery*, 1844–46).

Eighth. The law authorizing this proceeding on the part of the State is in violation of the Constitution of the United States, and of the Constitution of the State of Arkansas.

This law (see *Acts of Legislature of* 1860-1, *page* 235), in attempting to dispense with rights and privileges secured under the original contract, and which formed a part of the contract when made, and in dispensing with certain requisites of

the law under which the contract was entered into, and with reference to which, the State and all contracted, is in violation of that section of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts. The first section of the law permits the State to sue without paying the bonds. Such was not the contract when made—she undertook merely (Section 10, Charter,) to be security—as we have seen. So too, in relieving the State from producing the bonds in suit. These are all new features, new conditions, and most clearly a new contract, and therefore void: *Sedgwick Construction*, 616, *et seq.*; 2 *Story Con.*, 1374-1399; *Woodruff vs. State*, 3 *Ark.*, 285; *Curran vs. State*, 15 *How.*, 804; 19 *Ark.*, 360-409; *Hope Mut. Ins. Co. vs. Flynn*, 38 *Mo.*, 483.

Ninth. The demand sought to be enforced is stale, and the State, by her bill, shows she has been guilty of gross laches: 2 *Storys' Eq. J.*, 7*th Ed.*, 1520; 8 *Peters*, 420; 8 *Cranch.*, 471: 17 *How.*, 340; *Pandill vs, Mullikin*, 1 *Black.*, 585; *Wagner vs. Baird*, 7 *How.*, 234; *Badger vs. Badger*, 2 *Wallace*, 94, *et seq.*

Tenth. A receiver being appointed, he had charge of all the assets to be fully and completely administered, and being now receiver, under the complaint of the State to execute the trust in place of the trustees, and pay the debts, he and no one else should sue to foreclose these mortgages for the benefit of all interested: *Edwards on Receivers*, 95-354. As long as he is in power, and assented to, the State must leave him to ask, sue for and recover here for the benefit of all: *Swords vs. Blake*, 3 *Edw. N. Y. Ch. R.* 112; *Kennedy vs. Gibson*, 8 *Wall.* 506; *Libby vs. Roseknans*, 55 *Barb.*

Eleventh. The supposed State of Arkansas, in whose name the suit was brought, was not a State, and she was not bound for the debts of the bank.

When this suit was filed, as everybody now knows there was no State of Arkansas, and there was no right in what was then called Arkansas to sue. The right to sue must exist when suit is brought, and if not then existing the suit

cannot be maintained, and the question can be presented by demurrer: 17 *Ark.*, 442; 21 *Ib.*, 189; *Hornor vs. Hanks*, 22 *Ark.*, 572; *Adams Eq.*, 413.

Benjamin, Solicitor General, for the State.

First. The first point raised in the demurrer is, that there is no equity in the bill. As this one is included in, and depends upon, others, it will be passed for the present.

Second. The second point raised in the demurrer is that the State of Arkansas shows no right in herself to sue in behalf of herself and for the use of the creditors and bondholders of the Real Estate Bank. She is authorized to do so by express statute: *See Acts of* 1860-1, *page* 236; which is always the highest law known to the State, and which is, of itself, sufficient authority for bringing the suits, if there was no other law upon the subject; but, if there was no express statute authorizing the suits, the State would still be authorized to sue, etc.

The Constitution of the State of Arkansas authorized the General Assembly to estabish a bank for the promotion of the agricultural interests of the State, and loan the faith and credit of the State for the same; "*Provided*, such security can be given by the individual stockholder as will guarantee the State against loss or injury."

It is a well-established doctrine that sureties and guarantors have the right to enforce mortgages or other counter securities given to indemnify or guarantee them against payment, loss, or injury, as soon as they are endangered: *Tankersly vs. Anderson, et als.*, 4 *Dessaussure's Equity Reports*; *Bishop vs. Day et als.*, 13 *Vermont, page* 88; *Bellune vs. Walace*, 2 *Richardson's Reports, p.* 80; *Toulmin et als. vs. Hamilton et als.*, 7 *Ala.*, 362, *and Ohio Life Insurance Company vs. Ledgard et als.*, 8 *Ala., p.* 872; *Hunter & Davis vs. Levan and wife*, 11 *Cal. p.* 1.

See, also, the following authorities, which fully sustain the same doctrine: *Fells' Law of Guaranty and Surety, pages* 278,

279, and cases there cited. See, also, *Wagman et als vs. Hoag*, 14 *Barbour*, 232; *Bobbett, executor, et als. vs. Flowers, et als.*, 1 *Swann*, (*Tenn.*) *page* 511; *Barker et als. vs. Buel et als.*, 5 *Cushing* (*Mass.*), 520; *Teeter vs. Pierce*, 11 *B. Monroe*, 379.

But the right to sue on these mortgages has been fully settled by our own Supreme Court: *Wilson vs. Biscoe et al.*, 11 *Ark.* 44.

The third reason assigned for cause of demurrer is, that the State of Arkansas does not show that she has paid the debt or any part thereof.

The State of Arkansas is not a simple surety for these bonds without any special guarantee or security whatever. The State in these bonds became the principal, as between the State and bond-holder, and, in consideration for doing so, was secured by mortgages and special guarantee from the individual stock-holders of the Real Estate Bank.

Can there be any question but that the guarantee to pay and the guarantee against loss or injury are broken, and that a cause of action has accrued on each thereof? *See Faust, assignee, etc., vs. Burgevin et als.*, 25 *Ark.*, 170; *Thomas vs. Allen*, 1 *Hill*, 145; *Churchill and Hays vs. Hunt*, 3 *Denio*, 321; *Ramsay vs. Gervais*, 2 *Bay, S. C.*, 145; *East River Bank vs. Rogers*, 7 *Bosworth*, 493; *Gilbert vs. Wiman, et als.*, 1 *Comstock*, 550; *Chace vs. Hinman*, 8 *Wendell*, 452; *Town of Lyman vs. Lull*, 4 *N. H.*, 495; in matter of *Negus*, 7 *Wendell*, 499.

As to the fourth and fifth causes assigned, it is sufficient answer to say that the act of 1860-61 expressly provides that the State may sue without bringing the bondholders or claims before the court.

As to the sixth and seventh causes assigned, it is sufficient to say that the receiver's reports show what was seized and what disposition was made of it. Furthermore, the law of 1860-61 provides that these cases be referred to a master to ascertain how much is now due thereon.

As to the eighth cause assigned, that the law of 1860-61 is in violation of the Constitutions of this State and of the

United States, *See The State vs. Fairchild*, 15 *Ark.*, 619; *Bronson vs. Kinzie et al.*, 1 *Howard*, 315; *Gordon vs. The South Fork Canal Company et al.*, 1 *McAllister*, 513; *U. S. Bank vs. Longworth*, 1 *McL.*, 35; *U. S. vs. Jas. S. Conway*, *Hemp.*, 313.

As to the objection that the law did not take effect until after the passage of the ordinance of secession, *See Farrelly vs. Milor*, 25 *Ark.*, 353.

As to the ninth cause assigned, that the demand is stale, it is answered, by matter of fact, that the State has shown due diligence, and further laches do not apply to a government. *See Marion County vs. Moffett*, 15 *Mo.*, 604; *Park vs. The State*, 7 *Mo. Rep.*, 194.

As to the tenth cause assigned, it is sufficient to say that the mortgages were not due at that time and could not be foreclosed—(*See Edwards on Receiver, p.* 5).

As to the cause that the supposed State of Arkansas, in whose name the suit was brought, was not a State, and not bound for the debts of this State, *See State of Texas vs. G. W. White*, 3 *Am. L. R.*, 770.

GREGG, J.—Under the act of the Legislature of January 16th, 1861, the State of Arkansas filed her bill of complaint against the east half southwest quarter, and west half southeast quarter of section twenty, in township thirteen south of range twenty-nine west, in which she alleges that under the act of the State Legislature of October 26, 1836, the State issued two millions of dollars in her bonds, bearing interest at five per cent., and payable at twenty-five years, to the order of the Real Estate Bank, and transferrable by indorsement; and that it was further provided in said act that said bank was to pay the interest, and when due, the principal of said bonds; that stock should be first subscribed to the amount of $2,250,000, and such subscription secured by mortgages on real estate, conditioned for the payment of all moneys received from the bank and the final payment of the bonds of the State, which mortgages were the base of the capital of

the bank; that afterwards the interest upon the bonds, by act of the Legislature, was increased to six per cent., and that on the first day of January, 1838, the Governor issued fifteen hundred and thirty of such bonds, each for one thousand dollars, which were indorsed and, in September of that year, sold five hundred of them to the Secretary of the United States Treasury, and one thousand to Joseph D. Beers, and thirty to R. M. Johnson, but that the present holders are unknown; that under the act of the Legislature of 1838, to establish a western branch bank, five hundred bonds, of like conditions, amounts and terms, were issued on the first of January, 1840, upon similar subscriptions of stock and mortgages, which stock, bonds and mortgages were transferred to the State and the holders of her bonds, as an indemnity for the payment of the State bonds.

It is further alleged that these five hundred bonds were hypothecated for $121,336 59, without authority of law, and that the State is not bound to pay them.

It is alleged that Thomas B. Hayne, on the 10th day of June, 1837, having subscribed for forty shares, gave his stock bond for $4000, payable to the bank, or order, with five per cent. interest, half yearly, and due 26th of October, 1861; and that he, on said 10th day of June, executed his mortgage to said Real Estate Bank, conditioned as aforesaid, on the east half southwest quarter, and west half southeast quarter section twenty, township 13 south of range twenty-nine west; that afterwards, on the 16th day of September, 1837, thirty-eight shares of stock (valued at $100 each), were awarded said Hayne, and he became a stockholder to that extent, and that he has not paid off said stock bond, nor has he paid so much of the bonds of the State issued to said bank, etc.

It is also alleged that said Real Estate Bank, on the second day of April, 1842, by deed of assignment, conveyed to Henry L. Biscoe and others, as trustees, all the property and effects of said bank, in trust to pay off her liabilities in the order therein stated, who took charge of said effects and adminis-

tered said trust until the second day of April, 1844; that in July, 1844, upon *quo warranto* before the Supreme Court of this State, the charter of said bank was declared forfeited, and it ceased to exist as a corporation; that by a decree of the Chancery Court, rendered on the 20th day of April, 1855, upon a bill against the residuary trustees, charging fraud and waste in the administration of said trust, said trustees were removed, and a receiver appointed to take charge of all the assets of said bank, to administer the same, make reports, etc.; that to secure the 22,500 shares of stock awarded under the act of 1836, mortgages had been executed upon 127,-829 65-100 acres of land, valued at $2,603,922 72-100; that to secure the 5640 shares awarded stock-holders under the act of 1838, to establish the Western Branch Bank, one hundred mortgages were executed to said Real Estate Bank upon 60,290 24-100 acres of land valued at $776,840 6-100; that by the receiver's report of October, 1866, there were outstanding and unredeemed 888 of the 1530 bonds, on which was due of principal $888,000, and of interest $1,066,000, that there was also unpaid the sum of $121,336 59, obtained by the hypothecation of said five hundred bonds, and interest on said sum from the 7th of September, 1840, to the date of said report, amounting to $189,750 27, and of notes out, in circulation, $12,755; and that the total available assets at that date were $512,341 31, and therefore the liabilities over the assets were $1,771,500 59, and that the condition of said assets remain as then, and she prayed for a foreclosure of the said mortgage for her protection, as well as for the benefit of the holders of the bonds of the State and the creditors of the bank, to enforce the payment of said bonds and the interest thereon, which she is bound to pay to preserve her faith, etc., and that if payment of such proportional sum as may be chargeable upon the lands, above described, be not paid, that they be sold, etc.

Under the act of the Legislature, first referred to, the appellant appeared in the Chancery Court and claimed to be the

owner of the lands proceeded against, and by order of that court he was made a party and allowed to defend the action; whereupon he interposed a demurrer to the bill, in which were eleven specifications.

The first was a general denial of equity on the face of the bill.

The second was that the State had no right to sue in behalf of herself and the creditors and bond-holders.

The third, that the State does not show that she has paid or secured the debt.

Fourth. That the State has failed to bring the bond-holders before the court.

Fifth. That the State does not bring into court the claims or debts for which she seeks a foreclosure, nor does she show that she has control of them.

Sixth. That the State fails to show what disposition has been made of the funds she seized as assets of the bank.

Seventh. The State fails to offer to turn over such assets.

Eighth. That the law under which suit is brought is unconstitutional.

Ninth. That the demand is stale.

Tenth. That the State's rights were equitable only, and she should have proceeded to foreclose when she seized the assets and had a receiver appointed.

Eleventh. That there was no State of Arkansas when this suit was brought.

We propose a short review of these several causes of demurrer, mainly in their inverse order.

The last cause assigned, that Arkansas was not a State needs no comment.

The ninth and tenth assume that the State is barred by lapse of time and her neglect to sue. The record discloses the fact that the mortgage sought to be foreclosed fell due in October, 1861; until that time it would not have been proper for any party to have brought a bill to foreclose this mortgage. The legal presumption is that a mortgagor will pay his debt and

relieve his property before a forfeiture of the right of redemption. At all events he should not have been harrassed by suits, and taxed with attorney's fees, etc., until in default by the terms of his contract. Therefore, the right to sue properly accrued in October, 1861, at which time the State was in rebellion, and this action was brought in 1867; not an unreasonable time after the close of the war, and hence it is not necessary to pass upon the question mooted by counsel, as to whether or not in such case time runs against the State.

The eighth assignment challenges the constitutionality of the act of the Legislature of 1861. It is not controverted that a law which merely changes or regulates the remedy is not unconstitutional, although it affects the enforcement of existing as well as future obligations. Nor can it be controverted that an act of the legislature which impairs the obligation of a contract, or which cuts off or so modifies the remedy that it cannot be made effective, is unconstitutional and void, and the validity or invalidity of the act in question depends upon how it classifies under these definitions. From the whole object and scope of this act, it was clearly intended to furnish a remedy different from that which existed when these obligations were entered into; the matters of expected litigation appeared so complicated and extensive that the will of the Legislature seemed to be to abridge the pleadings, to narrow down and simplify the issues so as to reach the end of litigation by the shortest practicable way. And all this is within the power of legislation, if the acts do not infringe upon existing rights.

The State assumed a large liability. To indemnify her the bank promised to pay off her bonds, and the mortgagors bound themselves to pay off their stock bonds with all the interest that might accrue, or to pay such an amount of the bonds of the State, issued in favor of the bank, equal to the amount of stock granted to them respectively or their equity of redemption was subject to foreclosure.

Now the act in question does not lessen the time for, or in-

crease the amount of payment to be made by the mortgagor, nor does it change the funds required or the manner of payment. It only regulates or prescribes the mode of obtaining judgment and sale and, in this, it cuts off no defense, but allows the mortgagor, and all others who claim any interest, to appear, defend and maintain such rights as they may have, and although the manner of commencing the action, serving notice and proceeding to judgment, is not the same as when the obligation was entered into, yet, while the obligor is secured in all his rights under the contract, where he is liable to pay no more than formerly and within no less time than stipulated, and no new conditions added, it is but a regulation of the remedy and does not impair the obligation of the contract.

The sixth and seventh causes allege that the State has not turned over, or shown what disposition has been made of the funds seized and placed in the hands of the receiver; while this is not done with as much particularity and fullness as might have been done, yet, by examination of certain reports refered to, among other things, containing a statement of the amount of these assets, in October 1866, with an allegation that the condition of these assets remain as then, it seems to us that they are sufficiently accounted for to enable the claimant to form an issue upon this allegation, or, if it be conceded, to estimate the amount thus paid, by the offer of the State to deduct those available assets by her so received.

The fourth cause of demurrer is that the State has not brought the bond-holders before the court; and the fifth, that she has not the bonds or claims before the court.

The Act of 1861, which we have shown was not unconstitutional, expressly provided for prosecuting such suits, as this, without making profert of the State's bonds, or paying them off. The suit is being prosecuted in the interest of the holders of the State's bonds as well as that of the State, and the bill alleges that they are unknown, too numerous, etc., to be brought before the court, but they may be satisfied, if not

under this law, they have a perfect right to come in and set up any equity they may have, and by the terms of this Act, they have been notified of the pendency of this suit, and if they are content, we see no good reason or law requiring this defendant to here complain for them, and his future interests, under the decrees that may be in this cause, are fully protected by the faith and credit of the State; and we must recognize some difference between a proceeding carried on by a sovereign State, and one by an individual man. The sovereignty must be presumed capable of protecting every interest of all her citizens, while the promise and solvency of an individual, in equity, are so far questioned that he is required to perform all his equitable obligations before his opposing suitor will be decreed to perform his part of the agreement.

The remaining causes of demurrer go to the right of the State to sue without first paying the bonds, etc. We have already expressed the opinion that the Act of 1861 is constitutional, and it authorizes the State to proceed in this matter.

Whether or not profert of instruments sued on shall be made, and what papers shall be filed at the commencement or during the pendency of a suit, are matters of practice and subject to legislative discretion; and whether or not the evidences of liability are filed and made of record, does not affect the rights of a litigant, so he is fully protected against further recovery upon the settlement of what he justly owes. And under the Act of 1861, the sovereignty of the State is pledged for his protection; by a solemn enactment of law she vouches, upon her faith and credit, that the lands redeemed, or by her sold and conveyed, shall be forever saved and protected from any further liability on account of these stock mortgages. As a court, we cannot impute improper motives or charge bad faith upon the State; we must presume she will fulfill her obligations and make good all her pledges. Equity practice may require individuals, not primary in interest, who seek contribution or protection, to make sure their

offers by payment or other satisfaction, before appealing to a court to seize funds held by another as indemnity. But when the government assumes the liability, the presumption is that she will in good faith carry out her agreements, and therefore the reason ceases for enforcing such rule as applies to individual citizens.

In this case the appellant bound himself to pay and when such payment extinguishes his liability and protects him against all further suit or demand, and to this extent he is protected by the law and the absolute guarantee of his government, he cannot complain that injustice has been done him, and he ought not to complain at being required to fulfill his own contract. But he says the State ought not to sue. Who then, by the terms of his contract, was to be plaintiff, upon the ultimate failure to pay the amount of these stock bonds and mortgages? By the law, *Section* 14, *Act of October* 1836, which was a part of the contract, all the bonds and privileged mortgages, executed for stock, were transferred to the State and the holders of the bonds to be insured by the State as a guarantee of the State's bonds, and these mortgages were all so executed and transferred before the State executed her bonds. Now, why were these bonds and mortgages, by a provision of law before that time enacted and agreed to, thus transferred to the State, if she was not to sue in case the obligors did not fulfill their agreement? It was the State and not the bondholders that took these steps, and for her own protection incorporated these provisions in her contract. Yet it is urged that these mortgages were to the bank and not to the State, notwithstanding this solemn provision of law that upon their execution they were to be transferred to the State, and it is altogether clear that the parties contracting never contemplated a foreclosure of these mortgages by the bank, because the bank was to go out of existence the very day the stock-bonds and mortgages fell due; hence, it seems clear that they intended some other, and not the bank, should enforce these claims.

But it is urged that the receiver, appointed by the chancellor, to take charge of the assets of the bank, should have brought this suit. If we grant that he could have done so; if he, an individual, could thus act for the State and the bond-holder, under the law, could she not likewise act for herself and the bond-holders when expressly empowered by an Act of the Legislature? Is not the wealth and honor of the sovereign State security to the claimants, and the bond-holders, of as high a grade as the bond of a trustee with such surety as he could command? And the will of the people, when properly expressed by the Legislature, if not in conflict with the Constitution, is the rule of action for both State and citizen. We see no sufficient reason in law to estop the State from maintaining such suit. If she cannot sue, no suit can be maintained, and this would present a legal anamoly of most deliberate contracts, involving millions of dollars gain to one party and a corresponding loss to the other, and no right of recovery.

The Solicitor of the State is certainly in error in attempting to proceed in this form of action to recover the amounts received upon the five hundred bonds, hypothecated for funds to establish the western branch bank. At and before this time, the Legislature had assumed that these bonds were illegally disposed of, and that the State was not liable for their payment, and they and the mortgages to secure the State therefor, were not embraced within the provisions of the Act of 1861, and a suit under that Act, so far as they are concerned, cannot be maintained. But as she had the right to proceed for the amount of the 1530 bonds, her claim for an additional sum, not collectable by such proceeding, should have been otherwise met and was not the subject of demurrer.

Upon the whole case, taking the bill as confessed, it appears to us that the appellant has only been decreed to pay what in duty and law he ought to have paid. And the mortgagor's inquiries as to whether the State stands in the attitude of surety, acts as trustee, or as principal, need be of but little

concern so he pays no more than he obligated himself to pay, and no more than a just recompense for what he received, and thereupon is exonerated from all further liability.

The decree of the Chancery Court is in all things affirmed and the cause remanded.

NORMAN v. CURRY.

APPEALS—*Regulated by the Code*—The provisions of the Code of Practice, in relation to appeals, regulate the practice and are the general law for proceedings in that respect in all the courts, and they prescribe the requisites for all changes from one court to another, in bringing and prosecuting suits through all the courts.

CONSTRUCTION OF STATUTES—*Sec.* 16, *Act of* 1868.—Section 16, of "An act to amend chapter sixty-nine of *Gould's Digest*, etc., approved July 16, 1868, was not enacted under its appropriate title, and further, in so far as it prescribes a condition precedent to the right of appeal, by the payment of all costs, is in conflict with *Sec.* 4, *Art.*, 7, *State Const.*, and is inoperative.

PETITION FOR MANDAMUS.

A. H. Garland, for Petitioner.

GREGG, J.—On the 6th of February, 1872, Norman filed in this court his application for a mandamus against John J. Curry, as the clerk of the Ashley Circuit Court, and alleged that one Henry Lee had, at the October term, 1871, obtained judgment against him for $639 00, from which judgment he had duly appealed to this court, and that he had filed in that court his supersedeas bond, which had been legally approved and a supersedeas awarded; that, thereafter, he demanded of said Curry a transcript in that cause, and tendered him all his fees for making out and certifying such transcript, but that said Curry refused to make out and deliver to him such transcript.

Curry responds that the allegations in the petition are true; but he insists that he was not bound to make out such transcript until the petitioner, who was the appellant in the cause in that suit, had paid all the costs that had accrued in the cause, and he refers to *Section* 16, *p.* 243, *session acts of* 1868, which is as follows: "That in all cases of appeal to any superior court, the clerk of the court, or the justice of the peace, from which the appeal is taken, shall not be required to deliver or forward the transcript until his fee for such transcript, together with all costs that may have accrued, are paid."

This section was interpolated in an act declaring the amount of fees allowed certain State and county officers, which was not an appropriate title under which to insert a general provision of law regulating practice and prescribing conditions of appeals in the courts. During the same session of the Legislature they enacted and adopted a Code of Practice which, on the first day of January next, thereafter, was to, and did go into effect for all purposes, and all proceedings were, after that time, to conform to its provisions. *Civil Code, Sec.* 890.

This Code provides, *Sec.* 859, that the judgment or final order of an inferior court may be taken to the Supreme Court by an appeal. By *Sec.* 866, the appellant may be required to give security for costs, *Sec.* 869, provides that an appeal shall not stay proceedings on the judgment, unless a supersedeas is issued. The next section prescribes the conditions of a bond for supersedeas. *Section* 871 provides that where a proper bond is executed a supersedeas shall be awarded. *Section* 873 provides that if the appellee believes the bond defective, or the securities insufficient, he may move the Supreme Court, or a judge thereof, to discharge the supersedeas, etc.

These Code provisions are intended, especially, to regulate the practice in all the courts. This is the general law for proceedings in the courts and for all changes from one court to another, and it was evidently intended to prescribe the whole course of bringing and prosecuting suits through all

the courts; and it prescribes all the requisites necessary to give an appeal from one court to another, and to secure the appellee and officers of court in all their rights. Under the Code the payment of costs is not a prerequisite, and upon complying with what is prescribed, this law declares an appeal shall be granted, and, if the clerk of the inferior court is not bound to make out a transcript, no appeal can be prosecuted against his consent.

This Code of law being complete in itself and enacted especially to regulate the practice in the different courts, and as it is enacted, in its own provisions, that other laws may be in force until the first of January, then next following, but thereafter all practice and proceedings should conform to its provisions, and that none of its provisions should be repealed unless such intention be expressly stated, and title, article or section to be amended or repealed, shall be particularly referred to and recited in the act amending or repealing the same; and hence lays down the general rules of practice on this subject. *Sedg. Stat. & Const. L.*, 124.

But as this statute prescribes a condition precedent to the right of appeal and, in instances where a litigant is appealing from an erroneous judgment for costs only, would deprive him of the benefit of his appeal, we hold that it is in conflict with *Section* 4, *of Art.* 7, *State Const.*, which authorizes the bringing of final judgments of inferior courts into the Supreme Court for revision, and therefore it is inoperative; *Simpson vs. Simpson*, 26 *Ark.*

A mandamus is awarded.

JOHN S. HORNER, ex parte.

APPEAL FROM PHILLIPS CIRCUIT COURT.

Hon. M. L. STEPHENSON, *Circuit Judge.*

A. H. Garland, for Appellant.

GREGG, J.—John S. Horner presented the will of William J. Ringo for probate, which was rejected by the Probate Court of Phillips county; he excepted and appealed to the Circuit Court, wherein the matter was heard anew, and the judgment of the Probate Court affirmed. He moved for a new trial; his motion was overruled; he excepted, and appealed to this court.

The only question before this court is whether or not a will written and signed by a testator, in his own proper hand writing, without attesting witnesses, is valid. The statute expressly provides that such wills are valid, and may be admitted to probate upon proof by three unimpeachable and disinterested witnesses to the hand writing and signature: *Gould's Digest, Chap.* 180, *Sec.* 4, *p.* 1073; *Rogers et al. vs. Diamond,* 13 *Ark.* 474.

The court below held that this law had been repealed by *Chap.* 12, *p.* 81, of what was known as "*Chapters of the Digest,*" published in 1869. This was an error, as the chapter referred to was never enacted as law: *Vinsant vs. Knox, page* 266, 27 *Ark.*

For this error the judgment of the Phillips Circuit Court is reversed, and this cause remanded to be proceeded in according to law.

COWSER et al. v. THE STATE ex use BURT, Adm'r.

CONFEDERATE COURTS—*Acts of void.*—All acts and proceedings of the different courts of the State, done and had under authority of the Convention of 1861, or while the State was in rebellion, are void.

APPEAL FROM UNION CIRCUIT COURT.

HON. G. W. MCCOWN, *Circuit Judge.*

J. H. Carlton, for Appellants.

GREGG, J.—Burt, as the administrator *de bonis non*, of the estate of John O'Guinn, brought suit against William R. Cowser, former administrator of said estate, and the sureties upon his official bond, alleging that they executed bond in the usual form; that said William R. took into possession the effects of the estate; that in 1861 he removed from the State; that the Court of Probate required him to make settlement; that he failed to do so, and that in August, 1861, said court ordered his letters revoked, and adjusted his account and found $3063 in his hands, and thereupon appointed said Burt such administrator *de bonis non*, and that said effects had not been turned over according to the order of the Probate Court, etc.

William R. Cowser was not served with process. James Cowser and Hicks, the securities, had notice; they appeared and demurred to the declaration; their demurrer was overruled, and, it seems, final judgment rendered against all three.

The demurrer should have been sustained.

The 25th section of the bill of rights, of our present Constitution, declares 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, 1861, was, and is, null and void. All the actions of the State of Arkansas, under 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.

The acts alleged to have been done by said Probate Court, were *judicial acts*, under authority of the Convention of 1861, and consequently void, as enacted and declared by the present Constitution. The courts are bound by the Constitution, in force, and the acts of the Legislature consistent therewith, and they cannot now give the acts of that court the force and effect of judgments. See *Penn vs. Tollison*, 26 *Ark.* 545; *Thompson vs. Mankin*, 26 *Ark.* 586; *and Knox vs. Vinsant*, 27 *Ark.*

The judgment is reversed, and the cause remanded for further proceedings.

NORWOOD and WIFE v. HOLLIMAN, Adm'r., etc.

DESCENTS AND DISTRIBUTIONS.—J. H. died, leaving surviving him six children, one of whom was E. H.; an administrator was appointed; E. H. married and died, leaving surviving him his wife, Harriet L., and one minor child; the child died, leaving the said Harriet L. her sole heir, who afterwards intermarried with C. N. On petition in the Probate Court by the said C. N. and Harriet L., making the administrator of J. H. party defendant, and asking that the said Harriet L. be declared entitled to one sixth interest in all the real and personal estate of which the said J. H. died seized, and that the administrator be ordered to turn over the same to the said Harriet L.: *Held*, on general demurrer, by the administrator:

First. That if Harriet L. was entitled to the estate descending to her from her former husband, it ought to come to her through his administrator, freed from his debts; and that the Probate Court had no power to declare that one sixth of the real estate of the said J. H. should be turned over to the said Harriet L., as the administrator only holds the estate for the payment of debts.

Second. That the petition for distribution should have affirmatively shown the condition and liabilities of the estate of the said J. H.; what, if anything, remained for distribution after the payment of the debts; that all the distributees should have been made parties defendant and should allege a tender of bond as required by law.

APPEAL FROM OUACHITA CIRCUIT COURT.

HON. GEORGE W. MCCOWN, *Circuit Judge.*

English & English, Leake and Garland for Appellants.

We submit:

First. That the demurrer in the court below should have been overruled, as being general and not specifying the grounds of objection to the complaint. *See section* 112, *Code of Practice.*

Second. That the bond to refund, to be given by an heir and distributee, under *section* 2, *p.* 49 *Chapters Digest*, is not a *prerequisite*, but is *discretionary* with the administrator to demand, and the court to order such bond given.

Third. That, under *chapter* 56, *Gould's Digest*, appellants were not only entitled to the personalty claimed in the petition, and *dower* in the interest of Holliman in the lands owned by his father at the time of his death, (one sixth) but, under *chapter* 10, "*Chapters Digest*," to the land *absolutely*.

U. M. Rose, for Appellee.

The demurrers confessed everything stated in the petitions, but nothing not therein stated. They were properly sustained, because:

First. It did not appear that the Probate Court had any jurisdiction in the premises, it not appearing that the letters in either case had been issued by the Probate Court of Ouachita county.

Second. It did not appear, with any degree of certainty, what the estate was that was to be distributed.

Third. It did not appear that the debts were paid, and that the estate was in a condition for distribution.

Fourth. Mrs. Norwood and her husband could not bring these suits as heirs, or claiming as such. Take the first case for example. They could not sue in their own names for the distributive share of Elijah B. in the estate of his father.

This could only be done by the administrator of Elijah B. So that the assets coming to him might be first applied to the payment of his debts. By this proceeding the applicants would have intercepted the estate, and cut off the creditors, which cannot be done. *Pryor vs. Ryburn*, 16 *Ark.*, 672; *Slocomb vs. Blackburn*, 18 *Id.*, 319; *Atkins vs. Guice*, 21 *Id.*, 179; *Lemon vs. Rector*, 15 *Id.*, 436; *Pope vs. Boyd*, 22 *Id.*, 535; *Anthony vs. Peay*, 18 *Id.*, 30; *Worsham vs. Field*, *Id.*, 448.

Fifth. The petitioners should have tendered a refunding bond, as required by statute. *Gould's Dig.*, *ch.* 4, *sec.* 150; *Chapters of Digest*, *p.* 48; *Keith & Jolly*, 26 *Miss.*, 131; *Cannon vs. Benson*, *Id.*, 395; *Logan vs. Richardson*, 1 *Penn.*, *S. R.*, 372.

Sixth. No one was made defendant except the administrator, whereas all parties in interest should have been brought in, and should have had ten days' notice of the application. *Gould's Dig.*, *ch.* 4, *sec.* 154; *Chapters of the Digest*, *p.* 49, *sec.* 6; *Murff vs. Frazier*, 41 *Miss.*, 418; *Valentine vs. Wetherill*, 31 *Barb.*, 655; *Cargile vs. Harrison*, 9 *B. Mon.*, 518; *Hawkins vs. Craig*, 1 *Id.*, 27; *Boyett vs. Kerr*, 7 *Ala.*, 9; *Porter vs. Porter*, 7 *How.*, (*Miss.*) 106; *Shattuck vs. Young*, 2 *S. & M.*, 130; *Robinson's Appeal*, 1 *Chip.*, (*Vt.*) 357

Seventh. This being an ancestral estate, on the part of the father, certainly as to lands under the statute of descents contained in *Gould's Digest*, on the death of Eugenie Maria it went "to the line on the part of the father, whence it came, not in postponement, but in exclusion of the mother's line." *Kelly vs. McGuire*, 15 *Ark.*, 555.

McCLURE, C. J.—In November of 1868, James Holliman died, leaving surviving him six children, one of whom was Elijah B. Holliman; the names of the other five do not appear of record. The estate, real and personal, of James Holliman, deceased, seems to have been worth $25,000 or $30,000. In February of 1869, Richard T. Holliman, the appellee in this suit, was appointed administrator on the estate of James Holliman, deceased.

In January, 1871, Charles M. Norwood, and Harriet L., his wife, filed their petition in the Probate Court of Ouachita county, asking that the said Harriet L. Norwood be declared entitled to a one-sixth interest in all the real and personal estate of which James Holliman died seized, and that the administrator of said estate, Richard T. Holliman, be ordered to pay and turn over to the said Harriet L. Norwood, one sixth interest of said estate of James Holliman, deceased. The administrator, Richard T. Holliman, is made a party defendant to this complaint, and it alleges that Elijah B. Holliman was a son of James Holliman, deceased; that in December of 1868, said Elijah B. Holliman died, leaving surviving him his wife, the said Harriet L. (the present appellant) and one child, Eugenia Maria Holliman; that said child, Eugenia Maria Holliman, died in August, 1870, leaving the said Harriet L. her sole heir; that in December of 1869, she, the said Harriet L., intermarried with her present husband, Charles M. Norwood. These are the facts upon which she bases her complaint, and upon which she bases her claim to the relief asked. In the Probate Court the administrator filed a general demurrer, which was by the court sustained. An appeal was taken to the Circuit Court; the demurrer was again sustained, and an appeal taken to this court.

Section 112 of the *Code*, in declaring the effect of a demurrer, says: "The demurrer shall distinctly specify the grounds of the objection to the complaint; unless it does so, it shall be regarded as objecting, only, that the complaint does not state facts sufficient to constitute a cause of action." It is in this light we shall examine this case.

The question presented, then, is: do the facts stated entitle the appellants to the relief asked? A response to this inquiry involves the examination of two statutes. The first of which is the tenth section of the statute regulating descent and distribution, as found in *Gould's Digest* (*page* 422), which is as follows: "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall

ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate, in the manner provided in this act; and in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs, as before provided."

The estate in this instance was not a "new acquisition;" it came by the "line of the father." The facts alleged by Harriet L. Norwood, in her complaint, would not allow her to the relief asked under this statute, and there could be no error in sustaining a demurrer to the complaint, for the facts stated do not, to use the language of the code, "*constitute a cause of action.*"

The counsel for the appellants urge that the line of descent and distribution, as fixed by the section just quoted, has been superseded, and that the facts alleged in the complaint entitle her to the relief asked under the provisions of section one of the chapter in the new digest (page 65), regulating the descent and distribution of the property of deceased persons, dying intestate. The section thus alluded to is, in substance, as follows—that the property shall descend:

First. To his children, or their descendants, in equal parts.

Second. If there be no children or their descendants, then to his father, mother, brothers and sisters, and their descendants in equal parts, etc.

Under the provisions of this section the appellants claim that at the death of Elijah B. Holliman the one-sixth interest of the estate of James Holliman, deceased, which, by the law, passed to the said Elijah B., descended to Eugenia Maria Holliman; and that at the death of the said Eugenia, there being no children, or their descendants, or father (living), that this one-sixth interest in the estate of James Holliman passed to Harriet L. Norwood, the mother of said Eugenia Maria Holliman, as her sole heir.

Counsel for the parties to this suit insist that the question thus presented involves the validity of the chapters of what is called the "new digest." While we have no disposition to evade a question presented by the record in this case, we think it better to first examine the question presented by the demurrer, and see if the complaint would be sustained under either of the statutes from which we have quoted; for if it shall appear that the complaint does not state facts sufficient to constitute a cause of action under either statute, it might be claimed that so much of the decision as related to the constitutionality and validity of the statutes was a mere *obiter dictum.* This being true, and the validity of the chapters of the digest being a matter of some doubt in the mind of the profession, we prefer to settle the question of their legality in a case where the opinion of the court would not be regarded as mere *dictum.*

From the beginning to the end of the complaint there is nothing in it which advises the court of the condition of the estate of James Holliman, deceased. It is true that the complaint states that the estate was worth some twenty-five or thirty thousand dollars; but what its liabilities were, is nowhere stated, nor is it alleged that the administrator had, or would have, a single dollar to distribute among the heirs of James Holliman, deceased, after the payment of his debts. Without these facts appearing affirmatively, the court below could not do otherwise than sustain the demurrer.

Counsel for the appellee urge that Mrs. Norwood and husband cannot bring the suit, on the ground that the toleration of such a practice would intercept the estate of Elijah B. Holliman, deceased, and cut off his creditors. In this we agree with him.

Mrs. Norwood had no right to bring such an action. If she was entitled to the estate descending to her former husband, it ought to have come to her through his administrator, freed from his debts. The Probate Court had no power to declare that one-sixth of the real estate should be turned over

to Mrs. Norwood, as the administrator only holds the estate for the payment of debts.

Section one of the chapters of the new digest (page 48) declares that an executor or administrator shall not be compelled to make distribution until one year after the date of his letters. Section two of the same chapter declares that an administrator shall not be compelled to make distribution within two years after the date of his letters, unless ordered to do so by the court, until bond and security be given by the legatee or distributee, etc.

Counsel for the appellee insists that the complaint should recite a tender of the bond required by section two, before he is entitled to an order for distribution. In this view we agree with him. The complaint, as has been stated, does not mention the names or residences of any one of the other distributees. This, we think, it should do, as section six of the chapter, now under discussion, declares that the distributees not applying for distribution, shall be notified in writing of such application ten days before any such order shall be made, etc. The thirty-third section of the same chapter also shows conclusively that the other distributees should be made parties, as it provides that guardians *ad litem* should be appointed for such of the heirs as are not residents of the county. There are many reasons why the other distributees should be made parties to any suit or proceeding which has for its purpose the distribution of the effects of an estate. The order of distribution, when made by the court, is in the nature of a judgment, and ought to settle the rights and interests of all the distributees. If this proceeding had been for the partition of an estate, the distributees would have had to have been made parties defendants, and we can see no reason for the relaxation of such a rule where the complaint asks for the distribution of an estate. That portion of *Gould's Digest, page* 129, which relates to legacies and distribution, is very similar to the chapter of the new digest on this subject; and so far as the old or new digest, on the

subject of administration, is concerned, the complaint does not come within either. These things being true, the discussion of the constitutionality or the unconstitutionality of the chapters of the new digest becomes unnecessary, and all argument upon that subject, from this point onward, would be nothing but *dictum*, and treated as such by the profession. While it might, to some extent settle conflicting opinions held by members of the bar, it is our experience that *dictums*, upon questions not necessarily before the court, seldom give the universal satisfaction as though the opinion had been prepared in a case where the question was directly involved.

The judgment of the Ouachita Circuit Court is affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ARKANSAS,

AT THE

DECEMBER TERM, A. D. 1872.

GARIBALDI v. JENKINS et al.

TAX TITLES—*Where resident's lands sold as non-resident.*—A resident's lands were assessed to a non-resident; the taxes were not paid; the lands were advertised and sold as non-resident lands: On bill by purchaser to confirm his title, *Held*, That under the law then in force, *Gould's Digest, Chapter* 148, the resident owner had a right to redeem, and approving *Gossett, et al vs. Kent, et al.*, 19 *Ark.*, 602. *Kinsworthy, et al vs. Mitchell and wife*, 21 *Ark.*, 145.

APPEAL FROM PULASKI CHANCERY COURT.

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

Gallagher, Newton & Hempstead, for Appellant.

It makes no difference in whose name land is assessed, if the taxes are unpaid the sale is valid. The name of the owner is unimportant. The particular land taxed stands liable for it, no matter who may be the owner. See *Merrick & Fenno vs. Hutt*, 15 *Ark.*, 331.

Defendants being residents of Pulaski county, are not entitled to redeem. *Section* 145, *Gould's Digest*, (which was the law when and under which this sale was made), *Chapter* 148, 953.

Farr & Fletcher, for Appellees.

We submit that the lands being assessed and sold in the name of a non-resident of Pulaski county, the law which governs the sale of a non-resident's lands, for the non-payment of taxes, must govern in this case; and therefore, it follows that the party, having the legal or equitable interest in the lands sold for the non-payment of taxes, can redeem them at any time within twelve months from the date of the sale. See *Gossett et al. vs. Kent*, 19 *Ark.*, 603; *Kinsworthy et al. vs. Mitchell and wife* 21, *Ark.*, 145. Any person having the legal or equitable title in lands sold for taxes can redeem. *Merrick & Fenno vs. Hutt*, 15 *Ark.*, 341.

GREGG, J.—The appellant filed his petition, in the Pulaski Chancery Court, praying to have his title confirmed to certain described lands situate in said county, which he alleged had been duly assessed to B. M. Griffith, a non-resident, returned delinquent and sold to appellant for the taxes of the year 1867, and that after the expiration of one year therefrom, they had, in due form of law, been deeded to him.

Upon appearance and petition, the appellees were made parties defendants, and they responded that, as the widow and heirs of Hezekiah Jenkins, deceased, they were the lawful owners and entitled to the possession of said lands. They admitted the assessing, advertising and sale as alleged; (only as to one forty acre tract on which the taxes had been paid); they admit their residence in the county, and that they had not paid taxes on the remainder of the lands. They repeat the allegation in the bill, that the lands were assessed to a non-resident, and they aver that within less than one year after the sale, they offered to redeem all of said lands, and tendered the appellant more than the amount of taxes, penalty and costs, with one hundred per cent., and that he refused to accept the money and allow them to redeem, and they bring the amount into court and tender the same, etc.

The parties filed an agreed state of facts: "That the lands

were assessed to Griffith, a non-resident; that the taxes were not paid; that the lands were advertised and sold as non-resident lands; that appellant bought and paid for them and obtained a deed as alleged; that the appellees who resided in the county were the true owners of the lands, and that they tendered the money and offered to redeem as stated in the answer, and that the appellant refused to accept the money or relinquish his claim."

The cause was submitted to the court upon the pleadings and facts, and the Chancellor found in favor of the appellees, and decreed that the petition be dismissed and that the complainant pay costs, from which decree he appealed to this court.

The appellant contends that the appellees had no right to redeem, because they were residents of the county in which the lands were situate, and the law, then in force, did not provide for the redemption of a resident's lands when sold for taxes.

It is true, the law then in force (*Gould's Digest, Chapter* 148) made no provision for the redemption of a resident's lands after tax sale, but all the lands under that law were classified in assessing; they were to have a fixed status, and certain requisites were prescribed before declaring the resident in default and fixing liability upon his lands. The law provided a different mode of assessing, of advertising, and a different time and manner of selling non-resident from a resident's lands.

The personal property of the latter was first to be resorted to and, if not paid, a personal demand was to be made, and in default, then the lands were to be levied upon and sold without right of redemption. The non-resident lands were proceeded against by advertising, and if no payment was made, by sale at a fixed time and place, and one year thereafter was allowed for redemption; the owner had but constructive notice, but was thus favored, in time, to clear up his titles.

If the resident's lands were improperly placed in the lists of non-residents, and he wanted to have his personal property converted for the payment of his taxes, or to have the notice prescribed by law, (and each has a right to all the delays the law sanctions) his lands might be sold without any notice to him, and without the privilege of redemption.

To repeat, sales of resident and non-resident lands were at different times and conducted in a different manner, and to work a forfeiture, the officers must proceed against the lands in the manner prescribed by law.

It is said to be immaterial whether the lands are assessed in the name of the true owner or not, so the taxes are unpaid, etc., but be that so, the law prescribes the channels through which proceedings must pass in order to produce a valid tax title. And as has been held, by this court, in *Gossett et al. vs. Kent et al.* 19 *Ark.*, 602, there must be a point at which it is determined whether or not the lands are liable as residents or non-residents, and it was there held that upon the assessment lists being returned to the County Court for correction and confirmation, and being passed upon and approved, became a matter adjudicated, and after such judgment was passed upon the assessment lists, the status of the lands must be regarded as a thing determined, and all parties concerned were, thereafter, bound by such determination, and the lands were then subject to advertisement, sale and redemption, according to their status on the assessment lists. And the law declares sales valid whether the lands are assessed in the name of their true owner or not, and sufficiently empowers the collector to make valid sales of all assessed lands, provided he pursues the mode indicated by the status of the lands upon the lists.

This doctrine, so well settled in this case, was approved and again affirmed in *Kinsworthy et al. vs. Mitchell and wife*, 21 *Ark.*, 145, and we are not now inclined to disturb these decisions.

Let the decree be affirmed.

ACKERMAN v. DESHA COUNTY.

MANDAMUS—*When will not lie.*—Where the duty imposed by law upon an officer has, from some cause or other, become impossible to be performed, *mandamus* will not lie.

PETITION FOR MANDAMUS.

T. D. W. Yonley, for Petitioner.
Pindalls, for Respondent.

Mandamus is an extraordinary remedy, and to entitle a party to this remedy, he must show a clear right in himself, and *a corresponding obligation on the part of the officer*, for if the right or the obligation be doubtful, the court will not interfere by this process: *Asbury vs. Beavers*, 6 *Texas*, 473. Same principle, *State ex. re. vs. Jacobus*, 2 *Dutcher's (N. J.) R.*, 135. *Draper vs. Notewear*, 7 *Cal.*, 279, *was refused because of a casus omissus in the law.* In *Rawle vs. Colley Tp.*, 29 *Penn. S. R.* 121: Held *mandamus* will not be granted when it is not an effectual remedy. Nor, if when granted, it would be nugatory in accordance with the maxim, *lex non cogit inutilia. Com'r vs. Comr. A. Co.*, 20 *Md.*, 461.

GREGG, J.—On the 17th day of May, 1870, Ackerman filed in the court his petition for a *mandamus* against the justices composing the County Court of Desha County.

He alleged that he was the holder and owner of certain levee bonds issued by said county, under the acts of the Legislature of the 16th of February, 1859, and 15th of January, 1861, and the 8th of April, 1869, against levee districts No. 5, 6 and 7, and to be paid out of taxes to be collected therefrom; that said bonds were issued in lieu of certain scrip which had been issued by levee inspectors of said districts; that, by the act of April 8th, 1869, the County Court of said county was required to hold certain terms, and to levy a tax on the respective districts to pay the levee bonds issued under said acts; that he had presented his bonds for payment, and had caused them

to be registered according to the provisions of said last act; but that the County Court had refused to pass upon his rights, and utterly neglected and refused to levy any tax whatever for the payment of said bonds.

To this petition, the justices of the County Court answered, in which they admit that under the acts first referred to there were levee districts laid off, of which there were districts numbered 5, 6 and 7; that selectmen and levee inspectors were appointed; levee work was done and certificates issued; that in some districts the lands, subject to taxation, were selected and reported, etc., and taxes collected for one or two years; that a proper record book was kept, in which were recorded the orders and proceedings of the court in reference to levees, including the description of the districts and the lands included, the reports of assessments, etc., warrants issued, etc., the sums collected, etc., and the same was kept nowhere else, and that in 1865 said book was destroyed by a detachment of Confederate soldiers, and that in 1863, the office of the clerk of said county was forcibly broken open by some United States soldiers, and all the original papers relating to said levee matters were destroyed, and that there now remains no evidence or records upon which respondents could levy the tax as prayed for by the petitioner; that the county of Desha is not liable for such taxes; that they can be assessed and collected only from particular lands, in particular districts, in unequal proportions, and by a standard of valuation, fixed upon the benefits derived from the levees by each particular tract of land, and that the respondents have no information or knowledge of the lands so selected, nor of the valuation at which they were assessed, nor of the proportion of such indebtedness to which they were subject, and they cannot obtain such information or knowledge; that the magnitude of the indebtedness renders it impossible that the taxes should pay any considerable portion of the interest of the bonds issued, etc., etc.

The cause has been submitted upon this petition and an-

swer, and upon the question whether *mandamus* will issue upon the facts stated in the bill and answer. This proposition seems not difficult. If, as stated in the answer, the officers composing the County Court of said county had no knowledge or information, and no means by which they could find what lands composed the respective districts, or the extent of the benefits derived by the levees to any particular tract of land, or the amounts assessed against such tracts respectively, it was not possible for them to assess a tax against the lands according to the provisions of the law; and if the petitioner would force a levy, he should aver and show that they had or could acquire such information, or else he should, by some means, designate the particular lands liable to such assessments, because it is clear that a *mandamus* will not lie against an officer requiring him to do what he cannot possibly perform: *Tapping on Mandamus*, 15; 12 *Barb.* 220, *and Ib.*, 617.

Be the applicant's means of redress what it may, it is evident he has not shown facts which authorize a *mandamus*. The question of jurisdiction, and others argued, need not be discussed.

The writ is refused.

HALLIBURTON et al. v. SUMNER.

UNLAWFUL DETAINER—*Circuit Courts have jurisdiction in.*—The provisions of the Code of Practice, respecting jurisdiction in actions of unlawful detainer, are not to be construed as taking from the Circuit Courts jurisdiction in those actions.

SAME.—Lands were sold by an administrator by order of the Probate Court; but previous to the time of confirmation and subsequent to the time of sale, the same administrator, with the approbation of the Probate Court, rented the lands to another party. On unlawful detainer brought by the purchaser at the administrator's sale: *Held*, That the purchaser was entitled to the possession from the time of ratification of the sale, and he was not deprived of any of his rights by virtue of the lease.

APPEAL FROM ARKANSAS CIRCUIT COURT.

Garland & Nash, for Appellants.

We submit that, by the purchase of the appellant at the administrator's sale, the relationship of landlord and tenant was created between him and the appellee holding under the lease. 1 *Washb. Real Prop.*, 445. This being true his action was properly brought and his case fully made out. 13 *Ark.*, 448; 18 *Id.* 284-304. That the Legislature could not take away the jurisdiction of the Circuit Courts in such action; 4 *Ark.*, 147; 7 *Id.* 173. But if the act attempting to take away jurisdiction is of any validity, not repealing expressly the jurisdiction in the Circuit Courts, it leaves the jurisdiction concurrent; 25 *Ark.*, 567, *et seq.*; *Delafield vs. State*, 2 *Hill* (*N. Y.*) 159, *et seq.*

BENNETT, J.—W. H. Halliburton and William A. Sample brought an action of unlawful detainer against Jacob B. Sumner, in the Arkansas Circuit Court, at the May term 1870, for the recovery of the possession of certain lands in that county.

The issues joined, in the court below, were submitted to a jury which found for the defendant. From which verdict and judgment the plaintiffs appealed.

But two questions are presented in the motion for a new trial:

First. Had the Circuit Court jurisdiction in an action of unlawful detainer?

Second. Was there such a relationship of landlord and tenant existing between the plaintiffs and defendant as to maintain an action of unlawful detainer upon the part of the plaintiffs; and if so, were the plaintiffs entitled to possession on the merits?

The question of jurisdiction was settled by the act of the Legislature, approved December 16, 1868. *Sec.* 1 *par.* 11, says: "In actions of forcible entry and detainer and unlawful detainer, justices of the peace shall only have concurrent jurisdiction with the Circuit Courts." Whatever doubts may have been thrown upon the question by the wording of the Code, have been removed by this latter enactment.

As to the second proposition, the evidence produced at the trial shows that Sevier, the administrator of Jordan's estate, obtained an order of the Probate Court of Arkansas county, on the 13th day of January, 1869, to sell certain portions of the lands belonging to the estate, for the purpose of raising money to discharge its indebtedness. The lands said to be unlawfully detained, by the defendant, were included in the order of sale. In obedience to the above order, the administrator offered the lands for sale. At a term of the Probate Court held on the 13th day of October, 1869, the administrator produced his report of the sale and asked that it be approved and confirmed; which was accordingly done. By this report, it appears that one J. B. Ricks was the purchaser at the sale, but he afterwards, with the assent of the administrator, transferred, assigned and relinquished his bid to William H. Halliburton, who accepted it and agreed to become the purchaser of the lands in place of said Ricks. It also appears that on the 16th day of October, 1869, it being one of the days of the regular terms of the Probate Court, the order confirming the sale of lands, as approved in the administrator's report, was set aside, and further action on the report was postponed. On the 13th day of January, 1870, the

Probate Court finally confirmed the sale as made by the administrator. A bond for title was given by the administrator to W. H. Halliburton, but no date appears upon it, nor was it ever acknowledged. The evidence also discloses the fact, that the defendant Sumner was a tenant of the administrator for the years 1868–69 and that, at a public renting, by order of the Probate Court, on the 4th day of January, 1870, he rented the lands in controversy for the year 1870, and that the Probate Court, on the 11th day of April, 1870, confirmed said lease of lands.

We think the question has been settled in the cases of *Bradley vs. Hume*, 18 *Ark.*, 284, and *Frank vs. Hedrick*, 18 *Ark.*, 304, that an action of forcible detainer, under our statutes, will lie at the suit of a purchaser of land which, at the time of the purchase, was in the possession of a tenant under a lease from the vendor, upon demand after the expiration of the term for which it was leased, although the purchaser has never been in actual possession of the land.

The evidence, in the case under consideration, shows that Halliburton bought the land at an administrator's sale, about the 1st day of October, 1869, which sale was confirmed on the 13th day of January, 1870. It, also, appears that previous to the time of confirmation, and subsequent to the time of sale, the same administrator, with the approbation of the Probate Court, had rented the land to the defendant for the year 1870. Now was Halliburton the purchaser at the sale of October 1, 1869, or Sumner, the lessee of January, 1870, entitled to the possession at the commencement of this suit?

It is undoubtedly true that a contract of sale, made between the court as the vendor of property, through its agent or trustee, and the purchaser, is never regarded as consummated until it has received the sanction and ratification of the court. In the case of *ex parte Minor*, 11 *Ves.*, 559, it was determined "That a purchase before the master is not complete, before confirmation of the report." Still, whenever the ratification

of the sale takes place, the sale becomes absolute from the day of sale and the right of the purchaser begins from that time. In the case of *Wagner and Marshall. vs. Cohen*, 6 *Gill* 102, the court say: "Although this is the character of the imperfect right acquired by a purchaser at a sale of this kind, yet, it gives to him an inchoate and equitable title, which becomes complete by the ratification of the court. When this is accomplished, the ratification retroacts, and he is regarded by relation as the owner from the period of the sale. He is, as such proprietor, entitled to the intermediate rents and profits of the estate; he cannot escape from the sale because he may believe it to be disadvantageous, and is bound to pay interest on the purchase money from its date; and has, therefore, a direct and strong interest in protecting the property from injury and rendering it as productive as possible." In the case of *Jackson ex dem. Noah vs. Dickerson & Thompson*, 15 *Johnson*, 315, the court say: "The subsequent delivery of the deed, being mere matter of form, must have relation back to the time of purchase at the sheriff's sale." In the case of *Jackson vs. Warren*, 32 *Ill.*, 342, the court say: "In England the practice is to keep the biddings open, at a master's sale, so that any person may advance on a bid received by the master, which he reports to the court, so, until a final confirmation of the sale, no one can be considered a purchaser but a mere bidder; but under our practice, at such sales, a valid and binding contract of sale is made when the hammer falls. In the absence of fraud, mistake or some illegal practices, the purchaser is entitled to a deed upon payment of the money."

Although the confirmation of the sale in the case before us was not made until after the premises were leased to the defendant for the year 1870, we must hold that, upon its confirmation, the purchaser, the plaintiff, was entitled to the possession of the premises from that date; and he being no party to the leasing of the same to the defendant, is not deprived of any of his rights by virtue of the lease. Therefore, the

motion for a new trial was improperly overruled, both as to the question of jurisdiction and upon the merits.

The cause is reversed and remanded to be tried anew, not inconsistent with this opinion.

WORTHINGTON et al. v. WELCH, Administrator.

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PRACTICE.—*Motions for new trial; when not necessary.*—Where the proceedings excepted to, as erroneous, appear in the records proper of the court, and the errors can be examined into and ascertained by simply reviewing such records, such cases may be brought to this court by writ of error or by appeal without a motion for a new trial.

When necessary.—Where the errors complained of are, in their nature, extrinsic of the records proper of the court, or where the proceedings objected to appear in the records proper, but the errors cannot be ascertained without considering the proceedings in relation thereto, that are extrinsic of such records, such proceedings or matters must be saved by bill of exceptions.

APPEAL FROM CHICOT CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellants.
Bell & Carlton, for Appellee.

SEARLE, J.—This was an action of ejectment brought, in the court below, by the appellee, against the appellant, for the recovery of certain lands situated in Chicot county. The issues were made up and submitted for trial to the court sitting as a jury. The finding and judgment were for the plaintiff, from which this appeal was taken.

The transcript of the record presents us with the evidence introduced upon the trial, to the introduction of which no

exceptions were taken; also, certain propositions of law, as declared by the court, to some of which exceptions were taken; also, certain propositions of law asked by the appellant to be declared by the court, but which the court refused to declare, and to which refusal exceptions were taken.

It appears the above proceedings and facts were brought upon the record by a bill of exceptions, but nowhere appears that a motion for a new trial was made. Was such a motion necessary in the case before us? To answer this question, it is only necessary to reiterate, in brief, the general principles so clearly enunciated in the case of *Steck vs. Mahar*, 26 *Ark.*, 536, and re-affirmed in the case of *Merriweather vs. Erwin*, decided at the last term, and which seem so certainly to be contemplated by our code of practice (see articles IV and V, pages 118–19–20–21, *Civil Code of Practice*) namely: "In any case where the proceedings excepted to as erroneous appear in the records proper of the court, and the errors can be examined into and ascertained by simply reviewing such records, such case may be brought to this court for review by writ of error, or by appeal, without a motion for a new trial."

On the other hand, in all cases where the proceedings, complained of as erroneous, are, in their nature, extrinsic of the records proper of the court, or when the proceedings objected to appear in the records proper, but the errors complained of cannot be ascertained without considering the proceedings in relation thereto, that are extrinsic of such records, such proceedings or matters must be saved by bill of exceptions. And the only method known to the law by which they may be so saved is, that they be tendered to the judge, *upon his overruling a motion for a new trial*, and signed and ordered filed by him. In the case before us, all the proceedings or matters objected to on the trial below, were, in their nature, extrinsic of the record proper, and, therefore, could only be brought upon the record by a bill of exceptions, *in a legal manner* tendered, signed, etc.

There having been no motion for a new trial, the bill of ex-

ceptions cannot be regarded as having been *legally tendered*, signed, etc., and the matters therein contained can not be regarded as being legally before us. We must presume, therefore, that the court below committed no error in its proceedings or judgment.

Let the judgment be affirmed.

GREGG, J.—Dissenting, says: This important case goes out of court upon a question of practice.

As heretofore announced, I hold that when the court below is asked to declare the law, and the decisions upon the questions of law are properly excepted to, and all the facts or findings before that court are, by bill of exceptions, brought upon the record, such questions of law ought to be heard in this court without a motion for a new trial.

Where no motion is made for a new trial in the court below, the facts or findings in that court are conclusive and cannot be here examined, but the law held applicable to such findings may, under our civil code of practice, be questioned in this court. But we argued this same question in the case of *Merriweather vs. Erwin, decided December Term*, 1871, and we refer to that without repeating arguments and references to authorities in this.

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MARTIN, Ex parte.

MUNICIPAL CORPORATIONS—*No power to tax auctioneers.*—Under the *act of April* 9, 1869, entitled, "An act regulating the incorporation of municipal corporations," the power *to tax and regulate auctioneers* is not conferred upon municipal corporations.

PETITION FOR HABEAS CORPUS.

English, Gantt & English, for Petitioner.

First. We submit that all powers not expressly granted by the charter of a municipal corporation, or necessary to carry out these powers, are denied. The corporation can take nothing by implication. *Abb. Dig. Corp., p.* 487, *secs.* 48-49; *Ib., p.* 517, *sec.* 380; *Booth vs. Town of Woodbury*, 32 *Conn.*, 118; *Ib.*, 131; *Alley vs. Inhabitants Edgcomb*, 53 *Maine*, 440; *Leavenworth vs. Norton*, 1 *Kansas*, 432; *Parker vs. Parker*, 1 *Clarke, Ch.* 223; *Kyle vs. Malin*, 8 *Ind.*, 34; *Hooper vs. Emery*, 14 *Maine*, 375. And these powers should be strictly construed. *Abb. Dig. Cop., p.* 517, *Sec.* 380; 2 *Kent. Com.*, 298, (2*d Ed.*) 9 *Cranch*, 127; *Wheaton* 680; 4 *Peters*, 152.

Second. The power to license AUCTIONEERS and to take bond for their good behavior, not being one of the incidents to a corporation, must be conferred by an act of the Legislature, and in exercising it the corporate body must conform to the act. *Fowle vs. Com. Council Alexandria*, 3 *Peters*, 399; *Abb. Dig. Corp.*, 513, *Sec.* 333.

McCLURE, C. J.—On the 23d of December, 1870, the petitioner was convicted before the Police Court, of violating an ordinance of the city of Little Rock, which reads as follows:

"That no auctioneer shall be allowed to sell any goods, wares or merchandize at any public sale, except to the highest bidder only; any person acting as auctioneer, violating this section of this ordinance, shall, upon conviction thereof, by the court of this city, be fined in any sum not less than ten nor more than twenty-five dollars for each offense."

The evidence adduced at the trial, discloses that the auctioneer took an article of merchandize from one of his shelves and offered it for three dollars; no one bidding that price, the same was offered for two dollars; no one bidding that price, the same was finally offered at one dollar; no one bidding that price, the article was laid back on the shelf as not sold.

The object of the ordinance seems to have been to compel the auctioneer to put the articles up and allow the bidders to start the same, and that the bidding from that time forward should be upward, and that the same should be sold to the highest bidder.

On conviction, Martin was sentenced to pay a fine of ten dollars and costs, and in default of payment he was committed to the city prison to work upon the streets, etc. Whereupon he filed his petition in this court for *habeas corpus.*

There are other questions and issues raised in argument, than has been stated, but the sole question presented by the record is, could the city council, of Little Rock, legally pass and enforce such an ordinance? We shall not at this late day enter into an argument to prove that a municipal corporation must confine its legislation within the scope of the power conferred.

Under the 16*th section of the act of December* 12, 1866, entitled, "An act to reduce the law incorporating the city of Little Rock, and the several acts amendatory thereof, into one act and amend the same," the power to *tax* and *regulate* auctioneers, was fully given to said city. The ordinance alluded to was passed December 8, 1870, and whilst the city was being governed by the provisions of the act of April 9, 1869, entitled, "An act regulating the incorporation of municipal corporations."

Upon an examination of the last recited act, the power to *tax* and *regulate* auctioneers is not conferred upon municipal corporations. The only mention that is made of auction, in the act under which and from which the city of Little Rock derives its authority and power, is found in the seventeenth

section of said act, and is as follows: "They shall have power to regulate or prohibit the sale of all horses or other domestic animals, at auction, in the streets, alleys or highways." It is clear that this language does not confer the power to regulate the sale of merchandize within an auction room, as was contemplated by the ordinance, and it is equally clear, that if the power to regulate auctions and auctioneers is not granted to the city, that it cannot be exercised.

The act of April 9, 1869, was a grant of power to municipal corporations, and a revocation of all power not therein enumerated.

The petitioner will be discharged.

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STATE v. CARSON.

PARDON—*Will not restore to office*—C. while holding the office of probate and county judge, was convicted in the Circuit Court of a felony; he appealed; during the pendency of the appeal he was pardoned by the Governor. On *quo warranto*, he pleaded his pardon; *Held*, That a judicial officer forfeits his office by conviction of a felony and that no pardon can restore him.

QUO WARRANTO.

Montgomery, Attorney General, for the State.

Persons convicted of malfeasance in office, or crimes punishable by law with imprisonment in the penitentiary, cannot hold office in this State. *Constitution, 5th clause, Sec.* 3, *of Art.* 8; *Sec.* 4, *page* 383 *Gould's Digest.*

Every attempt to exercise the functions of an office, after conviction, is an usurpation. *The Commonwealth vs. Fugate,* 2 *Leigh* (*Va. R.*) 724, *and cases there cited.*

A pardon does not restore offices forfeited, or property, or

interests vested in others, in consequence of the conviction and judgment. *Ex parte Garland*, 4 *Wallace*, 333, *and cases there cited.*

U. M. Rose, for Defendant.

McCLURE, C. J.—Carson was probate and county judge of Craighead county, and, prior to the filing of the information, was convicted of a felony, and sentenced to confinement in the penitentiary. From the judgment of the Circuit Court he appealed to this court. During the pendency of the cause in this court, Carson obtained a pardon from the Governor, and pleaded the same in bar to the suit then pending. The Attorney General confessed the pardon and its truth, and Carson was discharged.

After these proceedings were had, Carson returned to his home and continued to exercise the duties and functions of the office of probate and county judge, whereupon the Attorney General filed *quo warranto.*

To the writ of *quo warranto*, the defendant pleaded his commission and qualification. To this plea the Attorney General responded, that since the issuing of the commission and qualification, as alleged, the defendant had been convicted of a felony, which judgment has not been reversed. To this reply the defendant filed two pleas.

First. "That he was not indicted and convicted in manner and form as therein stated, and of this he puts himself on the country, etc.

Second. That after the time of said supposed conviction, to wit: on the 12th day of December, 1870, the Governor of Arkansas issued and granted unto the defendant, under the seal and in due form of law, a full pardon for the said offense, etc.

The Attorney General moved to strike the first plea from the files for the reason that it raised an issue of fact, and was not sworn to. This motion was overruled.

To the second plea, the Attorney General demurred on the

ground that the facts stated in the plea do not contain facts sufficient to constitute a defense.

We will dispose of the question of law presented by the demurrer, before discussing the question of fact.

Section 3, *Article VIII*, of the Constitution of this State, among other things, declares that "those who have been convicted of treason, embezzlement of public funds, malfeasance in office, crimes punishable by law with imprisonment in the penitentiary, or bribery, shall not be permitted to register, or vote or hold office."

Section 4, *of part X, of Gould's Digest* (383) is as follows: "Every person convicted of bribery or felony, shall be excluded from every office of trust or profit, and from the right of suffrage in this State."

Section 9, *of Article VI*, of the Constitution, gives the Governor power to grant reprieves, pardons and commutations *after* conviction.

The question now arises, does the Governor's pardon restore the office of probate and county judge to Carson, or does it only restore him to certain *civil* rights? In *ex parte, Garland* (4 *Wall*, 381) the Supreme Court of the United States, in speaking of the effect of a pardon said: "It does not restore to offices *forfeited*, or property or interests vested in others, in consequence of the conviction and judgment." 4 *Blackstone's Commentaries*, 402; 7 *Bacon's Abridgement Title, Pardon*.

In this case there was a trial, verdict and sentence. The appeal did not *set aside* the judgment of the Circuit Court, it merely *suspended* judgment, or rather, the execution of the judgment. *Section* 327, *Criminal Code, page* 329.

One of two things must be true in this case, either that Carson was tried, convicted and sentenced to the penitentiary, or that the Governor had no right to pardon him. The power of the Governor to pardon, by the terms of the Constitution, is limited to cases *after conviction*. If an examination of the record, in the Circuit Court of Craighead county, in the case of the State against this defendant, should dis-

close the fact that no conviction was had, then the pardon which he pleaded when the case was here on appeal, and the one which he now pleads is a nullity, having been granted *before conviction*. *State vs. McIntire*, 1 *Jones Law* (*N. C.*) 1.

On the other hand, if it appears that a conviction took place *before* pardon, then it clearly follows, that the defendant cannot assume to exercise the functions and duties of the office of county and probate judge. In the case of the *Commonwealth vs. Fugate*, (2 *Leigh Va.*, 724) a justice of the peace was convicted of a felony, and afterwards pardoned by the Governor. On his return home, he resumed the exercise of the office of justice of the peace. A rule was made upon him to show cause why an information, in the nature of *quo warranto*, should not be filed against him, etc. To the rule, he pleaded his commission, qualification and pardon, as is done in this case. In disposing of the case Brockenbrough, J., said: "The court is decidedly of opinion that such judicial officer forfeits his office by conviction of a felony, and that no pardon can restore him."

This case is very analagous to the one at bar, the only difference being that no appeal was taken. Carson was either convicted or he was not convicted. Instead of combating his case upon its merits in this court, he relied upon his pardon, and was allowed to depart from it—not upon a judgment of acquittal, but by the terms of a pardon, by which his guilt and conviction had to be acknowledged before it could be obtained. The pleading the pardon was a virtual abandonment of the appeal, and Carson now stands in no better light before the court than though he had not appealed.

The pleas in this case are contradictory; the first denies conviction, and the second pleads he was pardoned; but inasmuch as the demurrer to the second plea is well taken, we will pass to the first without comment.

With the papers submitted in this case, is a certified transcript record of the case of the *State of Arkansas vs. James Carson*, which clearly shows Carson to have been convicted

of a felony and sentenced to the penitentiary. The judgment and sentence of the Craighead Circuit Court has not been set aside. The record showing a conviction, it is incumbent on the defendant to rid himself of the record or accept the consequences which follow its introduction as evidence.

The defendant having failed to show a continuing right to exercise the office of probate and county judge, a judgment of ouster will be entered.

STATE ex use etc. v. BAILEY.

EQUITY JURISPRUDENCE—*When no cognizance of a suit in rem.*—Equity jurisprudence, independent of a statute for that purpose, has no cognizance of a bill brought *in rem* against real estate to foreclose a mortgage given thereon.

APPEAL FROM PULASKI CHANCERY COURT.

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

Montgomery, Attorney General, for Appellant.
Clark & Williams, for Appellee.

GREGG, J., announced the following opinion delivered by the chancellor in the court below, as the opinion of the court, to-wit:

"The bill in this case is brought by the State of Arkansas on behalf of herself and the holders of the bonds issued by the State, under the provisions of the act of the General Assembly incorporating the Real Estate Bank of the State of Arkansas, to enable that bank to obtain banking capital, as well as on behalf of the creditors of the bank to foreclose a mortgage given by John Dillard upon certain lands therein

described, to secure the payment of a stock bond executed by him to the Real Estate Bank, dated the 27th day of October, 1838, for the sum of fourteen thousand eight hundred and ninety-six dollars.

The bill in this case is not brought against Dillard, his heirs, executors, administrators or assigns, or any other person claiming by, through or under him, or against any person in possession of the property, but is brought directly against the land itself, and is, to all intents and purposes, a proceeding in *rem*.

To this bill, Joseph H. Bailey has interposed a demurrer, assigning, among other causes not necessary to be mentioned under the view that I take of the case, that neither the said John Dillard, nor his executors, administrators or heirs, nor any person claiming any interest in the lands mortgaged, nor any other person, is made defendant to said bill of complaint, nor is the said bill a proceeding against any person, but against the lands in *rem*, and that by the Constitution and laws of the United States, and of the State of Arkansas, the said mortgage cannot be foreclosed, and all equity of redemption be barred as against any and all owners of said equity by a proceeding in *rem* against the lands.

After mature reflection, I am well satisfied that this cause of demurrer is well taken. It is argued, however, that under the 13th and 14th sections of chapter 28, Gould's Digest, this court has no jurisdiction of the subject matter of this suit, and that Bailey having appeared, claimed the land, and interposed a demurrer, is estopped from questioning the sufficiency of the service, and that Bailey having thereby entered his appearance, the court now has jurisdiction of both the person of Bailey and of the subject matter of the suit, and ought to proceed to a final decree in this case. This argument is fallacious, and is sustained by neither reason nor authority.

This case is not claimed to be within the provisions of the act of January 16th, 1861. That act provides for the fore-

closure of the mortgages given under the 13th section of the act establishing the Real Estate Bank of Arkansas, approved October 28th, 1836, and for the forclosure of none others.

The object of these foreclosures was to provide a fund for the payment of the fifteen hundred and thirty bonds originally issued by the State to the Real Estate Bank.

The mortgage to foreclose which this bill is brought, is not comprehended within the terms or meaning of that act; it belongs to a different class of mortgages altogether. Such being the case, the inquiry is reduced to the simple question: Can a bill, independent of a statute for that purpose, be brought in *rem* against real estate to foreclose a mortgage given thereon.

We would seek in vain for an authority warranting such a proceeding, both in the equity jurisprudence of England and America.

It is certainly true that the act of January 16th, 1861, relates entirely to the remedy and not to the right. It provides a remedy for the foreclosure of certain mortgages, of which the mortgage now in question is not one.

The mortgages, included within the statute, may be foreclosed in pursuance of the statute, but those which are beyond its provisions, must be proceeded upon according to the established rules of equity jurisprudence, that is to say, by a proceeding in *personam*, and not a proceeding in *rem*.

Indeed the difficulty in this case is not about the service only; the trouble is of a decidedly more serious character.

Had this suit been brought against the parties in interest as defendants, then their general appearance to the bill would have dispensed with service, or cured a defective one. But this bill is brought against the land, and is wholly without the sanction of law.

The demurrer questions not the sufficiency of the service, but attacks the validity of the whole proceeding, and denies the right of the court to take cognizance of a suit brought in this manner, and to render a decree of foreclosure thereon,

which, in law, would have the effect to bar the equity of redemption of the parties in interest. It asserts that the suit is brought in violation of the rules of equity jurisprudence, and, therefore, is without a *locus standi* in a Court of Chancery.

These objections are well taken, and seem to me to be beyond controversy.

If the State can, without the aid of a statute, proceed in *rem* to foreclose this mortgage, why cannot every mortgage be foreclosed by a like proceeding?

The State is here merely a suitor, and in this, as in every other suit brought by her, she must proceed according to the known rules of the law, or otherwise must fail. There is, in a legal point of view, no suit here.

To constitute a suit in chancery, except in a few cases that may be proceeded in *ex parte*, there must be a party complainant and defendant, and every departure from this rule must depend upon some statute law for its sanction. The appearance of the claimant does not help the matter. There is no suit pending in this court against Bailey, to which he can enter his appearance as a defendant. The proceeding is against the land of which he claims to be the owner. He comes into court and says he owns the land, and by his demurrer objects to the legal right of this court to take cognizance of the cause brought in the manner it is, or to render any decree whatever in the premises. Denies, in fact, the jurisdiction of the court to decree a foreclosure of the mortgage given by Dillard under the form of proceedure adopted in this case.

Having appeared, cannot take away his right to do this. Every defendant can do this, whether he has voluntarily appeared to the action, or been brought into court by the due service of process.

At common law the defendant could enter his appearance and then demur to the form of the action, as that debt has been brought when the action should have been assumpsit. And it would have been no answer to have said that the court had jurisdiction of the subject matter, and that by reason of

the defendant's appearance the court has acquired jurisdiction of his person.

The objection is to the form of the action, and, if well taken, puts an end to the suit.

It is certainly true there never were any forms of action in equity proceedings necessary to be adopted to enforce particular rights, or redress particular wrongs. Yet there are certain well fixed rules to which every proceeding in chancery must conform, and among them is the rule never departed from, to my knowledge, that suit in chancery must be a proceeding in *personam*. Certainly a Court of Chancery may, as incident to a suit brought, lay hold of property and hold it subject to the final result of the suit, but can, according to the rules of equity jurisprudence, never proceed directly against property as a party to the suit.

This case not being within the act of January 16, 1861, and being a proceeding against the land itself, brought without the sanction of law, is not a proceeding of which this court can take cognizance, and must, therefore, be dismissed."

The decree of the Pulaski Chancery Court is in all things affirmed.

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COLLIER et al. v. DYER.

SET-OFF—*Must be mutual.*—To authorize a set-off the debts must be mutual and due to and from the same parties; there is no such mutuality between an individual and firm account.

APPEAL FROM YELL CIRCUIT COURT.

HON. W. N. MAY, *Circuit Judge.*

J. E. Cravens, for Appellants.

GREGG, J.—This action was commenced by appellants before a justice of the peace of Yell county.

The appellee filed a plea of set-off, claiming a larger amount for medical services rendered one of the appellants than their demand against him.

A trial was had; verdict and judgment against the appellants for $36 40 and costs, from which judgment they appealed to the Circuit Court.

In the Circuit Court a like finding and judgment was had, only for a smaller sum; the appellants moved for a new trial; their motion was overruled and they appealed.

This court has long since holden that to authorize a set-off, the debts must be mutual and due to and from the same parties. *Field vs. Watkins*, 5 *Ark.*, 672; *Bizzell vs. Stone*, 12 *Id.* 378; *Brown vs. Houstin*, 23 *Id.* 333.

Under this ruling, the appellee could not set-off an individual account on Wilson W. Collier, against the firm demand of E. G. & W. W. Collier. And some of the instructions given by the court, in behalf of the appellee, were clearly erroneous, being abstract and not supported by sufficient evidence, but as these were not excepted to, or made grounds in the motion for a new trial, we are not called upon to consider them here.

The evidence, on the trial, certainly failed to show a mutuality of accounts between the appellants and the appellee, and, consequently, his plea of set-off could not have entitled

him to a recovery, and if the evidence was such as satisfied the court that he had a valid and subsisting defense, in payment of the whole, or a part of the plaintiff's demand, under *Chap. VIII, Title VII, of the Civil Code*, he might have allowed the appellee to have amended his pleadings in such manner as would have worked no prejudice to the rights of the appellants. But we do not wish to be understood as intimating that the court, on its own motion, should suggest or make changes in a litigant's defense, where the ends of justice do not absolutely require such suggestion.

If the court had been satisfied, by proof, that the Colliers as a firm, had agreed to accept medical services of the appellee rendered W. W. Collier in part payment of the appellant's bill for lumber delivered, and upon a proper issue the jury had so found, we would not attempt to weigh the evidence or disturb the verdict, if there was evidence tending to support such finding. But there is clearly no such promise, as, under our statute, could have rendered E. G. Collier, or the firm of E. G. & W. W. Collier, liable for future services to be rendered W. W. Collier as an individual; and not the slightest evidence that E. G. Collier ever, in any way, became liable to pay the appellee the excess of his medical bill, rendered against W. W. Collier, and if the pleadings had been changed, or acted upon by the court as if amended, and if there had been sufficient evidence to have sustained appellee's claim in part, the finding to the full extent was certainly unauthorized by either law or evidence, and in such cases a Circuit Court should always exercise its sound discretion and grant a new trial.

The judgment is reversed and the cause remanded to be proceeded in according to law.

COOK ex. use v. BAXTER.

MANDAMUS—*Where affidavit filed under Section 760, Amended Code.*—Where suit was pending in the Circuit Court, the defendant filed an affidavit under *Section* 760 of Amended Code; the circuit judge refused to proceed further with the trial of the case; on petition for mandamus by the plaintiff, *Held:* That the filing of the affidavit disqualified the judge, and that the clerk of the circuit court should have made an order changing the venue as in such case provided by law.

PETITION FOR MANDAMUS.

U. M. Rose, for Petitioner.

BENNETT, J.—At the October term, 1871, of the Jackson County Circuit Court, there was pending and duly entered on the civil law docket therein, a suit entitled C. C. Cook, for the use of Theodore H. Phillips vs. John R. Loftin as administrator of Publius S. Windom. After various interlocutory proceedings were had therein, at previous terms of said court, at that October term, the defendant, John R. Loftin, filed his affidavit to the effect that he verily believed that the Hon. Elisha Baxter, judge of the Jackson County Circuit Court, in which court the action was pending, would not give him a fair and impartial trial. Afterwards, during the same term, the plaintiff C. C. Cook, etc., moved the court to call the case, the same having been reached in its regular order on the docket, and proceed to the trial thereof, which motion was overruled, and the judge (the Hon. Elisha Baxter) refused and still refuses to take any further action in regard to the case. Therefore, the said C. C. Cook, for the use of Phillips, files his petition in this court for a mandamus, commanding the judge to proceed to the determination of the above suit.

On the 14th day of June, 1872, an alternative writ was issued from this court, directed to the Hon. Elisha Baxter, to show cause why a peremptory mandamus should not issue as prayed for.

July 2d, Judge Baxter filed his response, and among other

things says: "At the November term of the Jackson Circuit Court, 1871, the defendant, in the suit mentioned in the petition, filed an affidavit in said cause under *Section* 758 *of the Civil Code.*"

To this response the petitioner filed a general demurrer.

Is the response sufficient in law to justify the judge in refusing to further proceed with the cause?

Section 758 of the Code of Practice, was repealed by an "Act entitled an Act to amend the Code of Civil Practice," approved March 27, 1871. Therefore, as far as that section is concerned, the response would not be good; but the Legislature incorporated a section in the Act, above referred to, which says: "Whenever a party to any civil action, in the Circuit or Chancery Court, verily believes that the judge of the court, in which the action is pending, will not give him a fair and impartial trial, he may file with the clerk of such court an affidavit to that effect, verified as pleadings are required to be verified, whereupon *the clerk* shall make an order changing the venue in such case to the most convenient county in an adjoining circuit," etc. *Section* 760, *Amended Code.*

The petition for mandamus states that "the defendant filed an affidavit stating he verily believed that the Hon. Elisha Baxter, Judge of the Jackson Circuit Court, in which court said action was pending, would not give him a fair and impartial trial thereof."

Whenever such an affidavit is filed, it is the duty of the clerk of the court to make an order, changing the venue in such case to the most convenient county in an adjoining circuit.

The filing of the affidavit disqualifies the judge from making an order or further proceeding in the case. Upon the general doctrine that, upon demurrer, the court will examine the whole record and give judgment to the party who, on the whole, is entitled to it, we must say the petition, upon its face, shows that the defendant is not entitled to a writ of man-

damus against the judge of the Jackson County Circuit Court.

Wherefore, the petition will be dismissed and mandamus refused.

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CLOPTON v. BOOKER et al.

EXECUTORS—*Jurisdiction of foreign courts over, etc.*—While an executer, as such, cannot be held to an account and settlement before a foreign court, or the court of a different State from the one granting such letters, yet, on bill for that purpose, he may be held in such court to disclose with what, and the character of the funds with which he has purchased property, and whether he holds the same as trustee, and for what uses and trusts.

LANDS—*Title, etc. to, determined by local courts.*—Where the title of lands and the right of possession thereto come in litigation, whether the contract affecting the same be express or implied, direct or in secret trust, the same must be determined by the courts of the State wherein the lands lie.

APPEAL FROM PHILLIPS CIRCUIT COURT.

HON. M. L. STEPHENSON, *Circuit Judge.*

Palmer & Sanders, and *U. M. Rose*, for Appellants.

If it be true, as was charged, that the executor had used the means of the estate to purchase these lands, and had taken the title in her own name, there is no doubt that a trust would result in appellant's favor. *Wallace vs. Duffield*, 2 *S. & R.*, 521; *Buck vs. Ulrich*, 16 *Penn. S. R.*, 499; *Claussen vs. LeFranz*, 1 *Clarke*, 226; *McCrory vs. Foster*, 1 *Clarke* (*Iowa*) 271; *Harper vs. Archer*, 28 *Miss.*, 212; *Schaffner vs. Grutzmacher*, 6 *Clarke*, 437; *Seaman vs. Cook*, 14 *Ill.*, 501; *Garrett vs. Garrett*, 1 *Strobh. Eq.*, 96; *Williams vs. Hollingsworth*, 1 *Id.* 103; *Caplinger vs. Stokes*, *Meigs*, 175; *Lee vs. Fox*, 6 *Dana*, 171; *Pugh vs. Pugh*, 9 *Id.*, 132.

The court below placed its decision on the ground that the suit should have been brought in Tennessee, where the testator lived, and where the letters were issued. But now that the hurry of the assizes is over, certainly no one will contend that any court in Tennessee can, by any proceeding whatever, affect the title to lands lying in Arkansas. *Sto. Confl. Laws, section* 543; *McGoon vs. Scales*, 9 *Wal.*, 23; *Redfield on Wills*, 398 *and note.* See also for a full discussion of this subject, *Wharton's Confl. of Laws, section* 273, *et seq.* It is extremely clear that if the suit could not be brought here where the land lies, it could not be brought at all, and yet the bill was dismissed because the plaintiff had gone into the wrong forum. As to immovables, the property in each State constitutes a different succession. *Burbank vs. Payne*, 17 *La. An.* 15; *Scohler vs. Knapp*, 1 *Bradf.*, 241; *Atkinson vs. Rogers*, 14 *La. An.*, 633. Where land was in possession of a foreign executor, it was held that he might be sued for it in the State where the land lay; *Id.* And a foreign executor has no right to hold land in this State. *Naylor vs. Moffatt*, 29 *Mo.*, 126; *Crusoe vs. Butler*, 36 *Miss.*, 150; *Gilman vs. Gilman*, 54 *Me.*, 453; *Normand vs. Grognard*, 2 *Green* (*N. H.*) 425; *Mason vs. Nutt*, 19 *La. An.*, 41. A foreign executor leasing lands lying in this State could only be regarded as the agent of the heirs and devisees, and his tenant would hold under them. *Rutherford vs. Clark.*, 4 *Bush*, 27; *Succession of Ruffignere*, 21 *La. An.*, 364. A suit here will lie against a foreign executor touching any assets in this State. *McNamara vs. Dwyer*, 7 *Paige Chy.*, 239; *Tunstall vs. Pollard*, 11 *Leigh*, 6; *Gulick vs. Gulick*, 33 *Barb.*, 92; *Jones vs. Gooch*, 6 *Jones Eq.*, 190; *Olney vs. Angell*, 5 *R. I.*, 198.

Tappan & Horner and A. H. Garland, for Appellee.

An administrator can only be held to account to the jurisdiction granting his administration: *Goodwin vs. Jones*, 3 *Mass.*, 513; *Stevens vs. Gaylord*, 11 *Mass.*, 256; *Dawes vs. Boylston*, 9 *Mass.*, 337. The final distribution of the estate belongs exclusively to the jurisdiction where probate of will

was originally granted: *Dawes vs. Boylston*, 9 *Mass.*, 337; *Davis vs. Estig*, 8 *Pick.* 475; *Clark, adm'r. vs. Holt*, 16 *Ark.*, 257; *Williams on Executors, Vol.* 1, 377; *Vol.* 2. 366.

The fact that a portion of the property was moved by the executrix to Arkansas, does not give jurisdiction to require account: *Story on Conflict of laws, Sec.* 514, *B.* The same rule applies as between *States*: *Jackson vs. Johnson*, 34 *Ga.*, 511; *Davis vs. Estig et al.*, 8 *Pick.*, 475.

The assets received by a foreign executor or administrator in the State where the testator resided, are to be administered in that State: *Fay Judge vs. Hazen*, 3 *Metcalf*, 109; *Isham vs. Gibbins*, 1 *Brad. N. Y.*, 69; *Farmers & Savings' Bank vs. Brewer*, 27 *Conn.*, 600; and generally as to the doctrine here contended for: *Story Confl. Laws* (*Redfield's Edition*), 513 *et seq.*; *Probate Court* (*Law and Practice*) *by Chilton* 212, *et seq.*; *Judy vs. Kelly*, 11 *Ills.* 211.

GREGG, J.—The appellant filed his bill in Chancery, in the Phillips Circuit Court. He alleged that in 1846 James G. Booker died in the State of Tennessee, seized and possessed of a large estate there and in Mississippi; that he left the appellee, Eleanor M. Booker, his widow and executrix; that she took posession of his estate, and received large sums descended to him and his heirs from his father's estate; that she has kept and controlled the whole amount over twenty-four years, up to this time; that she has received large incomes from crops, from the labor of hands, from the sale of some valuable plantations and other property; that she was guardian for all the children of said James G. Booker; that she was not required to give any security as such executrix or guardian; that the whole estate was passed into her hands in trust for the heirs of said James (reserving certain portions for her use during life) to be distributed among said heirs upon their arrival at a certain age; that said Eleanor, as such executrix and guardian, had filed no inventory or sales bills; that she had made no settlement whatever with

the proper court; that she had made no distribution among said heirs at the time or in the manner directed in the will of said James G. Booker, but that she had kept, used, disposed of and controlled all of said property as if it were her own individual estate, except that she had educated the children and paid the debts of the said James. That, with the effects belonging to the estate, she had bought a large and valuable plantation for herself, a homestead now worth $50,000; that she had sold certain plantations of the estate and, with the proceeds of one, she had purchased the Phillips county plantation of about seven hundred acres, and, without authority, took the title in her own name; that the said Eleanor was only entitled to a life estate in the lands of the said James G., and in those since purchased by her with the trust funds in her hands; that all the heirs of the said James G., deceased, died intestate and without issue, except the wife of B. Drake Clopton; that the appellant had intermarried with Ellen, one of the daughters and heirs of the said James; that she died in 1869, but before her death, and during coverture, she and the complainant made a deed of conveyance, or settlement in trust, to William B. Gordon, whereby all the property and estate of the said Ellen were to be held for her use during life, and, in default of issue, with remainder to her said husband, the complainant; that by virtue of the will of said James G. Booker, and the decease of all his heirs (except the said Mary) without issue, and the provisions in said deed of trust and settlement made to the said Gordon, for the use aforesaid, the complainant is entitled to the one-half of all the real estate of the said James, and also that bought by the said Eleanor with the effects of the said estate, as aforesaid, and held in trust for the heirs as aforesaid; that in the year 1869, said Phillips county plantation, by the consent and agreement of the said Eleanor, was divided by and between this complainant and wife, and said B. Drake Clopton and wife, but after the death of Ellen, the appellee Eleanor withdrew her consent to such division; that

complainant is still in the possession of about one half of said plantation, and that the title of right is held in trust for him and the said Mary.

The appellant prayed that the appellees might be compelled fully to answer all the allegations in his bill; that the said Eleanor be required to discover and file a full statement of her action as executrix of James G. Booker, showing what assets came to her hands, and how she disposed of them; what debts she had paid; what property she had sold; what incomes she had received; what amount she received for the plantations in Mississippi; whether or not she had made any distribution of said estate among the heirs, and what disposition she had made of the assets of the estate, and where she obtained the money to pay for said plantation in Phillips county, etc. With a final prayer that the said Eleanor be declared a trustee of the said Booker plantation, in Phillips county, for the said Mary Clopton and the appellant; that the division of the same as heretofore made be approved and confirmed, and the appellant quieted in his possession thereof, and for all proper relief.

The appellee, Eleanor, appeared and demurred to the bill, because it shows her executorship to be in the State of Tennessee, and seeks an account in Arkansas; because she cannot be compelled to account in Arkansas, etc.

The court below sustained the demurrer, dismissed the bill and rendered a decree against the appellant for costs, from which he appealed to this court.

We think the law is well settled that an executrix, as such, cannot be held to an account and settlement before a foreign court, or the court of a different State from the one granting such letters: *Story's Confl. Laws, Sec.* 514 *and note*; *Jackson vs. Johnson* 34, *Geo.*, 511; *Davis vs. Estig*, 8 *Pick.*, 475; *Boston vs. Boylston*, 2 *Mass.*, 384; *Burbank vs. Payne & Harrison*, 17 *La. An.* 15.

On the other hand, it seems as well settled that the title of lands, and the right of possession thereto, must be determined

by the courts of the State wherein the lands lie: *Story's Confl. Laws, Sec.* 543; *McGoon vs. Scales*, 9 *Wal., U. S.*, 23; *Burbank vs. Payne & Harrison*, 17 *La. An.* 15.

Contracts may be made and obligations pass at points quite remote from the lands intended to be effected thereby, but whenever litigation must be had to test the validity of the claim to such lands, whether the contract be express or implied, direct or in secret trust, resort must be had to the local laws and local courts.

Hence the principal question, in this case, seems to be to determine the object and purpose of this bill—its legal bearing. Does the complainant seek to subject the defendant, Eleanor, to an account of her executorship, and to fix responsibility upon her as such, or does he only seek to have determined who is the owner of the Phillips county plantation, and who is entitled to the possession thereof, is the question?

The appellant goes into a lengthy detail of James G. Booker's estate, and of the conduct of the appellee, Eleanor, as his executrix, and perhaps with unnecessary particularity, described the various funds that came into her possession, and the manner in which they were used and disposed of, but we find no allegation in the bill made against her as executrix.

The allegations that she, without security, was allowed to receive and control this large estate, to pay debts, educate the children, and hold the remainder in trust for a given time, and then distribute the same among the heirs of the deceased; that she had failed to make such distribution; that she had received and kept large sums, and had sold large amounts of said trust property, and invested the proceeds in other property, etc., might, with propriety, be made to show that the property now held is a trust fund resulting in favor of the heirs, as well as such allegations might be used as a foundation upon which to seek an account of such administration.

And when we go one step further and consider the prayer of the complainant, we see no reason to doubt as to the object and intent of the bill—at least its legal purport and

bearing. The appellant asks no general account for the purposes of a distribution of the estate; asks no decree fixing the extent of her liability, or allotting to him his share in the estate; and hence we must conclude he does not seek an account from her as an executrix, further than to show that the Phillips county plantation was purchased with funds now properly belonging to the heirs of said estate, and that she holds in trust for their use. And his only relief, specifically prayed for, is that she be declared a trustee for them, and that his title be confirmed and quieted to this Arkansas land according to the division heretofore made.

We therefore hold that the demurrer was not well taken; that the appellant may call upon the appellee to know if she, as a trustee, does not hold that land for the use of him and said Mary Clopton, and to answer such pertinent interrogations as show how she became seized of said plantation.

The decree of the court below is reversed, and the cause remanded with directions to proceed not inconsistent with this opinion.

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BLOOM Sr. v. LEHMAN, NEWGASS & CO.

ANSWER—*When want of distinctness in statement of defenses in, will not prejudice.*—Of the several defenses that may be relied on in an answer, under the Code, although the answer may be so unskillfully drawn as not to distinguish between them, yet, if it contains sufficient facts to show a defense under either, the defendant will not be prejudiced by reason of his not making the proper distinction between the kind of defenses.

COUNTER-CLAIM—*Nature of.*—The defense of counter-claim, under the code, is but the plea of recoupment under the old practice and, in general, is to be governed by the same doctrines, except where the defendant's demand exceeds that of the plaintiff he may be entitled to a judgment for the excess.

SAME—*When applies.*—The defense of counter-claim only applies to breaches of stipulations, fraudulent or otherwise, growing out of the contract sued upon, and not upon entirely separate and distinct causes of action.

SET-OFF—*Nature of, not extended or enlarged by the code.*—The language of the Code of Practice, respecting set-off, is declaratory and does not extend or enlarge the nature of the demand that may be used as a set-off; it merely recognizes the law as it existed when the code was adopted.

DAMAGES—*When cannot be pleaded as set-off.*—In an action *ex contractu* the defendant cannot rely upon damages sounding in *tort* as a set-off for the plaintiff's demand.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

A. H. Garland, for Appellant.

BENNETT, J.—This action was brought against the appellant on a note for fourteen hundred dollars. The answer, by way of defense, alleges:

First. A partial payment to the amount of $566 06.

Second. Says he is entitled to two thousand dollars as damages due him from appellees, by reason of the false and fraudulent suing out against him of a writ of attachment, whereby they seized upon and attached the property of the appellant and damaged him in his goods, wares and merchandize, and good name and credit as a merchant, in the sum of two thousand dollars, which sum he offers to set off and make

a counter-claim against any surplus due on said note, and prays a judgment in his favor for any balance found due.

The appellees filed a general demurrer to the plea of set-off or counter-claim. The court sustained the demurrer; the plaintiffs admitting the plea of payment, judgment was rendered against the appellant for balance of note sued on. From the judgment on demurrer, the appellant has appealed to this court. Was the demurrer properly sustained?

There are three kinds of defenses that may be relied on, in an answer, under the code:

First. Matter which, by the common law, was usually pleaded in bar of actions.

Second. Counter-claim.

Third. Set-off.

Although the answer may be so unskillfully drawn as not to distinguish between the three, yet, if it contains sufficient facts to show a defense under either, the court will not permit the defendant to be prejudiced by his not making the proper distinction, in his answer, between the kinds of defenses.

It is not claimed by the appellant that the plea demurred to was a defense which could have been pleaded under the common law, but it is insisted, in the body of it, to be a counter claim or set off; therefore, we are not called upon to decide what pleas would be proper under the head of general denial or general issue, but our attention is more directly called to the requisites of a counter claim or set off under the Code. The Code defines a counter claim to be "a cause of action in favor of the defendants, or some of them, against the plaintiffs or some of them, *arising out of the contract or transactions* set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action." *Section* 117, *Civil Code.*

A counter claim, *eo nomine*, was unknown in the former system of pleading; but the subject matter of such a plea was, in actions *ex contractu*, often available under a plea which

might be styled *recoupment*. Chitty, in his work on Pleadings, on page 563, says: "At common law, and independently of the statutes of set off, a defendant is, in general, entitled to retain, or claim by way of *deduction*, all just allowances or demands accruing to him, or payments made by him in respect of the same transactions or account which forms the ground of action. But this cannot be termed a set off, in the strict legal sense of the word, because it is not in the nature of a *cross* demand or a *mutual* debt, but rather constitutes a *deduction*, rendering the sum to be recovered by the plaintiff so much less."

The general principles governing a plea of recoupment have been well defined and laid down in the case of *Desha vs. Robinson*, 17 *Ark.*, 245, wherein the court say: "When 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 chooses, instead of bringing a cross action, recoup his damages arising from the breach committed by the plaintiff, whether those damages be liquidated or not. The idea being that all cross actions or claims arising out of the same contract, shall compensate each other, and the balance only be recoverable by the plaintiff."

The defense termed counter claim, under the Code, as defined, is but the plea of recoupment under the old practice, and, in general, is to be governed by the same doctrines, except, under the provisions of *Sections* 418 *and* 419, *Civil Code*, if the defendant's demand exceeds that of the plaintiff, he may be entitled to a judgment for the excess. This defense only applies, however, to breaches of stipulations, fraudulent or otherwise, growing out of the contract sued upon, and not upon entirely separate and distinct transactions. The plea before us is defective as a counter claim, inasmuch as the matters alleged are separate and distinct from the cause of action.

But it may be contended that it is a valid set off and made so by the Code. The Code defines a counter claim with precision, but it gives no definition of a set off. It, however, restricts the use of a set off to such actions as are founded on contract and to such demands as arise on contracts, or have been ascertained by a decision of a court. See *Section* 119. The demands which could be relied upon as a set off, at the time the Code was adopted, were designated by law, and what demands constituted a valid set off was a matter well understood. See *Gould's Digest*, 1019. It was not necessary to give any explanation in the Code, at the time of its adoption, of the meaning of a set off, explanatory of its nature or extent. If a radical change, on the subject of set off, was intended by the adoption of the Code, the reasonable presumption is, that such an intention would have been clearly indicated. Such being the case, we are not at *sea* upon the question as to what is a good set off to an action. The language of the Code of Practice, declaring that a set off must be a cause of action arising on a contract, does not extend or enlarge the nature of the demand which may be used as a set off; it merely recognized the law as it existed when the Code was adopted. In any event, neither before nor since the adoption of the Code, can a defendant, in defense to an action founded on contract, rely upon a trespass to his person or property, or injury to his character as a set off for plaintiff's demand. It must be some cause of action for which, under the former system, an action of assumpsit, debt or covenant might have been maintained.

The plea before us endeavors to set up a damage, as defense, which might accrue to him by reason of the wrongfully suing out of a writ of attachment, whereby he says he was injured in property, moneys and good name to the amount of two thousand dollars. This he very evidently cannot do, as the damages, if any, are due by reason of tort, trespass or wrong doing of the plaintiff, and are not arising from matter of contract, nor have they been before determined by a court, or in

any manner liquidated or ascertained. Therefore, the court did not err in sustaining the demurrer.

Judgment affirmed.

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EDWARDS v. THE STATE.

CRIMINAL LAW—*Requisites of indictment.*—The Code of Criminal Practice, except in reference 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.

MURDER—*When indictment insufficient for want of certainty.*—The charge, in an indictment, that the offense was committed with a "*shot gun*," does not set forth the manner and circumstances attending the use of the gun with such a certainty as would enable a defendant to make a complete defense, if innocent.

COERCION—*Declarations of husband not competent.*—While a wife cannot be found guilty of a crime, if it is shown, from all the facts and circumstances, she was acting under the threats, commands or coercion of her husband in the commission of the offense, yet, the declarations of the husband to that effect made to another, being hearsay, are incompetent testimony, upon the trial, in favor of the wife.

How shown—The coercion of the husband must be made to appear *from all the facts and circumstances*, and is not to be presumed merely from the presence of the husband and, the fact of killing being admitted, the wife, to excuse herself from the crime, must show that she was not acting, at the time, from her own volition, but from that of the husband.

APPEAL FROM DESHA CIRCUIT COURT.

HON. M. L. STEPHENSON, *Circuit Judge.*

Pindalls, for Appellant.

First. We submit that the indictment is insufficient.

The indictment must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendments.

Archibold's Crim. Prac. and Plea., title Indictment d., and authorities cited and illustrations given in Note 1, *Waterman's Ed., p.* 283.

This Statement Must be Certain.—This principal rule is thus stated, that where the definition of the offense includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. *Id., page* 291, and on *page* 295, *n.* 1, it is broadly stated that "at common law, in an indictment for homicide, the means by which the death was effected must be stated. A mere statement that the defendant killed, etc., will not suffice unless the whole tenor of the charge furnish an intelligible description of the manner of committing the offense; and the kind of death proven must not essentially differ from that alleged." See the illustrations given in the note. *See Chitty Crim. Law, pages* 734–5; *Starkie's Crim. Plea., chap.* 7, *Forcible Means, pages* 91–2–3; *Wharton's Crim. Law, sec.* 285, *note g; Bishop Crim. Pro., vol.* 1, *sec.* 54—*vol.* 2, *secs.* 511, 519, 524, 529, 567–68. That the indictment is not good by construction or intendment of the provisions of the criminal code. *See Fouts vs. The State,* 9 *O. S. R.,* 122; *Rhodes vs. Com.,* 2, *Dural,* 159; *Ib.,* 89; *Thompson vs. State,* 26 *Ark.,* 323.

Second. The court erred in not admitting as evidence the declarations of Isham Edwards made to Cumby. They were part of the *res gestæ,* and admissible as original evidence. 1 *Greenleaf, sec.* 108; *Lund vs. Inhabitants of Tyngsborough,* 9 *Cush.* (*Mass.*) 36.

Third. That the *verbal charge,* and *fourth and ninth instructions,* given by the court to the jury, respecting the threats and coercion of the husband, are contrary to the law.

By the common law the excuse of the wife was made dependent only upon the presence of the husband (except in case of treason or murder.) Our law abolishes this exception, but makes the excuse dependant upon it appear-

ing *from the facts and circumstances* that threats, etc., *were used*, (*Freel vs. State*, 21 *Ark.*, 218; *Gould's Dig.*, 325), while these instructions further require the wife to show that her actions *were influenced by the threats, etc.*, and not by the promises or inducements.

Montgomery, Attorney General, for Appellee.

BENNETT, J.—The appellant was indicted in the Desha Circuit Court for the murder of Daniel Jackson, and, upon trial, was found guilty of murder in the second degree, and from the judgment rendered in the court below, has prosecuted this appeal.

The action of the court below is now complained of on the grounds:

First. The court erred to the prejudice of the appellant in overruling her motion in arrest of judgment. The motion in arrest is based upon the assertion that the indictment does not charge an offense with such a degree of certainty as to enable the court to pronounce judgment on the conviction. In determining this point we are limited to the single inquiry, whether the facts, as stated in the indictment, constitute a public offense within the jurisdiction of the court. *Crim. Code, sec.* 272.

The indictment accuses Lucy Edwards of the crime of murder in the first degree, committed as follows, to-wit: "The said Lucy Edwards, on the 23d day of February, A. D. 1871, in the county and State aforesaid, did feloniously, willfully, premeditatedly and with malice aforethought, in and upon one Daniel Jackson, with a shot-gun, make an assault, and him, the said Daniel Jackson, with the shot-gun aforesaid, did then and there feloniously, willfully, premeditatedly and with malice aforethought, kill and murder, against the peace and dignity of the State of Arkansas."

The requisites of an indictment, under our criminal code, are these: It must contain the title of the prosecution, specifying the name of the court in which the indictment is pre-

sented, and the name of the parties; also a statement of the facts 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 it must be direct and certain as regards the party and the offense charged; the county in which it was committed, and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. *But no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon, be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits. Criminal Code, secs.* 121 *to* 129 *inclusive.*

It is admitted by the appellant that the indictment contains all the requisites, as above stated, with the exception that the facts constituting the offense are not set forth in such ordinary and concise language as to convey to a person of common understanding the nature of the offense charged. By *sec.* 128, *Criminal Code,* an indictment is sufficient if it can be understood therefrom: That the act or omission, charged as an offense, is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction, according to the rights of the case. In this, and in other similar provisions, the legislature has very clearly manifested an intention to dispense with the rigid adherence, heretofore required, to mere technical forms which, instead of protecting the substantial rights of the accused, most generally operated to defeat the real ends of justice. The rule, however, is well settled, that an indictment must set forth the offense with such certainty as to apprise the defendant of the nature of the accusation upon which he is to be tried, and with such clearness and conciseness as to constitute a bar to any subsequent proceeding for the same offense. The indictment under consideration charges the defendant with the felonious, willful, premeditated and malicious killing and murdering of Daniel Jackson, and states the manner of the killing to be "by making an assault upon him with a shotgun."

The offense of murder is clearly charged against the defendant, and this crime is within the jurisdiction of the Circuit Court of Desha county. But the appellant claims that the circumstances and manner of the killing are not fully stated, because the indictment does not allege in what manner the assault was made with the shot-gun—whether the shot-gun was used as a fire-arm or as a bludgeon, or to frighten him to death with it. It would have been much better, and not have been considered as surplusage, to have said in the indictment, that the assault was made with a shot-gun, and with said gun did kill and murder by *shooting* him, or that the assault was made with a shot-gun, and by *shooting him* with said gun did kill and murder him, or any other allegation of the manner of the assault and killing in accordance with the facts. It may be very material for the defendant, as a matter of defense, to know how the fatal blow was produced.

In an indictment for murder the gravamen consists in the killing, which may be distinctly stated, but the manner in which it was done be omitted. The omission to do so may "tend to prejudice the substantial rights of the accused on the merits," and so effect the judgment of conviction as to justify the court in reversing it on that ground alone.

It is a rule of criminal law that every indictment should be certain:

First. A complete description of the offense charged.

Second. It should set forth facts constituting the crime with a reasonable degree of certainty, so the accused may have notice of what he is to meet.

The fact that Daniel Jackson was feloniously, willfully, premeditatedly and maliciously killed and murdered by Lucy Edwards with a shot-gun, is stated with sufficient conciseness to make out the offense charged, but that Daniel Jackson was killed "with a shot-gun," does not set forth the manner and circumstances attending the use of the gun with such a

certainty as would ordinarily enable a defendant to make a complete defense, if innocent.

None of the substantial rights of the defendant, in the case at bar, may have been denied her, as appears from the record, from an imperfect statement of the facts constituting the crime, which might cause us to hesitate in reversing this case upon a motion in arrest of judgment, but the record shows that, before her plea to the indictment was entered, she demurred to it, which demurrer was overruled. Whether a new indictment, alleging all the circumstances of the killing, would have given the accused any better notice of what she was to meet upon trial, we are unable to say. Still she was entitled, in the outset, to a more full and complete accusation as to the mode and manner of the commission of the offense.

The court erred in overruling the demurrer to the indictment, and the motion for arrest of judgment. The case of *Thompson vs. State*, 26 *Ark.*, 323, fully decides the requisites of an indictment.

Second. The defendant insists that the court erred in not allowing certain declarations of Isham Edwards, her husband, made after the killing was done and to Esquire Comby, to go to the jury.

From the transcript, it appears that the witness, Lilly Jones, called by the defendant, stated on the trial, that when Isham Edwards, the husband of Lucy, the defendant, went up to Esquire Comby and told him, "that he, (Isham Edwards) had made Lucy, his wife, kill Jackson."

The court ruled this statement of Edwards as inadmissible, and instructed the jury to disregard it altogether and would not allow Esquire Comby, when called as a witness, to testify to any statement by Edwards to him.

The defense, in this case, seems to have been mainly predicated upon the fact that the defendant was a married woman, and if she did the killing, it was done under the threats, commands and coercion of her husband, Isham Edwards, and claims any admissions or confessions made by him in her favor

were competent testimony and should have been received by the court and jury.

Our statute declares that, "married women, acting under the threats, commands or coercion of their husbands shall not be found guilty of any crime or misdemeanor, *if it appear from all the facts and circumstances of the case that violence, threats, commands or coercion were used.*"

It would thus appear that a wife cannot be found guilty of a crime, if it is shown from all the facts and circumstances, she was acting under the threats, commands or coercion of her husband in the commission of the offense.

The declaration of Edwards, the husband, that he "made Lucy, his wife, kill Jackson," made before another person, would not be competent testimony upon the trial in favor of the wife, because it is hearsay, and such evidence is incompetent to prove a specific fact which is in its nature susceptible of being proved by witnesses, who speak from their own knowledge.

In the case of the *United States vs. Douglass*, 2 *Bl. C. C.*, 207, the court say: "when, on a joint indictment against them for murder, one of them is tried separately, it is not competent to give in evidence a conversation between the other two, when alone, inculpating themselves and exculpating him from all participation in the crime." These declarations of Edwards were properly excluded from the testimony.

The third cause for a new trial is, that the court erred in instructing the jury that, "The burden of proving coercion, threats or commands devolves upon the defendant, and the crime must appear to have been done under the influence of such coercion, threats or command."

We think it clear, under our statute, that if a wife commit a crime under the threats, commands or coercion of her husband, she cannot be found guilty, but this coercion of the husband must be made to appear *from all the facts* and circumstances, and is not to be presumed merely from his presence. A defendant who virtually admits the killing and attempts to

excuse herself from the crime, must show that she was not acting at the time from her own volition but from that of another.

The instruction was not erroneous. It is not necessary to review the testimony to determine whether the verdict of the jury was correct or not, as from the insufficiency of the indictment the judgment must be reversed. The cause is remanded with instructions to hold the defendant in custody until the case is again brought before the grand jury of Desha county.

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CARNALL v. CLARK ex use HERSHEY.

PRACTICE—*When limitations pleaded after default.*—The rule that a default will not be set aside to permit a defendant to plead the statute of limitations has no application when the default has been irregularly taken, or if, in point of fact, the defendant had no notice of the pendency of the suit.

BURDEN OF PROOF—*Where limitations pleaded to set-off*—The burden of proof lies on the party who substantially asserts the affirmative of the issue and, on replication of the statute of limitations to a plea of set-off, the defendant will not be permitted to affirmatively show that his cause of action accrued within a time not barred by the statute.

CONDITIONAL SALES—*Relationship of parties and remedy.*—On a conditional sale, the relationship of debtor and creditor does not exist between the parties—the property in the thing sold passes to the vendee, subject to be divested on performance of the condition as stipulated, and if the vendee part with the property before the time to redeem expires, the vendor's only remedy is by an action for damages for breach of the covenant, and not for the recovery of the property.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

Clark & Williams, for Appellant.

First. We submit that the court erred in striking out the defendant's plea of the statute of limitations to the plaintiff's

action. It is true that this court, in the case of *Pennington vs. Gibson*, 6 *Ark.*, 447, held that they would not where *timely service had been had*, set aside a judgment by default to let in the plea of statute of limitations. The principle of that case was never applied, except where the defendant had been duly served with process, and where he had been guilty of laches or default. See *Wilson vs. Phillips*, 5 *Ark.*, 183; *Browning vs. Roane*, 9 *Ark.*, 354; *Robinson vs. State Bank*, 11 *Ark.*, 301; *Hudson vs. Breeding*, 7 *Ark.*, 445.

A judgment by default without notice is a nullity. See *Act of 17th February*, 1859, *Pamphlet Acts, page* 172.

Second. The court erred in giving to the jury the instructions asked by plaintiff.

The written agreement of 3d of January, 1861, given in evidence, neither involves a promise to pay, nor the acknowledgement of a debt, nor any undertaking of Carnall on which a suit could be brought. If it had, *then the suit should have been on the instrument*, and debt on simple contract could not be maintained. 1 *Chitty Pl.*, 103; *Goodman et al. vs. Jenkins*, 14 *Mass.*, 93; *Andrews vs. Montgomery*, 19 *Johns.*, 161; *Fletcher vs. Pratt*, 7 *Black.*, 522; *Compton vs. Jones*, 4 *Cow.*, 13; *Jewell vs. Shrayrel*, 4 *Cow.*, 564.

The law presumes that it was taken as payment, and the note or obligation is at the risk of the party taking it. *Whitebeck vs. Van Ness*, 11 *Johns.* 408; *Breed vs. Cook et al.*, 15 *Johns.*, 241; *Arnold vs. Camp*, 12 *Johns.*, 409; *Markle vs. Hatfield*, 2 *Johns.*, 455; *Wilson vs. Force*, 6 *Johns.*, 110; 1 *Smith's Leading Cases, marg. p.*, 146.

But, in case the notes were taken as conditional payment only, and not as mere collateral security, on the one hand, or absolute payment on the other, the plaintiff could not recover without first accounting for these notes, and showing that she had used due diligence to collect them, and failed. *Herring vs. Sanger*, 3 *John's Cases*, 71; *Tyson vs. Pollock*, 1 *Penrose & Watts.*, 375; *Chapman vs. Sternitz*, 1 *Dallas*, 261; *Ozee vs. Spencer*, 2 *Whart.*, 253.

U. M. Rose, for Appellee.

The judgment recites that the defendant was served with process more than thirty days before the commencement of the term. This recital is evidence of that fact, and supplies the place of the summons. *Acts* 1858, *page* 172. After the term expired the court could not set aside the judgment. *Smith vs. Stinnett*, 1 *Ark.*, 497; *Byrd vs. Brown*, 5 *Ark.*, 709; *Rawdon vs. Rapley*, 14 *Id.*, 203; *Biscoe vs. Sandefur*, *Ib.*, 568; *Ashley vs. Hyde*, 6 *Id.*, 100; *Cossitt vs. Biscoe*, 12 *Id.*, 95; *Brooks vs. Hanauer*, 22 *Id.*, 176.

Nor could it ever be set aside by consent: *Mayor vs. Bullock*, 6 *Ark.*, 282; *McKnight vs. Strong*, 25 *Id.*, 212.

After setting aside the judgment by default, the only right defendant had, on trial of the writ of inquiry for the assessment of damages, was to cross-examine the plaintiff's witnesses, and doubtless introduce witnesses of his own to lessen the amount of damages: *Thompson vs. Hairlip*, 14 *Ark*, 220; but he was allowed to plead several pleas to the merits; this was error, but the error was in favor of the appellant, and therefore he could not complain: *Ashley vs. May*, 5 *Ark.*, 408; *Swinney vs. State*, 22 *Id.*, 216.

After appearing and having the default set aside, he could not plead that the court had no jurisdiction of his person: 1 *Saunder's Pl. & Ev.*, *p.* 1. The want of jurisdiction as to the person of the defendant is waived by an appearance: *Rhode Island vs. Massachusetts*, 12 *Pet.*, 657; *Carter vs. Bennett*, 15 *How.*, 354.

HARRISON, J.—This was an action of debt, for money loaned and money had and received, by Sarah Clark against John Carnall, commenced in the Sebastian Circuit Court, for the Fort Smith district, and, after the pleadings were made up, transferred by change of venue to the Crawford Circuit Court.

At the return term, judgment was taken against the defendant, but the same was, at the next term, before the dam-

ages were assessed, set aside upon the application of the defendant, and he filed four pleas; *nil debit*, payment, the statute of limitations and set off.

At the instance of the plaintiff, the plea of the statute of limitations was struck from the record, and she filed two replications to the plea of set off, *nil debit*, and the statute of limitations, and upon the pleadings as thus stated, issues were formed.

Upon trial, the jury returned a verdict, in favor of the plaintiff, for one thousand dollars debt, and five hundred and ninety dollars damages. The defendant moved for a new trial, which was refused, and he excepted and appealed.

Whilst it may be an established rule of practice that a default will not be set aside to enable a defendant to plead the statute of limitations, it is also well settled, that it has no application when the default has been irregularly taken, and especially, if without notice to the defendant of the pendency of the suit.

No summons is found in the record, and the bill of exceptions shows that the default was set aside, because the same was taken without notice to the defendant. It, however, appears, by the transcript, that the entry upon the record of the default showed service of process upon him, which according to the provisions of the Act of the General Assembly, of February 17, 1859, is sufficient evidence of the fact; but the default being set aside, the entry thereof is no part of the record. The court, therefore, erred in striking out the plea of the statute of limitations.

The grounds, upon which the motion for a new trial was made, were:

First. That the court refused to allow the defendant to produce proof of particulars of his plea of set off, in respect to which his right of action had not accrued within three years.

Second. Misdirection of the jury, and

Third. That the verdict was against the evidence.

We are unable to see that the court erred in refusing to permit the defendant to prove the matters of his set off, not within the period of limitations. Upon the issue made upon the replication of the statute of limitations to his plea of a set off, the defendant undertook to show, affirmatively, that his cause of action did accrue within three years. "The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue. 1 *Green Ev. Sec.* 74; 2 *Cromp & M.*, 658. The plaintiff, who only adduced any evidence, read to the jury the following instrument of writing:

"This agreement, on the part of the undersigned, with Miss Sarah Clark, of Fort Smith, Arkansas, is as follows, to-wit: I have this day, in order to raise money, sold and delivered to said Miss Sarah, the following writing obligatory, to-wit: dated January 9th, 1860, for $710 due at eighteen months, with ten per cent. from date, and signed by B. T. DuVal, John King, W. B. Calhoun and S. Howard Calhoun; and also, the following note, to wit: dated January 23d, 1860, for $828 $\frac{29}{100}$, due at twenty-four months, with interest at ten per cent. from date, and signed by Benj. J. Jackoway and Samuel M. Hays, payable to Samuel L. Griffith's order, and indorsed by him to me; the first writing above being payable to me or order, at and for the sum of $1000 in cash, with the understanding, however, that I am to be permitted to redeem said notes at any time within the ensuing twelve months by paying the said sum of $1000, with interest at ten per cent. per annum from this date, or at any time within twenty-four months, unless said Sarah Clark shall serve upon me a notice in writing, giving me six months notice, that unless I paid said sum of $1000 and interest within said six months, she will consider I have forfeited all right to redeem said note and writing obligatory.

Witness my hand and seal, this 3d day of January, 1861.

JOHN CARNALL, [*Seal.*]"

She also read the following indorsement thereon.

"The within note of $828 $\frac{29}{100}$, is this day given up to the undersigned. January 23, 1862.

JOHN CARNALL."

And the defendant being introduced by her, testified: That, on the 23d day of January, 1862, Griffith offered to pay him the note in Confederate money; he went to plaintiff and told her that Griffith was ready to pay it; she produced it and handed it to him and he took it to Griffith and got the money, whereupon, he returned to plaintiff, and offered to pay her, without, however, telling her in what kind of money the $1000 and the interest which had accrued. She replied that she did not need it, and that he could keep and use it; that his note, and DuVal's and King's, were amply suffiient to secure her, and she was satisfied with them. He thereupon asked for the agreement, which being produced, he made the indorsement upon it, read to the jury.

The instruction given to the jury was as follows:

"If the jury find from the evidence, that the defendant borrowed from the plaintiff the sum of one thousand dollars, and, to secure the payment thereof, executed to her the instrument of writing read to them, they shall find for the plaintiff the sum of one thousand dollars, for her debt, with six per cent. interest from the 3d day of January, 1861."

This instruction was predicated upon the hypothesis, that the money the defendant obtained from the plaintiff was borrowed, and the writing obligatory and note were placed in her hands simply as a security for its re-payment; but the contract between the parties, as evidenced by the instrument read to the jury, admits of no such construction. The writing obligatory and note, were delivered to the plaintiff upon a conditional sale, in consideration of the money the defendant received; not as a pledge or security for the re-payment of the money. There was no promise or agreement on the part of the defendant to repay the money, and the relation of debtor and creditor did not exist between them. The property in them passed to the plaintiff, subject to be divested by

the defendant within the time limited, by paying the sum of money he received with the stipulated interest. If she had parted with them before the time in which he might have redeemed expired, his only remedy would have been an action for damages for her breach of covenant, and not for their recovery. *Porter vs. Clement*, 3 *Ark.*, 364; *Johnson vs. Clark*, 5 *Arkansas*, 321.

The instruction was, therefore, erroneous and as it doubtlessly influenced the verdict, which was not sustained by the evidence, the motion for a new trial should have prevailed.

The judgment is therefore reversed, and the cause remanded with instructions to set aside the verdict, and reinstate upon the record the plea of the statute of limitations, and proceed according to law.

MILLS v. JONES & REED.

SUPREME COURT—*Practice on appeals.*—Exceptions taken to the rulings of the court below, but not made the grounds for the motion for a new trial, will be considered waived and not subject to review in this court.

APPEAL FROM MONROE CIRCUIT COURT.

HON. JOHN E. BENNETT, *Circuit Judge.*

Watkins & Rose, for Appellant.
Wassell & Moore, for Appellees.

We submit there is no question of law before this court. All exceptions not incorporated in the motion for a new trial are waived. *Collier vs. State*, 20 *Ark.*, 360; *Graham vs. Roark*, 23 *Ark.*, 19. That the scope of review in this court is limited by the grounds taken in the motion. *Hopkins et al. vs. Dowd*, 11 *Arkansas*, 627.

SEARLE, J.—This suit was brought to the November term, 1868, of the Monroe Circuit Court. The trial was by jury; finding and judgment for plaintiffs, from which this appeal was taken.

From the transcript of the record before us, it appears that the only exceptions taken, on the trial of the cause, were to the instructions of the court to the jury. But these exceptions were not made the ground for the motion for a new trial. They were therefore waived. *Collier vs. State*, 20 *Ark.*, 36; *Graham vs. Roark*, 23, *Ark.*, 19. No rule is better settled than that the scope of review, in this court, is limited to the grounds upon which the motion for a new trial was based. *Hopkins et al. vs. Dowd*, 11 *Ark.*, 627. There is, therefore, no question of law before the court. If errors of law were committed on the trial, they have been waived.

We will remark, further, that it does not appear from the transcript that the overruling of the motion for a new trial was excepted to, and the motion is not, in fact, any part of the record of the case.

Finding no errors in the proceedings of the court below, from the transcript before us, let the judgment be affirmed.

BENNETT, J., did not sit in this case.

HON. W. I. WARWICK, *Special Supreme Judge.*

DUNNINGTON et al. v. BAILEY.

CIRCUIT COURTS---*When no jurisdiction on appeal.*---Where the amount in controversy, in a suit before a justice of the peace, is above the jurisdiction of the justice, the Circuit Court can acquire none on appeal.

APPEAL FROM INDEPENDENCE CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

U. M. Rose and *W. Byers*, for Appellants.
A. H. Garland, for Appellee.

GREGG, J.—The appellee, in 1869, sued Metcalf and Seymore before a justice of the peace and recovered judgment. An execution was issued and returned, "no property found." The justice endorsed thereon, "renewed for twelve months."

Sometime thereafter, the constable seized certain cotton which was claimed by the appellant. Under *Section 727 of the Civil Code of Practice*, the appellant, in order to hold the cotton, tendered a bond with security, which was approved by the constable and returned with the execution.

The bond did not conform to the statute; it was for $3000, not given to the plaintiff in the execution but to him and Burr & Reed. There was no showing as to what the property was valued at, or what portion was seized under Bailey's execution, or what under an execution in favor of Burr & Reed, which appeared also to be in the constable's hands.

On the 4th of January, 1871, the appellee moved the justice of the peace for judgment on the bond, reciting that it had been executed by Dunnington to him. The justice sets out on his record the $3000 bond of Dunnington and Wright to Bailey and Burr & Reed; a jury was empanneled, and they returned that they found the property not subject to the execution. The justice rendered judgment that the "levy be annulled, the property restored," and that Bailey pay costs; from which Bailey appealed to the Circuit Court, and obtained a supersedeas. The record does not show what issues were

made up in that court, but shows that a jury was empanneled to try the issues, and that they returned that they found for the appellee $74 05, with ten per cent interest on the amount, for which sum and costs judgment was rendered against Dunnington, and he moved for a new trial and in arrest of judgment, which motions were overruled, and he excepted and appealed to this court.

The motions and bill of exceptions are verbose and lengthy. We deem it only necessary to say that the grounds, in the motion in arrest of judgment, seem to be well taken.

This is not a statutory bond in the form and with the conditions prescribed by the Code and without deciding what was, or was not Dunnington's liability on that bond, it is not such as authorized a recovery in this form of proceeding. *Watson vs. Gabbery*, 18 *B. Mon.* 664. Bailey's proceeding against Dunnington was commenced by motion upon this $3000 bond, before the justice of the peace. The bond was the foundation of his complaint there, and it being for a sum above the jurisdiction of a justice of the peace, he could not successfully prosecute such claim in that forum.

If the justice of the peace had no jurisdiction, the Circuit Court could acquire none by appeal. *Collins vs. Woodruff*, 9 *Ark.*, 463; *Latham vs. Jones*, 6 *Ark.*, 372.

The judgment is reversed and the cause remanded for the appeal to be dismissed for want of jurisdiction.

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WEAVER & WEAVER v. FLETCHER & HOTZE.

PAROL EVIDENCE—*When written contract not varied by admission of*—The admission of parol evidence to establish a contemporaneous, collateral, substantive agreement, relating to the same subject matter and forming a part of the consideration of a written contract, does not contravene the general rule that parol evidence will not be received to contradict, vary, or in any manner control the legal import of a written contract.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Gallagher & Newton, for Appellants.

We submit that the decision of the court below was erroneous on two grounds:

First. Mistake of original transaction. See *Baltimore etc., Steamboat Co., vs. Featherston,* 54 *Penn.,* (4) 77; *Woodfin vs. Slader,* (*Phill. N. C.*) *l.* 200.

Second. It was a collateral substantive agreement, and as such can be proved by parol. *Branch vs. Wilson,* 12 *Fa.,* 543. *Part* only was reduced to writing. *Cobb vs. Wallace,* 5 *Cold.* (*Tenn.*) 138; *Fox vs. Parker,* 44 *Barb.,* 541.

Farr & Fletcher, for Appellees.

The note was the written contract between the parties, and it is a well established rule of law that a parol contemporaneous agreement will not be allowed to contradict or vary the written contract of the parties. *Borden et al. vs. Peay, Rec.,* 20 *Ark.,* 294; *Greenleaf on Ev., vol.* 1, *secs.* 275, 282, 319; *also Featherston vs. Wilson,* 4 *Ark.,* 154.

BENNETT, J.—Fletcher & Hotze sued appellants, in the Pulaski Circuit Court, upon their promissory note for $791 35. Appellants appeared and filed their answer, wherein they set forth that being indebted to the plaintiffs, Fletcher & Hotze, in a certain sum upon account, they delivered to plaintiffs an amount of cotton, which, at the time of delivery, was to be

credited upon said account at the rate of fourteen cents per pound, but, "if there should be a rise in market when said cotton should be sold in value over and above fourteen cents, the defendants were to receive the benefit of said rise or its market value." With this understanding the defendants executed their note for the balance of the account, with the further agreement that the amount, if any, of the excess in price of the cotton, when sold, should be credited upon it. The answer also alleges that the cotton did sell for a greater amount than fourteen cents per pound, amounting in the aggregate to $400, and they claim that said amount should be allowed them in settlement of the note.

Appellees filed demurrer to answer, which was sustained by the court. Judgment was rendered for full amount of note and damages, from which judgment an appeal was granted. Two causes of demurrer were assigned, viz: "1st. Because the said answer sets up a *verbal* contemporaneous agreement by which the note sued on should be credited. 2d. Because said answer alleges that there was an agreement between plaintiffs and defendants, at the time said note was executed, that if there should be a rise in the price of cotton, said defendants should have the benefit of the rise in thirty-eight bales of cotton which defendants had previously sold to plaintiffs at fourteen cents per pound, and said answer does not allege that said agreement was in writing.

The demurrer may be considered as a whole, as both causes assigned are based upon the general rule that parol evidence is not admissible to vary or alter a written instrument, and, if admissible for any purpose, it must generally have a foundation in pre-existing evidence of fraud, accident or mistake.

It is certainly true that parol evidence will not be received to add to or take from a written agreement a term or stipulation which, though agreed upon between the parties as part of the contract, was not introduced into the written instrument, for this would be to alter the agreement. But, consistently with this principle, it is well established that a substan-

tive collateral agreement may be substantiated by parol evidence. Chitty says: "After an agreement has been reduced to writing, it is, by the rules of the common law, competent to the parties at any time before breach of it by a new contract not in writing, either altogether to waive, dissolve or annul the former agreement or in any manner to add to or substract from, or vary or qualify the terms of it and thus to make a new contract which is to be proved, partly by the written agreement and partly by the subsequent verbal terms engrafted on what will then be left of the written agreement." Thus, when there was a written contract "for the hire of a horse for six weeks at two guineas, Lord Ellenborough permitted parol testimony to be given that, at the time of the hiring, it was expressly stipulated that the horse would shy, and the hirer, if he took him, should be liable to all accidents."

In the case of *The King vs. Larmidon*, 8 *T. R. Durnford & East*, 379, the question as to a settlement was, whether the parties intended to contract as master and servant, or as master and apprentice; the written agreement was as follows: "I, J. M, do hereby agree with J. C. to serve me three years to learn the business of a carpenter; the first year to have, 1s 2d per day, as follows, etc." In addition to this J. C. was admitted to prove at the trial that, at the time of signing the agreement, he agreed to give J. M. the sum of three guineas as a premium to teach him the trade and that he was not to be employed at any other work. The court of King's Bench held that the evidence was admissible.

How does the case before us appear from the pleadings? By the filing of the demurrer, the plaintiffs, at least for the time being, admitted the truth of the answer. From this we learn that the Weavers were owing Fletcher & Hotze a large sum of money for goods, etc.; that in order to liquidate this sum in part, the Weavers let them have thirty-eight bales of cotton. At the time of delivering this cotton it was stipulated between them that the Weavers were to have credited upon

their account the cotton at fourteen cents per pound, but with the additional understanding, that if it should bring more, when sold, they were to have the benefit of the advanced price. Fletcher & Hotze credited the Weavers account at fourteen cents per pound. A balance appearing to be due them after deducting the value of the cotton at that price, the Weavers executed the note which is the foundation of this action. When the cotton was sold, it brought $400 more than the amount which the Weavers had been credited with by Fletcher & Hotze, which amount they have received from the cotton, and the Weavers claim should be deducted from the note.

If the evidence of the facts, as alleged in the answer of the defendants, would tend to contradict, vary, or in any manner control the legal import of the note sued on, as between the parties, its admission could not be sanctioned. But on a careful examination of the answer it will be seen that there is nothing inconsistent with the written legal effect of the note. The facts alleged, and the evidence necessary to substantiate them, will only establish a distinct collateral agreement between the same parties, which was not considered necessary to be put in writing when the note was given, but which, in fact, constituted, in part, the consideration of it. The authorities are abundant that proof of such an agreement, not inconsistent with the terms of the note, may be made by parol evidence. *Prible vs. Baldwin*, 6 *Cush.*, 557; *Nickerson vs. Sanders*, 36 *Me.*, 413; *Hersey vs. Venel*, 39 *Me.*, 271; *Burney vs. Morrel*, 57 *Id.*, 372; *Brunch vs. Wilson*, 12 *Florida*, 543; *Cobb vs. O'Neill*, 2 *Sneed*, 438.

Has the fact that the plaintiffs are suing upon a note, given under these circumstances, placed them in any different relation to the defendants than if the suit had been brought upon the original account? The promise of the defendants to pay the balance due on an account at a certain time, with the understanding that that balance might be reduced by certain contingencies which might arise, has, it is true, undergone the slight

modification of having the first part of the agreement put in the form of a written obligation, which is the foundation of this suit; but still the plaintiffs are in fact seeking to enforce the original contract, and the question of right must be settled in the same manner as though the action was in form upon the original account. But the plaintiffs, by their demurrer, urge that the damages or credits claimed do not spring out of the written obligation sued upon, but arise under the collateral agreement. It is undoubtedly true that there can be no counter claim by setting up an independent contract on the part of the defendant. But that is not this case. The defendants allege facts which, if true, show that the plaintiffs have appropriated moneys belonging to them which should go in part payment of the note. The amount of $400, so used, grows out of the mutual stipulations between the parties, made at the time the note was given and relating to the subject matter. There can be no difference in principle, whether the whole transaction is embodied in one written instrument setting forth the cross obligations of both parties, or whether it takes the form of a separate and distinct understanding—one in writing, the other verbal—by each party.

The defendants proposed to the plaintiffs to let them have a certain lot of cotton, to be credited on their account, at 14 cents per pound—they, the defendants, to be entitled to the rise. Upon this understanding they executed their note as an evidence of the balance due at that time. If the cotton had only sold for 14 cents per pound that would have shown what defendants were owing plaintiffs when the sale was made, but the cotton brought $400 more when sold, which amount, under the agreement, pays the note to that extent—it having been used by plaintiffs. Had the agreement, as to the rise, been incorporated into the note, this answer would have been a good and valid counter claim under the code. So it would have been had the whole subject matter rested in parol without writing. The nature of this transaction, however, cannot be changed by putting the

several stipulations of the parties into the form of distinct written contracts. Nor can it make any substantial difference that the undertakings of one party have been reduced to writing, while the engagements of the other remain in parol. In substance, it is still the case of mutual stipulation between the same parties, made at the same time, and relating to the same subject matter. The forms which the parties may have adopted for the purpose of manifesting their agreements cannot affect the rights, so far as the question is concerned. Whether all the mutual stipulations have been embodied in one instrument or in several, or whether some have been put upon paper while others rest in parol, the reason still remains for allowing the claims of both parties, growing out of the same transaction, to be adjusted in one action, if for no other reason than to avoid circuity or multiplicity of actions, and doing complete justice to both parties. In the case of *Reab vs. McAllister*, 8 *Wendall*, 109, Chancellor Walworth well remarked that "there is a natural equity, especially as to claims arising out of the same transactions, that one claim should compensate the other and that the balance only should be recovered." But the question of showing, by parol, independent collateral agreements, in connection with the written cause of action, is well settled upon authority. In *Frisbee vs. Hoffnagle*, 11 *Johns. R.*, 50, the action was upon two promissory notes, given by the defendant to secure the purchase money for a piece of land which the plaintiff had conveyed to the defendant with warranty. The defendant was allowed to defeat the action by showing a breach of warranty. The parties to this suit had given to a single transaction the form of two distinct agreements, and yet, when the defendant was sued upon his promise, he was allowed to set up a breach of the plaintiff's undertaking in answer in the action. The case of *Spaulding vs. Vandercock*, 2 *Wend.*, 431, in every important particular, is like the case under consideration. The plaintiff sold provision barrels and agreed that they should be such as would pass inspection under the law. The defendant had

given his note for the price, while the plaintiff's promise still remained in parol. Yet, in an action upon the note, the defendant was allowed to show this fact. In the case of *Borden et al. vs. Peay, Receiver*, 20 *Ark.*, 294, Chief Justice English held: "That in a suit upon a note, payable at a specified day, the defendant will not be permitted to introduce evidence of a parol contemporaneous agreement that the note was to be paid at a different day or in a different manner, as that the parties had agreed that the note was to be paid in work, and that the collection of it was delayed that the debtor might have the benefit of this agreement." But, "it was competent, however, for the parties to show that printing had been done, the time when done and the amount and price thereof, and that by agreement of parties the price of the work so done was appropriated as a payment upon the notes, because such evidence relates to the discharge of the notes, and in no way affects the terms of the written contract."

The same general doctrines will be found in the celebrated case of *Reab vs. McAllister*, 8 *Wend.* 109; also in *Burton vs. Stewart*, 3 *Wend.*, 236; *Still vs. Hall*, 20 *Id.*, 57. There is, therefore, nothing in the position that the defense, set up in the answer, contradicts, varies or alters the note. The defendants do not deny the execution of the note, but admit it. There is nothing inconsistent with this written stipulation of the parties, and the facts, as alleged in the answer, are a distinct collateral agreement, an independent substantive matter which was not required to be placed in writing. When, in the future, the cotton, which had been received, rose in value to the amount of $400, the defendants were entitled to that much money or credit. If appropriated by the plaintiffs, it virtually became a payment to that extent of the note or other indebtedness of theirs.

The demurrer was improperly sustained; the cause is remanded with instructions to overrule the demurrer, and proceed to trial not inconsistent with this opinion.

SIMMONS v. SMITH.

PRACTICE—*When evidence conflicting.*—It is the province of the jury to weigh the evidence and find the facts, and this court will not disturb that finding in doubtful cases, or where the evidence is conflicting.

APPEAL FROM DREW CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Gallagher & Newton, for Appellee.

GREGG, J.—This is an action of assumpsit, brought by the appellee against the appellant, in the Drew Circuit Court, for $617 61½, for so much money received by the appellant of commissions due the appellee as the administratrix of the estate of John Smith, deceased.

The appellant plead non-assumpsit, payment and set-off, upon which issues were formed; a trial was had before a jury; verdict and judgment for the appellee for $617 61½.

The appellant moved for a new trial, because the verdict was contrary to the law, the evidence, the instructions of the court, and the damages assessed were excessive.

The court overruled the motion; he excepted and appealed.

The evidence was conflicting; however, it seemed more favorable to the appellee. It was the province of the jury to weigh the evidence and find the facts; they did so, and the Circuit Court, in its discretion, would not disturb their finding, and, as has so often been holden, this court will not weigh the evidence in doubtful cases.

There being no sufficient grounds to warrant an appeal in this case, the judgment will be affirmed, and the appellant taxed with ten per cent. damages on the amount of the judgment against him.

JONES v. DOSS et al.

VENDOR'S LIENS—*When notes given for purchase money assigned, etc.*—The vendor's lien is *personal*, and 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.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

A. H. Garland, for Appellant.

First. As a general proposition, if a debt is secured by an express lien upon property, by agreement of parties, an assignment of the debt, secured by such lien, will give the assignee the benefit of such lien: 2 *Wash. Real. Prop.* 92; 4 *S. & N.* 294; 5 *Hump.*, 489; 2 *Yerg.*, 84; 4 *Iowa*, 430; 2 *Dana*, 98; 6 *B. Mon.*, 67; 1 *Blackf.*, 417; 7 *Ib.*, 329; 5 *Ind.*, 492; 13 *Ark.*, 533; 15 *Ves.*, 339; 10 *Ala.*, 441; 7 *Blackf.*, 227. By our law, the lien is held to pass in certain cases with the note: 18 *Ark.*, 142; 23 *Id.*, 225.

McCLURE, C. J.—On the 20th of January, 1860, Bocage sold six hundred and forty acres of land to one Leroy Doss for the sum of seven thousand dollars, one-third of the purchase money in hand, and the balance in two equal payments, due January 1st, 1862-3, respectively.

On the 14th of January, 1862, Bocage and wife made a deed to Doss, acknowledging the receipt of the first payment. The deed alluded to, in addition to the above, recites the fact that Doss has executed his two notes, bearing date January, 20, 1860, to Bocage, for $2333 33 each, due as before stated; said deed also contains this further clause, to wit: "*it being distinctly understood that a lien is reserved on the above granted premises to secure the payment of the purchase money in full.*"

The note due January 1st, 1862, was, on the 15th day of December, of that year, assigned by Bocage to N. K. Jones,

the complainant and appellant in this case. Doss died and, on the 19th of January, 1867, one Bagg was duly appointed administrator on said estate. On the 9th of April following, Jones presented his note, duly authenticated, to the administrator for allowance, and the same was rejected, but was afterward allowed by the Probate Court, and classed as a fourth-class claim. After the claim was allowed and classified, Bagg, the administrator on the estate of Doss, was ordered to sell the lands of which Doss died seized, to pay debts, which was accordingly done, and one W. P. Grace became the purchaser.

The note which fell due on the 1st of January, 1863, was, by Doss, in his lifetime, taken up by giving to Bocage a note on Davis & Templeman, which was for a like amount, and due at the same time the note was which Doss took up. Bocage transferred the Davis & Templeman note to one Carroll, and Carroll transferred the same to W. P. Grace, who presented the same to the Probate Court, and had the same allowed as a fourth-class claim against the estate of Doss, deceased. What authority the Probate Court had to allow the note of Davis & Templeman as a fourth-class or any other class claim against the estate of Doss, is beyond our knowledge, but, as the judgment is unappealed from, we will pass this subject without further comment.

On the 5th of October, 1869, Jones filed his complaint, in equity, asking that he be subrogated to the rights of a vendor, and that the lands of which Doss died seized, be sold to pay his debts. To this complaint, Francis Doss, Minus Doss, W. P. Grace, and C. M. Bagg, administrator of Leroy Doss, deceased, are made parties defendants. At the hearing, in the court below, judgment was for the defendants, and Jones appealed.

The complaint, in this case, alleges the sale of the land, the reservation of a lien in the body of the deed, the execution of the notes by Doss to Bocage, and the assignment of one of them to the complainant, etc. The view we take of this

matter renders it unnecessary to state any of the matters set up by the defendants, save those presented by a general demurrer to the complaint. Viewed in this light, there is little difference between this case and that of *Sheppard vs. Thomas*, (26 *Ark.*, 617.)

The only distinction between this case and the one referred to, is, in the language assigning or transferring the note. In the case of *Sheppard vs. Thomas*, (26 *Ark.*, 617), the notes were simply assigned "for value received;" in this case, there are two assignments endorsed on the note, one of which reads as follows, and is found on the back of the note: "For value received, I assign the within note to N. K. Jones, December 15, 1862. (Signed) Jos. W. Bocage."

The other endorsement is written across the face of the note, but bears no date, and is as follows: "For value received I hereby assign all my right, title, interest and equity in this note to N. K. Jones. (Signed) J. W. Bocage."

If we should treat the assignment, made December 15, 1862, as the *only* assignment of the note, this case would fall within the rule laid down in the case of *Sheppard vs. Thomas*, (26 *Ark.*, 617), and the doctrine of *stare decisis* would forbid any extended argument of the question presented in this case. But it is insisted that the assignment of the *equity* by Bocage to the complainant, places him on higher and more tenable grounds than one who simply came into the possession of the note in the ordinary course of business. In order to ascertain if this be true, the first question to be determined is, whether Bocage had an equity which was *assignable*. It was said by the minority, in *Sheppard vs. Thomas*, (26 *Ark.*, 617), that, "there are *two* kinds of vendor's liens," and they are described as follows:

First. "A lien by express contract, or by agreement between the parties," and *Second;* "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."

In speaking, or rather in describing the first lien, the mi-

nority say, "where a vendor stipulates for a lien to secure the payment of the purchase price, and gives proper notice to all who may be concerned, such lien then becomes a security for such purchase money, and may be enforced by the vendor, or he may assign it to another, and such holder may enforce it." But *how* is the "*proper notice*" to be given? Can it be done by making the reservation of lien in the face of the deed and placing it of record? We think not. To tolerate such a course, would as effectually encourage secret liens, as to hold that the assignee of a note given for the purchase of lands, took all the equities of the vendor. This deed, says Bocage, shall have a lien upon the lands for the unpaid purchase money—the law gave him such a lien without any such expression in the deed, but, it is argued, because the parties have *expressed a lien*, that the presumption arises that something beyond what the law implied was intended. Here is where the argument is at fault. The *expression of the lien was not* for the purpose of giving to the notes, for the unpaid purchase money, a greater value than they would otherwise possess. Bocage knew, as does every man who understands the law, that after he executed an absolute deed for the land, that his vendor's lien was only good against the vendee, his heirs and other privies in estate, and purchasers *with notice*. What was really intended by the *expression of the lien*, was to place constructive notice on the record, *to purchasers of the estate*, and not to create an equity which would follow the notes into the hands of an assignee. The law, from the time the memory of man runneth not to the contrary, has been that the vendor's lien was *personal*, and not *assignable*. With this fact kept well in view, let us examine the language of the deed and see if the words there employed evidence an intention to create a lien which should follow the notes into the hands of an assignee; or whether it evidences an intention to warn purchasers of the estate, that *not the assignee* of the notes has a lien, but that the *vendor* has.

After the words "to have and to hold the above granted

premises to the said party of the second part, his heirs and assigns forever," is found the following: "it being hereby distinctly understood that a lien is reserved on the above granted premises to secure the payment of the purchase money in full." By reference to another portion of the deed, we find that the purchase money was due and payable, not to Bocage or his assigns, but to Bocage himself. It is a well known rule, that a deed will be most strongly construed against a grantor. This being true, and it being conceded that a vendor's lien, where an absolute deed has passed between the parties, was not a valid lien as against *purchasers without notice*, the question arises, what was the object of the parties in placing the words creating a lien in the body of the deed?

There is nothing in this transaction which indicates an effort on the part of Doss, or Bocage, to do aught else than to notify the public that the purchase money for the lands described in the deed was not all paid. There is nothing in the deed which imports that either Doss or Bocage made mention of a lien for the purpose of imparting a greater value to the note, or for the purpose of rendering a negotiation of the note less difficult. Bocage knew that a vendor had a lien for the purchase money against everybody, *save purchasers without notice*. Under such circumstances, what would a prudent man do? We think he would do just what Bocage did, take the precaution to place of record a fact which would preclude the possibility of any man purchasing the estate without notice of the non-payment of the purchase money.

It is true, the notes were to remain liens until the purchase money was paid, but it must be borne in mind that this language must be restricted in its meaning to the contracting parties, for we are not at liberty to assume, that, at the time of making the contract, either party had reference to assignees, or third parties. If these parties had desired to create a security or lien, which would follow these notes into the hands of third parties, language, showing such an intention,

should have been employed in the deed. We have no power to interpolate terms and conditions, at the instance or request of either party. The general rule is, that a deed shall be construed, in cases of doubt or ambiguity, most strongly against the grantor. The vendor's lien is personal to himself, and cannot be transferred after the title to the property has been alienated. Equity raises the lien in his favor, because it would be wrong for one to have and enjoy the lands of another without payment therefor. When the *vendor* has received satisfaction, the reason for the equity no longer exists. It may be said, there is no hardship in allowing this lien to pass to the assignee, and that it can make no difference to Doss, whether he pays to Bocage or some one else. We are not discussing a question of hardship. Older and wiser heads than ours have said the lien of the vendor was *personal* and not assignable after the vendor had parted with his title, and if the reasons given for the establishment of that rule, fail to carry conviction to the minds of those who yet doubt its correctness, we acknowledge our inability to do so. After the *vendor* has been satisfied, we can see no reason why one creditor should be placed upon higher grounds than another.

Bocage had no equity in the note, which was transferrable to Jones, or any one else, of a character to authorize the bringing of this suit. Finding no error in the proceedings of the court below, the judgment is in all things affirmed.

GREGG, J., dissenting says: I would have added nothing to what I said in the case of *Sheppard vs. Thomas*, upon the main question in this case, but it seems that I did not make myself fully comprehended by the court.

In that case I assumed that absolute owners of real property had a right to sell and convey the same or any part thereof or interest therein, or they could sell, subject to any conditions, restrictions or limitations, (not prohibited by law) and they could reserve just such right or interest, contingent or absolute, as they saw fit, and that, under our registry

laws, when a deed was put upon record, all concerned must know in whom the title vested, and the full extent of, and all limitations upon such title; the record affects such with notice.

I also assumed that the courts, in construing a deed, should endeavor to arrive at the meaning and intention of the contracting parties; that this fundamental rule in the law of contracts, as long since declared by this court, *Davis vs. Tarwater*, 15 *Ark.*, 287, is as applicable to agreements by deed as any other contracts, and when the contracting parties express their intention, the courts are not authorized to attach any other meaning to their agreements than what they themselves do, and that the courts ought to carry out the expressed will of the parties.

And I assumed further, that what is considered odious in secret—hidden liens—including what is technically equitable liens, does not attach to any lien created or reserved upon the face of a deed or otherwise published, by recording under the registry acts, so all can see the extent of the vendor's claims and the vendee's title. Every purchaser is supposed to investigate title before he invests his money. He would certainly be guilty of culpable laches if he did not ask an exhibit of the seller's titles, and he has only to read the deed, or its record, to see exactly what title is held by his vendor; he sees all that has been conveyed to him, and all the incumbrances, conditions and limitations upon such title, and consequently knows exactly what interest he is getting by the purchase, and cannot be deceived by any parol representations.

The liens disfavored, by courts, are those wherein a vendor makes a clear and unconditional conveyance, evidencing a receipt of the purchase price, and after that attempts to hold a secret lien for purchase money.

If the intention of the parties is to govern, when they assert, by a solemn provision in their deed, that a lien shall be held until the purchase money is paid, I know of no law

or rule giving us the right to say they meant only so long as the vendor held the notes, and did not mean what they said, until the notes were paid off. Had they wanted a lien in Bocage's favor only, they could just as well have said so; they did not say that, and we must presume they did not so intend, and from the stress this court puts upon the presumption that Bocage knew the law, we can certainly be indulged in assuming that he knew the force of common, plain English words. In the argument, the court say: "This deed says Bocage shall have lien;" this is the error; it says a lien is *reserved for the payment of the purchase money.*

They say the lien was not to give these notes a greater value than they otherwise would have possessed. How was this conclusion reached? We see nothing of the kind in the deed, and no intimation to that effect appearing anywhere between the parties, and by our reflections on the conduct and declarations of the parties, we arrive at exactly the opposite conclusion. We think it was the vendor's interest, and by his words and actions he has sufficiently shown, that it was his intention to make these notes most valuable, and we are not confined alone to the fact that such notes are commercial paper, and are largely put on the market in the business transactions of the country, but when Bocage so soon put them on the market, we may well conclude he intended to use them in that way, and reserving a lien for their payment, signified his intention to secure such payment.

The court say: "Bocage knew, as does every man who understands the law, that after he executed an *absolute deed* for the land, that his vendor's lien was only good as against the vendee, his heirs and other privies in estate, and purchasers with notice." Now if this stipulation in the deed was sufficient to compel purchasers to see that he was paid, why was it not sufficient to require them to see that the notes were paid, if the stipulation required such payment, which, in this case, is not controverted? But they say when Bocage executed an *absolute deed*, he knew, etc. Now we think this is a

misapplication of a significant term. This, as we understand it, was not an absolute deed in the legal or common acceptation of that term; to be absolute is to be free from all condition or limitation. This deed is not such, and to reason from that assumption, the argument is at fault and the conclusion wrong.

The stipulation, in this deed, made it the reverse of absolute, and such condition, incorporated in the deed, carried with it rights that would not follow secret equities upon an absolute deed; hence it seems fallacious to urge such reasons in this case as are applicable when deeds are absolute on their face. The court say: "It is true the notes were to remain liens until the purchase money was paid, but it must be borne in mind, this language must be restricted in its meaning to the contracting parties," etc. Why change the meaning in this? Why restrict it more than any other clause in the deed? If expressed in the deed, it is no secret lien, it becomes notorious by being of record, and we favor letting the whole deed mean what the grantor and grantee intended it should mean.

In another paragraph of the opinion it is said: "They only wanted notice that the purchase money was not paid." If that be so, then the words, creating or declaring this lien, were without any necessary use or meaning, because, before that time, they had set out in the deed the fact that only one third of the purchase money had been paid, and that two-thirds were not paid, and not to be paid until times fixed long in the future; and are we to suppose that the parties, after they had shown that the purchase money was not paid, went on to formally declare that a lien should be held merely to repeat what they had already announced. It seems that this could not have been the intent. As intimated, in the beginning of these remarks, we seem to differ in the groundwork of this question; the majority seem to hold that a vendor cannot pass a legal title, and, in the same contract or deed, hold an equitable one that will enure to the benefit of an

assignee of notes, while I hold that an absolute owner can sell what interest in the title he chooses, and withhold what he chooses, and for just such purpose (not unlawful) as he sees fit, and that the written contract or deed between him and the vendee is to evidence the intention, obligation and rights of the parties, and, in construing a deed, full effect should be given to all its conditions and stipulations as they were understood between the contracting parties. But I will only refer to my argument and the authorities cited in the case of *Sheppard vs. Thomas*, 26 *Ark.*, 617, and not comment at length.

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HERSHEY AND WIFE v. CLARK.

TENANTS IN COMMON—*Right of possession as respects each other.*—Where parties *in right of title* are tenants in common, if one have the possession and the other enter by favor of, or under contract from him so in possession, the party so entering cannot, while holding possession thus acquired, dispute the title of the other or litigate his own right to possession.

APPEAL FROM CRAWFORD CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

U. M. Rose, for Appellants.

We submit that the parties were *tenants in common* and, in such case, one of the parties had the same right of possession which the other had, and therefore each will be presumed to have held in accordance with his or her title, and not otherwise: *Dresser vs. Dresser*, 40 *Barb.*, 300. Nothing but a clear and express agreement will make one tenant in common a tenant of another holding under him as a landlord, for any interest whatever in the premises: *Wilcox vs. Wilcox*, 48 *Barb.*, 327.

One tenant in common is not bound to yield possession on demand as was required in this case: *Conover vs. Earl*, 26 *Iowa*, 167; *Holton vs. Binns*, 40 *Miss.*, 491.

The possession of one is the possession of all, and an action will not lie by one tenant in common against his co-tenant: *Strong vs. Coulter* 13 *Minn.*, 82. Nothing short of an express agreement, founded on a consideration, will change the legal situation of the parties: *Wilcox vs. Wilcox*, 48 *Barb.*, 327; *Crane vs. Waggoner*, 27 *Ind.*, 52. The possession of a tenant in common will be presumed to be in right of the common title, and all acts and declarations will be construed most strongly to sustain this view: *Bailey vs. Trammell*, 27 *Texas*, 317; and a mere silent occupation by him will not be held to be an adverse holding: *Marr vs. Gilliam*, 1 *Cold.*, 448; and even adverse possession loses its hostile character when the party in possession becomes a tenant in common in the ownership of the property: *Carpentier vs. Mendenhall*, 28 *Cal.*, 484.

A. H. Garland, for Appellee.

We submit that it was proved, on the trial below, that appellee had title to the property, or, at least, to an undivided portion of it, and appellants went into possession of it under appellee's lease and consent, and never set up any adverse title at all. This clearly established the relationship of landlord and tenant, and gave appellee the right to maintain this suit, and the law declared by the court was correct. See *Halliburton vs. Sumner*, *p.* 460 *ante*; 18 *Ark.*, 284; *Ib.*, 304; 13 *Id.*, 448; *Amendments to Code*, *p.* 31, *Sec.* 495 *et seq*; *Gould's Digest*, *Chap.* 72, *Secs.* 2 *and* 3, *p.* 541.

The law having been correctly given, this court will not examine into the testimony to decide the case upon it: 26 *Ark.*, 362, *and cases cited.*

GREGG, J.—On the 15th of July 1871, the appellee brought a suit of unlawful detainer against the appellants for a house and some lots in the city of Fort Smith.

The appellants, by plea, set up that the wife was the owner of a one-fourth interest and a tenant in common with the appellee, and as such, entitled to the joint possession with her, and also set up the statute of limitations, which was afterward virtually abandoned. The appellee filed a replication which the court properly struck out.

Upon the trial, it appeared that appellee and the appellant, Ann E. Hershey, were sisters; that the property, in controversy, once belonged to Abraham and Aaron Clark, two brothers, both of whom had died without issue; that Abraham first died, intestate, leaving these two and one other sister, who are yet living, and another brother and sister who have since died, intestate and without issue. Aaron willed all his property to the appellee and his mother, and the mother has died.

The property, in controversy, had long been in the peaceable possession of the appellee and claimed and controlled by her.

In March, 1865, Mrs. Hershey, in the absense of her husband and, at the solicitation of the appellee, moved into her residence on these premises. In August following, appellant, Benjamin, returned and joined his family there, and they resided with the appellee until the commencement of this suit. Before suit, appellee, in writing, demanded possession of the appellants, and they refused to surrender possession of the same.

The court instructed the jury, in effect, that if they find from the evidence that the plaintiff was in the sole possession of the property, and that the defendants entered by her invitation, as her guests or tenants, then, as to appellee, they occupied the relation of tenants, and they could not set up any adverse claim, and if, under such circumstances, they detained the property, after demand in writing, they should find for the plaintiff, and that no express agreement is necessary to fix the relation of landlord and tenant, but that it may arise where the one enters and occupies the premises of another with his permission or acquiescence, and from that a contract may be implied.

The court then instructed, at the instance of the defendants, that if they had had peaceable and uninterrupted possession for more than three years, next before the commencement of the suit, they must find for the defendants.

Secondly. "If the jury believe, from the evidence, that the defendant, Ann E. Hershey, at plaintiff's solicitation, moved with her children from Clarksville to Fort Smith, and took up her abode with the plaintiff, in the house on said premises, and continued to reside there until August of that year, when defendant, Benjamin F. Hershey, who went south during the late civil war, returned, and that he and his said wife and children continued to reside on said premises with plaintiff until the fall of 1869, with her consent, without any understanding or agreement either express or implied, in reference to the time or terms of their occupancy, they should find for the defendants." And,

Lastly. If they find that Ann E. was a tenant in common, and held peaceable possession, etc., for over three years, etc., without attorning to plaintiff, they should find for defendants.

The court then gave an instruction on its own motion, as follows: "That the deed read in evidence, from Rogers and wife to Abraham and Aaron Clark, is *prima facia* evidence of title in the latter; that if the father of grantees died before the execution of that deed, and that if Abraham Clark died before the year 1865, single and unmarried and without issue, and without will, leaving his mother and said Aaron, the plaintiff, defendant, Ann E. Hershey, and two other sisters, since deceased, defendant, Ann E. Hershey, inherited an equal interest with the surviving sisters in the undivided half of the premises conveyed by the deed from Rogers and wife, and is a tenant in common with the plaintiff; and if such facts appear from the evidence, you would be warranted in finding that said defendants had a right to occupy said property with said plaintiff as a tenant in common, unless he was plaintiff's tenant." To which the appellants excepted. And

it is here urged that this instruction made the jury judges of the law as well as the facts, and expressly made it optional with them to follow the law or not, and assumed that a tenant had not always a right to occupy during his tenancy, etc., and that it confused and misled the jury.

The last instruction was a crowd of words, and it had the appearance of leaving questions of law as well as fact to the jury, but taken in connection with all the other instructions, we are of opinion its inaccuracies did not mislead the jury.

The appellants insist that Ann E. Hershey was entitled to an undivided fourth interest in the premises; that she was a tenant in common and, as such, entitled to joint possession. This declaration of her *rights* is not denied as a legal proposition, but this is not an action to determine the parties' rights in the property, but to decide who shall have the present possession; and if Hershey and wife went into possession under the appellee, they became her tenants and could not question her title until they parted with the possession she had given them. This was the main question before the jury, and they found for the appellee, and as such finding was not without evidence this court will not question its correctness.

And to assume, as counsel do, that, because Mrs. Hershey had an interest in the property, she could set up her right of co-tenancy to defeat this possessory action, would certainly violate the rule that a tenant cannot dispute his landlord's title, but must surrender on expiration of his lease, or on demand, if holding at will. If an adverse title to a part could be set up by any tenant, certainly a legal right to the whole could be as well pleaded, and thus the door would be open to all tenants to dispute their landlord's claims by establishing title in themselves. This would violate well established law, and greatly disturb that relationship which should exist between landlord and tenant. The policy of the law will not suffer one to go into possession by the favor of another, and then take advantage of that favor and confidence and hold possession while he litigates a claim of title.

The judgment is affirmed.

JONES, Receiver v. RATCLIFFE, Assignee, etc.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Duffie & Jones, for Appellant.
Clark & Williams, for Appellee.

GREGG, J.—The attorneys for the respective parties concede that there is no error in the proceedings and judgment of the court below.

The judgment is therefore affirmed, with costs.

CARTER et al. Ex Parte.

COMMISSIONERS OF COURTS—*Compensation of, etc.*—Courts have a large discretion in determining the allowances to be made commissioners and similar officers appointed by them, and that discretion will not be interfered with, unless palpable injustice should result from its exercise; but the exercise of that discretion must be done by the court acting directly upon the report or matter before it, and not by or through the intervention of a master or other person appointed for that purpose.

APPEAL FROM RANDOLPH CIRCUIT COURT.

HON. ELISHA BAXTER, *Circuit Judge.*

A. H. Garland and T. J. Ratcliffe, for Appellants.

SEARLE, J.—The appellants, in this case, brought their *ex parte* action, in equity, to the Randolph Circuit Court, for the settlement, sale, division, etc., of the estate of Amy C. Marr, deceased, to which they were heirs. The estate was referred

by the court to Charles F. Bode, as commissioner, for settlement, sale, etc., who acted in pursuance of his appointment and made his report to the court. The court, by an order, fixed his compensation for these services at five per centum, on a sum not to exceed ten thousand dollars. The appellants objected to this amount as being excessive, and asked for a re-hearing of the matter, and to be permitted to introduce evidence to show what would be a reasonable allowance to the commissioner for his services. The re-hearing was granted, and the court appointed a special master to determine such allowance. In pursuance of his appointment, the special master made his investigation, and reported to the court that over ten thousand dollars of assets passed through the commissioner's hands; whereupon the court, by an order, fixed the compensation of the commissioner at five per centum of this amount. The appellants again objected, upon the ground that the allowance was unreasonable, and that they should be permitted to introduce evidence to the court, as to what was reasonable, and they appealed to this court. Circuit Courts have a large discretion in determining the allowances to be made to commissioners and officers of similar character for their services; and this court is not disposed to interfere with such discretion, unless palpable injustice should result from its exercise. In this case the allowance made to Bode, though it seems to be unreasonably large, is not so absurdly large as to justify us in inquiring into it, were it not for the manner the Circuit Court arrived at its ascertainment. Indeed, this is the only question we are disposed to direct our attention to. The court should have ascertained, directly from the commissioner's report, and other evidence, if necessary, in order to satisfy itself what should be allowed the commissioner in payment for his services, and not indirectly by the interposition of a special master.

Bode, himself, acted in the capacity of a special master in chancery, in the settlement of the estate; and it was certainly improper for the court to appoint a special master to

determine what amount should be his compensation. Had there been objections as to the allowances of this last special master, would the court have appointed a third? There certainly would have been as good reason for the appointment of a third, as of the second, and a fourth for that matter, and so on *ad infinitum*.

The order of the court below is reversed, and the cause remanded to be proceeded in, in a manner not inconsistent with this opinion.

REFELD v. FERRELL.

EQUITABLE LIENS—*May be shown outside of deed.*—The parting with the legal title and placing the vendee in possession, when relied upon as a defense by the vendee, in a suit by the vendor to enforce his equitable lien, will not prevent the vendor from showing the fact of sale and non-payment of the purchase money outside of the deed.

APPEAL FROM ARKANSAS CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

A. H. Garland, for Appellant.

We submit that, the purchase money being upaid, equity charges the land with its payment, and permits the facts of sale and non-payment to be shown outside. See 18 *Ark.*; 142; *Mackreth vs. Lymmans*, 1 *Leading Cases in Equity*, (*notes by Hare & Wallace*) 194, *et seq; top page* 248, *et seq.*

GREGG, J.—On the 25th of April, 1871, the appellant brought his action, in the Arkansas Circuit Court, against the appellee, for the possession of certain real estate.

At the September term following, the appellee filed his

answer, and on his motion the cause was transferred to the equity side of the docket.

The appellee alleged that, by verbal contract, the appellant sold the lands in controversy to W. R. Watkins, on a credit, for one hundred dollars, which was their full value at that time. That Watkins, with the full knowledge and consent of appellant, put about fifteen hundred dollars worth of improvements on the grounds, and held possession of the same, until the 11th day of July, 1867, when, with like knowledge, he sold the same to appellee, and put him in possession thereof, and that he held the same peaceably, and with appellant's full knowledge and acquiescence, until the time of making his answer. That he bought and paid for the premises with full knowledge of the appellant, and that he made no objection. That he has offered to pay the $100 due on the lot, but the appellant refused to accept the same or make him a deed, and he tenders the one hundred dollars and interest, in court. He prayed that the cause be heard in equity; that the appellant be decreed to make to him, as Watkins' assignee, a valid deed, and that he pay all costs.

The appellant responded to these allegations, that he did sell the premises to Watkins, for one hundred dollars, who was then indebted to him $1700 or $1800, and that it was the distinct understanding and agreement between them, that the title was to remain in the appellant, and that no deed was to be made Watkins until said indebtedness, as well as the $100 was fully paid, and with this knowledge and agreement, Watkins took possession and made the improvements, and that the purchase, or pretended purchase of the said Ferrel, was made with a full knowledge of these facts, and that appellant, at all times, set up his claim to said premises. That no money was ever tendered until long after the commencement of this suit, and then only one hundred and thirty dollars. That upon his hearing of the appellee's proposed purchase, he notified him of his claims upon the premises, etc.

A demurrer was sustained to this replication, and appel-

lant amended by averring more positively, that the consideration for the lot was the payment of the seventeen or eighteen hundred dollars, as well as the additional one hundred dollars, and that upon this consideration, the improvements were made, and the title was to remain in appellant until that full amount was paid, etc., and that appellee had full knowledge, at his pretended purchase, and when he took possession of the premises, and that no part of the purchase money has been paid.

The court sustained a demurrer to this amended response, and the appellant rested; whereupon, the court decreed that the appellant pay all the costs and make a good and valid deed to appellee for the premises and, upon the tender of such deed, that the appellee pay to him one hundred dollars, from which decree this appeal is prosecuted.

If it were true, as the court seems to have holden, that the appellant can recover no more than the amount named as the value of the lot, at the date of sale, and that his right of action was cut off by the appellee's tender, he would certainly have been entitled to interest from sale until the tender was made, and for that reason the decree should have been for more than one hundred dollars.

The decree below was based upon the appellee's answer, but upon the well established rule, that pleadings are construed most strongly against the pleader, the whole costs should not have been decreed against the appellant, because the appellee does not claim that he tendered him any sum, whatever, before the commencement of the suit. This court has repeatedly holden that where the purchase money was not paid, the vendor might enforce his lien by an ejectment suit, thereby placing himself in possession of the premises, where he can convert the rents and profits until his demand is extinguished. *Fears vs. Merrill*, 9 *Ark.*, 559; *Smith vs. Robinson*, 13 *Ark.*, 533; *Sullivan vs. Hadley*, 16 *Id.*, 144; *Pope vs. Boyd*, 22 *Id.*, 538. And surely a tender, after suit, could not relate back and cause him to be taxed with costs which he had been forced to pay to secure his legal rights.

But if these were all, the decree could be reformed in this court. The principal question is the sufficiency of the response to the allegations in appellee's answer. The answer admitted the legal title to be in the appellant, and that the purchase money had not been paid, but claimed that certain equities had arisen in favor of Watkins and himself, upon which title should be made to him upon the payment of one hundred dollars and interest, which he was ready to pay. Upon thus conceding the appellant's legal rights the appellee desired to change the forum to equity, wherein he might assert his claim, and in so doing he assumed the burden of establishing his own rights, and to that end he alleged the sale, etc., as above stated, and the appellant became the respondent, and that response admitted the sale to Watkins and averred that no part of the purchase money had been paid; that one hundred dollars was not the sole consideration for the lot; that seventeen or eighteen hundred dollars then due, in addition thereto, was to be paid, and that it was expressly understood that no title was to be made until the whole amount was paid, and with that understanding and agreement Watkins put the improvements on the lot, and that appellant in no way relinquished his right or clain upon the property, but always claimed the same, and the appellee knew all the facts at and before his purchase from Watkins.

It seems to us if these allegations be true—and upon demurrer they must be treated as facts—the appellant had a right to recover.

It is true that a litigant is often estopped, in equity, from establishing a claim upon a bare legal title to lands, whereon very valuable improvements have been made by another with his knowledge and consent, or wherein the parties labored under a mistake as to their legal rights, for it is unjust and inequitable for him, who knows his own legal title, to stand by and see an innocent and mistaken holder expend large amounts of capital and labor without notifying him of the outstanding claim.

But if the response, in this case, be true there is no such inequitable circumstances. If Watkins actually owed the appellant seventeen hundred dollars, and agreed to go upon this lot without title until that debt, and one hundred dollars in addition thereto was paid, and in the meantime to put several hundred dollars worth of improvements thereon, it was but a mode of securing the appellant, to that extent, in what was justly due him.

The replication was a sufficient response to the allegations in the answer, and the demurrer should have been overruled.

The decree is reversed and the cause remanded with directions to overrule the demurrer and proceed to a final hearing, not inconsistent with this opinion.

ARKANSAS INSURANCE COMPANY v. BOSTICK & RYAN.

POLICIES OF INSURANCE—*What the words "lost or not lost" evidence.*—Insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, even if that loss be total and the subject matter of the insurance is then non-existent, and this intention is expressly evidenced by the clause "lost or not lost," in the policy.

SAME—*When contract of insurance becomes complete.*—The contract of insurance, on an open or running policy, does not become complete until a declaration of a desire to insure is made by the assured, and until this is done the contract is incohate and incomplete, and if not made at all, the risk will be regarded as not having commenced.

SAME—*What will not work a forfeiture.*—The fact that, in the application for insurance and the policy, it is understood that the assured are to insure all goods consigned to or shipped by them, in the company, will not, of itself, on the failure of the assured so to do, work a forfeiture of the policy, unless such were the *express* terms of the instrument.

SAME—*When act of agent works estoppel.*—Where goods were reported to the agent of an insurance company as having been shipped from a given point, and the agent, by agreement with the assured, entered them as having been shipped from an intermediate way point, whatever may have been the requirements in this respect in the policy, the company will be estopped by the act of their agent from setting up this supposed deviation as a ground of defense.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Benjamin & Barnes, for Appellant.

We submit:

First. That where a party takes out an open policy of insurance, and his application is an agreement that he will insure all property shipped and belonging to him during the existence of said policy, and fails to do so, it avoids and vitiates the policy, is a fraud on the company and they are entitled to cancel the policy as soon as they find it out. *Sec.* 2 *Parsons on Maritime Laws, p.* 153–4–59, *and cases cited*; *Demistown vs. Lillie*, 3 *Bligh*, 232.

Second. That the appellees holding an open policy of insurance, requiring them to insure from the port where the goods are shipped, their application for insurance from an intermediate point was a fraud upon the company, and the company had a right to reject their application for insurance and cancel the policy. *See Hodgeson vs. Richardson*, 1 *Bl.*, 463; *Reid vs. Harvey*, 4 *Dow*, 97; *Selan vs. Law*, 1 *Johns.' cases*, 1; *Nanderlavel vs. United States Ins. Co.*, 2 *Johns.*, 451; *Palmer vs. Warren Ins. Co.*, 1 *Story*, 360.

Third. That the application for insurance being after the loss, and from a way or intermediate point, the company had a right to reject the application. *See Danville vs. Mutual Ins. Co.*, 12 *La. An.* 251; *Orient Ins. Co. vs. Wright*, 23 *How.* (*U. S.*) 401.

Clark & Williams, for Appellees.

We submit:

First. That the fact that the goods were lost before the shipment of them was reported to the agent of the company, would not prevent the plaintiffs from recovering. See *Davenport vs. Peoria Ins. Co.*, 17 *Iowa*, 276; *Kelley vs. Commonwealth Ins. Co.*, 10 *Bosw.*, (*N. Y.*) 82; 2 *Parsons on Cont.*, 364, 368; *Paddock vs. Franklin Ins. Co.*, 11 *Pick.*, 227; *Orient Mut. Ins. Co. vs. Wright*, 23 *How. U. S.*, 401, 406, 411; *Mark vs. Etna Ins. Co.*, 29 *Ind.*, 390; 1 *Phillips Ins. chap.* 5, *sec.* 2, *p.* 25.

Second. In the absence of an express stipulation to that effect in the policy, the fact that plaintiffs did make other shipments not insured in the company, would not vitiate their policy. See *Danville vs. Sun Ins. Co.*, 12 *La. An.* 259; *Orient Ins. Co. vs. Wright et al.*, 23 *How., U. S.*, 401, 411; *E. Carrier Co. vs. Manufact. Ins. Co.*, 6 *Gray* (*Mass.*), 214; *N. Y. Ins. Co. vs. Roberts*, 4 *Duer*, 141; *Parsons on Conts.*, 368, 396.

BENNETT J.—This was an action on what is called an open or running policy of insurance; trial had; verdict and judgment in favor of Bostick & Ryan; motion for a new trial by defendants overruled, and appeal granted.

The facts in the case, as appear on and admitted in the bill of exceptions, are as follows: The plaintiffs below, Bostick & Ryan, were manufacturers of tobacco at Fort Smith, Arkansas, and in the Indian country, west of Arkansas. On the first of May, 1868, they took out and received from the defendants, the Insurance Company, an open policy, or, what is sometimes called a running policy of insurance, which was to continue for one year from that date. About the first of April, 1869, Bostick & Ryan ordered a shipment of tobacco from Leopold & Co., of Louisville, Kentucky, which was, by Leopold & Co., shipped on board the steamboat "G. A. Thompson," which was a good and insurable boat, and was then bound for Fort Smith. The invoice of these goods was received by Bostick, one of the firm of Bostick & Ryan, the consignees, at Fort Smith, on Sunday, the 11th day of April, 1869, and, on Monday the 12th, immediately after breakfast hours, he (Bostick) reported the shipment to James H. Sparks, who was the acting and accredited agent of the company at that place, for the purpose of being indorsed as insured under the policy. Sparks examined the invoice, and asked Bostick whether he desired the goods to be insured from Louisville, or only from Memphis, when Bostick said he was satisfied to have them take the risk only from Memphis, or words to that effect. Whereupon, Sparks indorsed the goods as insured, under the policy, from Memphis to Fort Smith, and forwarded the application or report to William H. Fulton, secretary of the company, at Little Rock, and which reached the secretary on the 14th of April. The "G. A. Thompson," with these goods on board, proceeded along her voyage, passed Memphis, entered the Arkansas river, and proceeded to a point about forty miles up the river (below Little Rock), where she struck a snag, sunk and was burned, and the goods were a total loss. The boat was lost during the night of the 9th, or early in the morning of the 10th of April; and it was proven that the loss occurred by the perils insured against. The loss was fully known to the company at Little

Rock when Bostick's report or application was received from the agent, Sparks, on the 14th of April, but was not known to either Sparks or Bostick, or to any of the plaintiffs at the time Bostick reported the goods to Sparks for insurance, as aforesaid, on the 12th day of April. When Fulton, the secretary, received the report from Sparks it was regularly spread upon the book of risks, but there was a protest against allowing the insurance or paying the claim by members of the company; but it was agreed that it should be spread upon the books (which was the regular course according to the rules and the course of business of the company, for all such reports of goods insured) until the plaintiffs should have notice, in order that they might have a hearing on the question of rejecting the application and refusing the insurance. Afterwards, the report was rejected, the insurance set aside and the plaintiffs' policy cancelled by the board of directors of the company, and the plaintiffs' claim for pay for the value of the goods was rejected and refused, and notice of this was served on the plaintiffs through the agent of the company, Sparks, at Fort Smith, on the 26th day of July, 1869. But previous to receiving this notice, plaintiffs had shipped other goods and reported them to Sparks in the same manner for insurance under the policy, and Sparks had received them, charged up the premiums and forwarded them to the secretary at Little Rock, and they were duly entered on the book of risks, but were afterwards set aside, together with the setting aside of the risks on the lost goods, as aforesaid. At the time of reporting the goods to Sparks for insurance, no premiums were paid, but were charged up by Sparks to plaintiffs in a regular account book which he kept for that purpose; and it was the regular custom of the company, with those who held policies of this kind, to charge up the premiums on the report of shipment of goods, and the account of premiums were collected quarterly. It was further proven that the plaintiffs, after taking out this policy and before the shipment of the goods which were lost, made two or three

other small shipments of goods which they did not report to the company, and the company did not receive premiums on them; they did this with a view of taking the risk of these small shipments themselves. It was further proven that one shipment of goods made by them, after the issuing of the policy and before the shipment of the lost goods, was insured in another company, at Louisville; but that shipment was made by the order of the plaintiffs, sent by mail, and the insurance in the other company was effected by the consignors, in Louisville, unknown to the plaintiffs, and the plaintiffs, on receiving the invoices, reported the goods, as usual, to the company, through the agent, Sparks, and the premium was regularly charged and paid to defendant by plaintiffs. Further, it was proven that the goods lost were worth the invoice price, to-wit: $1000. Further, it was proven, by the rules and regulations of the company, that persons holding open policies of the company were required to report their goods immediately on receiving the invoices, but not at the time the shipment was made, except when the policy holder was the consignor.

The bill of exceptions and motion for a new trial present but three material points for adjudication.

First. It is contended that the company are not liable on their policy, because the goods were lost before the shipment of them was reported to Sparks, the agent, or the company's officer at Little Rock, Arkansas.

An indorsement upon the policy requires a report of each shipment to be made to the office of the company, at Little Rock, Arkansas, by mail or otherwise the same day the shipment is made, or, if on goods and merchandise to be received, the same day advice or the invoice of the shipment comes to hand, for entry on the office records and for protection purposes.

In the body of the policy is found the following stipulation: "That the Arkansas Fire, Marine, Life, Accident and General Insurance Company do, by these presents, cause Bostick & Ryan to be insured, *lost or not lost, etc.*"

In the determination of our first proposition, it will be necessary to fully understand the meaning and import of the clause "lost or not lost." Policies are frequently effected, not only on ships and goods in home ports, but on those, also, which are in foreign ports, or actually at sea on their way either to this or other countries, and with regard to which, it is, of course, uncertain whether they may not actually have been lost before the policy was effected. These words have been inserted in all marine insurance. Arnold, in his work on *Insurance, vol.* 1, *p.* 26, says: "This clause, however, though never omitted, does not appear to be strictly necessary, as there can be no reason why a previous loss of the subject insured should prejudice an insurance subsequently effected, if both the assured and the underwriters were equally ignorant of the loss at the time." This opinion of the author is sustained by Marshall, in his work on *Insurance, pp.* 338, 340, 1 *Phill. Ins.* 72, 438; 3 *Kent* (6 *ed.*) 258, *note c.*

It was decided by Lord Denman, in the case of *Mead vs. Davidson*, 3 *Ad. and Ell. p.* 303, that a policy containing this clause was good when the subject of insurance was accepted for insurance and the premium paid before loss, although the policy was not executed until *after* a loss had happened to the knowledge both of the assured and underwriter.

Phillips, in his work on *Insurance, vol.* 1, *p.* 925, says: "The risk may be assumed by the underwriters for an anterior period, and cover losses prior to the date of the policy, provided there is no concealment or misrepresentation by either party. For this purpose, the clause 'lost or not lost' is introduced. But this clause is not necessary; it is sufficient, if it appear by the description of the risk and the subject of the contract, that the policy is intended to cover previous losses."

It is, then, evident that insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, even if that loss be total; so that the subject matter of insurance is then non-existent, and this intention is expressly evidenced by the clause "lost or not lost," in the policy.

The material question then, presented under this proposition is, whether or not the company were under a contract, within any of the terms and conditions of the policy, to insure the goods at the time the loss occurred. This contract of insurance arises out of an open or running policy, which, from the very nature of such policies, enables merchants, etc., to insure goods shipped at a distant point, when it is impossible for him to be advised of the particular boat, or all the circumstances attending the shipment at first. The contract, however, does not become complete until a declaration of his desire to insure is made by the assured. Until this is done, the contract is inchoate and incomplete, and, if not made at all, the risk is regarded as not having commenced. Was such a declaration made by the plaintiffs in the case before us? We think there can be no dispute as to that fact. It is shown by the testimony, that the invoice of the goods were received on Sunday, April 11, 1869, by Bostick, one of the firm of Bostick & Ryan, and on Monday, the 12th, immediately after breakfast hours, he, Bostick, reported the shipment to James H. Sparks, who was the acting and accredited agent of the company, and such invoice was received by him at that time, and the amount of premium charged to Bostick & Ryan, as was the usual custom of the agency at Fort Smith. Applying the principles of law regulating policies of this kind, and the requisite act necessary to be done by the assured and the company, we are confident the company are liable under their policy, whether the goods were "lost or not lost" at the time the insurance was effected, unless the policy had been rendered null and void by previous act of the parties. The principles of law and rules of construction governing policies of this description appear to be well settled, as may be seen by reference to the authorities collected in the text writers, and by the following leading cases: *Hammond vs. Peoria Ins. Co.*, 17, *Iowa*, 276; *Kelly vs. Commonwealth Ins. Co.*, 10, *Bos. N. Y.*, 821; *Paddock vs. Franklin Ins. Co.*, 11, *Pick.* 227; *Orient Mutual Ins. Co. vs. Wright*, 23, *How*, (*U. S.*) 401; *Mark vs. Ætna*

Ins. Co. 29, *Ind.* 390; *E. Carver & Co. vs. Manufacturing Ins. Co.*, 6, *Gray*, 215.

The second point raised by the pleading and facts is: Was the policy rendered nugatory by the previous act of the plaintiffs in not insuring all the goods consigned or received by them under the policy?

It is conceded that plaintiffs did make several shipments of goods which they did not report to the company, and upon which they did not receive premiums, and it was further proven that the plaintiffs did insure one shipment of goods in another company, but such insurance was effected by the consignors of the goods, and not by the procurement of the plaintiffs.

Conceding, for the purpose of argument, that, in the application for insurance and the policy, it was understood that the plaintiffs were to insure all the goods consigned to or shipped by them in this company, a failure on the part of the plaintiffs to do so, would not work a forfeiture of the policy, unless such were the express terms of that instrument. Such a provision would doubtless be a condition precedent, the performance of which by the plaintiffs would be indispensable to their right of recovery, unless it had been dispensed with or waived by the defendant. *Inman vs. Western Ins. Co.* 12, *Wend.* 460.

It is only when a duty is created by the law that renders a contract void by non-performance of some requirement, and not when the duty is created by implication by the contract. *Harmony vs. Bingham*, 2 *Kern*, 99. Under this policy of insurance, the duty of the plaintiff may have been to report for insurance all goods shipped to them; but this duty was created by the contract, which does not fix a penalty for the failure to do so, and the law of insurance will not arbitrarily say it, *ipso facto*, works a forfeiture. Even if this was the general principle, in the case before us, the facts will justify us in saying the company have waived all rights to this defense.

Bostick reported the shipment to James H. Sparks, an ac-

credited and acting agent of the company, at the place where he resided, for the purpose of having the shipment indorsed as insured under this policy. Sparks, the agent, indorsed them as insured. From that moment the company were liable for any loss that might have or had occurred. The agent reported the application to the home office, at Little Rock, as he was required to do by the indorsement of the policy, "for entry on the office records, and for protection purposes."

The words "protection purposes," to be found in the indorsement, can not be construed to mean that the company might receive or refuse the application upon arrival. It was not the intention or understanding between the parties, at the time of taking out the policy, or when the insurance was effected. Sparks was acting as the agent of the company, at Fort Smith, with general powers. The validity of his acts to third persons did not depend upon the approval of the company. Nor can they secretly reserve the right of approval or disapproval, at a future period. The company have not the power to say, by their agent, to a person desiring insurance, "your shipment is insured," and leave him under that impression until after a loss has happened, and then say to him, that their election has not been made. Honesty and fair dealing forbid it.

If there had been any previous dereliction on the part of the plaintiffs in reporting shipments or payment of premiums previous to this transaction, the act of the company's agent, in insuring this one, must be considered as a waiver of it so far as the insurance of this is concerned. As to whether the plaintiffs are not liable to pay premiums on all goods shipped by them during the life of the open policy we are not called upon to decide, but that non-payment of them works a forfeiture of the policy on this shipment, we deny. There is not even a provision in the policy or application to this effect, and the law will not certainly annex one for the parties.

The third point for adjudication is, whether the goods were insured under the policy, as they were shipped from Louisville, Kentucky, and reported and indorsed for insurance from Memphis, a way port.

The evidence shows that the goods were reported to the agent, Sparks, as shipped from Louisville, and the agent entered them, by agreement between him and Bostick, as insured from Memphis. The insurance from Memphis was the proposition of Sparks, the agent, and whatever may have been the requirements in this respect, in the policy, we are clearly of the opinion that the defendants are estopped in the present case, from any supposed deviation, as a ground of defense by the act of their agent. By this act the plaintiffs had a right to regard any objections on this ground, as waived, when there was no concealment on their part as to where the goods were shipped from. Certainly, it cannot be allowed as a defense to this action without operating as in the nature of a fraud on the plaintiffs, who have acted on the belief that the acts of the agent were the acts of the company, and who, knowing all the circumstances, indorsed the goods from Memphis instead of from Louisville.

Having fully considered all the propositions, as raised in the trial of the case, and finding no error, the judgment is in all things affirmed.

LAMBERT v. KILLIAN & PREWITT.

APPEALS—*When objections not considered.*—This court will not consider objections or errors in a record where there was no motion for a new trial in the court below.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

G. W. Murphy and Farr & Fletcher, for Appellant.
J. W. Van Gilder, for Appellees.

GREGG J.—The appellees brought replevin before a justice of the peace for eight bales of cotton. Their claim to the cotton was founded upon three several mortgages executed, by laborers, to secure the payment of supplies furnished them while cultivating appellant's lands. The laborers were to have one-half the cotton grown upon the lands and the appellant the other; and the supplies were to be paid for out of the laborers' cotton. The appellant furnished supplies until in May; the appellees furnished them the remainder of the year, and took the mortgages above referred to on the laborers' share in the crop. Sixteen bales of cotton were produced and ginned and baled, appellant furnishing the bagging and rope. No division had been made and the cotton was all in the possession of Lambert, and the laborers had demanded half of it from him. The cotton was alleged to be worth $480.

Upon the proof of the above facts and the value of the cotton, each party asked the court to instruct the law to the effect, that upon the facts each had a right to recover against the other. The court gave the appellees' instructions, and refused those of appellant. To all of which he excepted, and tendered his bill of exceptions containing *all the evidence* and *instructions* given and refused, and *his exceptions thereto.*

The jury returned a verdict for the eight bales of cotton, or $805\frac{80}{100}$ as its value. Without moving for a new trial,

Lambert appealed to this court, and here insists that the Circuit Court erred in taking jurisdiction of the case and in giving and refusing instructions.

In the case of *Steck vs. Mahar*, 26 *Ark.*, 536; *Merriweather vs. Erwin, and Worthington vs. Welch*, I dissented from the opinion of the court, wherein the majority held that exceptions, such as are taken in this case, could not be considered for want of a motion for a new trial. Under that ruling the errors in this record cannot be considered, because the party aggrieved did not move the court below to correct such errors. The only additional question in this case is, that the record shows that the jury found the sum in controversy to be above the jurisdiction of a justice of the peace. No exception was taken to this in either of the courts below, and the plaintiff there alleged the value of the cotton at only $480, a sum within the jurisdiction, and that averment was in no way put in issue or controverted by the defendant. And if the jury returned a verdict for more than was claimed, it should have been set aside or the judgment arrested; but no motion was made, and the case, in this particular, also falls within the rule above referred to, which, as indicated, without my concurrence, has become *stare decises*.

The judgment of the court below is affirmed.

PARKE v. MEYER.

JUDGMENTS—*When may be several.*—Under the Code of Practice, a several judgment may be entered whenever a several suit might have been brought.

APPEAL FROM SEBASTIAN CIRCUIT COURT—MOTION TO DISMISS APPEAL.

HON. E. D. HAM, *Circuit Judge.*

Walker & Rogers, for Appellant.
U. M. Rose and *Clark & Williams*, for Appellee.

BENNETT, J.—Meyer sued Parke and Tibbetts, on an accepted draft, in the Circuit Court of Sebastian county. Service was had on Parke; none on Tibetts. When the cause was called, Park defaulted, and a final judgment was rendered against him, and an alias writ issued against Tibbetts, and the cause continued.

Parke appealed. Appellee, Meyer, now files his motion to dismiss the appeal, alleging that there is no final judgment from which an appeal will lie.

The motion to dismiss, no doubt, is based upon the provision of *sec.* 80, *chap.* 133, *Gould's Digest*, which says: "When there are several defendants in a suit, and some of them appear and plead, and others make default, an interlocutory judgment, by default, may be entered against such as make default, and the cause may proceed against the others, but only one final judgment shall be given in the action." The practice, however, under the Code, has been changed, or may be. *Secs.* 400 and 401 say: "Judgments may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants."

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

Thus, it is to be seen, the Code allows a several judgment

to be entered, whenever a several suit might have been brought. The plaintiff might have brought a several suit against Parke, on the accepted draft, and, by proving that the name of the firm had been used by him without authority from Tibbetts, have recovered a several judgment.

Inasmuch as we are only required to pass upon the question as to whether this judgment was a final one, from which an appeal would lie, we will leave the merits of the case to be hereafter considered. Motion to dismiss overruled.

GARDNER et al. v. HERSHEY et al.

INJUNCTION—*When should be made perpetual.*—Lands were mortgaged, with power of sale, to secure payment of note; note was assigned; assignor and assignee each demand payment in his own right; the lands were advertised for sale. On bill by mortgagor, offering to pay, praying that receiver be appointed, claimants required to interplead, and sale be enjoined. *Held:* That, after interpleader was decided, and payment by receiver, it was error to dissolve the injunction, but that the same should have been made perpetual.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

B. T. Du Val and *A. H. Garland*, for Appellants.
Rose & Green, for Appellee.

GREGG, J.—The appellants, as heirs of John Gardner, deceased, filed their complaint in equity against the appellees, alleging that John Gardner, in his lifetime, borrowed one thousand dollars of the appellees, Sarah, and Nancy Clark, now deceased; and, to secure the re-payment of said sum, he gave them a mortgage, with power of sale, on certain real

property; that the defendant, Hershey, claimed to be the assignee of said Sarah, and the absolute owner of the demand against the estate of John Gardner, and that, as such assignee, he had advertised for sale the lands embraced in said mortgage, etc., and that said Sarah also claimed to be the absolute owner of said demand. She denied that she had transferred the title therein to Hershey, and said the note had only been assigned to him, as security, and for collection. Each party had demanded the money, and forbid its payment to the other. Appellants could not tell to whom payment should be made, and they offered to pay as the Chancellor might direct, and prayed for an injunction, and that the parties might be required to interplead, and have their rights determined by the court. The Chancellor ordered that the money be paid to a receiver, and that injunction then issue against the sale. Hershey and Clark interpleaded; the court found for Hershey, and ordered the money paid over to him, and that Clark pay ten per cent. on the amount, as damages, for the delay caused by the injunction, and decreed accordingly; and also decreed that the injunction be dissolved. Gardner appealed.

So far as the record shows, there was no objection made to any ruling in the court below; no bill of exceptions filed, or appeal prayed; in fact, nothing tending to show that the parties did not all intend to abide the rulings and decrees of that court. But, after that court had adjourned, an appeal was obtained from the clerk of this court, from which we might infer the record entry dissolving the injunction was inadvertently made, and that counsel, not being as vigilant as they should have been, failed to scrutinize this record until after the close of that court. Be this as it may, when the Gardners paid all the money demanded of them, as they did, Hershey had no right to ask a dissolution of the injunction, and the order restraining him from selling the property should have been made perpetual.

The decree is reversed, and a perpetual injunction will be entered in this court.

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STREET, Trustee Etc. v. SAUNDERS.

DOWER—*Not allowed out of personal property in trust.*—Where S. conveyed his growing crop, in trust, to secure the payment of certain indebtedness, and died, and the crop so conveyed was not sufficient to liquidate the indebtedness intended to be secured; on claim of dower, in the crop, by the widow, *Held:* That the growing crop was personalty; that S. did not die seized thereof, and that the widow was not entitled to dower therein, although she was not a party to the trust deed.

APPEAL FROM CHICOT CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

W. B. Street, for Appellant.

We submit that Saunders, at the time of his death, did not own, or did not die seized or possessed of the crop of cotton. The personal property acquired by the husband through the wife, and reduced to possession, becomes his absolute property; his conveyance of the same is valid; she, having no vested rights therein, is not entitled to dower as against the purchaser. *Cook vs. Cook*, 12 *Ark.*, 381.

Growing crops being emblements, go to the executor, unless the heir assigns the land sown to the widow for her dower, then she takes the crop upon the land assigned; but the right to the growing crop does not attach in favor of the widow until after her dower has been assigned. 2*d Scribner*, 727, *et. seq. Parker vs. Parker*, 17 *Pick.*, 236. And if, before assignment, she receives the fruits and grain growing on her husband's lands at the time of his death, she is liable for their full value. *Kain vs. Fisher*, 2, *Seld.*, 597. 3 *Washb. Real Prop.*, 339.

Carlton & Simms and *H. Carlton*, for Appellee.

We submit that the deed of trust was a mere chattel mortgage, or unexecuted contract for the delivery of personal property at a future day, and that the widow is entitled to

dower in the personal property of her husband. *See Gould's Digest, chap.* 60, *sec.* 21. That this deed is a mere mortgage, we think there can be no question, and in support of this, would refer the court to the following cases in addition to those in our own Reports, viz: *Holmes vs. Crane*, 2 *Pick.* 607; *Ward vs. Sumner*, 5 *Pick.*, 28; 5 *Johnson*, 218; 9 *Johnson*, 341; 19 *Johnson*, 218; *Rob. on Fraudulent Conveyances, c.* 5, *sec.* 3, and *Second Term Reports*, 587. There was no delivery of the property, and the widow will take her dower against all persons. *Hill's admr. vs. Mitchell et al.*, 5 *Ark.*, 608; *Menefee, admr., vs. Menefee et al.*, 3 *Ark.*, 9. There should be actual disseizin or dispossession, to defeat dower. *Arnell vs. Arnott et al.*, 14 *Ark.*, 57; *James vs. Marcus*, 18 *Ark.*, 421.

BENNETT, J.—William B. Street, the appellant, at the March term, 1872, in the Circuit Court of Chicot county, filed his complaint to recover the possession of seven bales of cotton; of which cotton the defendant below, and appellee here, had possession, and claimed the same as part of her dower in the estate of her deceased husband. This was an amicable suit, submitted to the court below upon the following agreed statement of facts: "That John H. Saunders, on the 17th of July, 1871, executed his trust deed, in favor of appellant, to secure the payment of certain indebtedness mentioned therein. By said trust deed, Saunders conveyed his entire interest in his said crop to appellant, but the crop was left in the hands of Saunders for the purpose of gathering, etc., and should the proceeds of the same more than pay the claim of Street, the surplus was to go to Saunders. It was, however, admitted that the crop was not sufficient to liquidate the indebtedness of Saunders. Saunders died the 15th of December, 1871, before delivering the crop, or any part thereof, to the appellant. His widow, the defendant below, became administratrix of her late husband's estate; took possession of the said crop; the seven bales in question in this suit are a part of the identical crop covered by the trust deed;

and that the defendant and widow of the said Saunders refuses to give up the said cotton, but claims it as part of her dower." Upon this statement of facts, the court below found for the defendant, and held that the widow was entitled to these seven bales of cotton as dower. From which judgment Street appealed.

Under the common law, personal property was not subject to dower, but our law-making power, upon the highest principles of justice and public policy, has altered this, and it is now provided in *Gould's Digest, chap.* 60, *sec.* 21: "A widow shall be entitled, as a part of her dower, to the one-third part of the slaves whereof the husband died seized and possessed, for her natural life, and one-third part of the personal estate in her own right."

The only question is: Was this cotton personal property, and was John H. Saunders seized and possessed of it at the time of his death?

That the growing crop of cotton was personal we think there can be no doubt, and whether the wife was a party to the trust deed or not is unnecessary to discuss. The conveyance of personalty does not require the sanction or acquiescence of the wife. The trust deed, duly executed, acknowledged and recorded, shows that the only interest Saunders had in the crop was in the residue of the proceeds, after payment by the trustee of all the indebtedness specified, and by the statement of facts it is admitted that Saunders did not have interest enough in the cotton to pay off these liabilities.

The trust deed offered in evidence clearly shows that Saunders transferred to Street, as trustee, his entire crop for a valuable consideration, and bound himself to save and deliver the cotton to appellant. As soon as this deed was duly executed, the title to this crop passed to Street as trustee, and only remained in Saunders' possession for the purpose, as specified in the deed, "to save and prepare said crop for market as early as practicable."

A widow is only entitled to dower in the property of which

her husband was the owner at his death. The attempt of the appellee to say that the instrument of conveyance given by her husband to Street, as trustee, was only a mortgage, is an utter failure. Because it expressly states that "I (Saunders) have bargained, granted and sold, and do hereby grant, bargain and sell unto W. B. Street, as trustee for said above mentioned parties, my entire crop of cotton and corn," etc. No stronger language could be used to express a sale or transfer of property. Saunders did not own this crop at the time of his death, and only had possession for a specific purpose. It not being his, the widow cannot have any dower interest in it.

Therefore, the court below erred in so finding, for which error its judgment must be reversed, and the cause remanded, to be tried in accordance with the law.

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JOHNSON v. GRAVES.

VENDOR'S LIEN—*When creditor's right postponed to.*—When the creditors of a vendee take a conveyance of lands, encumbered with the vendor's lien, from the vendee, without advancing any new consideration, merely as a security for the debts of the vendee contracted prior to his purchase of the lands from the vendor, they will be postponed to the rights of the vendor.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Johnston & Hawkins and *U. M. Rose*, for Appellant.

A vendor's lien will not prevail against a purchaser without notice. *Petit vs. Johnson*, 15 *Ark.*, 55; *Shall vs. Biscoe*, 15 *Ark.*, 142.

Mortgagees and trustees in conveyances made to secure the payment of debts are purchasers. *Leading Cases in Equity H. W., vol.* 1, *p.* 277; *Story's Equity, vol.* 2, *p.* 481, *see.* 1229.

A vendor's lien will not prevail against a conveyance to creditors in consideration of antecedent debts. *Bayley vs. Greenleaf*, 7 *Wheaton*, 46; *Dunlap vs. Burnett et al., Smedes & Marshall, vol.* 5, *pp.* 702-710; *Roberts vs. Rose et al.*, 2 *Humphreys*, 145, 147.

A *bona fide* purchaser is one who, at the time of his purchase, advances a new consideration, surrenders some security, or does some other act which, if his purchase were set aside, would leave him in a worse than his original position. Johnson is, in the strictest sense of the term, a *bona fide* purchaser without notice. *Du Val vs. Bibb*, 4, *Henning & Munford*, 113, 120; *Wood vs. Bank of Kentucky, etc.*, 5 *Monroe*, 194, 195; *Bayley vs. Greenleaf*, 7 *Wheaton*, 46.

A vendor waives his lien for the purchase money by executing a deed to the purchaser. So that the land may be sold under execution against such purchaser. *Duncan vs. Johnson*, 13 *Ark.*, 180.

When Graves declared by his deed to Bell that he had received all the purchase money, Johnson could not be expected to inquire whether the purchase money had been paid. *Sugden on Vendors, vol.* 2, 7 *American Edition, p.* 353; *Bayley vs Greenleaf*, 7 *Wheaton*, 46.

J. W. Van Gilder, for Appellee.

That the vendor has a lien for the unpaid purchase, *see* 18 *Ark.*, 142; 21 *Ark.*, 203; 25 *Ark.*, 272, 277, 510.

If the matters stated in the answer in reference to the trust deed be taken as true, they do not constitute a defense. For it is distinctly charged in the complaint that the debts secured by the deed of trust were contracted before the deed of Graves to Bell, and is not denied by the answer, and the answer itself states facts which show that they were mere volunteers, paying nothing for their deed, and a vendor's lien

would have a preference over their claims. 1 *Hilliard on Mortgages*, 682; *Chance vs. McWhorter*, 26 *Geo.*, 315; 7 *Humphreys*, 239; 2 *Washb. on Real Property*, 3*d ed.*, *p.* 89, *secs.* 11, 13; 3 *Parsons on Contracts*, 5*th ed.*, *p.* 277; 2 *Story's Equity Jurisprudence*, *secs.* 1225, 1228; 21 *Barb.*, 327; 6 *S. and M.* 286.

STEPHENSON, J.—In October, 1860, Graves sold to Bell certain lands in Ashley county, for $2000, and took his promissory notes therefor. Graves made Bell a deed to the land and put him in possession, and now files his bill to enforce his vendor's lien.

Graves alleges in his bill that James H. Johnson is in possession of the land under a trust deed from Bell, in favor of his (Bell's) creditors, to secure certain debts due them prior to his sale of the land to Bell.

Johnson, answering for himself and Bell, admits all the allegations of the bill, but avers that he is an innocent purchaser, without notice of Graves' lien; also, that the beneficiaries of the deed of trust had no notice whatever that the purchase money remained unpaid. Johnson makes his answer a demurrer to the bill.

The cause was heard on the bill and answer, and decree for plaintiff, Graves. As the record shows no judgment of the court on the demurrer, we will treat it as having been overruled, and we think properly so.

The pleadings, viewed as evidence, show that Johnson and the beneficiaries, under his deed of trust, stand in court as *bona fide* purchasers without notice of the vendor's lien. It needs no citation of authorities to prove that the settled rule of this court is, that a *bona fide* purchaser, for a valuable consideration, without notice of the vendor's lien, takes the lands discharged of it; but does Johnson occupy this position? Appellee, Graves, alleges in his bill that "all the debts secured in said deed of trust were contracted prior to said deed of trust, and also prior to the conveyance from plaintiff to defendant, Bell," and as this is not denied in the answer, it

is taken for true. Under this state of facts, Johnson and the creditors of Bell, for whose use the trust was executed, occupy very different ground from one who pays his money in good faith upon the vendor's title, ignorant of his secret equitable lien for the purchase money.

The object of the law, in all questions arising between vendor and vendee respecting the equitable lien of the former, is to give the vendor the benefit of his lien as against the vendee and those holding under him having notice of the lien, but to save him harmless whose money has been advanced in good faith without this notice, and upon the vendor's declaration in his deed. Let us apply this principle to the case at the bar. The vendee, Bell, executes to Johnson his deed of trust, to secure certain of his creditors, which debts he had contracted prior to his purchase of the land from Graves. This deed, at most, gives but an equitable title to Bell's creditors, and which they must proceed to execute before they can gain the legal title. They have, by taking this security, in no wise impaired Bell's liability to them, but would have all the remedy, after taking this security, they had before. Nor are they in worse condition by giving the vendor, Graves, priority over them than they were when they gave Bell the credit. If they had taken the land in satisfaction of the debt, or had made advances *upon the faith of the title*, as it appeared of record, they would have occupied a different attitude in the case; but where creditors of the vendee take a conveyance from him merely as a security for their antecedent debts, without advancing any new consideration, they are postponed to the rights of the vendor. 2 *Wash. Real Prop.*, 3*d ed.*, 89; *Brown vs. Vanlier*, 7 *Humphrey*, 249; *Harris vs. Hornor*, 1 *Dev. & Bat.*, 455; *Eubanks vs. Poston*, 5 *Monroe*, 286; *McGown vs. Yerks*, 6 *Johnson's Ch. R.*, 450; *Chance vs. McWhorter*, 26 *Ga.*, 315; *Repp vs. Repp*, 12 *Gill & J.*, 341; *Dickinson vs. Tillinghest*, 4 *Paige*, 215,

Finding no error in the proceedings of the court below, the decree is in all things affirmed.

PENNY & CO. v. McLEOD.

WHARF-BOATS—*When agents of carriers.*—Where goods are consigned to the owner and delivered to a wharf-boat, it is not a delivery to the owner, but the wharf-boat holds them as agent for the carrier.

SAME—*Liability of to consignee.*—The owners of a wharf-boat may act as agents of both carrier and consignee and, when they agree with the consignee to receive goods for him, they are liable to such consignee if they fail to comply with such agreement.

APPEAL FROM PHILLIPS CIRCUIT COURT.

HON. M. L. STEPHENSON, *Circuit Judge.*

Palmer & Sanders, for Appellants.

The legal principle seems to be well settled that the liability of the warehouseman or wharfinger does not commence until that of the carrier ceases. *Sleade vs. Payne*, 14 *La. An.*, 453; *Dean vs. Vuccaro*, 2 *Head*, 488; *Alabama, etc., R. R. Co. vs. Kidd*, 35 *Ala.*, 209. And that in order to relieve the owners of vessels from responsibility, there must be a delivery on the wharf to some person authorized to receive the goods, or some act must be done which is equivalent to a delivery. *Herman vs. Goodrich*, 21 *Wis.*, 536.

The idea that appellants could have been agents for the boat, and for appellee also, at the same time, is preposterous. *Story on Agency, secs.* 210-217; *Edwards on Bailments*, 300, 301; *Story on Bailments, sec.* 453, *sec.* 538, *et seq.*; 2 *Kent's Com.*, 604.

A. H. Garland, for Appellee.

There was no error in the law as declared by the court. *See Angell on Carriers, sec.* 66; *Ib.*, 123, 129.

The trial being had by the court in place of a jury, this court will not reverse the finding unless there is an entire absence of proof to support it. 26 *Ark.*, 362, *and cases cited on that page.*

GREGG, J.—The appellee brought his complaint, at law,

against appellants for damages caused by their failure to deliver to his agents certain horses by them received, as wharfingers, at the port of Helena, Arkansas.

The appellants admitted that the steamer Des Arc delivered the horses at their wharf-boat, but they deny that they were plaintiff's agents, or that the horses were received for him. Issue was formed, and, by consent, the cause was submitted to the court sitting as a jury.

It appeared that appellants were the keepers of a wharf-boat and common receivers of freight for that port. That, a few days before the horses were landed there, appellee went on the boat and advised their clerk then in charge that he expected horses shipped there to him, and he desired Harris & Rayner, of the Eclipse livery stable, notified, and the horses turned over to them, and that arrangements had been made with them to receive the horses, etc. The clerk agreed to comply with such request. The clerk testified that he had no recollection of any such request or agreement; that he did not personally know consignee; that the horses were received by appellants as the agents of the steamer Des Arc, and stored at another stable for a few days, and then returned to the steamer. Other proof was made of the agreement with the clerk on the wharf-boat, and of the loss of one horse, the damage to others, etc.

The court found for the appellee $494 75, which finding was certainly not without evidence, and not unreasonable under the proof.

The court, in effect, declared the law to be that, where goods were consigned to the owner, and by the steamer delivered to the wharf-boat, it was not a delivery to the owner, but the wharf-boat holds them as agents for the carrier.

That the owners of a wharf-boat may act as agents of both carrier and consignee, and when they agree with consignee to receive goods for him, they are liable to such consignee if they fail to comply with such agreement.

The court refused to declare that a promise made by ap-

pellant's clerk to receive the horses and notify Harris & Reyner, without any consideration being paid, was a *nudum pactum*, and defendants not bound thereby. And further, that to charge appellants, appellee was not bound to have made his pecuniary arrangements and shipped the horses to them. And lastly, that appellants were under no obligations to advance charges, and, as they held the horses only as agents of the steamboat, they could not refuse to surrender them when called for by the boat. The last declaration of law was not warranted by the evidence. The second one refused was clearly not law.

A wharf-boat, doing a general receiving and forwarding business, is a public agent, and, to a large extent, occupying grounds similar to a public carrier, and has a right, as a midway man between carrier and consignee, and as the agent of both parties, to hold goods until all reasonable charges are paid thereon; and, in this case, it is not necessary to decide whether or not they were bound to receive goods without pay, and hold them until charges were paid, or the goods sold for such charges, because the clerk, who was acting for appellants, without demanding any advanced consideration, and upon being advised that Harris & Reyner would pay charges, etc., agreed to receive the horses and notify them. That agreement, in connection with the general business done by appellants, clearly made them liable if they failed to comply, as the proof shows they did. Hence, we hold there was no error in any of the declarations of law. The judgment is affirmed.

HON. M. L. STEPHENSON, being disqualified, did not sit in this case.

HON. E. H. ENGLISH, *Special Judge.*

27 564
54 525

DANO v. M. O. and R. R. R. R. Co.

RAILROADS—*Laborer's lien on, act of July 23d, 1868, construed.*—The lien given a laborer, by the act *approved July 23d*, 1868, is *personal* and cannot be assigned or transferred; it must arise out of a contract either express or implied between the parties; the party, seeking to enforce a lien of this character, must bring himself wholly and technically within the statute granting the relief, and there must be such an interest, in the estate subject to the lien, as can, upon process, be sold, transferred and conveyed to the purchaser thereof.

2. The first nine sections of the act have reference only to movable property and the labor performed thereon, and the word "*all*," as used in the act, is not to be construed literally, as giving to every laborer a lien for his labor.

3. The remedy afforded, by the act, is summary and should be strictly construed, and the *tenth section* of the act is not to be so extended or construed as to give to the laborer employed in ditching, building levees or railroad lines, a lien upon the real estate for his labor, where the labor was done under a contract from the State, but only when the contract was with the owner of the lands upon which the work was done.

Requisites of complaint.—In an action to enforce a laborer's lien, the complaint should disclose the property and the nature of the estate held by the defendant, and upon which the lien is claimed.

APPEAL FROM CHICOT CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Garland & Nash, for Appellant.

The law giving a laborer's lien is broad and comprehensive. It speaks of *all* laborers, doing *any* work under any kind of contract at all, having a lien on the production of their labor. See *Acts of* 1868–9, *p.* 224, *Sec.* 1, (*act of July* 23, 1868).

If any person can be called a *laborer* he who does work on a railroad can. The difficulty of identifying the product of his labor is nothing in this question. If he cannot identify it then he cannot have a lien. But that is certain in law which can be made certain. *Broomis' Legal Maxims*, 556.

Such are in giving mortgages upon things not *in esse*—crops not grown—lumber not sawed, etc., etc., when they are produced and identified then the lien attaches. *Pennock vs. Car*,

23, *How.* (*U. S.*) 117; *McClure vs. McDearmon*, 26 *Ark.*, 66.

Montgomery & Warwick and T. D. W. Yonley, for Appellee.

We submit the judgment should be affirmed:

First. That mechanics' and laborers' liens are purely statutory, and he, who does not come within the strict provisions of the statute, has no lien. *Houck on Liens.*

Second. To entitle a person to a laborer's lien, under the statute, he must show that he is a *laborer* within the meaning of the statute; the design of the statute is to protect the ordinary laborers of the country, and although a person may have performed labor, such as clerk, agent and the like, he does not come within the purview of the statute.

Third. The lien of a laborer is personal and cannot be assigned. It is contrary to public policy that liens of this kind should be enforced against any public corporation.

McCLURE, C. J.—Duane M. Dano filed a petition, in the Chicot Circuit Court, against the appellee, praying for a laborer's lien upon certain grading or road bed. At the April term of said court, the appellee moved to strike from said petition the names of several parties who sought to become co-plaintiffs in the prosecution of the suit; said motion was sustained by the court. The appellee, also, filed a general demurrer to said petition, which the court also sustained, and the plaintiff's petition was ordered dismissed; to which said rulings, the plaintiff excepted and appealed to this court.

The appellant assigns for error the following causes:

First. That the court erred in striking from the record the names of the parties plaintiffs, except Dano.

Second. In sustaining the demurrer to plaintiff's petition, and in dismissing the same.

For the purposes of this decision, we deem it wholly unnecessary to dwell upon the first assignment of error, for the appellant can take no exceptions, as his cause was properly before the court for adjudication, and the record fully shows its action thereon.

The second assignment, however, cannot be so summarily disposed of, involving as it does, a review, to some extent, of the law of liens, and the application of the same to a statute of our State, not heretofore considered by this court.

No branch of the law, probably, has been so thoroughly changed by legislation as that governing liens. In most of the States, and no doubt wisely, statutes have been passed granting special rights and privileges to certain members of society, such as mechanics, laborers and material men, changing the well defined rules of the common law, evidently based upon equitable principles and commercial necessity. Through all these statutes, however, so far as the courts have construed them, the law seems to be well established that there must, of necessity, be a contract, either express or implied, between the parties, and that the lien is *personal* and cannot be assigned or transferred; that the party seeking to enforce a lien, of this character, must bring himself wholly and technically within the statute granting the relief, and that there must be such an interest in the estate subject to the lien, as can, upon process, be sold, transferred and conveyed to the purchaser thereof.

The case, at bar, was brought under the provisions of "an act giving all laborers a lien upon the production of their labor until the same is paid," approved July 23d, 1868. The first section of the act, the one creating the lien, reads as follows:

"That all laborers, who shall perform work and labor for any person under a written or verbal contract, if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor."

The language of this section is broad and comprehensive, and defines, concisely, the nature and character of the lien and establishes the right of the *laborer* to resort to it. It says *all* laborers doing any work, under written or verbal contract, shall be entitled to a lien *on the production of their labor*.

In what sense did the Legislature use the word "laborers"

is one question which presents itself to our mind. Webster says, "a laborer is one who labors in a toilsome occupation—a man who does work that requires little skill, as distinguished from an *artisan*." We will assume, inasmuch as there was, prior to the passage of the act of July 23d, 1868, a law protecting that class of laborers coming under the head of *artisans*, that the word "laborer," as used, in the statute now under consideration, by the Legislature, was intended to be understood according to its common acceptation, and as defined by Webster. Viewed in this light, the next question arising is, what is the meaning of the words, "shall have an absolute lien on the production of their labor." In defining the word "production," Webster says it has reference to "that which is produced or made; product; fruit of labor; as, the *productions* of the earth, comprehending all vegetables and fruits; the *productions* of intellect, or genius, as poems and prose compositions; the productions of art, as manufactures of every kind."

It is clear to our minds that the first nine sections of the act, now under consideration, have reference solely to moveable property, and the labor performed thereon; thus, ordinary farm hands, employed in the cultivation of a crop, would have a lien on the crop produced by their labor. But it may well be doubted whether the laborer, who built fires whilst a man of genius wrote a poem, would have a lien either upon the rythm or the manuscript, although he may have contributed to the comfort and convenience of the poet. This word "all," as it is used in this act, is not to be construed literally as giving to every laborer a lien for his labor. The clerk of a merchant or banker, in one sense of the word, is a laborer, and so are ordinary house-servants; but they do not come within the purview of this act, because they produce nothing to which a lien could attach. The appellant was a laborer on a railroad, and, as such, is not, and does not come within the class of laborers described in the law, as being entitled to "a lien on the *production* of their labor." If he is

entitled to a lien under the law, that right must be drawn from that portion of the act not included in the first nine sections.

The tenth section of the act reads as follows: "When any real estate is to be sold under a lien for labor, such as ditching, building levees, etc., the justice of the peace shall file a copy of the judgment rendered in the county clerk's office immediately, and the county clerk shall place it in his judgment docket, and cause the sheriff to sell such real estate, having given thirty days' notice of the same, in the way the same is herein provided." This language looks like it was intended by the legislature that real estate might be sold for the payment of a laborer's lien, given by the statute now under consideration. The language used in the section just quoted, imports that it was the intention of the legislature to give to persons employed to do ditching, or employed in the building of levees, a lien on real estate for their labor. This is a wise and salutary provision, but must not be extended beyond the evident intention of the legislature. This language was not certainly intended to be so extended as to allow a laborer, employed in the building of a levee, under a contract from the State, to sell the real estate, of the person on whose lands the levee was situate, to secure a payment of his wages, in the event his employer failed or refused to pay him; nor can this act be so distorted as to allow a laborer to sell the levee, although he may have contributed towards its erection. But where the owner of the real estate made a contract for the ditching of his plantation, or for the erection of a levee, and refused to pay for it, no doubt the lien would attach. A railroad is neither a *drain* or a *levee*, in the common acceptation of the word. There is nothing in this act which intimates that the legislature intended it to be extended to railroads, unless it is in the abbreviation "etc.," which is used after the words "ditching" and "building levees." The abbreviation "etc." is sometimes used in pleadings to avoid repetitions, and when so used, usually relates to things unnecessary to be stated; but we have never before heard of it

being incorporated in a statute, and are, therefore, at some loss to determine just exactly what the legislature intended by its use.

The remedy afforded by this act is summary in its character and, to some extent, remedial, and at the same time contrary to the course of the common law. Remedial statutes should be construed liberally; not so, however, with summary statutes. This being true, we do not feel disposed to so construe the abbreviation "etc." as to mean and include railroads. But whether this view be correct or not, let us see if the appellant has brought himself within the statute, even if a railroad was included within the abbreviation "etc.," for this is of more importance than the determination of the other question, which is not necessarily presented in this case. Section five of the act provides, in substance, that the person having a lien shall file a statement of the amount due; the kind of service done, and for whom rendered, and a list of the land, property, crop, or other production of his labor, charged. The allegation of the complaint is for "work and labor, care and diligence of plaintiff, rendered said defendant in and about the construction of said road." The petition, or complaint, as will be seen, does not set forth a description of any land or property to which the lien had or might attach; nor does it disclose whether or not the appellee had any land or property in the road or any part of it. Had the court below rendered judgment in favor of the petitioner, the court would have been unable, in the absence of a description of the property, to have directed what property to sell. The action, provided by this law, partakes of a proceeding *in rem*, and execution would have to go against the property which the laborer was entitled to a lien upon. In attachment, the execution follows the property attached, and so it is under the laborers' lien law. It is also the duty of the plaintiff, in actions of this character, to disclose, not only the property against which he has a lien, but he must also disclose the nature of the estate held by the defendant. So far

as the court below was concerned, it had no means of ascertaining whether the estate, on which the labor was performed, was an estate in fee, an estate in trust, a lease-hold, or an easement. The complaint shows nothing of this kind. Without this knowledge it would be very difficult for the court to make the proper orders in a case. Without the proper knowedge it might order a sale of the fee, where the defendant had a lease-hold, or where the defendant had a mere easement.

The complaint of the appellant discloses the fact that a large part of his claim is made up of items, orders and charges of other parties assigned and transferred to him. Under the most liberal construction of the statute, the appellant is not entitled to the aid of this act to aid him in the collection of claims purchased or transferred to him by other laborers. The statute does not provide for it, and the whole theory of the law is against it. The remedy, provided by this act, is *personal*, and, as we have before stated, cannot be transferred.

Finding no error in the record, the judgment of the court below is affirmed.

GREGG, J., dissenting, says:—The appellant failed to describe his services; to show what labor he had done; he failed to describe the property against which he was attempting to enforce a lien, and he failed to charge that the appellee was the owner of the property against which he was proceeding, etc., and the demurrer should have been sustained.

But we are not prepared to concur in all the reasoning of the court.

The first section of the law referred to—Act of July, 23d, 1868—declares that all laborers shall have an absolute lien on the production of their labor, etc. Section five, in which the manner of commencing suit is prescribed, directs how lands and other property shall be listed, preparatory to sale, etc. The tenth section provides for a sale when judgment is obtained, and declares that when real estate is to be sold under

a lien for labor, such as ditching, building levees, etc., a copy of the judgment shall be filed in the county clerk's office, etc. Section fifteen provides that, in selling buildings, a reasonable amount of land, not exceeding two acres, will be sold with them, etc. Section sixteen prescribes that the officer making sale shall make deed, etc., and section twenty prescribes that no real estate shall be exempt from sale under an execution on a laborer's lien.

We think the lien upon real estate does not depend upon the language in section ten. That section in no way declares upon what kind of property the lien may attach; it prescribes the mode of sale, and alludes to ditching and levees as illustrations of the kind of work for which a lien attaches to real estate; it says when real estate is to be sold under a lien for labor, such as ditching, etc.; and whether or not railroads come within the provisions of the lien, does not depend upon the tenth section, or what is embraced in it, etc.

The act is general in its terms; it does not specifically point out either personal or real property, but attaches the lien to all property, and then prescribes how personal property and real property shall be sold; what quantity in certain cases shall be sold; that none shall be exempt from execution, etc. And we have no doubt but it was the intention of the Legislature to embrace all real estate whereon its owner may have valuable fixtures erected, and, by such labor, rendering the lands more valuable.

We think it immaterial whether the labor was in ditching, building a stone wall, or erecting other improvements, such as an owner might wish to attach to his lands. And, under our railroad charters, the companies do not erect their lines of road upon a mere easement—a mere right to pass over the lands of another. But they hold such title in the realty as is subject to mortgage and sale; subject to transfer by deed, etc. And if a proper case should arise, between proper parties, I see no reason why a lien might not be enforced against a railroad company as well as against others holding property.

CITY OF LITTLE ROCK v. WILLIS.

CORPORATIONS—*Actions against for torts.*—A right of action against municipal corporations does not exist at common law, and their liability to a private action, for *torts*, must be determined by the statute which creates them.

SAME—The sections of the general incorporation act, conferring upon cities the "power to lay off, open, widen, straighten and establish, keep in order and repair all streets, alleys and public grounds, etc., and to open and construct and keep in repair *sewers* and drains," are not mandatory, and for the exercise of a lawful power, which, by law, is vested in the *judgment* and *discretion* of a municipal corporation or public body, for the good of the whole, no injury for which an action will lie can be committed; but for the *imperfect, negligent, unskillful execution* of a thing *ordained* to be done, an action will lie, in the absence of an express statute.

APPEAL FROM PULASKI CIRCUIT COURT.

HON. JOHN WHYTOCK, *Circuit Judge.*

Fay Hempstead, for Appellant.

The *construction* of a public work by a corporation is necessary before a recovery can be had for damages resulting from it. 1 *Black.* 39; *Conrad vs. Ithaca*, 158; *Mayer vs. Furze*, 3 *Hill*, 612; *Montgomery vs. Gilmer*, 33 *Ala.*, 116; *Shearman & Redfield on Negligence*, *p.* 631, *sec.* 579; *Rochester White Lead Co. vs. Rochester*, 3 *Comstock*, 463. The fact of occasionally making repairs on a public work will not make a city liable for damages resulting therefrom, as a voluntary assumption of the duty of maintaining it. *Munn vs. Pittsburg*, 40 *Penn.*, 364.

Wherever it is left to the discretion of a corporation, whether a particular act shall be done or not, no liability attaches for a failure to use this discretion. *Cole vs. Medina*, 27, *Barb.*, 218; *Commissioners vs. Duckett*, 20 *Maryland*; *Carr vs. Northern Liberties*, 35, *Penn. St.*, 324; *Peck vs. Batavia*, 32 *Barb.*, 634; *Mayor vs. Cunliff*, 2 *N. Y.*

That a city is not liable for damages which are the result of the establishment of street grades. *See note* 1 *to p.* 147 *of*

S. & R. on Negligence, and the following cases there cited: *Kavanaugh vs. Brooklyn*, 38 *Barb.*, 232; *Matter of Furman street*, 17 *Wendell*, 667; *O'Conner vs. Pittsburg*, 18 *Penn. St.*, 187; *Taylor vs. City of St. Louis*, 14 *Mo.*, 20; *Round vs. Munford*, 2 *R. I.*, 154; *Lebanon vs. Alcott.* 1 *N. H.*, 339; *Bennett vs. New Orleans*, 14 *La. An.*, 120; *State vs. Graves*, 19 *Md.*, 351; *Cole vs. Muscatine*, 14 *Iowa*, 326; *Callander vs. Marsh*, 1 *Pick.*, 418.

Farr & Fletcher and *T. D. W. Yonley*, for Appellee.

The rule of law applicable to this case is thus laid down in the case of *Rochester White Lead Company vs. City of Rochester*, 3 *Comst.*, (3 *N. Y.*): "Where a municipal corporation has power by its charter to cause common sewers, drains, etc., to be made in any part of the city, although passing an ordinance for the construction of such a work is a judicial act for which they are not liable, yet the doing of the work in carrying it out is ministerial, and it is their duty to see that it is skillfully and carefully done. If by the want of care or skill in its agents, a culvert be constructed of insufficient capacity to carry off the water in a freshet, the city will be liable to individuals for damages thereby occasioned." See, also *Lloyd vs. Mayor of City of N. Y.*, 5 *N. Y.*, 369; *Delmonico vs. same*, 1 *Sand.*, 222; *West vs. Trustees, of Rockport*, 16 *N. Y.*, 161; *Morey vs. Town of Newfane*, 8 *Barb.*, 645; *Baston vs. City of Syracuse*, 37 *Barb.*, 292, 3 *Hill*, 612; *Barrow vs. Mayor and City of Baltimore*, *A. M. Jur.*, 203; *Rhoade vs. City of Cleveland*, 10 *Ohio*, 459. See, also, 16 *Ohio*, 475, *and* 7 *Ohio State*, 407.

It is a well settled rule of law in this State, that the court will not look to the testimony for the purpose of disturbing the verdict of the jury, unless the verdict is so clearly against the testimony as to shock our sense of justice and right upon the first blush. *Lenox vs. Pike*, 2 *Ark.*, 14; *Howell vs. Webb*, 2 *Ark.*, 360; *Sanderer vs. Wilson*, 5 *Ark.*, 407; *Hazen vs. Henry*, 6 *Ark.*, 86; *Drennon vs. Brown*, 10 *Ark.*, 139.

McCLURE, C. J.—It appears from the record, in this case,

that Willis was living in a house near a drain, at the corner of Third and Louisiana streets, in the city of Little Rock, which said drain is usually known as the "town branch." After an unusually copious rain, the drain alluded to, so the appellee alleges, overflowed its banks, and damaged him in the sum of one thousand dollars. At the hearing, in the Circuit Court below, the appellee obtained judgment in the sum of two hundred and fifty dollars. Motion for a new trial was made and overruled, and the cause is brought to this court by appeal.

On the trial of this cause, exception was taken to the ruling of the court, in refusing to give the second and eighth instruction offered by the appellant, and to the second and third instruction given by the court at the instance of the appellee.

The instruction which the court refused to give, at the instance of the appellant, is as follows:

"*Second.* Where a city constructs a sewer, which is not in itself a *nuisance*, but insufficient to carry off the water, the city is not responsible for damages occasioned by overflowing."

There is no error in refusing to give this instruction. The liability of cities and towns, under our statutes, is not measured by an answer to whether or not the thing complained of is a *nuisance*.

The instruction numbered eight, which the court refused to give, at the instance of the appellant, is as follows: "If the jury find, from the evidence, that the house occupied by plaintiff was ten or twelve inches below the grade of the street in front thereof, which crosses the 'town branch,' and that by reason of the house being below the grade, the plaintiff suffered the injury complained of, or if that fact largely contributed thereto, then the plaintiff cannot recover."

As the second instruction, asked by the appellee, was objected to by the appellant, and as it is in conflict with the one asked by the appellant, it will be here stated and the two discussed together. It is as follows:

"*Second.* If the jury find, from the evidence, that the city of Little Rock raised the grade of Louisiana street, in the said city of Little Rock, so as to cause water, in ordinary storms, which hitherto flowed off by another avenue, to flow into the 'town branch,' without making said 'town branch' of sufficient capacity to carry off such increased volume of water, whereby said close, of said plaintiff, was overflowed and his property destroyed, they will find for the plaintiff."

The third instruction asked by the plaintiff, and given by the court, is covered in the concluding portion of the second, just quoted, and raises no other question than those already presented.

Judge Wilshire testified, at the trial, that he had known the "town branch" for some time, and that he never knew of it overflowing at the point in front of the plaintiff's house, until Louisiana street was graded; that, before Louisiana street was graded, the water passed off on the low land, in front of plaintiff's house, and that the grading of Louisiana street had the effect of backing up the water on the premises; that after the street was graded, the house which the plaintiff occupied was about eighteen inches below the grade.

Willis, the appellee, testified that the street was graded in 1869, and that there was not sufficient room in the ditch, *after that*, for the water to get through—there is a pipe leading into the "town branch," and it got filled up with brush. On cross examination he said: "I claim the damage was caused by the grade of the street being raised higher than the house;" that he was not damaged by the overflow before the grade of the street was raised; that the "town branch" carries off the ordinary rain falls and does now, and overflows after unusual rains only.

It is no easy matter to lay down a precise rule embracing the torts for which a private action will lie against a municipal corporation; but it may be generally stated, that the liability of a body created by statute, must be determined by

the statute which creates it, for it is clear that a right of action against a municipal corporation does not exist at common law.

That a municipal corporation may be made liable for damage, in a case like that presented by the record of this case, there is no doubt; but that is not the question; the question is, does the statute, creating the city of Little Rock, give to the appellee a right of action for the wrong complained of? This question must be determined, not by what ought to be, but by the plain letter of the statute. Our duty is to declare what the law is, and not what it ought to be.

If the appellee is entitled to a right of action for the grievances of which he complains, that right exists only by reason of some statute, and in the ascertainment of this fact, the statute itself must speak. The tenth section of the act, creating municipal corporations, declares that the cities and towns shall be "capable to sue and be sued;" but this language is not sufficient to fix the *liability* of the city in any cause. The seventh section of the act declares "the city council shall have the care, supervision and control of all the public highways, bridges, streets, alleys and commons within the city, and cause the same to be kept open and in repair, and free from nuisances."

The eighteenth section provides, the City Council shall have power to lay off, open, widen, straighten and establish, keep in order and repair, all streets, alleys and public grounds, etc., and to open and construct, and keep in repair *sewers* and *drains*.

These are the sections granting power to the city of Little Rock, upon the subject of streets, drains and sewers, and, as will be observed, none of them are mandatory. Sections eighty-five and eighty-six fix the liability of cities and towns, in case injury is done the property of individuals by reason of grading the streets, and prescribes the mode of ascertaining the same, but this fact, of itself, is no argument to prove that the city would not be liable for damages sus-

tained by an individual, growing out of a neglect on the part of the city to keep its sewers in repair.

Whether or not a city is liable to a suit for damages, in a case presenting facts like the one at bar, depends upon circumstances. For the construction of a sewer which has not the capacity to carry off the ordinary or extraordinary rain falls, the city cannot be made responsible, and the reason for this is, that a city cannot be held to answer for an error of judgment, committed by a body, created by law, and clothed with discretion to determine the width and depth of drains and sewers; to hold a city responsible, under such circumstances, would be to vest the power of judging of the proper grade of streets and the width and depth of sewers in the judiciary, instead of the City Council, where the Legislature placed it. Where a city prescribes the grade of a street, or the capacity of a drain, and it is not constructed as directed, or in such an unskillful manner as to damage persons adjacent thereto, in that event, the city is liable. The law is, that for the exercise of a lawful power, which by law is vested in the judgment and discretion of a public body for the good of the whole, that no injury, for which an action will lie, can be committed—*salus populi suprema est lex*—but that for an imperfect, negligent, unskillful execution of the thing ordained to be done, an action will lie in the absence of an express statute. The acts of municipal corporations are divided into two classes; *first*, those requiring Legislative, or what is sometimes called judicial action, and *second*, those acts which are wholly ministerial. For the former, an action will not lie; but for the latter, it will.

One question presented by the record is: was the city bound to construct a sewer or drain of sufficient capacity to carry off all the water which might flow into the "town branch," or was it only bound to keep the drain in repair?

The testimony of Williams is, that the drain, commonly called the "town branch," was a natural water-course, and that the route was changed as far back as 1844. The evidence

of the appellee, himself, and the two others who were examined as witnesses, is that the "town branch" did not overflow so as to damage the property where the appellee resided until the streets were graded in his front. Williams further testifies that, prior to the war (1861), the "town branch," as changed, was sufficient to carry off all water finding its way thereto, without overflowing the property in question, and during the war, that the timber adjacent to the city was cut down and carried away, and that the natural objects, which retarded the surface water from finding its way to the river, had been removed, and that since then the "town branch" had occasionally overflowed on account of the removal of the obstacles which, at one time, retarded the rapid flow of water into the "town branch."

In the case of *Mills et al. vs. City of Brooklyn*, 32 *N. Y.*, 489, the plaintiff's lot, at the intersection of the avenues mentioned, was on low ground; that, before the paving of the streets, the water flowing thereon was absorbed by the earth, instead of remaining on the surface; that the grade of the streets was higher than his lot; that a heavy rain fell, inundated his premises, causing the wall of his house to settle and crack, for which, to recover damages, he brought suit. It also appeared that the city had put down a sewer which was insufficient to carry off all the surface-water which fell during a violent storm. In speaking of the insufficiency of the sewer, Judge Denio said: "After reviewing the cases of *Cole vs. The Trustees of Medina*, 27 *Barb.*, 218; *Cavanaugh vs. The City of Brooklgn*, 38 *Barb*, 232; *Rochester White Lead Company vs. City of Rochester; Hudson vs. Mayor of New York*, 5 *Selden*, 153, it may, therefore, be laid down as a very clear proposition, * * * that an action would not lie against the corporation, though the jury should find a *sewer was necessary*, and that the defendants *were guilty of a dereliction of duty in not having constructed one.*"

The facts, as to the location of the property, in the case of *Mills vs. City of Brooklyn*, 32 *N. Y.*, 489, are not dissimilar to

the facts in this case—the testimony in both cases going to show that no damage ensued until the streets were raised to a higher grade, in front of the property, than the lots on which the buildings were situate.

There is no testimony in this case showing that the "town branch" was out of repair, or that the injury, of which the appellee complains, grew out of any negligence on the part of the City Council, or the other officers of the city. It is true, there is some testimony tending to prove that the sharp angle made at the corner of Third and Main streets, might have a tendency to back the water and retard its escape; but this angle was in the drain prior to 1861, and Williams testifies that, at that time, it was sufficient to carry off the water. The appellee, himself, testifies that a pipe, leading into the "town branch," got filled up with brush, and that the damage which he sustained arose from, not the defective construction, or the neglect to keep the "town branch" in repair, but because of the grade of the street "being raised *higher than his house.*"

The court instructed the jury, that if they found, "from the evidence, that the city of Little Rock raised the grade of Louisiana street, so as to cause water, which hitherto flowed off by another avenue, to flow into the 'town branch,' without making said 'town branch' of sufficient capacity to carry off such increased volume of water, whereby said close of said plaintiff was overflowed and his property destroyed, they will find for the plaintiff."

This instruction is erroneous, as the City Council and the corporation which they represent, were only bound to keep the sewer *in repair*; nor is it true that the city was, or is, bound to build sewers to carry off the surface-water, which, by reason of the grading of streets, at one time flowed by another and different route. This very point was presented in the case of *Carr vs. The Northern Liberties*, 35 *Pa. St.*, 324; and it was there held that if a drain ceased to be of sufficient capacity, which it at one time possessed, in consequence of

the increase of population and the greater extent of territory graded and built upon, a corporation having municipal powers was not responsible or liable for damage arising from an overflow.

We are of opinion that appellant's instruction, numbered two, should not have been given; that her instruction, numbered eight, should have been given, and that instructions, numbered two and three, of the appellee, to which objection was made, should not have been given.

For the errors aforesaid the judgment is reversed, and the cause remanded.

LYMAN et al. v. CORWIN.

ANSWER—*Defenses should be paragraphed.*—Where different defenses are attempted to be set up in an answer, the court, on motion, may properly cause each defense to be stated in a separate paragraph.

PRACTICE—*Misjoinder of cause of action, etc.*—The court, on motion of defendant, at any time before defense, should strike out any cause or causes of action misjoined.

SAME.—A party, who has a defense by way of recoupment, will not be permitted to seek affirmative relief by making another person, in interest, a party defendant, by way of subrogation.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Bell & Carlton, for Appellants.
A. H. Garland, for Appellee.

GREGG, J.—The appellee, as assignee of H. A. Pierce, brought suit against Lyman, Stanford, Kenyon, Murphy and John M. Clayton, for $1000, alleged to be due from them upon a writing obligatory. At the return term, the appel-

lants filed the petition of B. C. Hubbard to be made a party, and moved the court to consolidate this suit with two others alleged to be brought by Pierce for debts incurred as a part of the same consideration, and that the whole cause be heard in equity, and Hubbard's claim to an interest in the property, for which the notes had been given, be, with the other matters in controversy, determined.

On motion of appellee, the petition to consolidate and transfer was stricken out. Whereupon, the appellants filed their answer, and appellee moved that they be required to paragraph their answer, which the court ordered done.

The appellants filed an amended answer, in which they avered that the appellant, Lyman, had purchased from the assignor, Pierce, a one undivided half interest in the Jefferson Republican printing office, fixtures, furniture, etc., for the consideration of $2750, to be paid said Pierce in cash, and the assumption of the payment of one half of certain claims against the office for a like amount, in the aggregate $4125; that of the amount to be paid Pierce, $1250 were paid down, and the notes, in the three suits named, were executed for the remainder of the $2750 to be paid said Pierce. They aver that Pierce owned but one half of said printing office, presses, etc., and, without the knowledge of said appellants, before that time he had sold, and by written bill of sale conveyed to G. W. Davis one fifth of the whole of said office, presses, etc., and that he, at the date of the sale to appellant, Lyman, actually owned but three-fifths of one half of said office, presses, etc., and that he concealed that fact and fraudulently sold to him one half of said entire office, presses, etc., by then falsely representing that he was the owner to that extent; and that, by the conveyance to the said Lyman of one full half interest in said office, presses, etc., he could not and did not take but three-fifths of one half interest in the same, that being the only interest said Pierce had or could convey, though he sold and pretended to convey such half interest, and therefore the consideration to that extent had

failed; and they offered to pay any further sum that might be found due, and prayed judgment, etc.

The appellant's second amended paragraph sets up, substantially, the same defense as the first. In their third, they allege that Hubbard, as the assignee of Davis, was interested in the result of the suit, and prayed that he be made a defendant, and that his rights, with the others, be determined.

The appellee moved the court to strike out appellant's third paragraph, which motion the court sustained and ordered it struck out, to which appellants excepted. Appellee then filed a demurrer to the first and second paragraphs of appellant's amended answer. The court sustained the demurrer, and the appellants declined to plead over, whereupon the court rendered judgment against them for $1000 and costs. They moved for a new trial; their motion was overruled; they excepted and appealed to this court.

It is here urged that the court below erred in compelling appellants to paragraph their answer; that it erred in striking out their third paragraph, and also, in sustaining the demurrer to the first and second paragraphs of the answer.

When a party attempts to set up different defenses in a general answer, without designating his respective defenses, the court, upon motion, may properly compel such respondent to state separately his alleged defenses to the action, by properly setting out each cause of defense in a separate paragraph of his answer. *Civil Code, sec.* 116; *Newman's Plead. and Pract.*, 538, 539; *Lewis vs. Carter*, 9 *O. St.;* 1 *Duval*, 84. The third paragraph of the answer attempted to bring Hubbard before the court as a defendant, and in the attitude of seeking affirmative relief, by asking to have his claim of one-fifth interest in the printing office, presses, etc., adjudicated, in which claim he prays to be subrogated to Pierce's right to recover of Lyman et al., two-fifths of the sum Lyman agreed to pay him. He had no right to thus recover of the appellees, and he was not a necessary party to the suit, and the court did not err in refusing to allow him to be made a party

and in striking out this paragraph. *Sec.* 104 *Civil Code*; *Hancock vs. Johnson*, 1 *Met.*, 242; 8 *O. St.*, 293.

The only question remaining is the ruling upon the demurrer. If, as averred in the answer, Pierce did fraudulently represent that he owned one-half of the printing office, presses, etc., and sold that amount to Lyman for the sum alleged, when, in fact, he only owned three-tenths thereof, as averred, and did not and could not convey more than that, he was practicing a fraud upon Lyman, and to that extent there was a failure of consideration. If such facts did not exist, appellee should have taken issue upon the answer. Under the modern practice, Lyman was not bound to pay the full amount of the obligation given by him and others to Pierce, and then resort to a cross action for the damages sustained by such fraudulent representations, but he might recoup or withhold that amount from collection. *Wheat vs. Dotson*, 12 *Ark.*, 699; *Civil Code*, *secs.* 116, 117; *Stone vs. Stone*, 2 *Met.*, 339.

The court below erred in sustaining the demurrer to the first and second paragraphs of appellant's amended answer, and for that error the judgment is reversed, and the cause remanded, to be proceeded in to final judgment.

LYMAN et al. v. PIERCE.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Bell & Carlton, for Appellants.
A. H. Garland, for Appellee.

GREGG, J.—This cause has been submitted to the court upon the same briefs and for a decision of the same questions involved in the case of *Charles L. Corwin, as assignee, vs. Fred. K. Lyman, et al.*

The judgment is reversed, and the cause remanded.

LYMAN v. PIERCE.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Bell & Carlton, for Appellant.
A. H. Garland, for Appellee.

GREGG, J.—This cause was submitted upon the same briefs and for a decision of the same questions involved in the case of *Fred. K. Lyman et al. vs. Charles L. Corwin*, and *Fred. K. Lyman et al. vs. H. A. Pierce*, and, for the errors mentioned in the former, the judgment herein is reversed, and the cause remanded, to be proceeded in according to law.

PHELPS & JONES v. JACKSON, Admr.

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66 488

ADMINISTRATORS—*To set aside fraudulent contracts by, etc.*—A creditor seeking the aid of a Court of Chancery to reach an equitable interest in an estate, or to set aside a fraudulent contract made by an administrator, should aver and show, in his bill, that his demand or claim has been legally ascertained or reduced to judgment.

EQUITY PRACTICE—*Changed by Code.*—The rule that, if complainant has a plain and ample remedy at law, his bill must be dismissed, has been changed by the Code of Practice, in so far that, if his bill shows that he has a legal right, without motion before, and on motion after answer filed, if made within proper time, he may have the action transferred to the proper docket.

SAME.—On dismissal of bill for want of equity, where it appears that complainant has legal rights, the better practice is, to dismiss without prejudice and not peremptorily.

APPEAL FROM DREW CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Wells & McKain and *Bell & Carlton*, for Appellants.

As to the question of jurisdiction, we submit that the Circuit Court has concurrent jurisdiction with the Probate Court in claims of this kind. *See chap.* 4, *Gould's Digest*; 5 *Ark.*, 472; *Ryan vs. Leman*, 7 *Ark.*, 84, and *Saunders vs. Rudd, admr.*, 21 *Ark.*, 519. Under our Code, there is no such thing as dismissing a bill for want of equity. *See secs.* 3, 18, 338, 606. If the proceedings should have been at law instead of equity, the error would not cause the abatement or dismissal of the suit. *See Code, sec.* 5 *et seq.*; *Lonsdale vs. Mitchell*, 14 *B. Monroe*, 349; *Trustees of Lebanon vs Forest*, 15 *B. Monroe*, 171; *Robertson vs. West*, 14 *B. Monroe*, 5; *Frazer vs. Naylor*, 1 *Met.*, 596; *Foster vs. Watson*, 16 *B. Monroe*, 71.

J. W. Van Gilder and *J. A. Jackson*, for Appellees.

The plaintiffs cannot come into a court of equity to set aside a sale for fraud, unless they first show that they have a judgment at law, and have an execution issued and returned

"*nulla bona.*" *See* 11 *Ark.*, 411, 718; 12 *Ark.*, 387; 18 *Ark.*, 589. There is certainly no equity in the bill.

BENNETT, J.—The appellants, Phelps & Jones, filed in the Drew Circuit Court their complaint in equity against the administrator and heirs of W. E. Conly, Sr., deceased. Afterward, on the 4th day of October, 1870, the appellants filed an amended complaint. On the 4th day of April, 1870, Jackson, as administrator, filed his answer to the original complaint, with a demurrer clause added, and, on the 11th of April, 1871, filed answer and demurrer to amended complaint.

The heirs, though served with notice, did not appear. April 11th, 1871, an interlocutory decree was taken against some of the defendants. On the 15th of April, 1872, the cause was heard on the original and amended complaints, exhibits, answers of the administrator and guardian *ad litem* for minor defendants, demurrer and proofs, and a decree was rendered dismissing the complaint. From which decree an appeal was granted.

Was the complaint properly dismissed? The complaint stated that plaintiffs were partners, on the 20th day of January, 1862, and doing business as commission merchants, in New Orleans, and that W. E. Conly, Sr., on that day was indebted to them in the sum of $4270 28, of which sum $1082 98 was evidenced by a note; the balance was on account.

W. E. Conly, Sr., died on the 1st day of September, 1865. At the time of his death, he held a vendor's lien on certain lands, as described in the complaint. On the 11th day of October, 1866, one of the defendants, W. E. Conly, Jr., as foreign administrator, obtained a decree in chancery to foreclose this equitable lien. The land was sold, in pursuance of this decree, to W. E. Conly, Jr., for the benefit of the heirs of W. E. Conly, Sr. No part of the purchase money was paid, except the amount sufficient to pay costs of foreclosure. The complaint alleges that W. E. Conly, Jr., and the heirs of

W. E. Conly, Sr., were in collusion to defraud the plaintiffs, by the purchase of said lands, and not accounting for the same. The heirs of W. E. Conly, Sr., are in possession of the land.

On the 11th of July, 1869, the defendant, James A. Jackson, was duly appointed administrator. On the 18th day of August, 1869, the note and account, duly authenticated, were presented to the administrator, but he refused to allow them as claims against the estate of W. E. Conly, Sr. It is further alleged, that the accounts of the plaintiffs with the estate of Conly, deceased, are so complicated that they cannot have proper relief in a court of law, and that the personal assets of the estate are not worth $25. The complaint then prays that the defendant, Jackson, as administrator, be required to state what amount of personal assets belong to said estate, and that their claim be allowed and classed as a demand against the estate, and that the administrator pay the amount out of the assets, and, in default of which, that the lands mentioned be subjected to the payment. The note and accounts are made exhibits.

In the amended complaint, certain judgments obtained in Texas are set out, and the complaint states that these judgments were obtained against W. E. Conly, Jr., as administrator of W. E. Conly, Sr., and that they are unsatisfied, and that there is no other property out of which they can satisfy them except the lands as described in the original complaint. It as also alleged that W. E. Conly, Sr.'s estate is insolvent.

The answers of the defendants, Jackson, administrator, and of the guardian *ad litem*, deny none of the allegations of the bill; nor does the proof introduced. The records do not disclose the fact whether the court below dismissed the bill upon its merits, or whether it was dismissed for want of equity. The answers and proof not helping the defendants, we must presume the judgment of the court was based upon the demurrer. Therefore, we shall consider the case as though no answer or proofs were introduced, and decide the issues of law as on demurrer.

The answer of Jackson sets out three causes of demurrer: *First*, as to the sufficiency of the complaint; *Second*, as to the jurisdiction; and, *Third*, a special cause, which is more properly included in the first.

Taking these parts of the demurrer in their more appropriate order, we will discuss the question of jurisdiction first.

In the collection of claims against the estates of deceased persons, litigants may proceed by actions as laid down in the statutes. By *chap.* 4, *secs.* 101, 102, *Gould's Digest*, the manner of exhibiting claims against the estates of deceased persons is prescribed. One of the modes thus prescribed is laid down in *sec.* 101, *chap.* 11, which says: "All actions commenced against any executor or administrator, after the death of the testator or intestate, shall be considered demands legally exhibited against such estate, from the time of serving the original process on the executor or administrator, and shall be classed accordingly."

In claims of the kind, as presented in the complaint, the Circuit Court has concurrent jurisdiction with the Probate Court. *Pullam et al. vs. Yell, Governor*, 5 *Ark.*, 472; *Ryan vs. Lemon*, 7 *Ark.*, 84; *Saunders vs. Rudd, adm'r.*, 21 *Ark.*, 519; *Hornor, as Trustee, vs. Hanks*, 22 *Ark.*, 587.

This leads us to consider that part of the demurrer which states that the complaint does not allege facts sufficient to constitute a cause of action.

The complaint sets out that W. E. Conly, Sr., was indebted to the plaintiffs in an amount named; that it was never paid, and the defendant, Jackson, is his administrator, and that the claim was properly authenticated and duly presented. The suit is founded, in part, on bills of exchange, and the dates show that they are not barred by the statute of limitations. These facts, if true, would entitle the plaintiffs to judgment in a suit at law; but do these facts constitute a cause of action in chancery?

The plaintiffs' claim to the equitable interposition of the equity side of the court rests, 1st: Upon the ground that they

are creditors of the estate of W. E. Conly, Sr., deceased, and that W. E. Conly, Jr., the foreign administrator, confederated with the heirs of W. E. Conly, Sr., and fraudulently secured the title and possession of certain lands, in violation of the rights of plaintiffs, and that, aside from these lands, there are no known assets out of which their claim can be paid. They also seek to make the administrator discover what personal assets may be in his hands, and desire judgment for the amount of their claim, and, in default of payment by the administrator, that the lands mentioned be subjected to the payment of it.

Whatever may be the effect of fraud upon a contract, as between parties themselves, in consideration of their infamy, or public policy, there can be no question but that creditors and others, whose rights are affected thereby, may cause such fraudulent contract to be set aside, and their rights, so affected, may be protected and preserved: Justice Walker, in the case of *Meux vs. Anthony, et al.*, 11 *Ark.*, 418, says: "The right to this equitable interposition is based upon three grounds: *First*, that the party complaining has such rights. *Second*, that they are affected by such fraudulent contract. *Third*, that the contract is, in fact, fraudulent. And first, in regard to the rights to be affected. They must be definite, ascertained rights, by the ordinary tribunals appointed for that purpose. Thus, it has been held that it is not sufficient for a creditor, when he comes into a court of equity, to have a fraudulent sale set aside and the property subjected to the payment of his debt, that he should simply show an outstanding debt liquidated or unliquidated, but he must also show that he has prosecuted such claim to judgment, so that it may be judicially ascertained that he has a certain specific amount due him; nor is that sufficient; he must show that process has been regularly issued thereon, and returned *nulla bona*, for, until this is done, it is not ascertained that his rights are necessarily affected by such transfer. Or, if the complainant would avoid the force of this rule, he should show

such equitable circumstances as will relieve him from its application, making his case an exception to the rule." It has been expressly decided by this court, that a judgment, in the Circuit Court, obtained against an administrator or executor, does not confer authority upon the plaintiff to collect the judgment in the ordinary mode, by the process of the court. The judgment, though it has settled the existence of a demand, has completed its allowance, and has imposed upon the administrator the duty to classify it. *Adamson et al. vs. Cummins, ad.*, 5 *Eng.*, 548.

Therefore, it may not require a person, seeking in equity to set aside a fraudulent contract, made by the administrator with the heirs of an estate, to aver in his bill that process has been regularly issued and returned *nulla bona;* but we can see no reason why he should not have obtained a judgment on his claims. The reason and propriety of this is obvious. It is altogether premature, on his part, to ask the Chancellor to set a contract aside until this is done. Until his claim is so adjudicated, even admitting the transfer of property, or the use of the assets to have been fraudulent, he has no right to complain of wrong done him. He may never obtain a judgment upon his claim. He may not be a creditor of the estate. The note and account may have been paid—the judgment satisfied. The refusal of the administrator to allow them must have been based upon some legal reason for their rejection. Therefore, it is necessary that at least the legal rights of the parties should have been ascertained before a bill of complaint in equity can be maintained to reach an equitable interest or set aside a fraudulent transaction of the debtor.

The second ground of equitable jurisdiction in this case is alleged to be, that the suit embraces a mutual and complicated account.

Provided the rule is that equity has jurisdiction to settle mutual and complicated accounts, the facts in this case would not warrant equitable interference for that reason. This cause of action is founded upon a note, judgments and ac-

counts. The note is a plain promissory note. The judgments, as set forth in the amended bill, were obtained in the State of Texas, in a court of competent jurisdiction, and duly authenticated, and the account is a plain, straightforward statement of debits and credits, such as is usually made and rendered in daily mercantile transactions. Nothing appears in either to make their solution, in any sense, a matter that a legal tribunal could not justly solve. No equity, then, appears in the bill. The plaintiffs, however, insist that, providing there is no equity disclosed in the bill, it should not have been dismissed, if it showed a cause of action at law, but have been transferred to the law side of the court.

It is an old and familiar rule of chancery practice that, if the complainant has a plain and ample remedy in a court of law, his bill cannot be entertained, but must be dismissed for the want of equity. The Code, however, has changed this practice, and allows a plaintiff, who has committed an error as to the kind of proceedings adopted, to change them and transfer the action to the proper docket; but this change and transfer must be done by the plaintiff. If the error is discovered before answer is filed, it may be done without motion; if afterward, on motion, in court. The transcript in this case does not show that the plaintiffs, in the court below, made any effort to have the proceedings changed. It is within the province of the court to make the transfer, but it is not bound to exercise this discretion, unless asked to do so by the party desiring it. When the bill has been examined, and judgment pronounced of "no equity in it," unless the party complaining makes some effort to have the proceedings changed to the proper forum, it is the duty of the Chancellor to dismiss the bill.

The complainants, in the case at bar, may be entitled to a judgment at law upon their notes, etc.; in such instances it is not best to make a peremptory order of dismissal, but to dismiss the bill without prejudice.

To this extent, the decree of the Chancellor is erroneous,

and should be modified to read, "and complainants' bill be dismissed without prejudice." In all other respects, the proceedings and findings of the court below are affirmed.

SMITH & BRO. v. VAN GILDER, Adm'r.

VERDICT—*When not disturbed.*—The verdict of a jury, or the finding of facts by the court trying the case, sitting as a jury, will not be disturbed unless the same be without evidence to support it.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Johnston & Hawkins and *Watkins & Rose*, for Appellants.
J. W. Van Gilder, for Appellee.

SEARLE J.—The issues in this action were tried in the court below by the court sitting as a jury. Finding and judgment were for the defendant, from which plaintiffs appealed to this court. The motion for a new trial was upon the following grounds:

First. That the court refused to declare certain propositions of law, asked by the plaintiffs to be declared as the law of the case.

Second. That the verdict and judgment of the court were contrary to the law and evidence.

As to the first ground for a motion for a new trial, we have but a word to say. The court declared a number of propositions of law, which, taken together, fully comprehended the substance of what was contained in the propositions of law refused. No prejudice, therefore, could result from the refusal of the latter. The propositions of law

declared seem to comprehend fully the law of the case. So the appellants can have no cause for complaint upon this first ground for their motion for a new trial, by the same being overruled.

We will now consider the second ground for the motion for a new trial, namely, that the verdict and judgment of the court were contrary to the law and the evidence. This we will take to mean, as was doubtless intended, that the finding of the facts by the court, sitting in the trial of the case, as a jury, was contrary to the law and the evidence. It appears that the writing sued upon, as evidence of indebtedness, was executed by Kittrell & Co., and it is contended, by appellants, that D. L. Evans, of whose estate the appellee is administrator, was a partner of the firm when the same was executed, or at least held himself out as such, which fact induced the appellants to give credit to the writing sued upon, and accept the same. The main question of fact for the court, as a jury, to find, was, as to whether Evans was a partner in said firm, or held himself out as a member of the firm, thereby giving the firm credit, by which the obligation accrued, as upon this depended his liability or the liability of his estate to satisfy the note sued upon. The court found, as the facts in the premises:

First. That Evans was not a partner in said firm.

Second. That he did not hold himself out by words or acts, as a partner, either open or secret, of the firm, or as in any manner connected or interested in the business of the firm.

Was this finding contrary to the evidence? We have carefully examined the evidence, and though we find it very conflicting, the finding of the court was not without foundation. We are not, therefore, disposed to disturb it. For the well known rule that the verdict of a jury will not be disturbed, unless the same be without evidence to support it, will apply to the finding of facts by a court trying the case, sitting as a jury, to the same extent and for the same reasons. The finding of facts, by a court, not being against the evidence,

is neither against the law, as the law was correctly declared.

The opinion of this court is, therefore, that there was no error in the proceedings and judgment of the court below, and the judgment must be affirmed.

HAAG et al. v. SPARKS.

ADMINISTRATION—*When court of equity will interpose.*—Although a Court of Chancery will not interfere in the administration of an estate, already commenced in the Probate Court, and assume the settlement of a question concerning the estate, which rightfully belongs to the jurisdiction of the Probate Court, yet, if the bill presents such a state of facts and circumstances as show that an irreparable injury is pending, against which the Probate Court is powerless to grant relief, the interposition of a Court of Chancery is allowable.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. E. D. HAM, *Circuit Judge.*

Walker & Rogers, for Appellants.

While a court of equity will not interfere with an estate in process of settlement in the Probate Court, yet, if the administrator refuse or neglect to account, the creditors or distributees can hold him to account in a court of equity. *Mallett et al. v. Dexter*, 1 *Curtis, U. S. Ct. Ct. Rep.* 178; and certainly under our Code of Practice. See *Section* 465, *page* 141.

A. H. Garland, for Appellee.

The Probate Court has full and complete jurisdiction of administrations—to compel administrators to settle, etc. *Gould's Digest, Title, Administration, Sections* 122, 148; and until a party has exhausted all his remedy in that court, or

for fraud, etc., he cannot be heard in equity to force an administrator to settle the estate. 23 *Ark., p.* 93 *and cases cited;* 26 *Ark.*, 373.

STEPHENSON, J.—This was a bill filed by the heirs of John P. Haag, deceased, in the Circuit Court for the Fort Smith district of Sebastian county, against James H. Sparks and William Levy, administrators, and Volney V. Milor, administrator, *de bonis non*, of the estate of said Haag.

The bill charges that John P. Haag, father of the plaintiffs, died about February 11, 1861, possessed of a large amount of personal property, greatly more than sufficient to satisfy and pay his just debts and funeral expenses; that in March following, James H. Sparks and William Levy, two of the defendants herein, obtained letters of administration upon the estate, from the Probate Court of Sebastian county, and possessed themselves of the personal estate of the intestate; that debts to the amount of $485 75 have been proved and allowed against the estate; that soon after getting possession of the property, Sparks and Levy sold the same and invested the proceeds in their private business, and have never paid over or accounted to any person for the same, but, on the contrary, fraudulently converted the same to their own use; that they have never filed any account current or sales bill in the Probate Court, so that the plaintiffs are unable to state the true amount of the estate, but they believe and so charge, that they received in money (gold) $665, and of the proceeds of the sale $1000; that soon after the sale of the property, Levy left the State, and plaintiffs have been unable to learn his whereabouts. That recently, James H. Sparks has been adjudged a bankrupt, and is now in greatly embarrassed circumstances, wholly unable to pay his debts contracted since his bankruptcy, and those debts of a fiduciary character, from which he could not be discharged under the bankrupt law; that C. G. Hicken, who has since died insolvent, and John Beckel, who is also insolvent, were the only securities

on the administration bond, executed by the said Sparks and Levy; that, on account of the insolvency of Sparks, he is unable to give a new bond if required to do so; that Sparks is joint owner or tenant in common, with John F. Wheeler, of a printing and newspaper office, and the brick building containing it, on Garrison Avenue, in the city of Fort Smith; that he is now attempting to dispose of his interest in said premises, with the fraudulent intent of preventing this property from being subjected to liability to these plaintiffs, and in case he should effect such sale, any judgment which they might obtain against him, would be worthless; that this is all the property Sparks has out of which they can make their claim against him.

Plaintiffs further allege, that one Volney V. Milor claims to be administrator *de bonis non* of Haag, but allege that they are unable to find any record evidence of the revocation of the letters granted to Sparks and Levy, but pray that he may be made a party and required to disclose his alleged rights in the premises. Prayer of plaintiffs that Sparks be enjoined from selling or disposing of the property until an accounting can be had; that an account be taken of the property of the estate in the hands of Sparks. Also, that an account be taken of the debts and funeral expenses of the intestate; that the personal estate be applied in a due course of administration, and that the clear residue thereof be ordered and adjudged to be paid to the plaintiffs.

The record shows service upon Sparks, but none upon the other defendants. Sparks appeared and filed a general demurrer and answer to the bill, reserving several causes of special demurrer to be determined at the hearing.

The demurrer to the bill was sustained by the court, and the plaintiffs resting upon it; the bill was dismissed, and the plaintiffs appealed.

We have simply to inquire if the plaintiffs have set up such a state of facts as will entitle them to equitable relief.

This court, in *Clark vs. Shelton*, 16 *Ark.*, 481; *Dooly vs.*

Dooly, 14 *Ark.*, 122; *Moss vs. Sandefur*, 15 *Ark.*, 381, has defined the jurisdiction of the Probate Court, under existing statutes, so far, at least as is necessary to the determination of this case; and, in *Moran et al. vs. McCown et al.*, 23 *Ark.*, 94, *and Freeman et al. vs. Reagon*, 26 *Ark.*, 373, it is decided that, where the administration of an estate has been commenced in the Probate Court, and is in process of adjudication, a Court of Chancery will not assume the settlement of any question concerning the estate which rightfully belongs to the jurisdiction of the Probate Court, nor will it withdraw a case from that court.

If, therefore, the relief prayed for in this bill falls within the scope of the jurisdiction conferred on the Probate Court, as defined in the cases above cited, the demurrer was properly sustained.

Before proceeding to the consideration of the only question which we think involved here, we are constrained to remark that the long space of time through which the case has been allowed to sleep, undisturbed by that vigilance which the law requires at the hands of the court charged with the administration of dead men's estates, suggests the query, how far such neglect might be allowed to continue without the interposition of the superintending control of this court?

Appellants charge in their bill that one of the securities in the bond of Sparks and Levy is dead and his estate is insolvent, and that the other, though living, is also insolvent. That one of the administrators, soon after the sale of their father's personal estate, left the country, and has not since been heard of; that his co-administrator, Sparks, who interposes this demurrer, has been adjudged and discharged as a bankrupt; that he has become embarrassed and unable to pay his debts contracted since his bankruptcy, and those of a fiduciary character, from which the bankrupt law did not absolve him; that he is the part owner of a brick building in Fort Smith, and a printing and newspaper office, which he is attempting to sell for the fraudulent purpose of defeating the

claim of these appellants; and that this property is the sole reliance of the appellees for their money.

These allegations, which appellee, Sparks, by his demurrer admits to be true, certainly present a case where the appellants are in great danger of suffering irreparable mischief, if not relieved by some judicial power, and, from the authorities above referred to, it is clear that they are not relievable in the Probate Court. It is the peculiar province of the Chancellor, under the state of facts presented by these pleadings, to lay his hand upon this property and prevent the fraudulent disposal of it until the rights of Haag's heirs can be adjudicated and determined in the forum charged with that duty; and we are of opinion that such a spur applied to the dormant energies of the appellee, would hasten a conclusion of the long slumber which the administration of this estate seems to have had in the Probate Court. We do not find it necessary to consider further the question of the withdrawal of the case from the Probate Court, as the Chancellor, upon the hearing, can, if he finds the allegations of the bill to be true, enjoin the sale of the property until the administrator files a sufficient bond for the faithful administration of the estate, or renders an account of his administration, or in case of his failure to do so, then the Chancellor could, with propriety, upon presentation to him of the indebtedness of Sparks to the estate, after his removal, decree its payment out of the property enjoined.

As we have determined that appellants are entitled to relief upon purely equitable grounds, and can obtain it as against the appellee, Sparks, as fully, under his bill, as if the administration of the estate was transferred to a Court of Chancery, we decline to go into the question presented by appellant's counsel, as to the power of removal into the Circuit Court of the administration of estates begun in the Probate Court under the provisions of *chapter* 3, *Code of Civil Practice.*

The decree of the Sebastian Circuit Court, sustaining the demurrer and dismissing the bill, is reversed, and the cause re-

manded, to be proceeded with to the hearing, in a manner not inconsistent with this opinion, and a temporary restraining order, as prayed in the bill, is granted until the further hearing before the Circuit Court, and upon the filing of a bond in the sum of $500 by the appellants, approved by the Circuit Clerk of Sebastian county.

JOHNSON, Adm'x. Etc. v. DuVAL, Adm'r. Etc.

APPEALS—*When not taken in time.*—An appeal, not taken in the manner and within the time prescribed by law, will be dismissed for want of jurisdiction.

SAME—*When time may be extended.*—The court, in the exercise of its sound discretion, may extend the time for filing the papers on appeal, by a proper showing, on the part of the appellant, that the delay was not owing to laches on his part; that due diligence has been used, and that he has been prevented by means and circumstances over which he had no control.

SAME—*When taken by Executors, etc.*—Executors and administrators, appealing from judgments rendered against the goods of their testator or intestate, are not required to file the bond and security as in other cases provided, but they will be held to file the affidavit, for appeal, required by the statute.

APPEAL FROM SEBASTIAN CIRCUIT COURT.

HON. T. H. BARNES, *Special Circuit Judge.*

Walker & Rogers, for Appellant.
Rose & Green and *Ben. T. Du Val*, for Appellee.

BENNETT, J.—This suit was originally brought in the Probate Court by the appellee against the appellant. On the 9th day of May, 1871, an appeal was granted to the Circuit Court, but the papers in the case were not filed until the 4th day of November, 1871.

At the next succeeding term of the Circuit Court, held in April, 1872, the appellee filed a motion to dismiss the appeal. Upon the hearing of the motion it was sustained by the court, and the cause dismissed. The appellant asked for a re-hearing, which was also overruled. From this order of dismissal an appeal to this court has been granted. The appellee now files a motion to dismiss the appeal from this court; because, as the Circuit Court acquired no jurisdiction, this court can have none on appeal.

The jurisdiction of the Circuit Court, in this case, depended solely upon the fact, as to whether the appellant had taken her appeal in the manner and within the time prescribed by law.

Section 2 of an act of the General Assembly, approved March 16, 1871, says: "Appeals may be taken from said Probate Courts to the Circuit Courts, but shall be taken without bills of exceptions, and in the manner and within the time that appeals are now taken from Justices' Courts; that is to say, the party appealing shall produce, within sixty days, after the rendition of the judgment, to the clerk of the Circuit Court, a certified copy of the judgment and amount of costs, and cause to be executed, before said clerk, by one or more sufficient sureties, to be approved by the clerk, a bond to the effect that the appellant will satisfy and perform the judgment that shall be rendered upon the appeal; whereupon, the clerk shall issue a mandate to the judge rendering the judgment or decree, as the case may be, notifying him that an appeal has been taken in the cause, and to stay all further proceedings on the same, and to transmit, to the office of said clerk, all the original papers therein, and the appellee shall be actually or constructively summoned to appear and defend the appeal." * * * * * Section 3, says: "The party appealing, besides executing the bond, as required by section 2 of this act, shall file with said clerk of the Circuit Court, an affidavit that the appeal is not taken for delay or vexation, but that justice may be done."

Under this law, which was in force at the time of this appeal, there are three main requisites necessary to perfect an appeal from the Probate to the Circuit Court. 1st. The party appealing shall produce, within sixty days after the rendition of the judgment, a certified copy of the judgment and amount of costs. 2d. He shall cause to be executed a bond, with securities, to the effect that he will satisfy and perform any judgment that may be rendered against him. 3d. He shall file with the circuit clerk an affidavit that the appeal was not taken for delay or vexation, but that justice may be done.

From the transcript of this case, we find that neither of these requirements has been done. On the 9th of May, 1871, the judgment, on the subject matter, was rendered in the Probate Court, and on that day an appeal was granted by the court. The papers, etc., of the cause, were not filed in the office of the circuit clerk until the 4th day of November, 1871, nearly six months after the appeal was granted. Even if this was the proper mode of procedure to perfect the appeal, it is barred by the lapse of time between the day of the rendition of the judgment and the day of filing the papers in the Circuit Court, and the court could properly dismiss the appeal upon that ground alone, unless the court, in the exercise of its discretion, should extend the time, by the appellant showing she had used reasonable diligence on her part, or that the delay was not caused by her own laches, and by means or circumstances over which she had no control.

Neither was a bond filed in this case; but was it necessary? Notwithstanding the broad language of the act which requires from *parties* applying for appeals, that they should give bond and security to pay the amount of the recovery and cost awarded, in case the judgment should be affirmed, these terms, we think, cannot be regarded as applying to executors or administrators, when they are appealing from judgments rendered against the goods of the testator or intestate.

There have been various reasons assigned for construing such cases to be exceptions of the statute. It has been said

that they are not bound to give security on an appeal, because they gave it when they undertook the administration of the estate; and that such bond and security would make the debt their own, and that such bond and security from executors and administrators, on appeals from judgments or decrees found upon a demand against the testator, would frequently prevent them from seeking relief against an erroneous judgment or decree, which, however ruinous to the estate, might not affect his individual interests. These are the reasons given: 1 *Lomax on Executions*, 541, *and McCauley vs. Griffin*, 4 *Grat.* 9; *Shannon vs. Christian*, 1 *Rand.*, 393; *Sadler vs. Gun*, 1 *Hen. & Munf.*, 26, all of which were construing a statute in Virginia somewhat similar to the one now under consideration. And we believe them to be sufficient to warrant us in saying, that executors or administrators, under official bonds, as such, are not required to give the bond required in section 2 of the act approved March 16, 1871.

No affidavit was filed, as required by the statute. This is a prerequisite which has not been waived or dispensed with. No reason can be urged why an executor or administrator should not say, under oath, that he desires to appeal that justice may be done and not for delay or vexation.

The case, we think, was properly dismissed, in the court below, for want of jurisdiction. The Circuit Court having no jurisdiction, we can acquire none on appeal. The motion to dismiss is sustained, and the cause ordered to be stricken from the docket.

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WELLS v. COLE.

STATE SCRIP—*Not receivable in payment of county or school district tax.*—The Legislature cannot make the certificates of State indebtedness and Auditor's warrants receivable in payment of county taxes, or school district taxes.

SAME—Where the Legislature authorizes money to be raised for one purpose, the funds so raised cannot be applied to another and different purpose, but each levy is a separate and distinct tax and must be discharged in *money*, or by a warrant drawn on that particular fund.

APPEAL FROM DREW CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

A. H. Garland, for Appellant.
T. D. W. Yonley, for Appellee.

MCCLURE, C. J.—The appellant, desiring to pay taxes due on his lands, in Drew county, tendered to the collector of said county the amount due thereon in what is commonly called "Treasurer's certificates." For the amount *due the State*, the collector signified a willingness to receive the "Treasurer's certificates," but declined to receive said certificates in payment of the taxes *due the county*, on the ground that the County Court of said county had instructed and ordered him "not to receive State scrip or Auditor's warrants for the payment of county taxes, or the school district tax." To compel said collector to receive said "Treasurer's certificates" in payment of said taxes, the appellant applied to the Drew Circuit Court for *mandamus*, which said court refused, and the case is brought here by appeal.

The sole question presented by the record is: Can the Legislature make the certificates of State indebtedness and Auditor's warrants receivable in payment of county taxes or school district taxes?

The first act, which authorized the issue of Treasurer's certificates, was approved July 23, 1868, and provides that said certificates shall bear eight per cent. interest per annum, and

be receivable for all *State dues* and *State taxes*, except taxes for school purposes, and be printed on bank note paper, in sums of one, two, five and ten dollars respectively. On the 16th of March, 1869, the legislature passed another act (that of July 23, 1868, having expired by limitation), authorizing the issue of Treasurer's certificates similar to those issued under the provisions of the last named act, which were to bear five per cent. interest per annum, and were receivable for State taxes and debts due the State, except taxes for school purposes and debts due to the school fund.

On the 24th of March, 1869, the General Assembly passed another act authorizing the issue of eight per cent. certificates, by the Treasurer, on bank note paper, in sums of one, two, five and ten dollars respectively. The first section of said act makes said certificates receivable for all State taxes, special or otherwise, and for all debts due the State. The second section of said act makes said certificates receivable in payment for all State, county and municipal taxes, and all collectors are required to receive the same, when tendered, in payment for taxes for State, county, school and municipal dues, at the face thereof, and accumulated interest.

On the 15th of March, 1871, the General Assembly passed another act repealing the last mentioned act, and authorizing the issue of five per cent. certificates, making the same receivable for all State and *county* taxes, and all other taxes due the State, except interest on the public debt.

In the revenue act, which was passed ten days after the above recited act, is found the following: "He (the collector) shall receive county warrants in payment of county taxes, the orders or warrants that may be payable upon presentation, of any township, town or city, for their respective taxes, and the warrant of Auditor of State or Treasurer's certificate of indebtedness, for State taxes."

This last act does not say that Treasurer's certificates and Auditor's warrants shall not be received in payment of county and municipal taxes; it only enjoins upon the collector to re-

ceive county and municipal taxes in warrants, issued by proper authority, when tendered, leaving the exception of the Treasurer's certificates and Auditor's warrants an open question as to whether county and municipal taxes could be paid with Treasurer's certificates, if the tax-payer did not have county or municipal warrants. It may be urged that the language used in the revenue act of March 25, 1871, evidences an intention to prohibit the reception of Treasurer's certificates for county or municipal taxes. All this may be true, but we prefer, or will assume, for the purpose of argument, that the tax-payer had the option to pay all his taxes—State, county and municipal—in the Treasurer's certificates, and this we do for the purpose of meeting the question presented in its strongest light. The question stated, and the one presented, is: Can the Legislature make Treasurer's certificates of indebtedness receivable in *payment* of county and school district taxes?

Counties are *quasi* corporations, organized as a part and parcel of the State government, to subserve the public interest, and to this end, and in order to accomplish this object, certain corporate powers are conferred upon them. The building of bridges; the improvement of roads; the support of the poor; the erection and care of county buildings; the payment of interest and principal of bonds issued by counties to aid in public improvements; the payment of expenses incurred in the support and maintenance of courts of justice, and the *payment* of all officers and persons entitled by law to compensation for the duty performed or enjoined, and many others that could be named, are among the things which the county authorities are required to levy a tax for the *payment* thereof.

Under chapter one hundred and forty-seven of Gould's Digest, regulating the assessment and collection of county revenue, the County Court is authorized to levy a *county* tax to defray the expenses contracted and incurred by the several counties. The amount so levied was denominated a "county

tax," and when so levied and collected, the amount, thus obtained, was subject to distribution and appropriation for the internal improvement and local concerns of the county; for the payment of viewers, reviewers and overseers of the road; the erection of bridges, and the keeping of the same in repair; the maintenance of paupers; the erection and repair of county buildings, and the payment of the ordinary expenses of the county. The law, in this respect, has been changed, and the objects for which a county may levy and collect a tax are specifically enumerated by law, and must be distinctly stated when levied, and when collected, constitute separate and distinct funds. *Section* 74, *Revenue Law of* 1871 says: "The County Court of each county shall, on the first Friday after the first Monday of October of each year, determine the amount to be raised for ordinary county purposes—for public buildings; for the support of the poor; for bridges; for roads, and for interest and principal on the county debt. The County Court shall set forth upon the record of proceedings, specially, the amount to be raised for each of the above defined purposes. The county clerk shall carefully ascertain the net amount collected for each purpose under said levy, and it shall not be lawful to use any specific fund for any other purpose than the one which the same was specifically levied, until the purpose for which such tax was levied shall have been accomplished."

The one hundred and forty-sixth section of the revenue act, of March 25, 1871, makes it unlawful for the County Court to levy a greater amount than five mills on the dollar for "ordinary county purposes;" that is, for the payment of the ordinary expenses of the county; for bridge purposes, not exceeding one mill on the dollar; for road purposes, not exceeding one mill on the dollar; for the support of the poor, not exceeding one mill on the dollar; for the erection or repairing of public buildings, not exceeding two and one-half mills on the dollar; for the payment of the interest on the funded debt of any county, or the payment of such funded debt or parts

thereof, such an amount as may be actually necessary; for the payment of the interest on any railroad bonds issued by any county as may fall due within the current year, or next succeeding year, such an amount as may be necessary, not exceeding five mills on the dollar.

The object of thus classifying and designating the objects and amounts which might be levied and collected by county authorities, must be obvious to all, and it must be equally apparent that the county authorities have no power to levy taxes for purposes other than those mentioned by some act of the Legislature. To illustrate, we will suppose the County Court desired to erect a county jail or court house, or to pay the interest upon her bonds issued to railroads, and that the outstanding warrants of the county were greater than the levy of five mills on the dollar would take up, within that year, the result would be, if the warrants drawn on the county treasurer, to pay the "*ordinary expenses of the county*," were receivable in payment of the levy made to pay the interest on railroad bonds, or in payment of the tax levied to build a jail or a court house, that the specific object of the levy would be defeated; but if on the other hand, as the law contemplates, these levies are kept as separate and distinct funds, and only payable in the warrants drawn thereon, the object for which the levy was made may be accomplished, and the persons entitled thereto paid the amount due them from the particular fund. In the case of the *People v. Stout*, 23 *Barb*, 338; this principle was discussed, and it was held that where the Legislature authorized money to be raised for one purpose, that the fund could not be misapplied. Each levy is a separate and distinct tax and must be discharged in *money*, or by a warrant drawn on that particular fund.

We have seen where a diversion of a fund would lead to, and what would ensue if one fund of a county could be absorbed or paid by warrants drawn on another. State scrip, as it is sometimes called, is not *money;* that is, it will not pay a debt existing between individuals; that it is not at par, or

worth to the holder what it calls for on its face, this court has had more than one reason to believe within the past year. It is insisted, by the appellant, that when a county takes State scrip, that it is but the State taking her own paper. We presume such an assumption arises out of the fact that the State created the counties, and that a payment to an off-spring is a payment to a parent. Such is not the law. The counties incur debts and obligations which they are bound to discharge *in money*. State scrip is not *money*, and the Legislature cannot make it so. If counties or school districts are compelled to receive Treasurer's certificates and Auditor's warrants for county taxes proper, or in payment of the taxes authorized to be levied by the County Court or school districts, or county authorities, they would be unable to pay the creditors of the county or districts, or to carry into effect the objects for which the taxes were levied. The funds raised for various purposes, by taxation, would be virtually vested in "State scrip," and the creditors of the counties and other bodies deprived of money specifically raised to pay them. The State has no power or authority to require the different organizations or counties of the State to invest the taxes collected in certificates of indebtedness, and this would be the result and effect of such a law, if the position of the appellant is correct. Counties and similar organizations have a right to demand the collection of their taxes in lawful money of the United States, if there be no warrants outstanding, which are entitled to payment out of the money when collected, tendered in payment thereof.

The view we have taken, of this case, renders it unneccessary to refer to that clause of the Constitution of the United States which inhibits the States from emitting "bills of credit," or whether a treasurer's certificate comes within the definition or description of the thing called "bill of credit."

Judgment affirmed and mandamus denied.

GREGG, J., dissenting says: This action was brought to

test the validity of the Act of the General Assembly providing for the payment of county and school taxes in State Treasurer's warrants, and in the range of argument has embraced municipal taxes.

While we have arrived at a different conclusion from that reached by a majority of the court, we distinctly announce that a State has no right to emit bills of credit, or to issue notes or bills and make the same a legel tender; because, to that extent, she has parted with her sovereignty. And it is equally well known that a State cannot impair the obligation of contracts, or destroy private vested rights, because the Constitution of the United States is paramount, and by it such rights are protected. While we concede that a State is bound to observe all the rights protected by the Constitution of the General Government, beyond this, we hold that, within her own jurisdiction, she is sovereign and without the control of any lawful power.

Next, we assume that a Legislature, as the representative of the people, is a representative of sovereign power, and has dominion and control over all the property and effects within the State, except wherein it is limited by Constitution, either State or National; other departments of a State may exercise all such authority and power as may be granted them respectively by the Constitution, but it is left alone to the Legislature to do everything not expressly prohibited by constitutional limitation. This has been so often repeated, that certainly no one can now be found who doubts the absolute power of the Legislature, except wherein it is restricted by a Constitution.

With this announcement of fundamental principles, we will proceed to examine the statute under consideration.

This Act provides that these State Treasurer's certificates shall be issued, on bank note paper, in sums of one, two, five and ten dollars, and that they shall be receivable for all State and county taxes, and all other debts due the State—Act of March 16, 1871. By the first Act, that of July 23, 1868, for

the issue of Treasurer's interest bearing certificates, they were made receivable for all State taxes, except for school purposes, and all debts due the State, except debts due the school fund. The second Act, March 16, 1869, provided for a similar issue. And the third Act, March 24, 1869, provided for issuing like certificates, to bear eight per cent. interest; and in the second section it is enacted: "That the certificates or warrants issued by the Treasurer of the State of Arkansas, under and by virtue of the Act aforesaid, and all certificates or warrants which may hereafter be issued by said Treasurer in pursuance of law, shall be, and are hereby made receivable in payment for all State, county and municipal taxes, and all debts due the State, whatever; and all collectors of taxes are hereby required to receive said warrants or certificates, when tendered, in payment of all taxes, State, county, school or municipal, for the amount and interest borne on the face of such certificates or warrants."

The last Act, March 15, 1871, continues the issue of Treasurer's certificates or warrants, on bank note paper, but reduces the rate of interest to five per cent. and declares them receivable for all State and county taxes and all other debts due the State, except interest on the public debt.

Under the provisions of these acts, the legislative will is quite clear. There can be no reasonable doubt as to what they intended should be paid in these treasurer's certificates. Then, under the enactments of the legislature, allowing assessments of taxes upon citizens, for municipal and local purposes, the main and only question is the power of the legislature, by law, to prescribe the kind and amount of effects that counties and towns must receive for such purposes. When considering the political or public rights of such corporations, or quasi corporations, held and exercised for the good of the people, and not confounded with the private property rights they may have, we are of the opinion that the legislature has such power, and, before referring to some special provisions in our laws, we cannot better urge this prop-

osition than to quote what has been written by judges abler than ourselves:

In the Dartmouth College case, 4 *Wheat*, 659, Mr. Justice Washington said: "That as a private corporation, it held rights that could not be taken away by legislative act, as it would impair the obligations of a contract," but he said "there are two kinds of corporations aggregate, viz: Such as are for public government, and such as are for private charity; the first are those for the government of a town, city or the like, and being for public advantage, are to be governed according to the law of the land * * * of these there are no particular founders * * * there are no patrons of these institutions," etc. Further speaking of public corporations, he says: "Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it. The trustees or governors of the corporation being merely the trustees for the public * * * these trustees or governors have no interest, no privileges or immunities which are violated by such interference, and can have no more right to complain of them than an ordinary trustee who is called upon in a court of equity to execute the trust." And in the same case, page 629, Chief Justice Marshall said: "If the act of incorporation be a grant of political power, *if it create a civil institution, to be employed in the administration of the government*, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, *the subject is one in which the Legislature of the State may act according to its own judgment*, unrestrained by any limitation of its power imposed by the Constitution of the United States." See 10 *How. U. S.*, 535.

Mr. Kent, in his commentaries, *Vol.* 2, *side p.* 305, says: "In respect to public or municipal corporations, which exist only for public purposes, as counties, cities and towns, the legislature, under proper limitations, have a right to change, modify, enlarge, restrain or destroy them," etc. In the case of

Richmond Co. vs. Lawrence Co., 12 *Ill.* 8, Judge Trumbull said: "Public or municipal corporations, however, which exist only for public purposes, and possess no powers except such as are bestowed upon them for public political purposes, are subject at all times to the control of the legislature, which may alter, *modify or abolish them at pleasure.*" See 12 *Iredell* (*N. C.*) 304 *and* 328 to the same effect.

In the case of *Bass vs. Fontleroy*, 11 *Texas*, 705, the Supreme Court of Texas says: "The establishment of counties, their boundaries, court-houses, jails, bridges and ferries are all matters of public policy—are dependent on the legislative will for their creation; and according to the rules laid down by the Supreme Court of the United States in the cases of *East Hartford vs. The Hartford Bridge Co.*, 10 *How.* 511, and *Mills vs. St. Clair Co.*, 8 *How.* 569, are equally dependent upon the same will for their continued existence," etc.; and to the same effect, see 7 *Cal.*, 97. In *Montpelier vs. East Montpelier*, 29 *Ver.*, 18, the court say: "The town of Montpelier, as originally created, was invested with the powers of a municipal corporation, and like all other towns in this State, was instituted as an auxiliary of the State in the regulation and establishment of its form of government; the rights and franchises of such municipal corporations can never become vested rights as against the State * * so far as their public and municipal franchises and existence are concerned; it has become a well-settled principle in the courts of this country that the legislature may *exercise over them exclusive control*, and, constitutionally, may enlarge, restrain and even destroy their municipal *existence as the public interest may require.* Such an act defeats no vested rights, nor does it impair the obligation of any contract." Also see 27 *Ver.* 704, and *Cooley's Const. Lim.*, 239, 240 *and* 241.

An individual tax payer, in a corporation, has no vested right in corporate grants that cannot be legislated upon as against the corporation. 25 *Cal.*, 641.

It is not only well settled that a State may regulate the po-

litical acts and franchises of a corporation which are purely governmental, but; likewise, she may control its business affairs and material effects so far as the same appertain to the public. In the case of the *People vs. Howes*, 37 *Barb.*, 440, the Supreme Court of New York held that where a party claimed to have done work for a city, but the corporation denied that any legal contract existed, the Legislature, by law, appointed a board of arbitrators to assess the damage and provided for the payment, by *mandamus*, on the comptroller. The city denied the power to make it submit to arbitration and payment, but the court held, as it was a public corporation, the Legislature had full control over it, and that its charter and franchises were under legislative control. *Dillon, Municipal Corp., p.* 82, *Sec.* 39.

In *Layton vs. The City of New Orleans*, 12 *La. An.*, 515, the Legislature joined Lafayette town to New Orleans under one government, with a provision that the town should pay no tax more than her own liability, to settle the public debt, and that the city of New Orleans should pay all her debt. Afterwards a uniform tax law was passed, and the town of Lafayette made liable for a full proportion of the city debts. It was held that this was not a violation of any vested right; that all towns, cities, etc., were subject to legislative will, and the Legislature could constitutionally impose this tax upon the town.

In the case of *Dennis vs. Maynard et al.* 15 *Ill.* 479, wherein a bridge was commenced by private enterprise, the court say: "It was for a public purpose, and it was competent for the Legislature to require the building of this bridge by a general county tax, or by a precinct or township tax, if the policy was thought best," etc. Further they say: "So it (the Legislature) may direct the county authorities to ascertain and allow past claims upon the public treasury, or it may ascertain and tax that amount, and direct the raising of means by taxation for its payment. The public county and township funds are under legislative control, and so decided in the

County of Pike vs: The State, 11 *Ill.*, 202. These local municipal corporations are created for convenience in the police arrangements, but their powers and duties remain subject to the public will through the Legislature." *State Bank vs. Kroop*, 16 *How., U. S.*, 369, *et seq*; *State, etc. vs. St. Louis Co. Court*, 34 *Mo.*, 546; *Louisville vs. Commonwealth*, 1 *Duval* (*Ky.*) 295; *Dill. Municipal Corp.*, *Sec.* 30, *et seq.* "The Legislature, as the trustee for the general public, has full control over the public property and *subordinate rights* of municipal corporations, accordingly it may authorize a railroad company to occupy the streets in a city without its consent and without payment." *Dill. Municipal Corp.*, 88-89, *Secs.* 42-43. See 31 *N. Y.*, 164; 58 *Penn.*, 320; 24 *Wend.*, 65; 4 *Blackf.* 208; 4 *Scam.*, (*Ill.*) 273.

While the authorities show these municipal corporations and these quasi corporations must submit to the will of the Legislature in the management and disposition of their public property; they also show them equally helpless in the acquisition of property and means for their public comfort and convenience. They can levy no taxes, make no local assessment or collection but in exact accordance with the expressed will of the Legislature.

In the city of *Zanesville vs. The Auditor of Muskingum County*, 5 *O. S.* 592, it is said: "Without express authority of law no tax, either for State, county, township or corporation purposes, can be levied. * * * The convention was very well aware that much the largest part would be required to answer the purposes of these local subdivisions; and equally well that it could only be levied *as the* General Assembly should provide." In the case of *Nappa Valley R. R. Co. vs. Nappa Co.*, 30 *Cal.* 438, the Supreme Court, in discussing the right of the State to tax and direct the use of the revenue, etc., say: "And except as specially restricted its powers of appropriation of the moneys raised is co-extensive with the power of taxation. It may appropriate them to claims which have no legal obligation, and are founded only in justice.

The power of appropriation which the Legislature can exercise over the revenues of the State, for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city or town for any purpose connected with its present or past condition. In creating the law imposing the tax, it can prescribe the objects to which the money raised shall be applied." See 13 *Cal.*, 343; 20 *Cal.*, 642. If this be correct, might not our Legislature have prescribed that this county tax should be applied in taking up State Treasurer's certificates?

In the case of *Gilman vs. The City of Sheboygan*, 2 *Black. U. S.*, 515, the court said: "The levying of taxes by authority of a county, city or town, for their support, is as much an exercise of the taxing power as when levied directly by the State for its support. The State acts by the municipal governments, and their acts in levying taxes are as much the acts of the State as if the State acted by its own officers."

And according to Mr. Cooley, these county and town organizations are so far different from private corporations, and so fully but a sub-division of the State government, that the people residing within these sub-divisions have no choice as to whether they will assume the duties or exercise the powers of such political organizations. The Legislature assumes that these divisions are essential to good government, and the duties are imposed as a part of the necessary burden that the citizen must assume in the process of self-government; and their functions are wholly of a public nature, and all their rights and privileges depend upon the will of the power that created them.

Outside of these general principles, from the very foundation of our State laws, it seems to have been contemplated that the Legislature should create such sub-divisions of State government, and prescribe their powers and duties. *Sec.* 28, *art.* 5, *of our Constitution*, declares that "The General Assembly may enact laws providing for county, township or precinct governments." *Sec.* 48 declares that "The General As-

sembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws, but all *such laws may*, from time to time, *be altered or repealed*," etc. And *sec.* 49, that "The General Assembly shall provide for the organization of cities and incorporated villages, by general laws and restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers."

Now, if these counties or small districts were not governed upon general principles, as above shown, and as held by the courts of other States, we have these constitutional provisions authorizing the Legislature to create such local governments, and to form corporations under general laws, which laws may at any time be altered or repealed; and when cities or villages are organized, she shall restrict their powers of taxation, assessment, etc. Do not these show beyond a doubt that the framers of our Constitution intended that these sub-divisions of the government should be fully under legislative control? It positively prescribes that they shall restrict them in taxing; then, if the taxing power is left to the General Assembly, can any one else control their action, because the policy seems to be bad?

But, further, *sec.* 9, *art.* 15, *of the Constitution*, expressly provides that these sub-divisions shall share in the want of par funds when such burden is felt by the government of the State; it is therein declared that "all salaries, fees and *per diem*, or other compensation of all State, county, town, or other officers within the State, shall be payable in *such funds as may by law* be receivable *for State taxes*."

Thus, it is a part of our Constitution, that all officers, including county and town officers, whether paid a salary out of the treasury or paid by the day, or compensated in fees or otherwise, shall accept *such funds* as may be receivable for State taxes. If we had no act of the Legislature declaring that these warrants should pay all taxes, how could the county and town officers, whose high salaries and exor-

bitant fees have proved so burdensome to the people, refuse, in the face of this Constitution, to accept for their public services (which consume most of the county revenues) the warrants receivable for State taxes? They can not refuse such funds, it seems to us, without violating the very Constitution they have sworn to support. Yet, the appellee refuses to take any part of the county taxes in such warrants; thus, he will compel the tax-payers, contrary to these solemn enactments, to pay all fees and *per diem* for his public services in different and better funds.

But, upon general principles, if authority can be relied upon, these *quasi* corporations are forced into existence by the will of the State, through her representatives, and the length of such existence and the powers and privileges of such bodies are alike subject to her volition.

From the cases examined, we find that a State may embrace in one of these sub-divisions such territory and so many people as she deems best. She may locate their county seat, direct what public buildings must be erected, and prescribe how the people of the county shall pay for them. She may compel them to settle debts in the mode she points out. She may compel them to pay for work for which they had made no binding contract. She may cause works, supposed to be of public utility, to be completed, and make them pay for it. She may take their streets and other public property, without pay, and convert them to other uses. They can collect no tax, only as she by law particularly points out, and she compels them to pay such taxes and assessments as the will of the State may dictate, and, as they come into existence as a conclusion of her policy, she takes from or adds to their privileges or burdens, or destroys their existence upon her own choice. While we may well question any State policy which throws heavier burdens upon any locality or class of her citizens, yet, if we regard authority, we cannot seriously question her powers. These are political organizations, formed within certain boundaries by the wisdom of the Legislature,

to aid in self-government, and the powers, privileges and burdens granted or imposed for the good of the people and the State, must be left to the wisdom of those who represent the sovereignty of our government.

To urge that it defeats the objects for which taxes are levied, if the counties or towns receive their taxes in these certificates of the State, when they are not worth their face value, is of no more force than to say it defeats a like object to compel the State collectors to take them. The counties need money to carry on their business transactions, but it is equally necessary for the State to have money to meet her obligations.

If the State and counties were separate and distinct organizations, emanating from different sources, and having different objects and purposes in view, that argument would have more force, but while both are of the same political body, the one but a member of the other, the whole created by the people, for no individual purpose or advantage, but for the common good, and to carry out the purposes of self-government, we see less reason and justice in one member claiming exemption from a malady affecting the body politic. But these are simply questions of policy, and must be determined by the sovereignty of the State—not by her courts. They are questions of policy—not of power.

Upon these conclusions we rest our opinion that a *mandamus* ought to issue in this case.

APPERSON & CO. v. STEWART.

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DISCHARGED BANKRUPT—*Debt of, revived by parol promise.*—A discharged bankrupt is under a moral obligation to pay his debts in full when he can, and this obligation is, at common law, a sufficient consideration to sustain an actual parol promise to do so.

SAME—*Nature of the promise, etc.*—An unwritten promise to revive a discharged debt must be distinct, specific and satisfactorily proven, and, if conditional, the party seeking to enforce it must show that the condition has been satisfied.

COURTS—*Finding of facts by, etc.*—The findings upon the facts by the court, sitting as a jury, required by law to be reduced to writing, need not necessarily be put in writing *before* judgment, but the court may, *after* judgment rendered, reduce the same to writing.

APPEAL FROM PHILLIPS CIRCUIT COURT.

HON. M. L. STEPHENSON, *Circuit Judge.*

U. M. Rose, for Appellants.

We submit that it was not necessary that the promise to revive the debt should have been in writing. *Samuels vs. Cravens*, 10 *Ark.*, 380. That if the defendant promised to pay the debt absolutely, no express acceptance was necessary. *Williams vs. Robbins*, 32 *Maine*, 181; *Pratt vs. Russell*, 7 *Cush.*, 462; *Fitzgerald vs. Alexander*, 19 *Wend.*, 402; *Herndon vs. Givens*, 16 *Ala.*, 261.

No expressed assent to a promise beneficial to the creditor is necessary. *Conway ex parte*, 4 *Ark.*, 360; *Hempstead vs. Johnson*, 18 *Id.*, 123; *Carnall vs. Du Val*, 22 *Id.*, 140.

ENGLISH, *Special Judge.*—The appellants, E. M. Apperson & Co., sued the appellee, Thomas Stewart, in the Phillips Circuit Court, on a promissory note. The appellee pleaded that, after the making of the note, he was discharged in bankruptcy. The appellants replied that, after his discharge, he promised anew to pay them the money specified in the note. The issue was submitted to the court, sitting as a jury, finding and judgment for appellee; motion for a new trial over-

ruled; bill of exceptions setting out the evidence, etc., and appeal.

On the trial, *D. E. Myers*, a witness for the appellants, testified, in substance, that in June or July, 1870, acting as the attorney of appellants, he went to the residence of appellee, to see him about the payment of the note sued on, and asked him to pay it. Appellee said the note had been settled by his bankruptcy. Witness then threatened to oppose his discharge, and told him of some of the grounds upon which his discharge could be resisted. Whereupon, appellee said he did not seek to take advantage of his discharge, in bankruptcy, as to all his debts, but that there were some honest debts he intended to pay, and this was one of them. Witness then proposed that he should give a new note, but he refused. Witness then proposed that he should secure the debt by mortgage, but he refused, and said this was an honest debt, and he intended to pay it, and would pay it, but did not say when he would pay it; more than that he would ship cotton enough to plaintiffs that fall, to pay, at least, a part of it. Witness then returned to Memphis. That fall witness saw appellee in Memphis, and asked him about the cotton he promised to ship to pay a part of the debt, and took appellee to the office of appellants, and there G. V. Rambant, one of the appellants, and appellee had a conversation about the matter, and appellee again refused to give a new note or a mortgage to secure the debt, but promised to pay the note unconditionally, and without specifying any time of payment; and he made the same promise to witness at his (appellee's) residence. Appellee did not say that he would pay when he was able, or on the happening of any other contingency, but promised absolutely to pay the note. After he promised to pay the note, witness gave up the idea of opposing his discharge in bankruptcy, and did not oppose it. (Here it may be remarked, by the way, that appellee's discharge bears date 23d July 1869.)

G. V. Rambant, one of the appellants, testified, in sub-

stance, as follows: Some time, in the fall of 1870, appellee came with D. E. Myers to the office of appellants, in Memphis, and had a conversation with witness about the note in suit. In the conversation, witness proposed to appellee to give a mortgage to secure the debt, but he refused to do so, but said the debt was one he intended to pay and would pay; and said something about selling his plantation to appellants at $1200, and let the note go as part payment, but witness told him they did not wish to purchase. He then asked them to try and sell it for him at that price. In the conversation, appellee promised to pay the note unconditionally, and did not make its payment depend on selling his place, or any other contingency, and did not specify any time of payment, or say that he would pay when he got able.

Stewart, the appellee, testified, in substance, that sometime in February, 1870, D. E. Myers came to his residence, showed him the note in suit, and asked him about payment of it. Witness told him, he could not pay the note then, and that he could not say when he could pay it. That he would pay it when he was able. Myers asked him to give a new note for the debt, and offered to make it payable at any time he wanted. Witness refused to do this; telling him that some of the parties might die, and the note might come right on him for payment. Myers, also, asked him to give a mortgage to secure the debt, which he refused to do. In the fall of 1870, witness saw Myers in Memphis. He again asked him to give a new note for this debt, which he refused to do. Also refused to give a mortgage. Witness told him, in both conversations, that this was a debt he intended to pay, when he was able; that he did not take the benefit of the bankrupt law to avoid it entirely, but only that he might have his own time to pay it in. When he saw Myers, in Memphis, he asked witness to go with him to the office of the appellants and repeat to them what he had said to him. He went with him to the office, where they met Major Rambant. Myers said: "repeat to Major Rambant what you have told me." Witness

replied that Major Rambant knew his statements about the debt, which was all he said to them. It was before the crops were planted that Myers was at his house. They conversed under a tree in the yard, and the tree was leafless. There was at that time a mortgage on his plantation for $10,000, and a mortgage on his stock for $2500. He lost three thousand dollars in his planting operations, the year before he was testifying. There was still a mortgage on his place for $7500. The mortgage on his stock was still unpaid, and he had fallen behind with his merchants $750. He had not been able to pay the debt in question; had not been able to buy his wife a second dress. Had never promised to pay this debt except, as before stated, when he got able. Never promised to pay it out of his last year's crop.

The court, of its own motion, delivered an opinion in writing, giving its views of the law applicable to the case, which does not appear to have been excepted to by the appellants, or made ground of the motion for a new trial, and hence, need not be reviewed.

Upon the evidence, the court, sitting as a jury, found in favor of the appellee, and in this, it is insisted that the court erred, and should have granted a new trial.

It seems to be settled law, that a discharged bankrupt is under a moral obligation to pay his debts in full, when he can, and that this obligation is, at common law, a sufficient consideration to sustain an actual promise to do so. The promise, however, must be distinct and specific. If the promise is conditional, then the party, seeking to enforce it, must show that the condition has been satisfied; as if the debtor promised to pay when he was able, then the creditor must prove his ability. 1 *Parsons on Contracts*, 381, 382.

In Samuel vs. Cravens, 5 *Eng.*, 381, the promise of the discharged bankrupt was, that he would pay the debt when he should be able to do so, accompanied by the statement that he was not then able, and he refused to give his note, etc. The creditor sued him immediately, and this court held that

the action could not be maintained under the circumstances; that the promise was conditional, and that it did not appear that the creditor had accepted the promise upon the condition on which it was made. By the common law a parol promise was sufficient to revive a discharged debt. In England, however, by statute, *VI. Geo., Ch.* 16, the promise must be in writing; 1 *Par. on Cont., page* 381, *note A.* But this provision of the English statute was not copied into the recent American Bankrupt Act. Hence here, by the common law, an unwritten promise is valid to revive a discharged debt, but the promise should be distinct and specific, and satisfactorily proven.

If the court below, sitting as a jury, believed the testimony of the appellee, that he promised to pay the discharged debt when he was able, and that he made no other promise, the finding was correct, because the appellants failed to introduce any evidence to prove that he was able to pay the debt at the time the suit was commenced, but on the contrary, the testimony of the appellee conduced to prove that he was unable to pay the debt.

If the court below believed the testimony of one of the appellants, and their attorney, Myers, that the promise of the appellee to pay the debt was absolute and unconditional, then the finding should have been for the appellants. But it seems from the finding of the court, and from its refusal to grant a new trial, that the court did not believe their testimony.

We may have the impression that the weight of evidence was against the verdict rendered by the court, but under numerous and uniform decisions of this court, we are not at liberty to overrule the decision of the court below, refusing a new trial, on the ground that the verdict or finding was against the weight of evidence.

It seems, from the bill of exceptions, that the court below did not reduce to writing its findings upon the facts until after the judgment was rendered, and this was made ground of the motion for a new trial. After the motion was over-

ruled, however, the court reduced to writing, and filed its findings, etc.

The Constitution provides that judges shall not charge juries with regard to matters of fact, but shall declare the law. In all trials by jury, the judges shall give their instructions and charges in writing; and if the trial is by the court, he shall reduce to writing his findings upon the facts in the case, and shall declare the law in the same manner he is required to do, when instructing juries. *Const. Arks. Art*, 7, *Sec.* 11. And the *Code*, *Sec.* 364, provides: upon trials of questions of fact by the court, he shall state, in writing, the conclusions of fact found, separate from the conclusions of law. The object of this provision of the Constitution, and of the Code, in requiring the court, when sitting as a jury, to reduce to writing its findings or conclusions upon the facts, was, doubtless, that a memorial of them might be furnished and preserved; but we can see no particular reason why this may not be done as well after, as before the rendering of the judgment.

We do not deem it necessary to review the objections made by the counsel for the appellants, to the written decision made by the court below, in relation to the law of the case, because it was not excepted to, or made ground of the motion for a new trial.

Judgment affirmed.

STEPHENSON, J., being disqualified, did not sit in this case

HON. E. H. ENGLISH, *Special Supreme Judge.*

STRAUB & LOHMAN v. GORDON, Sheriff.

CONSTITUTIONAL LAW---*Article X. construed.*---The words, "the treasury," occurring in the several sections of *Article X.* of the Constitution, mean the *State treasury*, and are not to be construed to mean the various county treasuries. 27 625 58 611 27 625 39 459

SAME---*Power of Legislature to tax pursuits, etc.*---The Legislature has power, under *Article* 10, *Section* 17 *of the Constitution*, to impose a State tax upon such privileges, pursuits and occupations as are of no real use to society, and the occupation of wholesale dealer in spirituous liquors, is such a pursuit as the Legislature may require the party, exercising the same, to pay into the State treasury a compensation for the privilege of engaging in such pursuits, and the imposition of such tax is not a tax upon *property* within the meaning of the Constitution.

STATUTORY LAW---*Act 25th March*, 1871, *construed.*---The Act of March 25, 1871, Section 154, providing that there shall be levied and collected as a *county tax*, upon dealers in liquors, etc., is not to be construed as an attempt to raise a State revenue by a tax upon dealers in liquors, and the Act is not in contravention of the provisions of the Constitution in regard to the raising of State revenue.

LIQUOR LICENSES---*Power of Sheriff to collect, etc.*---The acceptance of a license issued by the clerk, and tendered by the sheriff, is optional with the dealer and, in the absence of a provision of law to punish, criminally, the sheriff cannot distrain and sell property for the non-payment of the tax.

APPEAL FROM PHILLIPS CIRCUIT COURT.

HON. M. L. STEPHENSON, *Circuit Judge.*

A. H. Garland, for Appellants.

Upon the several propositions involved, I beg leave to refer to the cases following: *Moore vs. Trustees*, 4 *Bush* 406; 9 *Dana*, 516; 18 *B. Monroe* 15; 20 *La.* 585; 46 *Ill.* 392; 11 *Wis.* 35; 13 *Ill.*, 554; 3 *Ohio* (*State R*) 1; 37 *Maine* (2 *Heath*) 156; 4 *Texas* 137; 9 *Id.* 369; 3 *Sneed* (*Tenn.*) 120; 6 *Ind.* 13; 9 *Minn.* 273; 12 *La.*, 343; *Id.* 344; 13 *Ark.*, 752 *et seq.*

This tax is condemned by all law, and the injunction should have been granted.

ENGLISH, *Special J.*—The bill alleged, in substance, that Straub & Lohman, the appellants, were merchants of Helena,

doing a general grocery and produce business, and as part of their merchandise, they kept and sold spirituous liquors, but in quantities not less than one quart. That they were what were known as wholesale liquor merchants, licensed, as such, under the laws of the United States, and kept ardent spirits for sale generally to their customers; that by section 154 of an Act of the General Assembly, regulating the assessment and collection of revenue of the State, approved March 25, 1871, it was provided that, "there shall be levied and collected, as a county tax, the sum of one hundred dollars, for each and every person selling, either at wholesale or retail, any ardent or vinous liquors (except the same is sold exclusively for medicinal purposes) in any county for the term of one year or less;" that under said Act the County Court of Phillips county, at the July term 1871, assessed a tax of one hundred dollars upon all liquor dealers within said county, and the county clerk had issued licenses and placed them in the hands of D. C. Gordon, (the appellee) as sheriff of said county, to be collected from all persons selling liquor within said county; that among those thus assessed, and to whom license had been issued, were the appellants, and that the sheriff had a license for them, and was proceeding to collect the same by making a levy on their property; that said Act is unconstitutional, because *Article X*, *Section* 2, of the Constitution of the State, provides that, "laws shall be passed, taxing by a uniform rule, all money, credit, investments in bonds, joint stock companies or otherwise; and also, all real and personal property according to its true value in money," etc., etc. That under said clause of the Constitution, and Acts of the General Assembly, all the merchandise held and sold by them, including liquors kept by them for sale, was assessed and taxed as personal property; that by said section 154, of the Act of March 25, 1871, it was attempted to impose upon them an additional tax of one hundred dollars, without regard to the value of the property; that by *Article X*, *Section* 17, of the Constitution, it is provided that: "The

General Assembly shall tax all privileges, pursuits, and occupations that are of no real use to society; all others shall be exempt;" that the sale of liquor is like the sale of any other article of merchandise, and is a right common to every citizen, and in no sense a privilege within the meaning of said section of the Constitution; that before any occupation can be taxed, it should be first declared of no use to society, etc. That liquor is an article of merchandise in all States, and has been in all times; that the sale of liquor has not been declared a nuisance; but that the General Assembly, by an Act approved April 1869, entitled, "an Act regulating the incorporation and organization of municipal corporations," has conferred the power upon municipal corporations "to regulate saloons, dram shops or drinking places, or suppress the same," and that the County Court possesses no power to license dram shops or tippling houses doing business within incorporated cities or towns, and that the city of Helena is incorporated within the purview and meaning of said Act. That the tax of one hundred dollars so assessed by said county, is illegal and unjust; that unless the sheriff was restrained, by injunction, he would proceed to enforce the collection of said tax by a levy upon the property of the appellants, to the great and irreparable injury and damage of their business, etc. Prayer for injunction, etc.

The cause was heard, in the Phillips Circuit Court, on the face of the bill, as if upon a demurrer; the injunction was refused, the bill dismissed for the want of equity, and the complainants appealed to this court.

The Constitution provides that, "laws shall be passed taxing, by a uniform rule, all money, credit, investments in bonds, joint stock companies or otherwise; and also, all real and personal property, according to its value in money, etc.," and provides for the appraisement of real and personal property, for the purposes of taxation, at its true value in money, etc. *Art. X, Sections* 2 *and* 3, *etc.*

No doubt but that all taxes assessed upon property of any

description, under these provisions of the Constitution, whether for State, county or municipal purpose, must be imposed according to the properly appraised money value of the property. The tax complained of in the bill is not a tax upon property.

Section seventeen of the same article (10) of the Constitution, provides: "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*."

Money raised under this provision of the Constitution is to be paid into "*the treasury*." What treasury, within the meaning of the language here employed, is "*the treasury?*" Surely the framers of the Constitution did not intend to embrace in the words "*the treasury*" the numerous county treasuries of the State. They manifestly meant the treasury of the State. Most of the provisions of the 10th article relate to raising revenue to support the State and to maintain its credit. The words "*the treasury*" occur in two other sections of this article. Thus, in *section* 8: "No money shall be paid out of *the treasury* until the same shall have been appropriated by law." And in *section* 15: "The principal arising from the sale of all lands, donated to the State for school purposes, shall be paid into *the treasury*, and the State shall pay interest thereon for the support of schools, at the rate of six per cent. per annum." No one can fail to see that the treasury of the State is meant by the words "*the treasury*," as used in these sections, and it is equally clear that their meaning is the same as used in the *seventeenth section*.

That the legislature has the power, under this section, to impose a State tax upon such privileges, pursuits and occupations as are of no real use to society, we have no doubt. The usual mode of imposing such a tax (if it may be called a tax) is to require persons desiring to exercise such privileges, or to engage in such pursuits or occupations, to obtain a license, at some fixed price, and to subject them to penalties

for exercising the privilege or engaging in the pursuit or occupation without obtaining the license. If the Legislature had thought proper to require wholesale dealers in spirituous liquors to pay into the treasury of the State a compensation to the public for the privilege of engaging in such pursuit, we should be slow to hold that such an act was unconstitutional, on the ground that such pursuit is of real use to society.

But the act complained of in the bill is not an attempt to raise a State revenue by a tax upon dealers in liquors. It provides that, "There shall be levied and collected *as a county tax*, the sum of one hundred dollars from each and every person selling, either at wholesale or retail, any ardent or vinous liquors (except the same is sold exclusively for medicinal purposes) in any county of this State, for the term of one year or less." *Act of 25th of March*, 1871, *sec.* 154. If this act is in conflict with any clause of the Constitution, we have not been able to find it. The Constitution of the State is a restraining and not an enabling instrument, and it may be said, in general terms, that the General Assembly may pass any law which it is not prohibited from passing by the Constitution of the State, or the Constitution of the United States. *State vs. Ashley*, 1 *Ark.*, 513.

The authority of the Legislature to regulate the exercise of privileges, or the following of pursuits and occupations, does not fall properly within its taxing powers, but within its police powers.

Pursuits that are pernicious, or detrimental to public morals, may be prohibited altogether, or licensed for a compensation to the public.

So persons desiring to exercise privileges, or engage in callings really useful to society, may be required to obtain license, and pay a reasonable compensation therefor. Such as the keepers of ferries, draymen, hackmen, and even persons who furnish meat or bread to communities. *Cool. Con. Lim.*, 200. The power to license such privileges and pursuits

has usually been conferred on county and municipal authorities.

The distinction between the raising of a State revenue by a tax upon property, and the licensing of privileges and pursuits by the local authorities, was clearly stated in *Washington vs. The State*, 13 *Ark.*, 761.

Here, as in most, if not all the States, retail dealers in liquors have been required to obtain license, and to pay a compensation therefor, and under the present, as well as former Constitutions, laws requiring such payment for license have been deemed valid and constitutional. *Henry vs. State*, 26 *Ark.*, 523.

By the 154th section of the act of the 25th March, 1871, the Legislature attempted to put wholesale dealers in liquors upon a footing with retail dealers, but there has been a failure, so far as we can find, to provide any mode of enforcing the act against the wholesale dealer. No man is obliged to apply for license to retail liquors, nor is he obliged to accept and pay for license, if issued by the proper authority, and offered to him by the sheriff or other officer. But if he engages in retailing without obtaining the license, he is liable to be punished by a criminal procedure. *Gould's Digest, Ch.* 169.

So, under the chapter relating to ferries, in *Gould's Digest*, no man was bound to apply for or accept and pay for a license to keep a ferry, but if he kept a ferry without obtaining a license, he could collect no toll, and was liable to a fine for keeping an unlicensed ferry. *Sections* 4, 14, *Chap.* 70. Other illustrations might be given, but these are deemed sufficient.

But no provision has been made by law to punish, criminally, a person who engages in selling liquors, in quantities larger than a quart, that we are aware of.

It seems, however, from the allegations of the bill, that the clerk issued, and the sheriff offered to appellants a license, and on their refusal to accept and pay for the license the sheriff was about to proceed to levy upon and sell their property,

to make the one hundred dollars which he demanded for the license. It would be a novelty for a sheriff to levy upon and sell property with a liquor license. Such process is unknown to the law, even under the Code, which has made sad havoc of most of the common law forms.

A collector, armed with the tax-book, and the process which accompanies it, in the nature of an execution, (*Gossitt vs. Kent*, 19 *Ark.*, 602) may sell the property of all delinquent tax payers, regularly assessed and put upon his tax-book. But licenses are not returned upon the assessment list, nor placed upon the tax-book. They are simply made out by the clerk in blank, and handed to the sheriff to be supplied to such persons as desire them. At least, such was the course pursued in this case, as alleged by the bill. *See sections* 155-6, *Acts* 1871, *p.* 180.

The decree of the court below is reversed, and the cause remanded with instructions to reinstate the bill and award the injunction prayed for.

STEPHENSON, J., being disqualified, did not sit in this case.

HON. E. H. ENGLISH, *Special Judge.*

NEWSOME v. WILLIAMS, Adm'rx.

EJECTMENT---*When will not lie for possession.*---Lands were sold and bond given to make title upon the payment of certain notes executed for the purchase money. The vendor brought ejectment for the possession of the lands; the vendee pleaded a tender and demand of deed before suit brought; on demurrer to the plea, *Held:* That the plea was sufficient to defeat the action of ejectment.

APPEAL FROM CROSS CIRCUIT COURT.

HON. J. M. HANKS, *Circuit Judge.*

U. M. Rose, for Appellant.

First. The plea was bad because the defendant did not offer to bring the money into court. *See* 2 *Greenleaf Ev.*, 600; 3 *Chitty Pl.*, 955–6; *Slack vs. Price*, 1 *Bibb.*, 272; *Eddy vs. O'Hara*, 14 *Wend.*, 221; *Booth vs. Conneggs, Minor's R.* 201. The money should have been brought into court, and notice of that fact given at the time of serving the plea. *Sheridan vs. Smith*, 2 *Hill* (*N. Y.*) 538; *Earle vs. Earle*, 1 *Harr.*, 273. Unless brought into court when pleaded, the tender is of no avail. *Jarboe vs. McAtee*, 7 *B. Monroe*, 279; *Knox vs. Light*, 12 *Ill.*, 86; *Clark vs. Mullenix*, 11 *Ind.*, 352; *Cullen vs. Green*, 5 *Harrington* (*Del.*) 17; *Mason vs. Groom*, 24 *Geo.*, 211.

Second: If the plaintiff has the legal title—and clearly he had, according to the statement of the plea—the defendant cannot set up an equitable title in bar. *Jackson vs. Pierce*, 2 *Johnson's R.*, 221; *Jackson vs. Deys*, 3 *Id.*, 442; *Jackson vs. Van Slyck*, 8 *Id.*, 487; *Sinclair vs. Jackson*, 8 *Cow.*, 543; *Spencer vs. Mackel*, 2 *Ham.*, 263; *Heath vs. Knapp*, 1 *Penn. S. R.*, 482; *Cawser vs. Driver*, 13 *Ala.*, 838; *Dixon vs. Porter*, 23 *Miss.* (1 *Cush.*), 84.

Adams & Dixon, for Appellee.

The plaintiff, to recover in ejectment, must not only have title, but the right to immediate possession. *Wilson vs. Jobes*, 11 *Gill & Johnson*, 351.

The plaintiff must have also the right of action at the time of the final judgment. If, therefore, the action be founded on a mortgage, and the defendant, at any time before final judgment, tender to the plaintiff the amount due upon the debt, secured by the mortgage, and the cost in the action of ejectment, the plaintiff's right of action is taken away, and he can no longer obtain judgment in his favor in the action of ejectment. *McDaniel vs. Reed*, 17 *Vermont*, 674; *Beach vs. Beach*, 20 *Vermont* (3 *Washb.*), 83; *Cherry vs. Cherry*, 26 *Vermont* (3 *Dean*), 696.

The right of *entry* should exist at the time of the commencement of the action. *Brown vs. Kelly*. 18 *Barb.*, 484; *Champlain and Lawrence R. R. Co. vs. Valentine*, 19 *Barb.*, 484.

A vendee, under title bond, to whom possession has been given, is as mortgagor in possession, and cannot be evicted by vendor if he pays, or offers to pay, upon vendor's complying with the contract. *See Smith vs. Robinson*, 13 *Ark.*, 534; *Harris vs. King*, 16 *Ark.*, 126; *Moore vs. Anders*, 14 *Ark.*, 633.

GREGG, J.—In 1861 Newsome sold to Anson Williams certain real estate in Cross county, and gave him a bond conditioned that he would make a good and clear title upon the payment of three several notes, executed for the purchase money.

In 1866 Newsome brought his action of ejectment against Anson Williams for possession of the lands. Williams appeared before the court and filed two pleas—one, not guilty; the other, reciting the sale to him, the title bond and its conditions; and averring that he had paid the first two notes and, that before the commencement of this suit, he had tendered to the plaintiff the full amount of the other note, and interest, and demanded of him a deed to the lands, according to the conditions of the bond, but that he failed and refused to execute such deed; and averred he was ready and willing to pay said sum, if plaintiff would make him a deed, and that no deed had ever been tendered to him, etc.

The plaintiff demurred this plea; the court overruled his demurrer; he rested, and the court rendered judgment for the defendant, and to reverse that judgment, the plaintiff sued out the writ of error in this cause.

The death of Anson Williams was suggested, and the cause remained on the docket until the present term, when it was revived and submitted in the name of Orella Williams, administratrix, etc.

The only question for our determination is, whether or not a tender of the money due, and the demand of a deed, before suit brought, was sufficient to defeat the plaintiff's action of ejectment.

In more instances than one, this court has declared that if, upon a sale of land, the vendor takes notes and gives a bond for title, he occupies a position, in legal effect, the same as if he had executed a deed of conveyance and then taken back a mortgage to secure the payment of the notes. *Smith vs. Robinson*, 13 *Ark.*, 534; *Harris vs. King*, 16 *Ark.*, 126; *Moore & Cail vs. Andrews*, 14 *Ark.*, 633. Taking this as settled law, we must treat the plaintiff as a mortgagee.

If the plaintiff was strictly a mortgagee, he could not procure title to the lands by ejectment; he could only possess himself of the lands, and convert the rents and profits towards the satisfaction of the debt. Had suit been brought with a view of depriving defendant of title to the lands, it should have been in chancery for a foreclosure and sale of the lands to satisfy the note. It then seems clear, if the object of the suit was not to defeat the defendant's title to the lands, or to have them sold, but merely to seize upon the rents and profits until the note was paid, it is a suit to recover payment of the note, and if so, a tender of the amount of the note, before suit brought, ought to bar the action. But it is averred this tender was made upon condition that plaintiff would make a good and clear title to the defendant for the lands in suit. The plaintiff here insists that this was no defense to his action at law; that if available at all, it was only so by the de-

fendant suffering judgment, and then resorting to a court of equity to interpose by injunction until the plaintiff would make and tender such deed. On the other hand, it is insisted that there were mutual covenants existing; that when the defendant was bound to pay the money, the plaintiff was at that same time bound to execute such deed, and that he had no right to charge the defendant with being in default until he performed his own covenant.

In the case of *Smith vs. Henry*, 7 *Ark.*, 213, which was an action on a note given on a verbal contract for real estate, this court said: "The land formed the consideration for which the writing obligatory was executed, and, therefore, the purchaser should not be compelled to part with his money without receiving a title. Smith has done more than was incumbent upon him to do; he tendered the money and demanded a conveyance, which was refused."

In *McDaniel vs. Reed et al.*, 17 *Ves.*, 680, the court said: "This action is ejectment; the tender is made upon this action, and never could be made upon it. This action of ejectment is founded upon a mortgage, and the mortgage is only an incident to the debt, and the right to recover depends upon the fact, whether at the time there is a right of action upon the debt. The tender, therefore, was upon the debt, and if a legal tender was made upon the debt, the right of action was thereby suspended. If the right of action was suspended upon the debt, *eo instanti*, it was suspended upon the mortgage."

It has been repeatedly decided that a vendor cannot maintain an action for the purchase money, without tendering a deed. *Bank of Columbia vs. Hanger*, 1 *Pet.*, 465; *Green vs. Reynolds*, *Johns.*, 207; *Hunt vs. Livermore*, 5 *Pick.*, 397; *Withers vs. Atkinson*, 1 *Watts*, 246; *Leonard vs. Bates*, 1 *Black.*, 172; 4 *Black.*, 342; 7 *Wend.*, 129.

If an action directly on the note for the purchase money cannot be maintained without an offer to convey, can an action seeking pay through rents and profits, which can be se-

cured by obtaining possession, occupy any more advantageous grounds? This is but a mode of enforcing payment, and when the payment of the purchase price is the object of a suit at law, we do no see that one mode of seeking payment, in such court, should be placed upon grounds of defense not tenable in any other.

Our court, in the case of *Daniel vs. Lefevre*, 19 *Ark.*, 201, says: "That the plaintiff must show that he had a legal estate in the premises at the commencement of the suit; *second*, that he had the right of entry; *third*, that the defendant or some one claiming under him were in possession," which was but an enunciation of well-established law; hence it is well settled that a legal title alone is not sufficient upon which to recover, but a right of possession must exist at the time of suing.

Mr. Greenleaf, in his work on evidence, *Vol.* 2, *Sec.* 330, says: "Payment of a mortgage debt is a good defense to an action, at law, brought by the mortgagee against the mortgagor to obtain possession of the mortgaged premises * * * * and where usury renders the security void, this may also be shown, in defense, against an action brought by the mortgagee upon the mortgage."

As shown above, it is well settled, in this State, that a vendor who sells and gives bond for title occupies the same legal relation to the vendee as one who conveys and takes a mortgage back, and it is, therefore, clear that any defense that would defeat an action of ejectment by a mortgagee against the mortgagor, will also defeat a vendor who has sold and given bond for title; and when payment of the mortgage debt will defeat the ejectment, a proper tender and refusal will have the like effect, and, as above stated, it has been long since settled by this court that, upon contracts to make titles to lands upon the payment of the purchase money, the covenants are dependant, and he, who would resort to the courts for redress, must first perform, or offer to perform his part of the agreement: *Livermore vs. Hunt, Supra*; *Jones vs. Gardner*,

10 *Johns.*, 268; *Hudson vs. Swift*, 20 *Johns.*, 26; *Withers vs. Barb*, 7 *Watts*, 227.

It follows, if the facts averred in the plea be true, that the plaintiff ought not to recover, and the court did not err in overruling his demurrer.

The judgment is affirmed.

WRIGHT, Adm'r. Etc. v. CAMPBELL & STRONG.

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EQUITY PLEADING—*Demurrer for want of parties, etc.*—The mere fact that a party, at the time of the execution of a deed of trust, was insolvent, or largely indebted to *certain* creditors, does not, of itself, show that other parties may be interested in the result of a suit to set aside such conveyance, so as to render a bill for that purpose demurrable for the want of proper parties.

SAME—*To enforce creditor's demand allowed in Probate Court, etc.*—A demand allowed, classified and adjudged by the Probate Court to be a claim against an estate, has the same force and effect of a judgment, and, in such case, it is not a pre-requisite, as under the general rule, that a creditor having such demand, and seeking the interposition of a court of equity to set aside a deed, should show an execution issued and return of *nulla bona*.

EXECUTORS, ETC.—*Cannot purchase property of testator, etc.*—An executor or administrator cannot buy any part of the estate of his testator or intestate; as, in equity, he is held to be a trustee for the next of kin, legatees and creditors, and has no right to become the purchaser of the property he represents.

APPEAL FROM JEFFERSON CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

A. H. Garland, for Appellant.

We submit the demurrer was well taken. The bill shows on its face that there are other creditors beside the complainants, and the rule, in equity, is that all persons interested should be made parties: *Story Eq. Pl.* (*Redfield's Ed.*) 76 *et*

seq.; *Note* 2 *top page* 77. Where the parties are not known it must be so charged in the bill: *Ib.*, 99.

The fourth cause of demurrer is fatal, and not amendable. The complainants in their bill, by their own showing, have not exhausted their remedy and proceeding at law, which must be done before a Court of Chancery will interpose.

To contest the validity of a deed, the creditors must have obtained judgment and execution: 2 *Bibb.*, 416; 3 *Littell*, 13; 1 *Monroe*, 106; *Ib.*, 233; 5 *J. J. Marshall*, 87; 6 *Id.*, 83; 7 *Dana*, 496; 11 *Ark.*, 40; 11 *Ark.*, 718; 12 *Ark.*, 387; 4 *Johns. Ch.* 671; 4 *Id.*, 682-687; 2 *Id.*, 295-144; *Ark. Code p.* 143, *Sec.* 473. Mrs. Wright was administratrix of the estate, and the law forbade her purchasing the land for herself. As administratix, she was trustee for the heirs and creditors: 4 *How.*, (*U. S.*) 552 *et seq.*; 7 *Ark.* 520. The law positively forbade her dealing with the estate for her benefit: 2 *Spence Eq.*, 299; *Adams' Eq.*, 59-60; *Williard's Eq.*, 604-606; *Fonb. Eq.*, 445, *book second*, *Sec.* 7; 4 *Kent*, 438. Executors cannot use assets and retain profits: 4 *How.* (*U. S.*) 552; 12 *Ind.*, 266; *Hump. C. C. Reps.*, 225-251; 11 *Foster* (*N. H.*) 70; 29 *Penn.*, 64; 26 *Id.*, 67; 27 *Ala.*, 62; 5 *McLean*, 4; 1 *Stock* (*N. J.*) 218.

Bell & Carlton, for Appellees.

BENNETT, J.—On the 12th day of October, 1869, Campbell & Strong filed their bill of complaint in the Jefferson County Circuit Court to cancel a deed made by Elizabeth W. Wright to Garland H. Dorris, in trust for the benefit of her minor child, James W. Wright. The deed conveyed lands, and charged, in the complaint, to have been voluntary, and the consideration was love and affection merely. Campbell & Strong are creditors of Elizabeth W. Wright, who died in the year 1865. Their claim has been duly presented to the defendant, Hartwell T. Wright, as administrator of Elizabeth W. Wright, deceased, and the same allowed and duly classified in the Probate Court of Jefferson county. It is charged, in the complaint, that the estate of Elizabeth W. Wright de-

ceased, is wholly and totally insolvent, and it would be unnecessary and useless expense to proceed further against said administrator to make complainants' debt. It is also charged, in the complaint, that Elizabeth W. Wright was largely indebted at the time she made said deed of trust, and was at that time insolvent.

The insolvency of Elizabeth W. Wright, as charged, is admitted by all the defendants, in their answer, to be true. The making of the trust deed, and the consideration for the same, as alleged, are also admitted to be true. The defendants, however, say in their answer that the lands conveyed by the said trust deed were not the lands of the said Elizabeth W. Wright, but belonged to the estate of Joseph J. Wright, deceased, the husband of the said Elizabeth W. And the defendants say, in their answers, that Elizabeth W. Wright had no authority to make said deed of trust, and the same was a fraud upon the rights of the defendants, Hartwell T., Mary S. and Joseph Wright, children and heirs at law of said Joseph J. Wright. The defendants also expressly say and charge in their answers that the pretended claim of Elizabeth W. Wright to said lands was bought and procured by her when she was the administratrix of Joseph J. Wright, deceased, and with the money and credits of said estate, and with nothing else, and her purchase of said lands, each and all of them, inured to the benefit of the estate of Joseph J. Wright, and that she held them in trust for said estate, and that said lands belong to defendants, the heirs of said estate.

The answer of the defendant, Joseph Wright, in addition to the defendants' claim, as heirs of Joseph J. Wright, deceased, also sets up and asserts a tax title to said land, by virtue of a purchase made by Thomas S. James, at a tax sale on the 2d of March, 1868, who afterward assigned and transferred, in due form of law, his certificate of purchase to said Joseph Wright, who afterward obtained a tax deed, as provided by law.

The complainants, replying to this allegation of the answer,

state and charge that Thomas S. James was, at the time of said tax sale, the attorney of the estate of Elizabeth W. Wright, deceased, and had been acting as attorney for her estate for some time previous to said tax sale, and that said Thomas S. James did declare, at the time of his said purchase at the tax sale, that he was purchasing the same for the benefit of the estate of Elizabeth W. Wright, deceased, and for the purpose of defeating the mortgage of the Real Estate Bank upon the lands, and requested persons present not to bid against him on that account; all of which was known to Joseph Wright. For this reason the complainants, in their reply, say that this purchase by James, at the tax sale, was *fraudulent* and *void.*

A demurrer to the bill was filed in all the answers.

The record does not show what disposition was made of the demurrers, but we shall treat them as though they were overruled by the court below. The demurrers are general, but the counsel for defendants insist that the bill is defective:

First. For want of proper parties to it.

Second. Because it does not disclose any grounds for equitable relief.

This is a bill brought by Campbell & Strong to cancel a a deed made by Elizabeth W. Wright to her minor son, and to subject the land conveyed to the payment of their debt. It alleges that at the time of the conveyance, she was largely indebted, as much as thirty thousand dollars, and that she was insolvent and wholly unable to pay her debts. It also alleges that her estate is insolvent, and that they have no other means by which they can make their debt. These are the only allegations that can, by expression or implication, raise the presumption that there may be other creditors or parties interested in this suit.

The fact that the estate is insolvent does not show that other parties may be interested in the result of the suit, because the insolvency may arise from inability to pay the debt of Campbell & Strong alone. Nor does the fact that Eliza-

beth W. Wright, herself, was insolvent at the time of the execution of the trust deed, and that her indebtedness was thirty thousand dollars at that time. Because, if she was owing other parties than Campbell & Strong, at that time, that indebtedness may have been liquidated since, and they may be the sole creditors of the estate.

As to the want of equity. The defendants insist that before a court of equity will interpose to try the validity of a deed, a creditor, seeking to set it aside, must present to the court a judgment of a court upon his demand upon which an execution has been issued and it returned *nulla bona*; or if the creditor would avoid the force of this rule, he must show such equitable circumstances as will relieve him from its application, so as to make his case an exception: *Meux vs. Anthony et al.*, 11 *Ark.*, 411.

Conceding the above to be the correct doctrine, have not the plaintiffs brought themselves within it? The record shows that the claim of Campbell & Strong was allowed by the administrator of the estate of Elizabeth W. Wright, and that the Probate Court has allowed and classified it, and ordered and adjudged that the same stand as a claim against the estate. This order of the Probate Court has the same force and effect as a judgment: *Chap.* 4, *Sec.* 115, *Gould's Digest; Cositt et al. vs. Biscoe*, 12 *Ark.*, 95; *McMorrin, adm'r. vs. Overholt*, 14 *Ark.*, 244. Should execution have been issued on it? It has been held in the case of *Adamson et al. vs. Cummins, ad.*, 10 *Ark.*, 541, that "a judgment obtained in the Circuit Court against an administrator, as such, cannot be executed until the estate is settled in the Probate Court; but an execution on such judgment, before it is ascertained that there are assets to pay it, is irregular." The same doctrine has been maintained in the case of *Horner, as Trustee, vs. Hanks et al.*, 22 *Ark.*, 585.

If an execution, upon a judgment obtained in the Circuit Court, cannot be enforced against an estate, we can see no reason why it would be necessary for a creditor to proceed

to obtain an execution in the Probate Court, after he has had his claim allowed and classified. After this has been done, the administrator is obliged to pay such claims from the assets of the estate; an execution could accomplish no more. If the allegations of the bill are true, the complainants are entitled to relief. The demurrers were properly overruled.

In determining the rights of the parties in this cause, as presented by the bill, answer, exhibits and proofs, it becomes necessary to prosecute three inquiries:

First. Was the estate of Elizabeth W. Wright in these lands impaired by reason of the tax purchase and tax deed of Thomas S. James and Joseph Wright?

Second. Was the deed of trust executed to Garland H. Dorris by Elizabeth W. Wright null and void as against the creditors of said Elizabeth W.?

Third. Did the purchase of these lands made by Elizabeth W. Wright, in 1857, of the trustees of the Real Estate Bank, and of the heirs of Wood Tucker, inure to her individual benefit, or was she but the trustee for the estate of Joseph J. Wright in the purchase?

As to the first inquiry. The separate answer of the defendant, Joseph Wright, states that the lands in controversy were assessed for taxation in the year 1869, in the name of Garland H. Dorris, trustee. The taxes, costs and penalty remaining wholly due and unpaid, in due time, and in accordance with law, they were offered for sale, at which sale, Thomas S. James bid the same off for the taxes, etc., and he received a certificate of purchase from the collector, which certificate was afterward endorsed and transferred to him, and afterward he obtained a tax deed, duly executed and acknowledged, and, by virtue of this deed, he claims that the title to said lands, in law and equity, is vested absolutely in him. The deed is exhibited.

The answer of the complainant to this cross bill admits the tax sale and purchase by James, but charges that said James was, at the time of said sale and purchase, the attorney for

the estate of Elizabeth W. Wright, deceased, and had been acting in that capacity for some time previously, and that at the time of purchase of the lands at tax sale, did declare that he was purchasing them for the benefit of the estate of Elizabeth W. Wright, and for the purpose of defeating the mortgage of the Real Estate Bank of the State of Arkansas, which was upon the lands, and requested persons present not to bid against him on that account. It also alleges that the defendant, Joseph Wright, well knew these facts at the time of the endorsement and transfer of the certificate of purchase to him.

The proof introduced fully substantiates the answer to the cross matter.

It has been laid down as a general proposition that trustees—unless they are nominally such to preserve contingent remainders—agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any person who by their connection with any person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property: 2 *Sugden on Vendors and Purchasers.*

The declaration of James, at the tax sale, that he was acting for the benefit of the estate of Elizabeth W. Wright, together with the fact that he was its attorney, placed him in such confidential relation as would come within the above general rule. Joseph Wright, knowing all these facts, at the time of the transfer of the certificate, cannot acquire any greater interest in the lands than James himself would have had, if he had obtained the deed himself. It is clear, then, that this purchase by James is *void*, as between himself and the estate of Elizabeth W. Wright.

Second. Was the deed of trust executed to Garland H. Dorris by Elizabeth W. Wright null and void, as against the creditors of the said Elizabeth W?

This was a conveyance of the lands in trust to Garland H. Dorris for the benefit of her minor child, James W. Wright, the

consideration of which was "love and affection." At the time of its execution, it was admitted that Mrs. Wright was owing large sums of money, and that she was insolvent and wholly unable to pay what she owed.

The rule of law governing transfers of property, under these circumstances, is well expressed by Chief Justice Johnson, in the case of *Dodd vs. McCrew*, 8 *Ark.*, 106, and reiterated by him in the case of *Smith vs. Yell*, 8 *Ark.*, 470, and it is that "when there is no actual fraudulent intent, and a voluntary conveyance is made to a child, in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed and not considerably indebted, and the gift is a reasonable provision for the child, according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts, then such conveyance will be valid against debts existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy, or if the nature of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts, then such conveyance will be *void* as to creditors." See, also, *Van Wyck vs. Seward*, 6 *Paige*, 67; *Salmon vs. Bennet*, 1 *Conn.*, 525.

When this trust-deed was executed the complainants were creditors of Mrs. Wright, she owing them a large sum of money. She was insolvent and wholly unable to pay her debts, and, under the rule of law, as announced in the above cited cases, we have no hesitation in saying that this conveyance and gift, being voluntary, were, as to these complainants, absolutely void *in law*. See, also, the following cases: *Jackson vs. Seward*, 5 *Cowen*, 87; *Rende vs. Livingston*, 3 *John. C. R.*, 481; *Buckhorn vs. Jett*, 1 *Brockenb. R.*, 500; *Hapskirk vs. Randolph*, 2 *Id.*, 138; *Bullard vs. Briggs*, 7 *Pick.*, 533; *Bennett vs. Bedford Bank*, 11 *Mass.*, 421; *Ridgway vs. Underwood*,

4 *Wash. C. C. R.*, 137; *Sexton vs. Wheaton*, 8 *Wheaton*, 229; 2 *Hovendon on Frauds*, 74, and cases there cited.

We now come to the last, and, to these complainants, the most important inquiry in the case, to-wit: Did the purchase of these lands, made by Elizabeth W. Wright in 1857, of the trustees of the Real Estate Bank, and of the heirs of Wood Tucker, inure to her individual benefit, or was she but the trustee for the estate of Joseph J. Wright in the purchase, she being its administratrix?

The rule of law has been well settled, that an executor or administrator cannot buy any part of the estate of his testator or intestate, as, in equity, he is held to be a trustee for the next in kin, legatees and creditors, and has no right to become the purchaser of the property which he represents. We are, however, asked to consider the case as not within the above rule, because the administratrix, in this instance, purchased the land of a stranger, and not at public sale of the estate, and that the purchase was made with the money borrowed of the complainants, and not from any effects of the estate of Joseph J. Wright. What are the facts? It appears that Joseph J. Wright died on the 21st day of December, 1854. At the time of his death he was residing on these lands. At the May term, 1854, of the Circuit Court of Jefferson county, a decree was obtained against Wood Tucker and the said Joseph J. Wright, in favor of Henry L. Biscoe, trustee of the Real Estate Bank. This decree shows that unless a certain amount of money was paid by either Wood Tucker or Joseph J. Wright, within a certain time, the commissioner named should have power to sell these lands. The money was not paid, and the lands were sold as ordered in the decree. The trustee of the bank became the purchaser; the commissioner afterward making a deed, duly executed, acknowledged and recorded. All this transpiring was before the death of Joseph J. Wright.

After Mr. Wright's death, letters of administration were granted to his widow, Elizabeth W. Wright, on the 9th day

of January, 1855, and she was duly qualified as such administratrix. On the 12th day of March, 1859, Elizabeth W. Wright purchased these lands in her own name, of the trustees of the Real Estate Bank, and by deed, purchased the interest of the heirs of Wood Tucker, on the 22d day of December, 1859.

Thus it is to be seen that these lands were once owned by Joseph J. Wright, but were sold, under a judicial sale, by virtue of a decree rendered against him, in a court of competent authority. Whatever interest Joseph J. Wright had in the lands was transferred to the purchaser, and we can see no reason why Mrs. Wright, though administratrix of Joseph J. Wright's estate, could not purchase them of such person, if the transaction is not connected with fraud or collusion to the detriment of the estate. These lands did not constitute any part of Joseph J. Wright's estate, at the time of his death. The decree was rendered and the sale effected during his lifetime. The administratrix never took possession of them as such, nor were they ever under the control of the Probate Court, as will appear from the inventory of the estate on file. But it is claimed that Mrs. Wright made the purchase with the money and effects of the estate, and that the heirs have a resulting trust in the lands.

The law has never been favorably disposed to recognize trusts, created by operations of law, while it may be admissible to prove a trust in opposition to a deed or written instrument. Yet such evidence, for this purpose, must be of so positive a character as to leave no doubt of this fact, before it can set it aside. Does the evidence, disclosed in the record, show the money used in the purchase came from the estate of Joseph J. Wright?

Hartwell J. Wright, the administrator of Elizabeth W. Wright's estate, says that she resided on these lands from the death of his father until the time of her death, and she had no other home. He was well acquainted with his mother's business since his father's death, and he was

entrusted by her with the management of his father's estate, and he never knew of his mother owning any property, real or personal, in her own right, except some claim that may be set up by deed from Gordon N. Peay, receiver of the Real Estate Bank, executed the 1st of March, 1859. The only source of income that his mother had, and all she had to depend on for her living, was the proceeds of the lands above mentioned. In all her business transactions, the money that she had or used was derived from the proceeds of these lands.

The testimony of Thomas S. James is about to the same effect—no more definite or more conclusive.

This is all the evidence, in the least tending to show, either by expression or implication, that the purchase money for these lands came from the estate of Joseph J. Wright. No evidence whatever, as to how much money ever was received by Mrs. Wright from the estate; what was the yearly value of it, nor as to how much money ever was in her hands belonging to it. On the contrary, we have the direct testimony of M. L. Bell that he *knew* that Mrs. Wright purchased bonds to pay the Real Estate Bank for these lands about the year 1858, or spring of 1859, and that *he knew* she borrowed money from the complainants, Campbell & Strong, to purchase the bonds. Paschal W. Strong, one of the complainants, also testifies, that "on the 12th day of February, 1859, Campbell & Strong advanced to her twenty-five hundred dollars in cash, and on the 4th day of November, 1859, they accepted her three drafts on them for twenty-seven hundred and forty-five dollars—the three amounting to the sum of $8235. The money previously borrowed, with the drafts, amounting, in all, to $10,735. Mrs. Wright said, at the time she obtained it, that she wished to use it in the purchase of the lands belonging to her father's estate. This direct evidence, as to the procurement of the money, taken in connection with the fact that the purchase was made immediately afterwards, and the declaration of Mrs. Wright, that that was what she desired

of it, must be considered as conclusive that she did not use the money of the estate in the purchase, but she obtained the means of these complainants. The lands not belonging to the estate of Joseph J. Wright, and she not using the money or effects of that estate, with which to make the purchase, she had a right to take the title in her own name for them, and as such, they must be held subject to the payment of her just and lawful debts.

The decree of the chancellor below does not make any final disposition of the tax-deed of Joseph Wright. This deed having been found to be void as to the interests of Emma W. Wright, the decree should so declare. With this modification the decree of the Jefferson Circuit Court is in all things affirmed.

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GREENWOOD & SON v. MADDOX & TOMS.

CONSTITUTIONAL LAW---*Construction of Section 3, etc., Article XII. Constitution.*—Section 3, Article XII. of the Constitution, respecting the exemption of homesteads, is to be construed in connection with Sections 1, and 2 of same Article, and so construed, it exempts all homesteads from sale on execution or other final process, except in the instances in the sections named, and it does not, by any of its expressions, limit the benefit of this exemption to *married men or heads of families.*

SAME---*Unmarried men may encumber homesteads, etc.*—While, under the provisions of the Constitution, the homestead of an *unmarried man* is protected from sale on execution, except in the instances therein expressed, yet he is left free to place incumbrances upon it, which a *married man or head of a family* is forbidden to do.

SAME.—*Tenant in common, when entitled to homestead.*---Where lands held in common are levied upon, a tenant in common is at liberty to apply for partition, and after partition, by fixing his dwelling thereon, will be entitled to the benefit of the homestead exemption.

APPEAL FROM MONROE CIRCUIT COURT.

HON. M. L. STEPHENSON, *Circuit Judge.*

Hughes & Smith and *Wassel & Moore*, for Appellants.

We submit that the appellee, Toms, was not entitled to a homestead. For the determination of this question, we assume that there is no substantial difference between the old statute (*Gould's Digest, Chapter* 68, *Section* 29,) and the constitutional enactment (*State Constitution of* 1868, *Article XII. Section* 3.) By the old law, the requisites for claiming this privilege were:

First. Citizenship, which this court in *McKenzie vs. Murphy*, 24 *Ark.*, 155, construed to mean residence; and,

Secondly. The qualification of being a householder or head of a family.

The constitutional requirements are, residence, ownership and actual occupation. The constitutional provision is no broader than the old statutory provision, so far as this case is concerned, even if it is so broad. The object of the homestead law is a humane and a benificent one. The object is plainly not to enable men to evade the payment of their debts but to protect the family from the improvidence of its head: "to provide a home where the family might be sheltered, and live beyond the reach of financial misfortunes." *Wassell vs. Tunnah*, 25 *Ark.*, 101. "To afford a home to the family of which the householder was the head, irrespective of his liabilities. The statutes intended no *individual* benefit for the head of the family; disconnected from it, the head of the family was entitled to no consideration." *McKenzie vs. Murphy*, 24 *Ark.*, 159.

Could Toms claim as a homestead an undivided one-third interest in a tract of land containing 320 acres?

The Constitution requires the claimant to be the owner and occupier. Toms was a tenant in common with his two sisters. Until partition should be had, he had an interest in each and every one of these 320 acres. Upon partition, he might have had allotted to him more or less than 160 acres.

Before partition, he was not the exclusive owner of a single acre. The third declaration of law is therefore not altogether free from doubt.

A. H. Garland, for Appellees.

We submit that the finding of the court below, both as to the law and the facts, was correct.

First. That Toms, although not a married man, was the head of a family within the meaning of the Constitution and in contemplation of law, and as such, entitled to the homestead exemption. See *Wade vs. Jones*, 20 *Mo.*, 75; *Buchanan vs. Cranfar*, 3 *Humph.*, 216; *Washburn on Real Property*, 325, 380.

As to the position contended for by appellants, that the homestead is not exempt from the collection of this debt, because it was contracted, as alleged, for the purpose of erecting valuable improvements thereon, we submit that in this, they are neither sustained by the law or the evidence. See, as to fixtures, 1 *Wash. R., Prop.* 14, 20; *Ib.* 133–4. That Toms, if a tenant, had a right to remove the engine, etc. See *Elves vs. Meade*, 12 *Smith's Leading Cases*; *Holmes vs. Trumper*, 20 *Johns' Rep.*, 29; *Wainsborough vs. Morton*, 4, *Adoph & Ellis*, 884; *Culling vs. Tufold*, *Buller's Nisi Prius*, 34; 1 *Salk Rep.*, 363; *Atk. Rep.* 477.

ENGLISH, *Special Judge.*—Moses Greenwood & Son, merchants of New Orleans, sued Maddox & Toms, in the Monroe Circuit Court, on a note for $2707 14, dated 14th April, 1870.

Upon an affidavit that the defendants had removed a part of their property out of the State, etc., a writ of attachment was issued and returned by the sheriff, levied on an undivided third interest of Toms in the north-east quarter of section 23, and the north-west quarter of section 24; township 1 north, range 3 west, 320 acres; and, also, upon an engine, gin, machinery, etc., found on the premises.

Both of the defendants were also personally served with process.

At the return term, May 1871, Toms filed a motion to quash so much of the return of the sheriff, on the writ of attachment, as showed a levy upon his undivided one-third interest in the lands. As grounds of the motion, it was stated, in substance, that Toms was a resident of the State, and the head of a family; that he owned an undivided third of the lands attached, the other two-thirds being owned by his two minor sisters, of whom he was guardian; that the premises consisted of 320 acres, a part of which was improved, and a part unimproved lands; that his portion, upon a division, would amount to less than 160 acres; that the mansion house, on the premises, was the common residence of Toms and his minor sisters; that he claimed his interest in the premises as a homestead, exempt from levy and sale on attachment, execution, etc.; that the demand of the plaintiffs did not arise prior to the adoption of the present Constitution, etc.; that the lands were not in any town, city or village; and that the debt sued on, was not contracted for improvements made upon the lands within the meaning of the homestead provisions of the Constitution, etc.

To the motion of Toms to quash the levy upon the lands, a response was filed for the plaintiffs, in which it was denied that Toms was the head of a family, within the meaning of the exemption laws, etc., and avering that he was not, and never had been a married man. It was admitted that he had two sisters, who were under age, but denied that the sisters resided with him, or were in any manner dependent on him for support and maintenance, inasmuch as they were the owners, in their own rights, of a handsome estate, amply sufficient to support and educate them. Averred that the whole or a greater portion of the debt, sued on, was contracted by the defendants in the erection of valuable improvements upon the premises claimed by Toms as exempt from execution or attachment, etc.

It seems that the court rendered judgment, at the May term, 1871, against both of the defendants for the amount of the note sued on, and condemned the engine, etc., attached, to be sold as personal property in satisfaction of the judgment, but took the motion of Toms to quash the levy on the lands under advisement until the next term.

At the November term, 1871, the motion was decided. The court quashed the levy on the lands, and overruled a motion for a new trial. From a bill of exceptions taken by the plaintiffs, it seems that, upon the hearing of the motion, the following evidence was introduced by the parties.

Toms testified, in substance, that he was about twenty-two years of age, and by occupation a farmer. That he was a resident of the State, and resided upon the lands attached. His interest in the lands was an undivided third; the other two-thirds belonging to his sisters, Clarinda and Sallie. The three inherited the lands from their father. He, Toms, kept house, and the house occupied was his ancestral residence. He had never been married. His sisters, whose ages were respectively fifteen and twelve, resided with him when they were not at school. He was their legally constituted guardian. They had the same interest in the property that he had. They owed no debts, unless perhaps for current bills for board, tuition, medical attention, store bills, etc. He was considerably in debt. The consideration of the note, in suit, was in part a steam engine and machinery purchased by Maddox and himself of plaintiffs. They were partners, engaged in the business of farming. The note was made in April, 1870. The engine and machinery were placed upon the lands, in question, in the fall of 1869. The engine was used as the motive power of a cotton gin. It was a portable engine. He did not mean that it could be carried about in one's hands, or by a man on horseback, but that it could be moved on a stout wagon with adequate horse power, or oxen. Portable engines are distinguished from stationary ones by this, that the former are constructed with a special

view to being readily removed from place to place. The engine in question had never, in point of fact, been moved from the place where it was first put. It had a rough plank shed over it to protect it from the weather. It rested upon sills placed upon the ground, and could be easily removed without injury to the freehold. The cost of the temporary covering was no part of the debt sued on. The engine might be removed to any other place, or attached to any other gin, or used for driving any other machinery, without substantial injury to the freehold or to the engine itself. The debt represented by the note, sued on, was not contracted altogether in the purchase of the engine and machinery. A portion of it was supplies furnished Maddox and himself.

Burton, a physician, testified that Toms lived at the same place where his father had lived before him. He was the guardian of his two minor sisters, who were then boarding with witness, in Clarendon, going to school.

Maddox testified that the plaintiffs were commission merchants of New Orleans. That the note sued on was given in settlement of an account due by Toms and witness to them, the principal item of which was an engine and machinery, and the balance was for supplies furnished. The engine, etc., was purchased by them in the fall of 1869.

Wilburn testified that he had known Toms from his boyhood. He resided on the same place where his father resided in his lifetime. Describes the engine, etc., about as Toms did in his testimony.

The court made the following declarations of law:

"The court declares the law to be that any resident of this State, who is the owner of any real estate in the same, is entitled to the benefit of the provisions of the Constitution in relation to the homestead.

"That a married man or the head of a family cannot legally encumber his homestead in any manner except for taxes, laborers' and mechanics' liens, and security for the purchase money thereof. This provision does not extend to res-

idents of the State not married men or the heads of families.

"The undivided interest of any legatee or distributee, residing upon the estate of a deceased person, is not subject to sale on execution, or other process, but the owner is entitled to the homestead exemption as against any debts of his own contracting.

"That supplies for the purpose of carrying on a trade or business, and which were not furnished directly as betterments to the realty, although they may be placed upon the homestead, are not such as is contemplated by law as advanced for the erection of and as improvements thereon."

The plaintiffs excepted to these declarations of law.

The court found the following facts: "That Maddox & Toms were partners in the business of planting upon the estate of Henry Toms, deceased, who was the father of one of the defendants. That this defendant, Toms, resided upon the property which was the home place of his father, and was one of the heirs of the estate. That defendants contracted a large debt with the plaintiffs for supplies to be used in the carrying on of their business of planting, and that the note sued on was given for the balance on the settlement of their account. That among their other purchases defendants bought of the plaintiffs a portable steam engine, mill and cotton gin, which was intended, and was so understood by both parties, to be placed upon the plantation for the purpose of better enabling the defendants to prosecute their business of planters. That said machinery was placed upon the premises, but was not attached to the soil. That a shed was erected over said machinery, but that no part of the supplies furnished by the plaintiffs was used in the erection of said shed. The court, sitting as a jury, finds the issue, so far as the attachment upon the land is concerned, for the defendants."

The plaintiffs appealed to this court.

First. It does not appear that the court below found upon the facts of the case, whether Toms was the head of a family or not, but, in effect, declared the law of the case to be that

he was entitled to the benefit of the homestead exemption, as against the attachment and sale under execution, though not a married man or the head of a family.

By the statute in force at the time the present Constitution was adopted, every free white citizen of the State, male or female, being a *householder*, or head of a family, was entitled to a homestead exemption. The homestead consisted of not exceeding 160 acres of land in the country, and a town or city lot, being the residence of a householder or head of a family, with the improvements thereon, without limitation as to value. It was exempt from sale on execution, except for taxes, but there was no prohibition against incumbrances. *Gould's Dig., Ch.* 68, *sec.* 29, 30, 31; *Acts of* 1866-7, *p.* 311, *sec.* 6.

This statutory homestead exemption was allowed to no one but a *householder* or head of a family, but the benefit of the exemption was continued to the widow, child or children; after the decease of the owner, etc. *Sec.* 30, *ub. sup.*

A *householder* is the master or chief of a family; one who keeps house with his family.—*Webster.* A person having and providing for a household.—*Bouvier.*

In *McKenzie vs. Murphy*, 24 *Ark.*, 157, Mr. Justice Fairchild, remarking upon this statute, said: "The object of the statute was to afford a home to the family of which the citizen, the *householder*, was the head, irrespective of his liabilities. The statute intended no individual benefit for the head of the family; disconnected from the family, the head of it was entitled to no consideration; but the family, when deprived of its head by death, was to have the protection of the act by holding the land, or town or city lot, upon which the family residence was situated, exempt from execution, so long as either was occupied and used as the residence of the family of which the deceased head was the representative." In *Tumlinson vs. Swinney*, 22 *Ark.*, 414, the Chief Justice said of the same statute: "The legislature intended to secure to the householder, or head of a family, a home, a dwelling

place, free from the claims of creditors, and protected from the invasion of the officers of the law—an asylum, where the family may live in independence and security, and which they may improve and make comfortable, without the fear of being deprived of it, and turned houseless and homeless upon the world, by improvidence, or by the misfortunes and vicissitudes incident to life."

If, while this statute was the law of the homestead, a man had lived, from choice or necessity, in his house by himself, and done his own housework, without wife, children, dependent relations, or domestics, he would not have been entitled to the benefit of the exemption. The officer of the law, armed with an execution, might have invaded his asylum, and deprived him of whatever comforts he derived from his solitary and cheerless home. It may be remarked, also, that, under the provisions of *Chapter* 68, *of Gould's Digest*, but a small exemption of personal property was made in favor of a person not the head of a family—the wearing apparel, tools of a mechanic, books, etc., of a minister, teacher, lawyer, physician, etc., *Sec.* 22, 28—whilst a more liberal allowance was made to the married man with a family. *Sec.* 23.

After the war, when the people were impoverished, and many of them in debt, the exemption of personal property in favor of a married man, widow or widower having a family of children, or persons having the care or maintenance of a minor child or children, was liberally enlarged; and the exemption in favor of a class of persons, male or female, living alone, without families, was also increased. *Acts of* 1866–7, *p.* 309.

Thus stand, substantially, the law of the homestead exemption, and the law of the exemption of personal property, at the time the present Constitution was adopted, in 1868. When the convention assembled, the State was still laboring under the impoverishing effects of the war; the people were yet much in debt, and Congress had passed a bankrupt act. At an early day of its session, a committee *on exemption of*

real and personal property was appointed: *Debates and Proceedings of the Convention*, p. 61. The committee framed and reported provisions to be inserted in the Constitution. *Ib. p.* 205. After some discussion on the expediency of making constitutional, instead of legislative exemptions, the provisions reported by the committee, were referred to the committee on the *Constitution, its arrangement and phraseology. Ib. p.* 358–361. This committee made some changes in, and additions to the provisions referred to them, and, as amended, they were adopted as *Article XII*, of the Constitution, under the title, *Exempted Property.*

Sec. 1, of this article, provides that: "The personal property of *any resident of this State*, to the value of two thousand dollars, to be selected by such resident, shall be exempted from sale on execution," etc. This exemption is not limited to married persons, or heads of families, but is allowed to any resident of the State. The distinction made in the exemption statutes, above noticed, between persons with, and without families, was not kept up in this section.

Sec. 2 of the same article provides that: "Hereafter the homestead of any resident of this State, who is a *married man*, or *head of a family*, shall not be incumbered in any manner while owned by him, except for taxes, laborers' and mechanics' liens, and security for the purchase money thereof." This section simply places a limitation upon the power of a married man or *head of a family* to *incumber* the homestead, and was designed for the benefit and protection of families, wives, children or other dependent persons, etc.,—a provision which was not in the homestead statute, which only protected the homestead from sale on execution. This section does not prescribe the quantity nor the value of the estate that is to constitute the homestead, nor protect it from sale on execution, nor does it expressly or by necessary implication limit the homestead exemption to married men or heads of families.

Sec. 3, provides that: "*Every homestead*, not exceeding one

hundred and sixty (160) acres of land, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any town, city or village; or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and appurtenances thereon, *owned and occupied by any resident of this State*, and not exceeding the value of five thousand dollars, *shall be exempted from sale on execution* or any other final process from any court; but no property shall be exempt from sale for taxes, for the payment of obligations contracted for the purchase of said premises, *for the erection of improvements thereon*, or for labor performed for the owner thereof," etc.

This section limits the quantity of land that is to constitute the homestead in the country, as well as in the towns, etc., and certainly places a limit upon the value of the homesteads of the towns, etc., if it does not limit the value of the country homesteads. It also exempts all homesteads from sale on execution or other final process, except in the instances named; and it does not, by any of its expressions, limit the benefit of this exemption to *married men*, or *heads* of *families*, but seems, by fair interpretation of its language, to extend to *any resident* of the State. And this construction is in harmony with the first section, which relates to the exemption of personal property from execution, etc.

This conclusion is adopted after mature deliberation, though not free from all doubt, because of the want of clearness and accuracy in the expressions of the third section, but the conclusion has been reached by construing this section in connection with the other sections of the article.

The court below might well have found, upon the facts in proof, that Toms was the head of a family. He succeeded his deceased father in the care of his minor sisters, who continued to live with him in the family mansion, when not at school. 1 *Washburne on Real Property, top page*, 327.

But the question whether a man not married, or the head of a family is entitled to a homestead exemption from execu-

tion is directly presented by the record in this case, and we have deemed it a duty to decide it, though it may rarely happen that a man will be the solitary occupant of his home and dwelling place, unaccompanied by any of the persons ordinarily constituing a family. Still, if he resorts by choice, or from necessity to that lonesome life, the framers of the Constitution seem to have intended to protect his homestead from sale on execution, except in the instances expressed, though he is left free to place incumbrances upon it, which a married man or head of a family is forbidden to do.

Second. Was Toms entitled to a homestead exemption in the three hundred and twenty acres of land, which he held as a tenant in common with his two sisters, before his interest had been severed, by partition, and his dwelling fixed upon the share allotted to him? At the time he made the motion to quash the levy, returned by the sheriff upon the writ of attachment, he was not the owner of any particular portion, or acres of the land, but had an equal interest with his sisters in all of the acres, and the dwelling and appurtenances thereon. He certainly had the elements out of which he could cause a homestead to be formed, by having the land partitioned, and fixing his dwelling on the share allotted to him, if the ancestral mansion did not fall upon the portion assigned to him. At the time he made the motion to quash the levy, he had taken no step to have the land partitioned. If the court, on the one hand, had refused to quash the levy, and left the appellants at liberty to take out an execution, and sell his entire interest in the lands, he might have been deprived of his right to perfect his homestead claim, or of the privilege of putting himself into a condition to protect his homestead exemption—if, indeed, the sale would deprive him of that right. See *Hughes vs. Watt*, 26 *Ark.*, 228. On the other hand the court quashed the levy, and thereby deprived the appellants of an opportunity of having the benefit of a sale of any portion of the land in any event. This might work a wrong, because some of it

being improved, and some unimproved, and the former being more valuable than the latter, it might turn out upon a partition that Toms would get for his share unimproved lands, embracing more than 160 acres, the limit of the homestead right, and the appellants could sell the excess; or it might happen that the ancestral mansion would not be upon the share allotted him, and he might not choose to fix his dwelling on it, and in that event, the appellants would have the right to cause his share to be sold under execution. We think the better practice would have been, in the absence of statutory regulations, for the court not to have quashed the levy, but to have left the appellants at liberty to take out their execution, and Toms at liberty to apply for partition, etc. If it may be said that the appellants might be too fast for him with their execution, it may be answered that he could obtain an injunction to stay the sale until his homestead right could be ascertained and forfeited.

We are aware that it has been held, in California, that a homestead cannot be claimed by a tenant in common, on the ground that no provision is made by the homestead statute of that State for partition. *Wolf vs. Fleishacher*, 5 *Cal.*, 244; *Gibbin vs. Jordan*, 6 *Cal.*, 417. So in Indiana and Massachusetts, 1 *Wash.*, *on Real Prop.*, *top p.* 388. But it has been ruled otherwise in Iowa, *Thorn vs. Thorn*, 14 *Iowa*, 49, and in Vermont, *McCreary vs. Bixby*, 36 *Verm.*, 254, 257, and we prefer the reasoning of these decisions. See also *Horn vs. Tufts*, *New Hamp.*, 479.

Here there is no trouble about partition, for the application for partition might have been made in the court which quashed the levy. *Gould's Dig. Ch.* 811.

Third. The remaining question is whether the note, sued on, is an "obligation contracted for the erection of improvements" on the land in question, within the meaning of the third section of the 12th article of the Constitution? The engine, etc., for which the note was in part given, was purchased of appellants, by Maddox & Toms, as partners, and

placed on the premises as a motive power to the gin, etc., to be used in their partnership planting business. Maddox had no interest in the land. As between him and Toms, it did not become part of the realty, but remained personalty, and was subject to their partnership debts. Toms was only a tenant in common with his sisters, and they could not have claimed that the portable engine, placed on the land by him and his partner, for purposes connected with their planting business, became part of the realty. If Toms had been the sole owner of the land, and purchased the engine and placed it on the premises for his own purposes, and the controversy had arisen between him and a vendee to whom he had sold the land, there might be a question whether it was not a fixture, and passed with, and as a part of the realty. 1 *Wash. on R. Prop., top pages*, 16, 17.

Upon the facts of this case, the engine, etc., was surely not an *improvement* erected on the property within the meaning of the clause of the Constitution in question. As held by the court below it was no permanent betterment of the property.

For the reasons, however, above indicated, we think the court below should not have quashed the levy upon the lands, and the judgment of quashal must be reversed, and the cause remanded with leave for the parties to take such further step as they may deem proper, not inconsistent with this opinion, etc.

STEPHENSON, J., being disqualified, did not sit in this case.

HON. E. H. ENGLISH, *Special Supreme Judge.*

TURNER, Adm'r. v. LASSITER et al.

VENDOR'S LIEN—*Enforcement of, when tender of deed impossible, etc.*—Where the holder of a note, given for the purchase money of real estate, desires to subject the land to its payment, and the right to do so depends upon the making and delivery of a deed to the land, to the vendee, he must tender a deed with his bill, or, if the tender is impossible or impracticable, he must offer to make it, when ascertained by the court to whom it should be made; or, if the disability exists upon the part of the vendor to make the deed, when such disability is removed by the court.

APPEAL FROM ASHLEY CIRCUIT COURT.

HON. HENRY B. MORSE, *Circuit Judge.*

Johnston & Hawkins and *U. M. Rose*, for Appellants.

We submit, the court erred in sustaining the demurrers.

Between the plaintiff and Leach, the assignee of C. J. Lassiter, and the heirs at law of Lassiter, no personal, mutual and reciprocal rights and obligations exist.

The plaintiff has no right, in law or equity, to demand the payment of money from either of the defendants. Nor can they or either of them, by any right in law or equity, demand a deed from plaintiff. The plaintiff, in his suit, is not seeking to recover judgment against either of them personally for the money. The proceeding is *in rem* against the land only.

The rights of the defendants, Sumner and Van Gilder, are wholly dependent upon the rights and equities of the other defendants, *pendente lite.* See *Story's Equity, edition of* 1836, *vol.* 1, *secs.* 405–406.

J. W. Van Gilder, for Appellees.

That the demurrer was properly sustained we submit:

First. There is no equity in the bill, because it fails to allege, with sufficient certainty, the facts that would constitute a lien upon the land in favor of plaintiff's intestate. It states a sale without stating when, but states that after said sale in 1862,

Lassiter acknowledged he owed $2000, and gave his note. It does not state whether there was a contract in writing, or a bond for title given or not. This, we think, a fatal defect. *Story on Eq. Pleading, secs.* 23 *and* 257; *Harrison vs. Nixon*, 9 *Pet.*, 483; 22 *Ark.*, 227; 1 *Hilliard on Mortgages, chapter* 23, *section* 57.

The second cause of demurrer is also well taken.

The complaint does not tender or offer to tender a deed, which is certainly fatal. 26 *Ark.*, 506.

The bill does not even bring the heirs of Holloway as parties into court, so that a deed could be decreed. 18 *Ark.*, 24.

STEPHENSON, J.—On the 18th day of January, 1868, Milton Holloway filed a bill in the Ashley Circuit Court, on the Chancery side, against Francis Lassiter, Laura and Jones P. Smith, James M. Leach and James Merriweather, to subject certain lands, in Ashley county, to the payment of the purchase money thereof, and to cancel and set aside an outstanding adverse title set up by Merriweather.

The bill alleged that C. J. Lassiter, in his lifetime, purchased the lands from the complainant, who gave him possession and took his note for $2000. Soon after the sale, Merriweather brought suit, by ejectment, against Lassiter, to recover the lands; claiming title through the Swamp Land office, and a condition was annexed to the note, at the request of Lassiter, and by consent of complainant, that if the title of the latter should be maintained, the money should be paid; otherwise, if Merriweather's title prevailed. Merriweather's suit had been dismissed for want of prosecution, and abandoned by him, and Lassiter had sold the lands to Leach, who had full notice of the non-payment of the purchase money; that C. J. Lassiter has departed this life, and no administration has been had upon his estate; that Francis Lassiter and Laura Smith are his only heirs at law; that Jones P. Smith is the husband of the said Laura, and that all the defendants are non-residents of the State.

Notice was duly had on all the defendants, and at the —— term of the Ashley Circuit Court a decree, *pro confesso*, was taken against Leach and Merriweather. The other defendants appeared and demurred to the bill for want of equity and for multifariousness.

At this stage of the proceedings, the records of the court were destroyed by fire, and on the 2d of August 1869, Holloway having departed this life, his administrator, William Turner, filed a petition setting out all the above facts, and asked that the cause be reinstated.

The record shows no service on the defendants in the petition, but the written consent of Laura and Jones P. Smith, to reinstate, is filed.

At the March term, 1870, John Sumner and John W. Van Gilder presented their petition to the court to be made defendants, alleging that they were the then owners of the land. The court granted the petition.

At the Fall term, 1871, the court sustained the demurrer of Francis Lassiter and the Smiths interposed prior to the destruction of the record, and gave leave to Turner to amend his bill.

At the spring term, 1872, the amended bill was filed. From the nature of the amendments, it is evident that the demurrer was sustained on the ground that the bill was multifarious, from the fact that the name of Merriweather, as defendant, is stricken out; also the prayer for relief against his title. With these exceptions, the bill alleges the same facts as the original, with somewhat more circumstantial particularity. To the amended bill, Sumner and Van Gilder demurred for want of equity, and because no deed was tendered before the suit was brought.

The court sustained the demurrer and dismissed the bill, and Turner appealed.

The record shows the suit to have been improperly reinstated. No notice appears to have been given of the petition to reinstate, as required by law: *Gould's Digest, Chap.* 143, *Sec.* 5.

The agreement of the Smiths to reinstate could not bind the other defendants and it was necessary, before the court could properly proceed, that all the defendants should been brought in. It is evident, therefore, that for this error, which affects every subsequent step taken, in the cause, the decree of the court must be reversed. But, inasmuch as the appellant may properly reinstate his case, in order that he may have it properly adjudicated, in the court below, without again bringing it here, we will proceed to the examination of the subsequent questions presented in the record.

If the defendants had all been in court, the demurrer to the original bill might properly be sustained, for the settlement of the dispute between Holloway and Merriweather, as to the adverse title of the latter, was wholly independent of and unconnected with the cause here at issue. But it was certainly incumbent on the administrator, inasmuch as the legal title to the land was in the heirs of Holloway, to bring them before the court to enable it to decree a deed, if such step became necessary to the proper determination of the case.

The court erred in letting in Sumner and Van Gilder to defend upon the showing made in their petition. They base their right to come in simply upon the ground that they are the present owners of the land. For aught that appears in the record, they may claim title through Merriweather; and to allow them to come in upon this petition, is, in effect, to reinstate the error which was pointed out by the demurrer to the original bill, and cured by the amendments thereto.

Sumner and Van Gilder demur to the amended bill, because no deed was tendered before suit was brought. If they had been in court as original defendants, or as holders through Lassiter, and no tender of, or offer to make a deed had been made in the bill, this would have been a substantial objection; but it is evident that they were not the owners of the land at the time Holloway filed his bill, and *since*, there has arisen an emergency which renders a compliance with the contract, according to its literal terms, impossible.

Holloway is dead, and before a deed can be made by his heirs, the aid of a court must be invoked. To require a deed to be tendered, in such a case, before suit was brought, would be to require a manifest impossibility. And so where the vendor desires to subject the land to the payment of the purchase money, but the vendee is a non-resident of the State, or any other substantial reason which would render a tender impossible or fraught with doubt as to whom it should be made.

Where the holder of a note, given for the purchase money of real estate, desires to subject the land to its payment, and the right to do so depends upon the making and delivery of a deed to the land to the vendee, he must tender a deed with his bill, or, if the tender is impossible or impracticable, he must offer to make it, when ascertained, by the court, to whom the same should be made; or if the disability exists upon the part of the vendor to make the deed, when such disability is removed by the court.

There is no appearance, in the record, of any order by the court, reinstating the cause. The petition to reinstate is a suit, in court, upon which there must be a determination and judgment; until this is done, the court cannot proceed with any question touching the original cause.

The decree of the Circuit Court is reversed, and the cause remanded with directions to allow the appellee, if he so deems, to reinstate the cause and amend his bill.

HANGER & MOODY v. THE STATE.

REAL ESTATE BANK—*Stock mortgage, nature of, etc.*—The stock mortgages executed to the Real Estate Bank, were made for the double purpose of securing the payment of the State bonds, and money borrowed of the bank by the stockholders.

MORTGAGES—*Where equity of redemption of sold, etc.*—Where the equity of redemption in mortgaged premises is sold under a judgment, or under a junior mortgage, which judgment or mortgage is a lien upon the equity of redemption merely, the legal presumption is, that the purchaser only bids to the value of such equity of redemption, and that the land purchased is, in equity, the primary fund to pay the amount due upon the prior bond and mortgage.

APPEAL FROM PULASKI CHANCERY COURT.

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

Clark & Williams, for Appellants.

By the general nature and purposes of the bank, without any reference to its positive provisions, it seems to us plain that the bank could not, either by a foreclosure in a Court of Chancery, or under the power of seizure and sale contained in the charter, become the owner of these lands in her corporate right, so that they would belong to the general funds. But if we turn to the provisions of the charter, we shall find that such a proceeding is expressly, or rather by direct implication, prohibited; See 21*st section;* and as for the construction of this section, which is incorporated in most of the bank charters, as well as charters for insurance companies in the United States. See *Bank of Michigan vs. Niles*, 1 *Doug. Mich.*, 401. And see *Russell vs. Tapping*, 5 *McLean*, 194; *People vs. Utica Insurance Company*, 15 *Johns.*, 358; *Utica Insurance Company vs. Scott*, 3 *Cow.*, 709; *Farmers' Loan Company vs. Clawes*, 3 *Comst.* 470; *The Banks vs. Poitiaux*, 3 *Rand., Va.*, 136; *Tuamaston Bank vs. Simpson*, 21 *Me.*, 195; *Logan vs. Bodalett*, 1 *Blackf., Ind.*, 418–419; *Angell and Ames on Corporations*, 153, 154, 155; *Merrett vs. Lambert*, 1 *Hoff., C. R.* 166.

In our view of the case, the purchase of these lands, in such manner as to convert them into banking funds, was an act which could not possibly come within this proviso; because it was, in no sense, done as a "requisite for accommodation in relation to the convenient transaction of the business of the bank;" and if it was, it was not land which had been mortgaged to the bank in satisfaction of a debt previously contracted in the course of its dealings, both of which must concur to give the right to purchase. See the case above cited, and *Edwards vs. Farmers' Insurance Company*, 21 *Wend.*, 467.

M. W. Benjamin, Solicitor General, for the State.

Thorn mortgaged to the Real Estate Bank certain lands. These mortgages were double mortgages, the senior to the State and bondholders and the junior to the bank. See *Wilson vs. Biscoe, et al.*, 11 *Ark.*, 44. Thorn failed to pay and the bank foreclosed and bought in the property. The receiver sold the right of the bank (the equity of redemption) to Moody & Hanger.

Peay, in his capacity of receiver, was not and did not claim to be the State of Arkansas, and if he had been, there would have been no merger of the two titles in one, unless he had intended to make it. It is a well settled rule, that where two estates meet, in equity, there is no merger unless it is the intention of the party in whom they meet, to have them merge. See *Forbers & Moffett*, 18 *Vesey*, 384; *James vs. Morey*, 2 *Cowen*, 246; *Davis vs. Peirce*, 10 *Min.* 378; *Earle vs. Washburn & Allen*, 95; *Bell vs. Woodward*, 34, *N. H.*, 90; *Knowles vs. Lawlin*, 18 *Geo.*, 476; *Moore vs. Harrisburg Bank*, 8 *Watts*, 138; *Haynes vs. Pope*, 14 *La. An.*, 248; *Hawkins vs. McVae*, 14 *La. An.*, 334.

BENNETT, J.—The bill, in this case, is brought to foreclose a mortgage given by Thomas Thorn to secure the payment of a stock bond executed by Thorn to the Real Estate Bank of the State of Arkansas, and to subject certain lands,

therein described, to the payment of a debt, which, as is alleged, was secured by said mortgage.

By the bill, it appears that one David Fulton, subscribed for one hundred shares of the capital stock of the Real Estate Bank. That, on the 16th day of September, 1837, the proper officers of the bank awarded to said Fulton seventy-two shares of said capital stock, whereby he became a stockholder in the bank to that number of shares; that, on the 16th day of May, 1840, on his application, and the written request of Thomas Thorn, his stock was transferred to said Thorn, who furnished and executed the mortgage exhibited in the bill. This deed of mortgage recites that, on the 16th day of May, 1840, Thomas Thorn executed his bond, to be due on the 26th day of October, 1861, and payable to the bank for the sum of seven thousand and two hundred dollars, with interest at the rate of five per cent., payable half yearly. The bond was executed for stock subscribed as aforesaid. The mortgage was conditioned, that if the said Thorn or his assigns should pay all such sums of money as he might receive from the bank, on account of stock and the interest thereon, and should pay to whom it might be due, so much or such sum of bonds of the State, issued in favor of said bank and the interest thereon, or so much as would be equal to the stock allowed; and, also, should pay the bond in said deed recited, and the interest thereon, then the deed to be void. That, by virtue of being a stockholder in the bank, Thorn obtained stock loans; that the said Thorn has not paid or caused to be paid his proportion of the bonds of the State issued to the State; nor has he paid the bond above described, nor the interest on the same.

Peter Hanger and Francis Moody make themselves defendants under the provisions of the statute. They answer, admitting the facts of the bill, but allege that, after the execution of the mortgage above recited and sought to be foreclosed, Thorn borrowed of the Real Estate Bank, upon security of said mortgage, the sum of $3600, and that the bank brought a bill in the Pulaski Circuit Court to foreclose

said mortgage to pay them for this loan of $3600 and interest, which had never been paid by Thorn. On this bill a decree was finally rendered in favor of the bank against Thorn, and the lands mentioned in the mortgage ordered to be sold. A commissioner was appointed to carry the decree into effect. The money was not paid as ordered by the court. The land was sold under the decree, and bought by Luther Chase, one of the trustees of the Real Estate Bank, for the sum of $120. The commissioner made a deed to him for the benefit of the bank.

Gordon N. Peay, by a decree of the Chancery Court of Pulaski county, was afterwards appointed receiver of the effects and assets of the bank, and, while acting under orders from the court, on the 1st day of January, 1858, by deed, conveyed what right, title and interest the bank had in these lands to Hanger & Moody for $11,163, to be paid in the bonds of the State of Arkansas issued to the Real Estate Bank, which were paid and sale confirmed by the court.

This new matter is made a cross bill, and the defendants pray that the said mortgage may be declared fully discharged and satisfied; or that the sum of $11,163, so paid by these defendants, may be declared to be a fund devoted in equity to the payment of the sums due by said Thorn under the mortgage, and that an account may be taken as to what is due by said Thorn under the mortgage, and they (Hanger & Moody) be permitted to pay any balance which may be found due, after deducting that sum, in redemption of said lands.

The State, by her answer to this cross bill, admits the matter stated by the defendants to be true in point of fact, but insists that the defendants are not entitled to the relief as prayed. Upon the hearing, the cross bill was dismissed, and a decree rendered in favor of the State; from which decree an appeal was granted.

Only two points are raised by the new matter set up in the answer of the defendants:

First. Was the sale of the lands, and purchase of the same

under the decree of the Pulaski Circuit Court, a complete discharge of the mortgage which the State is seeking to foreclose?

Second. If not a complete discharge, are the defendants entitled in equity to have the amount paid by them, with the interest, while in the hands of the receiver of the bank, created into a fund out of which the stock mortgage shall be paid, and the mortgage discharged to the extent of that fund?

The mortgage, which the State is seeking to foreclose, was executed under the provisions of the thirteenth section of the charter of the bank. In that section it was required that the stockholders should execute bonds and mortgages to the bank, conditioned for the payment of the bonds of the State and interest thereon, and, also, for the payment of all moneys received from the bank on account of subscriptions for stock.

When a person has executed a mortgage, under the provisions of this section of the charter, his deed of mortgage secures the State for the State bonds loaned to the bank to the extent of his interest in it, and also secures the bank for the money he, as a stockholder, or otherwise, has borrowed of the bank.

We do not, however, deem it necessary to say more upon the nature of these mortgages, as the case of *Wilson vs. Biscoe, et al.*, 11 *Ark.*, 44, has fully and completely exhausted the reason and authority for holding these mortgages to be double in their character.

Justice Walker, in delivering the opinion in the above case, said, "that the two conditions in the mortgage are separate and distinct, and secure rights to the State and the holder of State bonds, prior in point of time and equity, and a subsequent equity and security to the banks for loans made to the stockholder, on account of stock, to the same extent and as fully as if two distinct instruments, the one prior to the other in point of time, had been executed for that purpose."

In the case before us, it appears that Thomas Thorn mortgaged to the Real Estate Bank certain lands under the pro-

visions of their charter. Thorn failed to pay his note or stock bonds; the bank foreclosed and bought the property itself. Several years afterwards the receiver sold the right of the bank to Hanger & Moody, and in the deed of the receiver it was expressly covenanted that he in no way sold or in any manner interfered with the interest of the State.

The foreclosure and sale was for only the subsequent equity and security which the bank held for loans made by it. The purchaser could only buy what was foreclosed and offered for sale, and, in this instance, stood in the relation of junior mortgagees, after the purchase from the bank receiver, and subject to the prior mortgage lien of the bondholders and the State. The purchaser acquired no other estate in the lands than the equity of redemption of the mortgagor, and a subsequent purchaser could not get any other or greater estate.

The sale, under the decree of the Pulaski Circuit Court, was not a complete discharge of the mortgage; then, are these defendants entitled, in equity, to have the money paid by them, with the interest, while in the hands of the bank receiver, created into a fund out of which the stock bond, given by Thorn to the bank, shall be first paid, and the surplus, if any, applied to the discharge of the mortgage? Or, in other words, was the relationship between the bank and these mortgagors a *fiduciary* one? the bank being a trustee, and having no power or control over the mortgages, except in a *fiduciary* capacity. And should it become necessary for the purposes of the trust, that a sale of the property should take place, could the bank become the purchaser of it, in its own right? as trustees cannot buy trust property, except for the interest of the beneficiaries.

We have already said that this mortgage was double in its character, having the same effect as though Thorn had executed two instruments—one to the State, to secure it for such a *pro rata* of the bonds issued to the bank as he (Thorn) held shares of its capital stock; the other, given to secure the bank for Thorn's stock-bond, made in payment for his stock

in the bank—the mortgage given to the State being prior to the one given to the bank. If this be true, there can be no trustee relationship between any of the parties. It is an occurrence which happens in nearly every day's business transactions, that A, to secure a debt which he owes B, executes to him a mortgage on his lands, and afterwards he executes another one to C. C, at the proper time, forecloses his mortgage, and, at the sale under the decree, buys the property himself. After the sale and confirmation, what has C obtained by his purchase? Simply the equity of redemption which A had, and the property subject to the prior incumbrance of B. Now, suppose that C sold what he bought for ten or twenty times as much as he paid for it, could it be said he was a trustee for A, and that the surplus over and above what he paid for the equity of redemption, should be applied to the extinguishment of the mortgage to B?

It has been repeatedly held that when the equity of redemption in mortgaged premises is sold under a judgment or under a junior mortgage, which judgment or mortgage is a lien upon the equity of redemption merely, the legal presumption is that the purchaser only bids to the value of such equity of redemption, and that the land purchased is, in equity, the primary fund to pay the amount due upon the prior bond and mortgage. *Tice vs. Armin*, 2 *Johns. Ch. R.*, 125; *Hyer vs. Pruyn*, 7 *Paige R.*, 465; *McKinstry, adm'r. vs. Curtis*, 10 *Id.*, 503.

Thus the lands are primarily liable to secure the prior incumbrance. The foreclosure of the mortgage, and the purchase of the lands by Chase, under the decree, extinguished all the right and title of Thorn to the land, satisfied the debt due the bank to the amount bidden, and discharged the lands from the lien of the mortgage in favor of the bank. The debt due the bank, before the foreclosure of the mortgage, was assets of the bank. After the purchase of the lands by Chase, they became assets to the extent of Thorn's interest therein; and after Hanger & Moody bought the lands of the

receiver, the amount paid by them, whether more or less, were assets of the bank to be applied to the extinguishment of its liabilities, and not for the benefit of Thorn.

If, at the sale under the decree, the lands had brought more than the amount of the junior debt, the residue would belong to the mortgagor, and not to be applied to the satisfaction of the mortgage first given; for the lands in the hands of the purchaser of the equity of redemption are primarily liable for this purpose. The equity of redemption is the property of the mortgagor, and the presumption of law is, that the purchaser of it only bids for its value—bids such sums as he deems the lands are worth in excess of the prior mortgage debt.

If Thorn had paid up all his indebtedness to the bank which was secured by this junior security, there would have been no doubt but that he would have been entitled to have had his lands released to that extent. But he having suffered his equity of redemption to be sold from under him, by virtue of a decree of a court of competent jurisdiction, that sale extinguished all his title to them, and it was vested in the purchaser, and a subsequent sale by the receiver of the bank, although for a much larger sum than was originally due the bank, cannot inure to Thorn's benefit, and certainly not to these defendants.

Under no view of the case can we see where the trustee of the bank, or the receiver of it, were the agents or trustees of the defendants, and it is not necessary to inquire into the fact as to whether the lands brought more than enough at the sale made by the receiver to Hanger & Moody to pay Thorn's indebtedness or not.

In reviewing the whole case, we are of the opinion the chancellor committed no error in dismissing the cross-bill of the defendants, and rendering a decree in favor of the State.

Decree affirmed.

FLOYD v. GILBREATH et al.

ILLEGAL TAXES—*By what courts and remedies, relieved against it, etc.*—On bill by plaintiffs, who sue for themselves and all other tax-payers of Scott county, alleging that certain taxes were *illegally* levied, praying that the collector be enjoined from the collection of the same, the court granted a restraining order. After appearance of parties, on demurrer, the injunction was made perpetual: *Held*,

1st. That the Circuit Courts of this State, under the present Constitution, though creatures of the Legislature, have the same jurisdiction that they possessed prior to its adoption, and they are clothed with all the powers conferred upon them by the Constitution of 1836.

2d. While the present revenue law provides the manner in which a party aggrieved may apply to have the *appraisement* or the *valuation* of his property corrected, there is no provision to correct an *illegal* or *erroneous levy* by the County Court and, in such case, he must look to the superintending control and appellate jurisdiction of the Circuit Courts over the County Courts, and where no remedy by appeal is provided by the act, he would be entitled to relief by *certiorari* or *prohibition;* and under these writs, the Circuit Court may revise the proceedings of the County Court, and if, from the record, it appears that the County Court has proceeded in a matter outside of, or in excess of its jurisdiction, the proceedings may be stayed or quashed, by *prohibition*, to the extent of the illegality, or quashed as to the whole, on *certiorari*.

3d. Where it is desired to correct an error which exists *de hors* the record, as where the levy, on the face of the proceedings to impose it, is a valid lien on land, and extrinsic evidence is required to show its invalidity, neither the writ of *certiorari* or *prohibition* are of any value, and, in such a case, a court of equity will interfere to prevent a multiplicity of suits, irreparable injury or a cloud upon title to real estate.

4th. Where the error or illegality appears of record, and the tax-payer does not choose to avail himself of his remedy by *certiorari* or *prohibition* to *prevent* the evil, he may have his action of trespass against the officer of his property; and replevin will also lie to recover personal property seized or sold, in whosesoever hands it may be. Or where the proceedings imposing the tax are regular on their face and the tax is paid under protest to avoid sale, the party may have his action to recover the money so paid.

5th. Where the proceedings are void upon their face, they form no cloud upon title and no ground of interference by a court of equity, and if they are not void upon their face, but merely voidable or irregular, a court of equity will not take cognizance of them, unless facts are alleged sufficient to bring the matter within some acknowledged head of equitable jurisdiction.

APPEAL FROM SCOTT CIRCUIT COURT.

HON. J. H. ROGERS, *Special Circuit Judge.*

A. H. Garland, for Appellant.

The whole theory of our Constitution, and the *revenue laws* under it, as to taxes, etc., is to place the subject entirely at the control of the County Court. Every body having cause of complaint, as to assessment and collection of taxes, has his day in this court, subject to appeal, etc., but there is no jurisdiction in equity to enjoin the collection of taxes there assessed. See argument and decision in case of *Nickels vs. Witherspoon,* decided at the last term, and *Clayton vs. Lafargue,* 23 *Ark.*, 137, and cases there cited. And no such special facts as would take this case out of the rule, are averred here—such as fraud, collusion, mistake, etc.—especially as complainants do not aver they made any effort to correct the matter complained of in the court having jurisdiction of the whole matter. *Davis vs. City of Chicago,* 11 *Wall.*, 108, and cases cited; 5 *Id.*, 74, 413; 18 *Ark.*, 381. And there is no such averment here as to immediate action and irreparable damage as would give equity jurisdiction. 11 *Wall. sup.*; 5 *Id. sup.*; *Jones vs. City,* 25 *Ark.*, 301.

B. T. Du Val, for Appellees.

STEPHENSON, J.—This was a bill to enjoin the collection of certain taxes in Scott county. The bill was presented to the judge of the Circuit Court, in vacation, who granted a temporary restraining order. At the regular April term, 1872, of the Scott county Circuit Court, both parties appeared, when the bill was amended and the defendant interposed a general demurrer to it, which was overruled by the special judge sitting, and further time to answer being refused, because the court was about to adjourn, the injunction was made perpetual and the defendant appealed.

The plaintiffs, who sue for themselves and all other tax-

payers of Scott county, allege that they are severally owners of property subject to taxation. That by an act of the Legislature, approved March 27, 1871, in section 146, it is enacted "that it shall be unlawful for the County Court of any county in this State, unless especially and expressly authorized by some act of the General Assembly, to levy on the taxable property of such county, in any one year, a greater rate per centum than is hereinafter authorized, to-wit: For all ordinary county expenses, not exceeding five mills on the dollar; for road purposes, not exceeding one mill on the dollar; for bridge purposes, not exceeding one mill on the dollar; for support of the poor, not exceeding one mill on the dollar; for the erection or repairing of public buildings, not exceeding two and one-half mills on the dollar; for the payment of the interest on the public debt of such county or the payment of such funded debt or parts thereof as may fall due, with the then current or next succeeding year, such amount as may be actually necessary," etc., etc.; and in and by section 88 of said act, in the proviso of said section, it is enacted "That the collector of each county shall receive county warrants in payment of county taxes; the orders or warrants that may be payable upon presentation of any township, town or city, for their respective taxes." That, at a special term of the County Court, on the 6th day of October, 1871, it being the time fixed by law for holding said special term, the court levied the county tax for the year 1871, as follows: one half of one per cent. for county purposes; one-half of one per cent. for special tax for officers' fees in par funds; one fourth of one per cent. for direct tax for repairing jail; also, one fourth of one per cent. for a court house tax, etc., etc." That so much of said order as provides for the levy of one half of one per cent. for special tax for officers' fees in par funds, is in conflict with the provisions of the act aforesaid; and all that portion of said order levying a tax of two and one half mills for repairing the jail, and one fourth of one per cent for a court-house tax is illegal and contrary to law. That there is no

special or general act, of the Legislature, which authorized the County Court to levy the taxes aforesaid; and that the order of the court is illegal, oppressive and void. That defendant, Floyd, threatens, and unless restrained, will proceed to collect and distress the property of plaintiffs, for the collection of said illegal taxes,

Prayer of the bill, that the defendant be restrained from the collection of said illegal tax.

It appears, from the amendments to the bill, that the plaintiffs do not resist the collection of that portion of the levy, which comes within the provisions of the law; and, from the fact, that only that portion which is alleged to be illegal is embraced in the restraining order, it is presumed that the remainder of the levy was paid. They also aver that, under our present system of practice, they have no remedy save in equity. The defendant, Floyd, interposed three causes of demurrer as follows:

First. That the court had no jurisdiction of the person of the defendant or the subject matter of the action.

Second. That there is a defect of parties, plaintiffs and defendant.

Third. That the complaint does not state facts sufficient to constitute a cause of action in chancery.

The first and third causes will be considered together:

First. Of the ability of a Court of Chancery to interpose for relief against the collection of an illegal tax.

The demurrer confesses the illegality of the tax, but we do not have to take this technical method to settle that fact. The records of the County Court are made exhibits to the bill, and they clearly show that the court levied a tax wholly unauthorized by law. The right to tax is an attribute of sovereignty, and the mode of its imposition and collection must emanate from the Legislature, and must be strictly pursued. No property can be taxed without this special grant of power, and if the particular amount and purposes are designated in the act, these provisions must be strictly complied with. An

examination of the law, under which the tax complained of was levied, shows conclusively that the County Court had no authority whatever to levy such tax, and consequently their acts, to that extent, at least, are void.

What then is the relief afforded, by our system of judicature, to the citizen, for this threatened invasion of his rights? That it is an injury of a character that relief should be granted, at the hands of some legal tribunal, we will assume at the outset. These appellants, by their demurrer, admit the illegality of the tax, but insist that relief cannot be had in a Court of Chancery. As before intimated, relief should be granted; and, upon the theory that if the appellees cannot have it at law, they are entitled to be heard in Chancery, we will at once proceed to the consideration of the case.

In order to arrive at a satisfactory solution of the questions presented in this case, we deem it necessary to go somewhat at length into the examination of our judicial system, to ascertain clearly the boundaries between the law and Chancery Courts; to observe what, if any, changes have been made in either, by the Legislature, which affect this question.

Sec. 6., *Art.* 6 of the Constitution of 1836, is as follows: "Until the General Assembly shall deem it expedient to establish Courts of Chancery, the Circuit Courts shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law."

The Legislature, pursuant to this clause of the Constitution, enacted the following law. "The Circuit Court shall exercise Chancery jurisdiction, in this State, in all cases where adequate relief cannot be had at law, and shall, in all things, have power to proceed therein according to the rules, usages and practice of Courts of Chancery, except when it may be otherwise provided by law," etc.

The article of the Constitution, and the act quoted above, have received judicial interpretation at the hands of this court. In *Hempstead vs. Watkins*, 6 *Ark.*, 317, it was held that "this section introduces no new rule, but it is only declara-

tory of the jurisdiction of Courts of Chancery as it stood before its enactment, and our Circuit Courts have jurisdiction over the same subjects as are common to a Court of Chancery, to be exercised according to the known rules of chancery as understood at the time of its passage. *Sec.* 6, *Art.* 6, *Const. of Ark.*, provides that the Circuit Courts shall have jurisdiction in matters of equity until the General Assembly shall establish Courts of Chancery; by which is meant such jurisdiction as a Court of Chancery could properly exercise at the time of the adoption of the Constitution.

Having thus determined the jurisdiction of Chancery Courts, as defined by constitutional grants and legislative enactment, they proceed to make the following deductions:

"Where a defense is purely legal and exclusively cognizable in a court of law, the party is bound to defend at law, and cannot have relief in chancery, unless he was deprived of his defense at law, by surprise, accident or mistake, or fraud of the opposite party, unmixed with negligence on his part, or he was ignorant of important facts material to his defense upon the trial at law. When the jurisdiction of Courts of Chancery and courts of common law is concurrent in consequence of courts of common law having enlarged their jurisdiction by their own acts, or its having been enlarged by the Legislature, without prohibitory words, the party may make his election as to his forum."

In *Andrews vs. Fenter*, 1 *Ark.*, 186, this court held that "where the remedy is plain, adequate and complete at law, and the party seeking relief fails to make his defense there, through ignorance or neglect, he will not be relieved in equity; but equity will embrace all cases of legal rights under *peculiar equitable circumstances*, where there does not exist a plain, adequate and complete remedy at law." See, also, *Block vs. Bowman*, 9 *Ark.*, 501.

It will be found, upon investigation, that the jurisdiction of the Chancery Courts have come down to us through all the changes of Constitutions and statutes, singularly free

from change, and remains to-day the same, in all its essential features, as at the adoption of the Constitution of 1836. Hence, the rule of decision adopted in the cases cited are of binding effect upon us. We but affirm the former decisions of this court, and reiterate a principle of chancery jurisdiction, old as that court, that where the applicant for relief, by bill in chancery, has a plain, adequate and complete remedy at law, he will be remanded to that court, and if he fail to negative this proposition by such statement of facts as will enable the court to see clearly its jurisdiction, or present some one of the reasons which will excuse him for not pursuing his remedy at law, his bill is demurrable. This he may do by *showing that he is remediless at law*, or, if a remedy exists, that it is not *plain, adequate and complete*, or is so doubtful in its character as that a reliance upon it might seriously prejudice his rights, or that he has been deprived of his remedy by surprise, accident or mistake, or the fraud of the opposite party, unmixed by negligence on his part, or that he was ignorant of important facts at the trial.

The appellees complain, in their bill, that the County Court of Scott county levied an excessive and illegal tax on their property, prohibited, in terms, by the very act under which they assume to make the levy, and, on the ground of this illegal proceeding, they seek to have the collection thereof enjoined.

We might, perhaps, content ourselves with the simple inquiry, if a legal remedy exists, and if so, whether the appellees have brought themselves within the rule as laid down above, but the gravity of the consequences of such procedure, on the part of the County Court, to the rights of the citizens and tax payers of the State, has induced us to look further and ascertain what remedies exist, at law, for the evil complained of, and their sufficiency to afford complete relief.

The Constitution of 1836, *Sec.* 5, *Art.* 6, provides that the Circuit Courts shall exercise a superintending control over the County Courts, and over justices of the peace in each

county in their respective circuits, and shall have power to issue all necessary writs to carry into effect their general and specific powers. Although, by our present Constitution, Circuit Courts are mere creatures of the Legislature, their jurisdiction remains the same as prior to its adoption until otherwise provided by the Legislature: *Art.* 7, *Sec.* 5 *Const.* 1868.

Until the Legislature restricts it, therefore, we hold that the Circuit Courts are clothed with all the powers which were conferred upon them by the Constitution of 1836. Having settled the power of the court to grant relief, let us examine the remedy afforded.

A provision exists, not only in the law under which this levy was made, but in all the revenue laws of the State heretofore passed by the Legislature, providing the manner in which parties who may feel themselves aggrieved may apply to have the appraisement or *valuation* of their property corrected, but we are not aware that any special provision has ever been made to correct an illegal or erroneous *levy* by the County Court. Doubtless the Legislature acted upon the presumption that the court would adhere to the plain and distinct provisions of the law, provided for its government in making the levy; and such a presumption, indulged in its favor, would not seem to be unreasonable, for we hardly expect a functionary, charged with the faithful administration of the law, to be the first to violate it.

This view may seem to militate against the decision in *Randle vs. Williams*, 18 *Ark.*, 380 This court there held that a proceeding by *certiorari* to quash a levy based upon an excessive valuation of property was erroneous. It was not the act of levying of which the party complained, but the act of the officer making the valuation, and the court properly decided that, inasmuch as the law, under which the valuation was made, gave him a specific remedy by appeal to the County Court, he was bound to pursue it; but it does not appear in the act referred to in that case that any remedy is given for an erroneous *levy*; and if it was the intention of the court to

hold that such a remedy did in fact exist, by virtue of the act they cite (*Gould's Digest, Chap.* 148, *Secs.* 35-36,) we must decline to follow it. If we are correct in our conclusions that a party aggrieved by an erroneous *levy* has no remedy by statute, is he remediless at law, in the absence of such special remedy? We think not.

It was held by this court in *Lindsey vs. Lindley*, 20 *Ark.*, 581, that the Circuit Court has a superintending control over County Courts, and appellate jurisdiction from their orders; but where no mode was provided by statute for the exercise of that jurisdiction, the proper remedy is by *certiorari*, and not by appeal. In *Marr, ex parte*, 12 *Ark.*, 84, is was decided that where an inferior court exceeds its jurisdiction, and its acts thereby are void, the Circuit Court has the power, on a proper showing, to remove the proceedings by *certiorari*, and quash them. Upon the same principle in *Derton vs. Boyd*, 21 *Ark.*, 264, it was decided that the Circuit Court has jurisdiction, by writ of *certiorari*, over the judgment of the Probate Court, when the judgment is irregular, and the party interested has no opportunity to appeal. In *Clayton vs. Lafargue*, 23 *Ark.*, 137, it was held, upon a bill involving the legality of a tax, assessed under the Act of 1859, to regulate the construction of levees, upon the ground that the land would not be benefitted by the levee, that the question as to the land being benefitted or not by the levee work, was a fact to be determined by the County Court, and if it erred, the remedy of the owner, if he had any, was by *certiorari*, and not in equity to enjoin the collection of the tax. This case was decided, doubtless, upon the ground that as the Act imposing upon the County Court the duty of levying the tax, provided no method of appeal, in the absence of such special provision, the party would be entitled to relief by *certiorari*.

Having, we think, clearly established the fact that a remedy exists at law, for the grievances complained of, in the appellee's bill, we do not wish to be understood as holding that it is exclusive of the jurisdiction of a Chancery Court; for this,

like any other law remedy, must be plain, adequate and complete. It is not the business of the court to point out the particular facts and circumstances which would authorize the party aggrieved to bring his bill for relief; each case must necessarily stand upon its own peculiar merits.

It may safely be assumed that there is no court, however plenary its powers, but will be slow to interfere with the collection of the revenue of a State or municipal corporations, except upon the clearest showing that its jurisdiction is unquestionable. The reasons, for this rule, are based upon sound public policy, and are too obvious to need further mention. Yet, where there is a clear infringement of the rights of a citizen, and no adequate remedy is provided at law for his redress, the interposition of the Chancery Court is not only proper but imperative. It must be borne in mind that our investigation, thus far, has been with a view of ascertaining the remedy, while the collection of the tax is *in fieri*, and we have seen that for an illegal or excessive appraisement, the law provides a specific remedy by appeal to the county board of equalization. Not so, however, where the *levy* is illegal or erroneous. In such case, as we have seen, his remedy was by *certiorari* under the old practice to quash the levy. The Code of Civil Practice, section 519, provides a remedy by mandamus, to compel an executive or ministerial officer to do or omit to do an act, the performance or omission of which is enjoined by law, and section 521, also provides a remedy against a judicial officer for proceeding in a matter outside of his jurisdiction. These Code remedies, however, will be found to be in no wise more efficacious than that by *certiorari*. In none of them can the court look beyond the record to cure any irregularities. They prescribe no new remedy, for these, as well as the writ of *certiorari*, exist at common law, and the remedial powers of the writs, as provided by the Code, are in strict conformity to the common law writs of mandamus and prohibition. The Code neither enlarges or restricts them.

Under the writs of prohibition or *certiorari*, the court may

revise the proceedings of the County Court, and if, by the record, it appears that the court has proceeded in a matter outside of its jurisdiction or in excess of it, the proceedings may be stayed or quashed.

This review of the action of the court may be asked by any one or more of the citizens or tax payers of a county, and if the proceedings are conducted in a manner beyond the powers of a court, they will, where the writ of prohibition is used, be inhibited to the extent of the illegality, or if by *certiorari*, the whole proceedings may be quashed, not as it effects the rights of the petitioners merely, but the whole levy. But when it is desired to correct an error which exists *de hors* the record, as where the levy, on the face of the proceedings to impose it, is a valid lien on land, and extrinsic evidence is required to show its invalidity, neither the writ of *certiorari* or prohibition are of any value, for as stated before, they can only reach errors which appear of record, and there exists no remedy at law for the *prevention* of such an evil. It necessarily follows, therefore, in such case, that a court of equity will interpose to prevent a multiplicity of suits, irreparable injury, or a cloud on the title to real estate; and where the tax is levied on real estate, the chancellor would not require the petitioner for an injunction to do more than allege such facts in his bill as will show that his remedy at law is inadequate to afford relief; for, under the peculiar statutes of our State as to the effect of a tax deed as evidence of title, such an instrument would certainly constitute "a cloud on title to real estate." More strictness, however, will be required where the levy is upon personal property.

To invoke the aid of chancery to restrain the collection of a tax, regular on its face, it must be shown that irreparable injury or multiplicity of suits will result to the tax payer, a much more difficult matter than to demonstrate the nature and extent of a cloud on title to land.

We have seen that the writs of *certiorari* and prohibition are the only means by which a threatened distress and sale of

property, for an illegal tax, may be prevented, and these remedies are effectual where the illegality of the tax appears on the face of the proceedings to impose it. Yet there exists other remedies for injuries resulting from the *sale of property for taxes.*

Where the error or illegality *appears of record*, and the tax payer does not choose to avail himself of his remedy by *certiorari* or prohibition to *prevent* the evil, he may have his action of trespass against the officer for the seizure of his property; and replevin will, also, lie to recover personal property seized or sold, in whosesoever hands it may be. Or, where the proceedings imposing the tax are regular on their face, and the tax be paid under protest, to avoid sale, he may have his action to recover the money so paid. Ordinarily the sale of *personalty* for taxes creates no hardship which cannot be fully compensated in damages by an action of trespass, or to recover back the money if paid under protest, and, as we before said, a Court of Chancery will be slow to grant relief, unless under peculiar and equitable circumstances, which must be clearly shown.

We have examined at some length the authorities of other States as to the circumstances under which the chancellor has interposed to grant relief against excessive and illegal taxation, and although the rule is not uniform, we have no difficulty in ascertaining the weight of opinion, where the question is based upon the general powers of a Court of Chancery, unaffected by local statutes.

In the case of *Cook County vs. The Chicago, Burlington and Quincy R. R.*, 35 *Ill.*, 460, which was a case involving the legality of a tax levied on the company's property, the court say: "We have carefully examined the former decisions of this court in regard to the asserted right of bringing a bill in equity to restrain the collection of a tax illegally assessed, and we have been unable to find any decisions asserting equitable jurisdiction in such case without regard to special circumstances;" and in commenting upon those cases where

the court had taken jurisdiction, it says that the question of jurisdiction was either not raised or the case presented special equitable circumstances, and concludes as follows: "While we consider it settled law that a court of equity will never entertain a bill to restrain the collection of a tax, excepting in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation, this court has never held that it would take jurisdiction in such excepted cases, without special circumstances showing that the collection of the tax would be likely to produce irreparable injury or cause a multiplicity of suits. Ordinarily, a party of whom a tax is illegally collected has an ample remedy at law by an action of trespass against the officer collecting it, or by an action of assumpsit to recover back the money paid." The same rule obtains in New York. In *Haywood vs. The City of Buffalo*, 14 *N. Y.*, 534, the court held that while an erroneous or illegal assessment may be reviewed by the courts by *certiorari*, the general rule is that a court of equity will not entertain jurisdiction except to prevent a multiplicity of suits, or irreparable injury; or where the assessment, on the face of the proceedings to impose it, is a valid lien on the land, and extrinsic evidence is required to show its invalidity. The doctrine established by the decisions is substantially this: That if the proceeedings are void upon their face, they form no cloud upon title and no ground of interference by a court of equity; and if they are not void upon their face, but merely voidable or irregular, a court of equity will not take cognizance of them, unless facts are alleged sufficient to bring the matter clearly within some acknowledged head of equity jurisdiction. This is a sound and salutary rule which should be steadily adhered to upon considerations of public interest and convenience, if no other. It is not the business of courts to furnish new remedies to parties aggrieved, even though existing ones are found inadequate to afford perfect protection or redress. That falls more properly within the province of the legislature. But if they

had the power they would hesitate before extending their equitable jurisdiction over all the acts of these inferior bodies, and allowing every one assessed to come in and litigate as to the validity of his tax before he should be required to pay it, who could allege some error in making the assessment.

In *Dows vs. The City of Chicago*, 11 *Wallace*, 108, which was a bill to restrain the collection of an illegal tax, Mr. Justice Field said: "The illegality of the tax and the threatened sale of the property for its payment, constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bring the case under some recognized head of equity jurisdiction before the remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes should be interfered with as little as possible; any delay in the proceedings of the officers, upon whom devolves the duty of collecting the taxes, may derange the operations of government and thereby cause serious detriment to the public. No court of equity, therefore, will allow its injunction to issue to restrain their action except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant before the aid of a court of equity can be invoked."

The Supreme Court of Connecticut, in *Dodd vs. The City of Hartford*, 25 *Conn.*, 232, say, that a bill of injunction will not lie to restrain the collection of an illegal tax. If the proceedings are illegal and void, an action at law will lie to recover all the damages which may arise from the levy; and

the question of the legality of the levy will then be tried in the appropriate forum, a court of law. There are also reasons of public policy, founded on the necessity of the speedy collection of the taxes, which ought to prevent a Court of Chancery from suspending these proceedings, except upon the clearest grounds. Mr. Blackwell, in his Treatise on Tax Titles, 555-568, assumes the contrary of the view taken in the foregoing authorities, basing his theory upon the case of *Burnet vs. City of Cincinnati*, 3 *Ohio R.*, and asserts that the weight of authority inclines to the position assumed by the court in that case. We have thought it proper to investigate the cases in which the opposite view has been taken from that which is assumed in the cases above referred to, and especialy when it is contended by Mr. Blackwell that it is against the weight of authority.

We think a careful examination of *Burnet vs. Cincinnati*, will show that the court rested its jurisdiction upon one of the well established heads of equity, for the sale of the property was enjoined upon the express ground that it would cloud the title to real property, and the doubt as to whether title passed by the sale would so confuse titles to real estate as to authorize a court of equity to stay the sale where upon examination it was found that the assessment was void. In Wisconsin the same rule obtains. The court, in *Dean vs. City of Madison*, 9 *Wis.*, 406, referring to *Burnet vs. Cincinnati* with approbation, adopt the same reasoning. But it will be seen that relief was granted in *Dean vs. City of Madison*, more on account of the inadequate remedy at law than because the title was subject to a cloud, although the latter reason was assigned. *Sec.* 34, *Chap.* 84, *R. S.*, of the State of Wisconsin, provides for the bringing of an action by the holder of the legal title to real estate, in possession, against any other person "setting up a claim thereto," and a statute precisely similar existed in Ohio when *Burnet vs. Cincinnati* was decided.

The existence of these statutory remedies in the States

whence we derive the decisions upon which Mr. Blackwell rests his theory, very materially weakens their force with us.

It will readily be seen that the legislatures of those States, when they adopted the laws referred to, were attempting to rid themselves of that rule in chancery which prevents a party in possession from bringing his bill in the Chancellor's Court, *quia timet*, before his possession was threatened or disturbed. But, as was said in *Dean vs. City of Madison*, the statute was inadequate to give complete relief against the holder of a tax certificate or deed; for to compel a party to lie by until the purchaser at a tax sale had obtained such rights under the sale as to amount to the setting up of an adverse claim, would but amount to a prohibition to the holder of the legal title against taking any steps until the mischief had been done.

Indeed, it would seem that a Court of Chancery might well interpose for relief *against* the statute; for in all those cases involving the constitutionality of the law, under which an assessment was made, where its illegality does not appear on the face of the proceedings, the tax payer who desires to test the validity of the tax must imperil his title to do so. Nor would such interposition be a stretch of equitable jurisdiction, for the applicant for relief would not be remitted to a court of law unless his remedy there was plain, adequate and complete. In Iowa the courts exercise equitable jurisdiction to relieve against an illegal tax. The leading case, *Macklot vs. City of Davenport*, 17 *Iowa*, in that State, upon which subsequent decisions in support of equitable jurisdiction rest, is so clear an exposition of the law that we quote from it at length. The court say: "The precise question presented in this case has not been determined by the court. The case of *Morford vs. Unger*, 8 *Iowa*, 82, decided that an action of replevin might be maintained by a person whose property had been seized to satisfy a tax levied under an unconstitutional law; or, in other words, where there was no authority to levy the tax, a warrant for its collection would not justify an offi-

cer in seizing property to satisfy it, and, of course, the owner of property seized under such a tax warrant could maintain replevin for it. The case of *Morford vs. Unger* was followed in the case of *Langworthy vs. The City of Dubuque*, 13 *Iowa*, 86.

In the present case there is no question but the city of Davenport had jurisdiction and authority to levy a tax upon the property of the plaintiff in the time and manner the tax was levied. It is claimed, however, and so found that the plaintiff was over-assessed. This case is, therefore, one of unjust over-assessment, and is, to the extent of such over-assessment, clearly erroneous. There is, however, a clear distinction between such a case and one of assessment without any authority—such as an assessment made under an unconstitutional law, or the assessment of property *for which the law has made no provisions for assessing*, or has expressly exempted from taxation. The distinction is the same in effect, and just as clear as that between an erroneous judgment of a court having jurisdiction of the person and subject matter, and a court having neither. And to illustrate further, a tax warrant, regular on its face, issued for the collection of a tax, levied under such erroneous assessment, would afford protection to the officer serving it, while under an unconstitutional law, or without authority of law, would afford no protection whatever. The remedy afforded by law to a party whose property is seized to satisfy a tax levied under an unconstitutional law, or levied without authority, under the law to levy, is clear. He may bring replevin for his property seized to satisfy such tax; or *when matters of equitable cognizance* are also involved, he may restrain their collection, or he may doubtless make the collector personally liable for damages." And in conclusion the court say: "There is another view of this case, which, perhaps, under close examination, might be found equally decisive, and that is, that a party would have his remedy at law against the assessor, or the city, for the recovery of any money paid out for taxes

wrongfully assessed; and having such adequate remedy at law, could not, of course, resort to equity. Yet the court, following this as the leading case on the subject, have held that a bill would lie to enjoin a tax, solely on the ground of its illegality, apparently assuming that position to be held in this case."

In *Litchfield vs. The County of Polk*, 18 *Iowa*, 72, the court say: "When the plaintiff is the undisputed owner of land, he is frequently allowed to file a bill to restrain an illegal sale thereof for taxes, grounding his right to relief upon the unauthorized proceedings of the public officer. And even in such case, there are not wanting respectable authorities that relief cannot be had by bill in chancery to enjoin the sale." In this case the court seemed either to have overlooked the very careful distinction made in the case of *Macklot vs. City of Davenport*, as to the special equitable circumstances, which alone would, according to that case, give the Chancery Court jurisdiction, and those cases when the relief prayed was based upon the mere illegality of the proceedings, or to have disregarded the rule of the case entirely. At all events, if the court intended to follow the rule as laid down in *Macklot vs. City of Davenport*, we are forced to believe that the special equitable circumstances necessary to confer the jurisdiction existed; but if they intended to enlarge the jurisdiction of the Court of Chancery, certainly no satisfactory reason is given therefor.

In Indiana the courts seem to have uniformly taken jurisdiction to grant relief against the collection of an illegal tax, but in none of the cases does the question of jurisdiction seem to be raised; but in *Jones vs. Sumner*, 27 *Ind.*, 510, the court say, in passing upon the question of illegal tax: "Where a party appeals to a court of equity for relief, and invokes its extraordinary writ of injunction, he must rely upon some substantial equity. The decisions of this court, heretofore, have gone to the utmost extent of authority in restraining the collection of taxes."

In Massachusetts, Courts of Chancery take jurisdiction in all cases to restrain the collection of erroneous or illegal taxes, but such jurisdiction is derived from a special statute (*Gen'l Stat., ch.* 18, *sec.* 79), which provides that "immediate resort can be had by a suit or petition to the court, sitting in chancery, to hear and determine concerning the validity of a proposed tax, or any violation or abuse of the legal right and power of raising taxes, and assessing them on the inhabitants, etc." Prior to the passage of this act, those complaining of such excessive or illegal taxation, were uniformly remitted to their relief at law.

Although the rule of decision, as to when a Court of Equity will interpose to restrain the collection of taxes, does not seem to be uniform in the several States, we think, in the absence of special statutes conferring jurisdiction on the Courts of Chancery, and where the question has been considered upon grounds of equity jurisdiction purely, the weight of authority, and especially the later and better considered opinion is in harmony with the rule as we have deduced it from an examination of our statutes, and former decisions of this court. When the statutes provide the mode of appeal from the judgments and orders of an inferior court, that method must be adopted in all cases where the court was acting within the scope of its jurisdiction; and in all cases where no appeal has been provided for, or the court is proceeding in a matter in excess of, or beyond the limits of its jurisdiction, so that its proceedings are so erroneous as to preclude an appeal, the remedy is by *certiorari* or prohibition. There may arise cases where even this resort would be inadequate to afford complete relief. In such cases, before the applicant would be entitled to relief by injunction, he must show the inadequacy of his law remedy, in order to enable the chancellor to ascertain clearly his jurisdiction to interpose for relief.

In the case at bar it is denied that a legal remedy exists. This, we have shown, is not the case. Appellees have shown clearly that the action of the County Court was illegal, and

the illegality of its act appears fully from the record. Their remedy at law was full, adequate and complete, and they show no excuse for not pursuing it. A review of the proceedings by *certiorari* would have disclosed the errors, and quashed the levy; or a writ of prohibition would have restrained the court from making the illegal levy complained of. Instead of an application for an injunction, if these appellees had presented a petition for either of the law writs mentioned, not only their own relief could have been secured, but also that of all the other tax-payers.

The appelles allege that if the injunction is not granted, it will involve the tax-payers of Scott county in a multitude of suits against the sheriff, to prevent the collection of this tax. Exactly contrary is the case. A suit at law, on the part of any one citizen against the sheriff, to *prevent* the collection under the levy, would have resulted in relief to all.

Having disposed of the causes of demurrer, which present the material issues in this case, we do not deem it necessary to consider the second cause.

It is argued that in these times of telegraphs, railroads and steam, that to insure immunity from wrongs and hardships under the law, the use of the extraordinary writ of injunction should be freely used. The bare statement of this proposition shows its weakness. If, indeed, we are fallen upon such times as that the citizen is either unwilling to brook the law's delay, or is unwilling to trust it to afford him redress, when the mode is pointed out to him, he may manifest that spirit in the popular branch of the government in the shape of law or decree authorizing the courts to disregard these enactments for the government of the judiciary, which are bottomed upon the wisdom and experience of ages, and arbitrarily settle the disputes of the country upon the progressive theory suggested by counsel. But so long as the courts are bound by sworn allegiance to the Constitution and laws of the State as they have been interpreted by the wisdom and experience of the eminent jurists who have gone before us, such a suggestion can but meet with disfavor.

We would suggest to counsel that the apparent necessity for the intervention of the restraining powers of a Court of Chancery, might be based upon quite a different reason, and one which, in time, will, it is hoped, cure itself.

We are but lately emerged from an internal convulsion, which left our government and laws in a state of disorder and confusion; and, in the process used to restore their efficacy for the purposes for which governments are intended, attended, as those efforts must of necessity be, with embarrassing questions, growing out of our late troubles, many cases of individual hardships have arisen which seem to require the interfering hand of extraordinary power, and from the frequency of their use, it would seem the citizen was not unwilling to avail himself, and the courts not slow to give the relief. Doubtless, the writ, in many cases, was wisely interposed; but from the number which seem to be found crowding the records of our courts, it would appear that it has almost become the ordinary mode of instituting a suit for the redress of a civil injury.

It has been said by counsel, that to the courts of the country, more than any thing else, does the public look for the stability and perpetuity of good government, and the protection of the rights of the citizens thereof. If this be true, can the courts better aid in the restoration and protection of those than by steadily adhering to the ancient and well established usages which time and experience have demonstrated to be most conducive to the desired end. We do not feel warranted in making shipwreck of time-honored rules for the government of courts, to meet hardships growing out of a disordered state of society, but rather by applying them vigorously to the malady, insure its speedy cure.

The decree of the Scott County Circuit Court, overruling the demurrer to the bill on the first and third causes assigned, is reversed, and the cause remanded with instructions to dismiss the bill for want of equity.

GREGG, J., dissenting says:

James C. Gilbreath and twelve others, in behalf of themselves and all other tax payers of Scott county, presented their bill of complaint against the appellant, to enjoin him from the collection of an excess of one-fourth of one per cent. tax for public buildings, and one-half of one per cent. in par funds, for officers' fees.

The complainants allege that they are severally the owners of considerable real and personal estate, liable to taxation in said county. They recite the various provisions of law, authorizing the County Court to assess taxes, and aver, that at the time and place fixed by law, said County Court met and made an assessment for the year 1871; that said court assessed the full amount allowed by law, for county purposes and for public buildings, and over said amounts they assessed and ordered collected one-half of one per cent., in par funds, to pay officers' fees, and one-fourth of one per cent. for a jail tax, which sums, among the legal taxes, were extended on the tax-books, and charged to them, and as an exhibit of the sum charged to each, they refer to the tax book and the sums carried out under the heads of such taxes; that the said tax books, with these illegal taxes thereon, has been made up in the usual form of law, with an execution thereto attached, and delivered to said appellant, as such sheriff and collector of Scott county, and he is proceeding to collect the whole of the tax on said book, that which is illegal, as well as that which is legal; that they are ready and willing, and offer to pay all the taxes legally assessed; that if said illegal taxes are not paid, said appellant threatens to, and he will, sell their property, unless he is restrained from so doing by an order of court; that said illegal levy is oppressive upon appellees, and that they ought not to be subject to the expense and annoyance of bringing a multitude of suits to prevent their property from being levied upon and sold for such illegal assessments. That under the present system of practice, in this State, they have no remedy, save by the exercise of the equity

powers of the court, to restrain the appellant from carrying into effect the oppressive and illegal orders of the County Court, and closed with the usual prayer of injunction.

There is no question but the law limited the County Court in their assessment for public buildings to one-fourth of one per cent., and in this instance they attempted to levy double that, and their attempt to assess one-half of one per cent. for officers' fees, all likewise agree, was without the shadow of authority.

Our only disagreement is upon the power of a court of equity to grant relief in such cases, and I may further state that upon many of the abstract propositions of law announced by the majority, we do not disagree, and so far as such legal propositions tend to sustain the conclusions at which they have arrived, I am willing to concede their full force and extent.

I am willing to argue this case upon their strongest grounds, and grant all that is claimed by Mr. Justice Field, in the well known case of Dows against the city of Chicago, 11 *Wal.*, 109, and few opinions in able courts have dealt in more general terms, or declined relief in stronger cases. He says: "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to *protect the rights of the citizen*, whose property is taxed, and he has no adequate remedy by the ordinary process of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant before the aid of a court of equity can be invoked."

Now the majority say that each case must fall under some one of these heads of equity jurisprudence; and at present we assume to face them upon this ground.

Some decisions favor their conclusions, if we do not consider our peculiar statutes, and different judges take different views upon this, as they necessarily will upon all important

questions litigated in so many forms, arising upon statutes having the same object, but widely differing in detail, and involving most important interests. And by far the greater number of apparent conflicts are attributable to the different judicial systems in which they are found. It is well known that in the various States of the Union our revenue systems are like the laws of descent, dower or homestead, fashioned after the changing will of a Legislature, and subject to all the uncertainty, dubiety and imperfections of hasty action, and we cannot arrive at a correct conclusion without a careful consideration of our own tax laws, and a clear view of our system of rights and remedies as they depend upon these revenue statutes. Thus considering, if this case comes under any of the above heads of equity jurisdiction, the judgment should be affirmed, we will consider them.

The ownership of real as well as personal property is averred; the assessment and the proceedings to collect in the forms of law are alleged.

It seems these citizens should not, under all circumstances, be compelled to pay this illegal assessment, which might involve the sacrifice of the very lands they are justly seeking to protect. The sheriff was proceeding to sell the lands, under the color of law, at the time and in the manner prescribed for the non-payment of taxes.

And under the execution annexed to the tax-book, he would collect taxes, penalty and costs, and the purchaser would receive a certificate for title. See *Secs.* 75, 98, 100, 105, *Rev. Act*, 1871.

Then a redemption can only be had (*Sec.* 116.) by the owner depositing with the county treasurer an amount of money equal to that for which the land was sold for tax, penalty and costs and the taxes subsequently paid thereon, together with interest, and one hundred per centum penalty on the whole amount so paid.

If such deposit is not made within two years, under section 125, the county clerk shall execute a deed to the pur-

chaser or his assigns for the whole tract of land or lot sold, which deed, in the usual form, shall be acknowledged and recorded, and shall vest in the grantee, his heirs and assigns, the title in the real estate described, and shall be received in all courts and places where such title is involved as conclusive evidence that each and every act and thing required to be done, under the provisions of the revenue law, had been done; and the party offering such deed shall not be required to produce the assessment, appraisement, notice or sale, or any other thing, as evidence to sustain such title, and the party controverting such deed can only show that the land conveyed was not subject to taxation.

Second. That the taxes due, had been paid before the sale.

Third. That such land had been duly redeemed according to law, before the execution of the deed; or

Fourth. That the land was the property of a *feme coverte*, minor, insane person, or one in imprisonment at the date of the sale and deed.

Now it will be readily seen by examining the provisions of these sections, that the statute gives no *legal* remedy to stop proceedings, or to stop or set aside a sale because of any oppressive or illegal levy or collection, but prescribes a direct channel through which acts shall proceed until an absolute deed is made for the lands, by one acting in the forms of, and under color of law, and by these statutes, this deed is not only relieved from reciting the appraisement, levy, notice, sale, etc., but it is expressly provided that the holder shall not be required to prove anything of the kind, and that his deed shall be *conclusive evidence*, unless the other party affirmatively show that the lands could not be taxed; that the tax or redemption money was paid, or the owner, under legal disability; thus cutting off, not merely defenses for informality, but for illegality, extortions and other gross wrongs. In this case depriving the parties of all redress, unless they first paid out their money. And can it be said such a deed, outstanding under these statutes, is no cloud upon the occupant's title?

And it is no answer, in this case, to say, the complainants had personal property out of which the tax could have been made, because, our statutes, so unlike most others, that preserve real estate, (section 92), expressly prohibit the sheriff from making a distress and sale of personal property for any taxes due on land, and requires such taxes to be made only out of the lands; how then shall the owner avoid the shadow overhanging his title? He, being in possession, cannot sue in ejectment, and of course it cannot be insisted that he could file a bill to remove the cloud from the title, because equity will never entertain such a bill, unless there is a real cloud existing, and to admit that, at any time, such cloud does arise upon his title, would be to admit all the most persistent, against tax injunctions, have ever said was necessary to authorize a chancellor to interpose by the prohibitory process of injunction.

And further, section 123, provides that "all actions to test the validity of any proceeding in the appraisement, assessment or levying of taxes upon any land or lot or part thereof, etc., shall be commenced within two years from date of sale and not afterwards." Thus making the limitation to all suits absolute upon the expiration of the period of redemption, a very remarkable limitation of only two years for real estate actions.

Beyond all this, section 178, provides that, "upon the sale of any land or town or city lot, or part thereof for taxes then due, if such sale should prove invalid on account of any informality in the proceeding of any officer having any duty to perform in relation thereto, the purchaser at such sale, shall be entitled to receive from the proprietor of such land or land or lot, the amount of taxes, interest, penalties and costs of advertising with interest thereon from the payment thereof, and the amount of taxes paid thereon by the purchaser, subsequent to such sale, and such land or lot shall be bound for the payment thereof," etc. Here it is declared that certain sales, are so far in violation of law that the courts must

set them aside, yet the proprietor must pay upon a levy and collection not valid in law, or he must forfeit and pay all these costs and penalties, which are made a lien upon his land. This is creating a very striking cloud upon his title, as well as showing a very inadequate remedy at law. Such provisions as cited—two years of limitation, no redemption, without paying double the amount, no recitals required in a deed, the deed made absolute and by law declared conclusive evidence in all courts, seem to becloud the title so a chancellor might restrain, where the attempted collection is clearly illegal, as it is conceded to be in this case; hence we are of opinion the court had jurisdiction.

We will refer to some good authority, but not attempt to notice numerous decisions that have been rendered sustaining this view.

Mr. Hilliard, in his work on injunctions says: "An execution sale may be enjoined where it would cause a cloud on the title of the complainant," (*page* 234;) and in laying down what he says has been held to be the law, on *page* 455, he says: "and though tax deeds of the land would be void, yet they would be a cloud on the title, and the issuing them may be restrained."

Mr. Blackwell, in his work on tax titles, *second edition*, *page* 481, speaking of an officer proceeding to sell without sufficient authority says: "The execution of the power under such circumstances is calculated to cast a cloud upon the title of the owner, and to render it unmarketable in the equitable sense of that term. * * * * When the owner is in possession of the land at the time illegal proceeding is about to take place, he has no remedy in a court of law which would indemnify him for the threatened wrong to his title. * * * * Surely under such circumstances a court of equity would grant relief upon the familiar principles of action in that court." Upon this and succeeding pages this able author reviews many decisions, and announces the doctrine that courts of equity have jurisdiction to enjoin the collection of illegal taxes.

Mr. Dillon, in his valuable work on municipal corporations, *page* 682 *section* 731 says: "In this country the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the taxpayers, such as * * * * levying and collecting void and illegal taxes and assessments, under the circumstances, presently to be explained, has been affirmed or recognized in numerous cases, in many of the States. *It is the prevailing doctrine on this subject*," etc.

Mr. High, in his very late work on injunctions, *section* 367, says: "The most generally recognized exception to the rule that equity will not interfere with the collection of the revenue, because of defects or illegalities in the proceedings, is in cases where the proceedings, if not enjoined, would result in clouding the title to real estate. * * * So, too, where a city charter declares *a tax a lien upon the premises* on which it is assessed, *the tax, if illegal, creates such a cloud upon the title as to warrant an injunction* * * * and the jurisdiction to thus interfere for the prevention of a cloud upon title, is regarded as pertaining to the well settled powers of equity, which will interfere to prevent such a cloud as tends to diminish the value of the property or cast a doubt upon the title." And in the next section, when speaking of proceedings, by law, void on their face, he says: "But where by statute a tax deed is made *prima facie* evidence of the regularity of all the proceedings incident to the assessment and sale, *if the tax has been imposed contrary to law, such a cloud upon the title will result as to warrant the interference of equity.*" In the case at bar, no one here questions the fact that the tax was imposed contrary to law, and the deed would not only be *prima facie* but conclusive.

Irreparable injury justifies equitable jurisdiction. It is not the great extent of the injury that is known as irreparable, but an injury that cannot be redressed or properly estima-

ted and relieved against, and if the costs, penalties and illegal taxes assessed against the appellees, could not have all been relieved against by process of law; and, under these peculiar statutes, I incline to that opinion, this would afford grounds for equitable relief.

To prevent a multiplicity of suits, taking the propositions inversely as above stated, is the third head of equitable jurisdiction, and this has been presented in so many leading cases that we do not feel called upon to re-argue it. In *Burr vs. Denison*, 17 *N. H.*, 170, seventeen persons sued for all the tax-payers of the district, and had a judgment enjoined, and also the tax to pay it. In *Smith vs. Swamstedt*, 16 *How.*, a few Methodist preachers sued for themselves and many others, etc. In *Page vs. The Inhabitants of Halifax*, 12 *Cush.* (*Mass.*), 410, a few tax-payers sued for all, and obtained an injunction, etc. *See Howard et al. vs. Mayor of Linn*, 1 *Allen*, 103. In *Nevett vs. Galispe*, 1 *How.* (*Miss.*), the court said: "Courts of equity will interfere to prevent a multiplicity of suits where the subject matter of contest is held by one individual in opposition to a number of persons who controvert his right, and who hold separate and distinct interests, depending upon a common source." But a reference to the elementary works does away with the necessity of referring to numerous decisions.

The last general head is the inadequacy of the remedy at law. A careful review of the authorities will show that where a proceeding is being had for the sale of lands occupied by a tax-payer, any remedy at law is almost universally held to be inadequate, because, even an illegal levy so far creates a cloud upon the title as to injure the value, and especially is this so where a deed by statute is made *prima facie* evidence of the regularity of the proceedings, and the party in possession has no legal remedy to remove the cloud from his title. And our peculiar laws declare the deed conclusive evidence in all courts; that everything has been done necessary to a perfect title, and forbids the proper owner making proof to the con-

trary, except proof that the lands were not taxable; that the taxes were unpaid, or the owner under legal disabilities. And these statutes give no remedy against illegal assessments, prescribe no mode of procedure to get rid of illegal or fraudulent action on the part of tax-officers. Then, with no mode of redress pointed out by statute, the owner is forced to pay and risk a suit for a return of his money, or his lands will be sold, a cloud thrown upon his title, or he would be compelled to pay out his money and take the risk and pay the expense of a suit to recover it back. The case of *Bull et al. vs. Reed, et al.*, 13 *Gratten*, 86, is so full and direct upon all the main points in this case, that a reference thereto ought to have been sufficient argument.

As a general rule, courts should not enjoin the collection of State taxes, unless the complainants show a case of great wrong, without adequate remedy at law. Municipal taxes, and other local assessments are not so highly favored, and some distinctions are made between personal and real estate—the nature of the former renders it easily marketable, and its loss can be justly estimated in damages.

Real estate is fixed; the title depends more upon decrees, deeds and other writings; its value may be affected by liens and by local surroundings, and a deed in form (if not technichally valid), outstanding, may lessen its worth, and especially so when such deed has been executed in the usual course of law, and hence the necessity for the rule allowing a court of equity to restrain where the law has prescribed no adequate remedy. *Burnett vs. Cincinnati*, 3 *Hammond*, 73; *Vanoree et al. vs. Justices of the Inferior Court*, 27 *Georgia*, 356; *Osborn vs. U. S. Bank*, 9 *Pet.*, 739; *Story's Eq. Pl.*, *secs.* 97, 112, 126; *Civil Code*, *sec.* 33.

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ADMINISTRATORS.

1. AD LITEM.——*Not bound by decree.*—An administrator *ad litem*, not being obligated by bond or affidavit, is without authority of law to bind any one in interest, and no decree can be properly made against him. *Russell vs. Umphlet*, 339.
2. TO SET ASIDE FRAUDULENT CONTRACTS BY, ETC.—A creditor seeking the aid of a Court of Chancery to reach an equitable interest in an estate, or to set aside a fraudulent contract made by an administrator, should aver and show, in his bill, that his demand or claim has been legally ascertained or reduced to judgment. *Phelps & Jones vs. Jackson, ad.*, 585.

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ADMINISTRATION.

1. FEDERAL JUDGMENTS—*When against administrators.*—Where a judgment was obtained, in a court of the United States, against an administrator in his fiduciary character—execution sued out, lands belonging to the estate sold and marshal's deed to purchaser; on ejectment brought by purchaser, *Held:* That a litigant obtaining a judgment, in a court of the United States, against an administrator in his fiduciary character, cannot proceed directly by exe-

cution against the estate, and any sale made or deed obtained, under such process, is invalid and worthless; but, the judgment creditor, as in cases of judgments in the State courts, is remitted to the court of probate there to receive payment or his *pro rata* out of the assets of the estate. *Yonley vs. Lavender et al.*, 252.

2. WHEN ATTORNEY'S FEES ALLOWED.—To entitle an administrator to charge his intestate's estate with attorney's fees, the fees should accrue in obedience to the order or sanction of the Probate Court. *Tiner, ad. vs Christian, adm'x.*, 306.

3. MISAPPLICATION OF EFFECTS, ETC.—The misapplication by an administrator of the effects of an estate, in distribution, will be rectified by the court, and such misapplication will not have the effect to deprive him of the commissions allowed, by law, for such sums of money as were *lawfully* expended in the settling of such estate. *Ib.*

4. WHEN COURT OF EQUITY WILL INTERPOSE.—Although a Court of Chancery will not interfere in the administration of an estate, already commenced in the Probate Court, and assume the settlement of a question concerning the estate, which rightfully belongs to the jurisdiction of the Probate Court, yet, if the bill presents such a state of facts and circumstances as show that an irreparable injury is pending, against which the Probate Court is powerless to grant relief, the interposition of a Court of Chancery is allowable. *Haag et al. vs. Sparks*, 594.

See *Dower*, 1; *Executors* 1, 2; *Practice* 3; *Probate Court* 1, 2.

AGENCY.

See *Agents; Trustees.*

AGENTS.

1. WHEN PURCHASE BY, WILL NOT OPERATE AS A RESULTING TRUST.—Where an authorized agent purchases land for his principal and advances the purchase money, not as a *loan to him* upon the security of the lands purchased, or for the purpose of converting the money into lands, but as an advance to the principal, to enable the agent to accomplish the object of his principal, no trust will result in favor of the agent. *Byers et al. vs Danley*, 77.

2. LIENS OF, FOR ADVANCES.—An agent has an implied or equitable lien, enforcible within proper time, in equity, for advances, expenses, commissions, etc., made in the purchase of lands for his principal, and this lien is incident to the debt and continues in the agent so long as he has the possession of the lands or title papers, but if he parts with the possession, or the debt be paid or barred by the statute of limitation, the lien is gone. *Ib.*

See *Guardian and Ward* 1, 2; *Insurance*, 1, 2, 3, 4; *Trustees* 1, 2; *Wharfboat*, 1, 2.

ANSWER.

1. WHEN WANT OF DISTINCTNESS IN STATEMENT OF DEFENSES IN, WILL NOT

PREJUDICE.—Of the several defenses that may be relied on in an answer, under the Code, although the answer may be so unskillfully drawn as not to distinguish between them, yet, if it contains sufficient facts to show a defense under either, the defendant will not be prejudiced by reason of his not making the proper distinction between the kind of defenses. *Bloom vs. Lehman, Newgass & Co.*, 489.

2. DEFENSES SHOULD BE PARAGRAPHED.—Where different defenses are attempted to be set up in an answer, the court, on motion, may properly cause each defense to be stated in a separate paragraph. *Lyman et al. vs. Corwin*, 580.

APPEALS.

1. SHOULD BE TRIED DE NOVO.—Appeals from the Probate to the Circuit Courts should be tried anew. *Collier, ad. vs. Kilcrease, ad.*, 10.

2. MOTIONS FOR NEW TRIAL, ETC.—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. *Merriweather vs. Erwin*, 37.

3. WILL ONLY LIE FROM FINAL JUDGMENTS.—An appeal will only lie from a final order or judgment; the overruling of a demurrer is not such a final order or judgment. *Horner, ad. vs. The State*, 113.

4. WHEN TAKEN BEFORE ADOPTION OF CODE.—Where an appeal was taken before adoption of the Code of Practice, the provisions of the Code, in relation to bringing appeals into this court, do not apply; the law in force at the time of granting the appeal will govern. *Cheek vs. Berry, ad.*, 314.

5. WHEN NO FINAL JUDGMENT, ETC.—Where the record shows no final judgment or decree, in the court below, the appeal will be dismissed. *Lee vs. Black, et al.*, 336.

6. WHEN DISMISSED.—When, on appeal, the transcript is not filed within the time prescribed by law, the appellee, on filing a certified copy of the judgment and order of appeal, may have the same dismissed. *Evans vs. Walker, ad.*, 348.

7. PRACTICE ON.—Where no error appears upon the face of the record, and no exceptions taken, motion for a new trial, or in arrest, in the court below, the judgment will be affirmed. *Phillip Trimble vs. the State*, 395.

8. REGULATED BY THE CODE.—The provisions of the Code of Practice, in relation to appeals, regulate the practice and are the general law for proceedings in that respect in all the courts, and they prescribe the requisites for all changes from one court to another, in bringing and prosecuting suits through all the courts. *Norman vs. Curry*, 440.

9. WHEN OBJECTIONS NOT CONSIDERED.—This court will not consider objections or errors in a record where there was no motion for a new trial in the court below. *Lambert vs Killian & Prewett*, 549.

10. WHEN NOT TAKEN IN TIME.—An appeal, not taken in the manner and

within the time prescribed by law, will be dismissed for want of jurisdiction. *Johnson, adm'x. vs Du Val, ad.*, 599.

11. When time may be extended.—The court, in the exercise of its sound discretion, may extend the time for filing the papers on appeal, by a proper showing on the part of the appellant, that the delay was not owing to laches on his part; that due diligence has been used, and that he has been prevented by means and circumstances over which he had no control. *Ib.*

12. When taken by executors, etc.—Executors and administrators, appealing from judgments rendered against the goods of their testator or intestate, are not required to file the bond and security as in other cases provided, but they will be held to file the affidavit, for appeal, required by the statute. *Ib.*

See *Circuit Court*, 1; *Construction of Statutes*, 11; *Courts*, 1; *New Trials*, 1, 2; *Practice*, 4, 6, 7, 8, 9; *Supreme Court*, 2.

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See *Construction of Statutes*, 4, 5.

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ASSIGNORS.

1. Notice necessary to bind.—An assignor is not liable on his assignment, unless he has received due notice of the non-payment or protest of the instrument assigned. *Winston vs. Richardson.* 34.

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1. Judgments in, liability of securities.—Under the act of March 17*th* (*Acts of* 1866–7) the liability of the securities, in an attachment bond, can only be for the amount of the appraised value of the property attached, and in case the verdict or damages found should be for an amount greater than the appraised value of the property, the court should render judgment against the principal and securities for the amount of the appraised value of the property and against the principal for the balance. *Holmes and Salmon vs. Cooper*, 229.

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BANKRUPTCY.

1. Plea of, good defense.—A person cannot be or remain a party to a suit after his bankruptcy, and the plea, when properly pleaded, is a good defense. *Collier, ad., vs. Hunter and Oakes*, 74.

2. After property was attached and sold, assignee in bankruptcy appeared by attorney and moved to be substituted as defendant; also filed motions

to have attachment dissolved, and the proceeds of the sale turned over to him. *Held*: That the facts set up in the motions were matters in abatement and should have been pleaded in an issuable shape, and verified by the claimant. *Hecht vs. Wassell, assignee*, 412.

3. DISCHARGED BANKRUPT, DEBT OF, REVIVED BY PAROL PROMISE.—A discharged bankrupt is under a moral obligation to pay his debts in full when he can, and this obligation is, at common law, a sufficient consideration to sustain an actual parol promise to do so. *Apperson & Co. vs. Stewart*, 619.

4. SAME, NATURE OF THE PROMISE, ETC.—An unwritten promise to revive a discharged debt must be distinct, specific and satisfactorily proven, and, if conditional, the party seeking to enforce it must show that the condition has been satisfied. *Ib.*

BELLIGERENTS.

See *Courts*, 2; *Law of Nations*, 1, 2.

BILLS OF EXCEPTIONS.

See *Exceptions*.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. WHEN VOID BY ALTERATION, BURTHEN OF PROOF, ETC.—Any material alteration of a note or bill, after delivery, without the consent of the maker, either as to time of payment or amount, whether such alteration be favorable to the maker or not, renders the note or bill void, and a plea by the maker, setting up such defense, where the alteration appears upon the face of the note or bill, devolves the burthen of proof upon the payee or holder to show that the alteration was made before the delivery, or afterwards, by consent of the maker; otherwise, where the alteration does not appear upon the face of the note or bill. *Chism et al. vs. Toomer*, 108.

BURDEN OF PROOF.

See *Bills of Exchange*, 1; *Practice*, 15; *Statute Limitations*, 2.

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See *Taxes and Tax Titles*, 6.

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See *Equity Pleading and Practice*.

CHAPTERS OF THE DIGEST.

1. WHAT CHAPTERS VALID.—The "Chapters of the Digest," that are valid, derive their validity from having been legally enacted by the General Assembly, as other original statutes, and of such statutes, sections from one

to ten inclusive, of the Chapter entitled "Circuit Courts," and Chapters entitled "corporations and organization of municipal corporations," "regulating the assessment and collection of revenue," "robbery," "forgery and counterfeiting," "enticing females to houses of ill fame," "trespass on personal property," "violating the grave," and "profane cursing and swearing," were only so enacted and valid. *Vinsant vs. Knox*, 266.

See *Constitutional Law*, 3, 4.

CIRCUIT COURT.

1. WHEN NO JURISDICTION ON APPEAL.—Where the amount, in controversy, in a suit before a justice of the peace, is above the jurisdiction of the justice, the Circuit Court can acquire none on appeal. *Dunnington et al. vs. Bailey*, 508.

See *Taxes and Tax Titles*, 6; *Unlawful Detainer*, 1.

CLAIMS AGAINST ESTATES.

See *Equity Pleadings*, 3.

CLOUD UPON TITLE.

See *Equity Pleading*, 1; *Pleading*, 10, 11, 12; *Taxes and Tax Titles*, 6.

COERCION.

See *Evidence*, 3, 4.

COLLECTOR OF TAXES.

1. AUTHORITY OF, TO SELL PROPERTY FOR PAYMENT OF TAXES.—The collector of taxes has not a general authority to sell property, liable by law to be sold for the payment of taxes, but to sell only at the time and in the manner prescribed by law. *McDermott vs. Scully*, 226.

COMMISSIONER OF COURT.

1. COMPENSATION OF, ETC.—Courts have a large discretion in determining the allowances to be made commissioners and similar officers appointed by them, and that discretion will not be interfered with, unless palpable injustice should result from its exercise; but the exercise of that discretion must be done by the court acting directly upon the report or matter before it, and not by or through the intervention of a master or other person appointed for that purpose. *Carter et al., ex parte*, 532.

COMMISSIONER OF CLAIMS.

1. NATURE OF FINDINGS.—The findings of the commissioner of claims, appointed under act, *approved, March* 28, 1871, are not judgments against

the State, but are only "in the nature of a judgment," which the commissioner shall make out and deliver to the claimant, who may file them with the Auditor of State, who shall draw his warrant on the treasurer, payable out of the moneys appropriated for that purpose. *Clayton vs. Berry, and.*, 129.

COMMISSIONER OF STATE LANDS.

1. DUTY OF.—Under the Act *approved July* 15, 1868, providing for the appointment of a Commissioner of Immigration and State Lands, all the duties that were required of the Auditor, in relation to such lands, now devolve on said Commissioner. *Harrison and Stewart vs. Lewis, Comr.*, 152.

COMMON CARRIER.

See *Wharfboat*, 1, 2.

COMMON SCHOOLS.

See *Taxes*, 1, 2, 3.

CONDITIONAL SALES.

1. RELATIONSHIP OF PARTIES AND REMEDY.—On a conditional sale, the relationship of debtor and creditor does not exist between the parties—the property in the thing sold passes to the vendee, subject to be divested on performance of the condition as stipulated, and if the vendee part with the property before the time to redeem expires, the vendor's only remedy is by an action for damages for breach of the covenant, and not for the recovery of the property. *Carnal vs. Clark, ex use*, 500.

CONFEDERATE MONEY.

1. NOT A VALID PAYMENT.—The payment in confederate money is not a valid discharge or payment of a debt or obligation. *Cooksey vs. McCrery*, 303.

2. ILLEGAL CONSIDERATION OF.—A promise or contract, the consideration of which, in whole or in part, is based upon Confederate money, is void. *Carl Lee vs. Carlton*, 379.

CONFEDERATE COURTS.

1. ACTS OF VOID.—All the proceedings of the courts of this State, acting under confederate authority, or during the rebellion, are void. *Carroll vs. Boyd et al.*, 183.

2. SAME.—All acts and proceedings of the different courts of the State, done and had under authority of the Convention of 1861, or while the State was in rebellion, are void. *Cowser et al. vs The State ex use, etc.*, 444.

See *Probate Court*, 1.

CONSIDERATION.

1. WAIVER OF RIGHT, ETC.—Where a party has a valid, subsisting claim or legal right and waives it, at the instance or request of another, such waiver is a sufficient consideration to sustain a promise made thereon. *Sykes vs. Lafferry*, 407.

See *Bankruptcy*, 3, 4.

CONSIGNEES.

See *Wharfboat*, 1, 2.

CONSTITUTIONAL LAW.

1. LEGISLATURE MAY CREATE OFFICE OF RECORDER, ETC.—The Constitution, of 1868, does not define or enjoin the duties to be performed by the county clerks, and it was competent for the Legislature, under *Sec.* 19, *Art. VII*, to define, add to or take from the duties of the county clerk, and the act, *approved*, *March* 16, 1871, "to provide for clerks of Circuit Courts in certain counties, and define their duties," is not unconstitutional. *State vs. McDiarmid*, 176.

2. ACT, APPROVED MARCH 28, 1871, UNCONSTITUTIONAL.—The Act, approved March 28, 1871, to "establish separate courts in the county of Sebastian," is in derogation of *Section* 12, *Article XV*, and *Section* 2, *Article X*, of the Constitution of the State of Arkansas, and is null and void. *Patterson vs. Temple*, 202.

3. CHAPTERS OF THE DIGEST.—*Section* 2, *Article XV*, of the Constitution gave no power to the revisers to prepare new laws, or to alter or amend old statutes, any further than was necessary to render them consistent among themselves, and in harmony with the new Constitution. *Vinsant vs. Knox*, 266.

4. SAME.—The "Chapters of the Digest" were not such a revision, etc., as was contemplated by the Constitution, and, therefore, derive no force therefrom. *Ib.*

5. ACT, JANUARY 21, 1861.—There is no prohibition, either in the Constitution of 1836 or 1868, against the exercise of the power, by the Legislature, of establishing more than one place for holding Circuit Courts within the limits of any county in the State, and the act of the 21*st of January*, 1861, entitled "An act to establish separate courts in the county of Sebastian," so far as it designates Fort Smith as the proper place to hold a Circuit and Probate Court, is valid. *Jones, ex parte*, 349.

6. ARTICLE X CONSTRUED.—The words, "the treasury," occurring in the several sections of *Article X.* of the Constitution, mean the *State treasury*, and are not to be construed to mean the various county treasuries. *Straub & Lohman vs. Gordon, sheriff*, 625.

7. SAME—*Power of Legislature to tax pursuits, etc.*—The Legislature has power,

under *Article* 10, *Section* 17 *of the Constitution*, to impose a State tax upon such privileges, pursuits and occupations as are of no real use to society, and the occupation of wholesale dealer, in spirituous liquors, is such a pursuit as the Legislature may require the party, exercising the same, to pay into the State treasury a compensation for the privilege of engaging in such pursuits, and the imposition of such tax is not a tax upon *property* within the meaning of the Constitution. *Ib.*

See *Construction of Statutes*, 2, 6; *Homestead*, 1, 2; *Legislature*, 1, 2; *State Scrip*, 1, 2; *Suits*, 1.

CONSTRUCTION OF STATUTES.

1. ACT OF JULY 13, 1868.—The act of *July* 13, 1868, repealing the usury laws of this State, operated upon all contracts made previously to its passage, still outstanding, as well as upon all future contracts; but the intent and effect of the statute was not that of a repeal of an absolute penal statute to invalidate contracts previously made, but only to take away or destroy the defense of usury thereunder. *Woodruff vs. Scruggs*, 26.

2. WRITS OF ERROR, CLERK MAY ISSUE.—*Chapter* 124, *Gould's Digest*, regulating the issuance of Writs of Error, is not in conflict with the present Constitution, and so much thereof, as has not been repealed by subsequent legislation, is in force, and the clerk of this court is authorized to issue such writs in vacation, as well as in term time. *Harrison vs. Trader and Wife*, 59

3. DESCENTS AND DISTRIBUTION—*Construction of.*—Where the inheritance is ancestral and comes from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement but in exclusion of the mother's line; and so, on the other hand, if it came from the mother's side, then to the line on the part of the mother from whence it came, to the exclusion of the father's line. *Campbell and Wife vs. Ware*, 67.

4. SPECIFIC APPROPRIATIONS.—When the legislature has directed what amount shall be set apart for certain specific expenditures or for the payment of certain debts, all executive and ministerial officers are bound to obey its directions. *Clayton vs. Berry, auditor*, 129.

5. AUDITOR—*Not to issue warrant when appropriation exhausted.—Section* 18 *of Chap.* 2, *Gould's Digest*, forbidding the Auditor from issuing a warrant when there is no appropriation to draw against, or when an appropriation has been exhausted, is not in conflict with the Constitution of 1868, but is in full force. *Ib.*

6. ACT APPROVED MARCH 16, 1869, CONSTRUED.—The Act, approved *March* 16, 1869, *amendatory of an Act approved July* 21, 1868, *entitled "an Act to repeal Chapter* 44, *Gould's Digest,"* is not to be construed as an attempt, on the part of the Legislature, to place a judicial construction on the Act of 1868, but the intention was, only, to allow a county seat to be removed by the expressed will of the electors. *Patterson vs. Temple*, 202.

7. How Construed.—In the construction of a statute, where the court finds, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the same statute, if, upon a review of *the whole act*, the real intention of the Legislature can be collected from the larger and more extensive expressions used in other parts, effect will be given to the *larger* expressions. *State vs. Jennings*, 419.

8. Act of April 9, 1869.—The act of the General Assembly of April 9th, 1869, entitled, "An act to regulate the incorporation and organization of municipal corporations," was intended to make uniform rules and regulations for all the cities and towns of the State, and repeals the act of July 23d, 1868, entitled, "An act for the incorporation of cities and towns." *Ib.*

9. Real Estate Bank—*Act of January* 16, 1861, *constitutional.*—The Act of the Legislature of January 16, 1861, entitled "An Act to aid the foreclosure of the stock mortgages, given to secure the stock subscriptions to the Real Estate Bank of the State of Arkansas," was intended to furnish a remedy different from that which existed when the obligations were entered into, and although it changed the remedy effecting the enforcement of existing obligations, by abridging the pleadings, simplifying the issues and regulating the mode and manner of the proceedings, yet it did not impair the obligation of contracts, or infringe upon the existing rights of the parties, and is in none of its provisions or requirements unconstitutional. *McCreary vs The State*, 425.

10. Same—*Holford Bonds*—The bonds known as the "Holford Bonds," were not intended to be embraced within the provisions of the Act of 1861, and a suit under that Act, so far as they are concerned, to recover the amounts received upon the five hundred hypothecated bonds, cannot be maintained. *Ib.*

11 Sec 16, Act of July 16, 1868.—Section 16, of "An act to amend chapter sixty-nine of *Gould's Digest*, etc., approved July 16, 1868, was not enacted under its appropriate title, and further, in so far as it prescribes a condition precedent to the right of appeal, by the payment of all costs, is in conflict with *Sec.* 4, *Art.*, 7, *State Const.*, and is inoperative. *Norman vs. Curry*, 440.

12. Where Affidavit filed under Sec. 760, Amended Code.—Where suit was pending in the Circuit Court, the defendant filed an affidavit under *Section* 760 of Amended Code; the circuit judge refused to proceed further with the trial of the case; on petition for mandamus by the plaintiff, *Held:* That the filing of the affidavit disqualified the judge, and that the clerk of the Circuit Court should have made an order changing the venue as in such case provided by law. *Cook, ex use vs. Baxter*, 480.

13. Act of March 25, 1871, Construed.—The Act of March 25, 1871, Section 154, providing that there shall be levied and collected as a *county tax* upon dealers in liquors, etc., is not to be construed as an attempt to raise a State revenue by a tax upon dealers in liquors, and the Act is not in contravention of the provisions of the Constitution in regard to the raising of State revenue. *Straub & Lohman vs. Gordon, Sheriff*, 625.

See *Appeals* 4, 8; *Attachment*, 1; *Chapters of the Digest*, 1; *Commissioner of Claims*, 1; *Commissioner of State Lands*, 1; *Constitutional Law*, 1, 2, 3, 4, 5; *Corporations*, 2, 4; *Counter Claims*, 1, 2; *Courts*, 5; *Descents and Distribution*, 1; *Equity Practice*, 5; *Forcible Entry and Detainer*, 5; *Indictment*, 1; *Injunction*, 1; *Judgments*, 2; *Laborer's Lien*, 1; *Legislature*, 1; *Married Women*, 1; *Pleading*, 3, 4, 7, 10; *Practice*, 5, 10; *Schools*, 1; *Set-off*, 2; *Sheriff's Sales*, 2; *Swamp Lands*, 1, 2, 3; *Taxes*, 1, 2; *Unlawful Detainer*, 1.

CONTRACTS AND AGREEMENTS.

1. OBLIGOR—*When discharged from performance.*—If the obligee does anything to obstruct or prevent the obligor from performing his part of the contract, the obligor is discharged from his obligation to perform it; the contract, in legal effect, is, on his part, performed, and he may demand performance at the hands of the other party. *Lewis and wife vs. Boskins, ad.*, 61.

2. WHAT PROOF OF INCOMPETENCY OF PARTIES NECESSARY TO SET ASIDE.—Where a deed or contract is regularly made, the competency and capacity of the parties to contract are presumed, and a Court of Chancery will not set aside or rescind such contract, unless the proof shows imposition, fraud or undue influence, with weakness of mind in the making or procuring of such deed or contract. *Killian et al. vs. Badgett et al.*, 166.

See *Law of Nations*, 2; *Marriage Contracts*, 1; *Parol Evidence*, 1; *Vendor and Vendee*, 2.

CONVEYANCES.

See *Contracts*, 2; *Purchaser*, 2; *Vendor's Lien*, 2; *Vendor and Vendee*, 1.

CONVERSION.

1. RECOVERY WHERE TORT WAIVED.—Where defendant converts property of plaintiff to his own use, and plaintiff waives the tort and elects to sue on an implied promise, he can only recover the amount actually received by the defendant. *Howell vs. Graves, et al.*, 365.

CORPORATIONS.

1. NATURE AND POWERS OF.—Corporations having municipal powers are mere tenants at will of the Legislature, so far as the officers thereof are concerned, and the General Assembly may incorporate a place, add to, qualify or abolish its municipal powers without its consent. *State vs. Jennings*, 419.

2. NO POWER TO TAX AUCTIONEERS.—Under the *act of April* 9, 1869, entitled, "An act regulating the incorporation of municipal corporations," the power *to tax and regulate auctioneers* is not conferred upon municipal corporations. *Martin ex parte*, 467.

3. ACTIONS AGAINST, FOR TORTS.—A right of action against municipal corporations does not exist at common law, and their liability to a private action for *torts*, must be determined by the statute which creates them. *City of Little Rock vs. Willis*. 572.

4. SAME.—The sections of the general incorporation act, conferring upon cities the "power to lay off, open, widen, straighten and establish, keep in order and repair all streets, alleys and public grounds, etc., and to open and construct and keep in repair *sewers* and drains," are not mandatory, and for the exercise of a lawful power, which, by law, is vested in the *judgment* and *discretion* of a municipal corporation or public body, for the good of the whole, no injury for which an action will lie can be committed; but for the *imperfect, negligent, unskillful execution* of a thing *ordained* to be done, an action will lie, in the absence of an express statute. *Ib.*

COSTS.

See *Construction of Statutes*, 11; *Supreme Court*, 1.

COUNTER-CLAIM.

1. NATURE OF.—The defense of counter-claim, under the Code, is but the plea of recoupment under the old practice and, in general, is to be governed by the same doctrines, except where the defendant's demand exceeds that of the plaintiff he may be entitled to a judgment for the excess. *Bloom vs. Lehman, Newgass & Co.*, 489.
2. WHEN APPLIES.—The defense of counter-claim only applies to breaches of stipulations, fraudulent or otherwise, growing out of the contract sued upon and not upon entirely separate and distinct causes of action. *Ib.*

See *Sett-off*, 1, 2.

COUNTY COURT.

1. CANNOT SET ASIDE ITS JUDGMENT AFTER LAPSE OF TERM.—A County Court loses power over its judgments, on the lapse of the term at which they were rendered, and cannot set them aside at a subsequent term. *Patterson vs. Temple*, 202.
2. ACTION OF, WHEN VOID.—The holding of a County Court at a time other than that prescribed or authorized by law, and all proceedings thereunder, are *coram non judice* and void. *Chaplin vs. Holmes*, 414.

See *Constitutional Law*, 2; *Construction of Statutes*, 5; *Taxes and Tax Titles*, 6.

COUNTY CLERK.

See *Constitutional Law*.

COUNTY SEAT.

See *Construction of Statutes*, 6.

COURTS.

1. ERRORS IN JUDGMENT OR ABUSE OF DISCRETION, HOW CORRECTED.—The discretion or judgment of a court of competent jurisdiction, where there is abuse of the one or error in the other, cannot be controlled by *mandamus*,

but may be corrected on appeal. *Union County vs. Robertson, Trustee*, 116.

2. OF WHAT, WILL TAKE JUDICIAL NOTICE.—Courts will take judicial notice of the fact that certain localities or portions of a State, in insurrection, were in the possession and under the custody of the forces of the United States, but will not infer therefrom, that individuals resided there, or in the territory over which the government had re-established its authority, as against the averments of a plea that they were public enemies. *Rice vs. Shook, et al.*, 137.

3. WHEN PROCEEDINGS PRESUMED REGULAR.—Where the record is silent, or it is not otherwise made to appear, the regularity of the proceedings of the court below will be presumed. *Welsh vs. Hicks*, 292.

4. ACTION OF, WHEN VOID.—The holding of a court at a time or place, other than that prescribed or authorized by law, and all proceedings thereunder are *coram non judice* and void. *Jones, ex parte*, 349.

5. FINDING OF FACTS BY, ETC.—The findings upon the facts by the court, sitting as a jury, required by law to be reduced to writing, need not necessarily be put in writing *before* judgment, but the court may, *after* judgment rendered, reduce the same to writing. *Apperson & Co. vs. Stewart*, 619.

See *Commissioner of Courts*, 1; *Construction of Statutes*, 6; *County Court*, 1, 2; *Evidence*, 2; *Judgments*, 1; *Lands*, 1.

COVENANTS.

1. PLEA OF PERFORMANCE.—To breach assigned for non-payment of money, a plea of performance, by giving note and due bill, should allege that the same were accepted by the plaintiff as a payment or satisfaction of his claim. *Blunts vs. Williams*, 374.

See *Partners*, 1.

CRIMINAL LAW.

1. MURDER—*When indictment insufficient for want of certainty.*—The charge, in an indictment, that the offense was committed with a "*shot gun*," does not set forth the manner and circumstances attending the use of the gun with such a certainty as would enable a defendant to make a complete defense, if innocent. *Edwards vs The State*, 493.

See *Evidence*, 3, 4; *Gaming*, 1, 2, 3; *Indictment*, 1; *Statutes construed*, 1.

DAMAGES.

1. WHEN CANNOT BE PLEADED AS SET-OFF.—In an action *ex contractu* the defendant cannot rely upon damages sounding in *tort* as a set-off for the plaintiff's demand. *Bloom vs Lehman, Newgass & Co.*, 489.

See *Conversion*, 1; *Practice*, 7.

DECREES.

See *Equity practice*, 1.

DEEDS.

See *Contracts*, 1; *Donated Lands*, 1; *Swamp Lands*, 1; *Taxes and Tax Titles*, 4.

DEFECT IN PARTIES.

See *Equity Practice*, 4.

DESCENTS AND DISTRIBUTIONS.

J. H. died, leaving surviving him six children, one of whom was E. H.; an administrator was appointed; E. H. married and died, leaving surviving him his wife, Harriet L., and one minor child; the child died leaving the said Harriet L. her sole heir, who afterwards intermarried with C. N. On petition in the Probate Court by the said C. N. and Harriet L., making the administrator of J. H. party defendant, and asking that the said Harriet L. be declared entitled to one sixth interest in all the real and personal estate of which the said J. H. died seized, and that the administrator be ordered to turn over the same to the said Harriet L., *Held:* on general demurrer, by the administrator:

First. That if Harriet L. was entitled to the estate descending to her from her former husband, it ought to come to her through his administrator, freed from his debts; and that the Probate Court had no power to declare that one sixth of the real estate of the said J. H. should be turned over to the said Harriet L., as the administrator only holds the estate for the payment of debts.

Second. That the petition for distribution should have affirmatively shown the condition and liabilities of the estate of the said J. H.; what, if anything, remained for distribution after the payment of the debts; that all the distributees should have been made parties defendant and should allege a tender of bond as required by law. *Norwood and wife vs. Holliman, ad.*, 445.

See *Construction of Statutes*, 3.

DEPOSITIONS.

1. General objections to.—A general objection to a deposition is not sufficient to reach an irregularity, and will not be considered as extending to formal defects. *Blunts vs. Williams*, 374.

DISCRETION.

Courts, 1; *Commissioner of Courts*, 1; *Evidence*, 1.

DOWER.

1. Not allowed in proceeds of lands sold, etc.—The widow is not entitled to dower in the *proceeds* of the sale of lands, whereof her husband died seized, made by the administrator, under order of the Probate Court, but she must look to the *specific* estate. *Tiner, ad. vs. Christian, admx.*, 306.
2. Mode of relinquishment.—To relinquish the wife's dower, the conveyance must be of her own free will; she must understand the nature and

effect of the deed, and in the absence of her husband, openly confess to an officer authorized by law to take the acknowledgement, that the conveyance is without undue influence and for the purposes specified. *Russell vs. Umphlet*, 339.

3. NOT ALLOWED OUT OF PERSONAL PROPERTY IN TRUST.—Where S. conveyed his growing crop, in trust, to secure the payment of certain indebtedness, and died, and the crop so conveyed was not sufficient to liquidate the indebtedness intended to be secured; on claim of dower, in the crop, by the widow, *Held:* That the growing crop was personalty; that S. did not die seized thereof, and that the widow was not entitled to dower therein, although she was not a party to the trust deed. *Street, trustee vs. Saunders*, 554.

DONATED LANDS.

1. Lands were donated to W. C. afterward applied to the Auditor to purchase the same, tendering the taxes, penalty and costs due thereon; and also offered to return the donation deed, with the written statement of W. that he could not comply with its conditions, and that he relinquished to the State all his rights in favor of C. *Held:* That the Auditor could not accept a return of the deed and cancel the entry. *O'Connor vs Auditor*, 242.

EJECTMENT.

1. WHEN WILL NOT LIE FOR POSSESSION.—Lands were sold and bond given to make title upon the payment of certain notes executed for the purchase money. The vendor brought ejectment for the possession of the lands; the vendee pleaded a tender and demand of deed before suit brought; on demurrer to the plea, *Held:* That the plea was sufficient to defeat the action of ejectment. *Newsome vs. Williams, admx.*, 632.

EQUITABLE LIENS.

See *Liens*, 1, 2.

EQUITY JURISDICTION.

1. A. owned a steam saw mill on the land of B. After assessment to A. for taxes, A. sold the mill to C. On bill by C. to enjoin the collection of the tax, on the ground that the mill was a fixture and assessed with the land—*Held:* That the mill was not a fixture, but if assessed with the land, and not as the personal property of A., the plaintiff's remedy, for any injury he might suffer from the sale, was in law and not by injunction. *Witherspoon & Gilliam vs. Nickels, sheriff*, 332.

2. WHEN NO COGNIZANCE OF A SUIT IN REM.—Equity jurisprudence, independent of a statute for that purpose, has no cognizance of a bill brought *in rem* against real estate to foreclose a mortgage given thereon. *State ex. use vs. Bailey*, 473.

See *Administration*, 4; *Purchasers*, 3; *Taxes and Tax Titles*, 6.

EQUITY PLEADING.

1. CLOUD UPON TITLE—*To remove, what bill must allege.*—A party, when asking for equitable relief in removing clouds from his title, must be in actual possession of the lands, or they must be unoccupied or not in the actual possession of another; otherwise his remedy is complete at law. *Miller vs. Neiman and wife*, 233.

2. DEMURRER FOR WANT OF PARTIES, ETC.—The mere fact that a party, at the time of the execution of a deed of trust, was insolvent, or largely indebted to *certain* creditors, does not, of itself, show that other parties may be interested in the result of a suit to set aside such conveyance, so as to render a bill for that purpose demurrable for the want of proper parties. *Wright ad. vs. Campbell & Strong*, 637.

3. TO ENFORCE CREDITOR'S DEMAND ALLOWED IN PROBATE COURT, ETC.—A demand allowed, classified and adjudged by the Probate Court to be a claim against an estate, has the same force and effect of a judgment, and, in such case, it is not a pre-requisite, as under the general rule, that a creditor having such demand, and seeking the interposition of a court of equity to set aside a deed, should show an execution issued and return of *nulla bona*. *Ib.*

See *Administrators*, 2; *Equity Practice*, 2; *Mortgages*, 1, 2, 3; *Pleading*, 10, 11, 12; *Vendor's Lien*, 2.

EQUITY PRACTICE.

1. DECREE BY CONSENT—*How changed.*—A decree, upon terms, by consent of parties, cannot afterwards be changed by supplemental order, on application of one of the parties, as against the objection of the other. *Peay and Scull vs. Tannehill and Owen*, 114.

2. WHERE MERITS IN BILL, BUT WANT OF PROPER AVERMENTS.—Where it clearly appears that there are merits and equity in a bill, the bill, for want of proper averments, should not be absolutely dismissed, but the court should direct the proper averments to be made, or dismiss the bill without prejudice to the complainant to file another bill. *Buckner vs. Sessions*, 219.

3. WHEN DEMURRER CONSIDERED WAIVED.—Where a cause has proceeded to final adjudication, without judgment of the court upon demurrer filed in same, the demurrer will be considered to have been waived. *Kiernan vs. Blackwell, ad. et al.*, 235.

4. COURTS SHOULD NOTICE DEFECT IN PARTIES.—Where the heirs at law of a deceased vendee are not made parties defendants to a bill seeking a sale of land or foreclosure for purchase money, the court below, on its own motion, should notice this defect of parties; and this court, in chancery, will protect the estate and heirs at law, who are not made parties, whether the objection is or is not made. *Ib.*

5. CHANGED BY CODE.—The rule that, if complainant has a plain and ample remedy at law, his bill must be dismissed, has been changed by the Code of Practice, in so far that, if his bill shows that he has a legal right, without motion before, and on motion after answer filed, if made within proper

time, he may have the action transferred to the proper docket. *Phelps & Jones, vs. Jackson, ad.*, 585.

6. ON DISMISSAL OF BILL FOR WANT OF EQUITY.—On dismissal of bill for want of equity, where it appears that complainant has legal rights, the better practice is, to dismiss without prejudice and not peremptorily. *Ib.*

See *Pleading*, 5; *Vendor's Lien*, 2; *Mortgages*, 3, 4; *Equity Pleading*, 1.

EQUITY REDEMPTION.

See *Mortgages*, 5.

ESTATES.

See *Administration*.

EVIDENCE.

1. DISCRETION OF COURT IN ADMISSION OF.—Whether or not to permit the recall of a witness, and what length after his first examination, and whether testimony is cumulative or not, are matters within the sound discretion of the court, and this court will not interfere with the exercise of that discretion, unless its exercise has been clearly to the prejudice of the party. *Smith vs. Childress*, 328.

2. PAROL TESTIMONY, WHEN ADMISSIBLE.—Parol testimony is admissible to show for what purpose, as for collection, a note was assigned, but not to vary the effect of the assignment. *Ib.*

3. COERCION, DECLARATION OF HUSBAND NOT COMPETENT.—While a wife cannot be found guilty of a crime, if it is shown, from all the facts and circumstances, she was acting under the threats, commands or coercion of her husband in the commission of the offense, yet, the declarations of the husband to that effect made to another, being hearsay, are incompetent testimony, upon the trial, in favor of the wife. *Edwards vs. The State*, 493.

4. SAME, HOW SHOWN.—The coercion of the husband must be made to appear *from all the facts and circumstances*, and is not to be presumed merely from the presence of the husband and, the fact of killing being admitted, the wife, to excuse herself from the crime, must show that she was not acting, at the time, from her own volition, but from that of the husband. *Ib.*

See *Guardian and Ward*, 2; *Parol Evidence*, 1; *Practice*, 10, 15, 16; *Swamp Lands*, 3.

EXCEPTIONS.

See *Practice*, 8, 12; *New Trials*, 1, 2; *Supreme Court*, 2.

EXECUTIONS.

1. REQUISITES OF.—An execution must be authorized by a judgment and

must follow it in every essential particular, not only as to material matters of form, but also as to the amount for which it is rendered. *Hightower et al. vs. Handlen & Venneys*, 20.

2. WHEN SALES MADE UNDER, VOID.—Where several levies and sales are made for separate sums, only such sales or levies would be void as are made to satisfy the amount in excess of the judgment; but where one sale is made to satisfy the sum actually due, and the execution has been issued for a sum greatly in excess of that sum, the whole proceeding will be declared void. *Ib.*

3. RECOURSE OF PURCHASER, WHEN PROCEEDINGS VOID, ETC.—Where the judgment of a court, or an execution issued thereon, is declared void, by competent authority, the purchaser, under such sale, takes nothing, but would have recourse upon the sheriff, who made the sale, for the money paid at it. *Ib.*

4. WHERE SALE MADE AFTER RETURN DAY.—The sale of real estate, under an execution, after the return day, is without authority and void. *Ib.*

See *Sheriffs*, 1; *Sheriff's Sales*, 1.

EXECUTORS.

1. WHAT INTEREST IN INTESTATES' LANDS.—The executor has no interest in the lands of an intestate or control over them, save as it may be necessary to subject them to the payment of general creditors. *Kiernan vs. Blackwell, ad., et al.*, 235.

2. JURISDICTION OF FOREIGN COURTS OVER, ETC.—While an executor, as such, cannot be held to an account and settlement before a foreign court, or the court of a different State from the one granting such letters, yet, on bill for that purpose, he may be held in such court to disclose with what, and the character of the funds with which he has purchased property, and whether he holds the same as trustee, and for what uses and trusts. *Clopton vs. Booker et al.*, 482.

3. CANNOT PURCHASE PROPERTY OF TESTATOR, ETC.—An executor or administrator cannot buy any part of the estate of his testator or intestate, as, in equity, he is held to be a trustee for the next of kin, legatees and creditors, and has no right to become the purchaser of the property he represents. *Wright ad. vs. Campbell & Strong*, 637.

See *Administrators*; *Appeals*, 12.

FEES.

See *Administration*, 2, 3.

FEDERAL JUDGMENTS.

See *Administration*, 1.

FINDING OF FACTS.

See *Courts*, 5.

FOREIGN COURTS.

See *Executors*, 2.

FIXTURES.

See *Equity Jurisdiction*, 1.

FRAUD.

1. WHAT AMOUNTS TO.—Representations to amount to fraud must be of a decided and reliable character, holding out inducements, to make the contract, calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations, and in the absence of means of information to be derived from his own observation and information, and from which he could draw conclusions to guide him in making the contract, independent of the representations of the vendor. *Grider and Wife vs. Clopton*, 244.

2. SAME, WHEN RECISION OF SALE SOUGHT.—When one seeks to rescind the sale of land, if the contract be executed and the conveyance made, and the vendee entered into possession, he is presumed to have examined the evidence of title, and if he was induced, by fraud, to accept the conveyance, if not evicted, he must show title paramount. *Ib.*

See *Contracts*, 1.

FRAUDULENT CONTRACTS.

See *Administrators*, 2.

FORCIBLE ENTRY AND DETAINER.

1. ACTIONS OF, DISTINCT.—The actions of Forcible Entry and Forcible Detainer, as provided for in our system of practice, are separate and distinct actions. *Smith vs. Lafferry*, 46.

2. FORCIBLE ENTRY, WHAT NECESSARY TO SHOW.—In an action of forcible entry it is necessary to show that the defendant did actually enter into the lands or tenements of the plaintiff, without the consent of the person having the *possession in fact* of the premises. *Ib.*

3. FORCIBLE DETAINER, WHAT MUST APPEAR.—In an action of forcible detainer it must appear on the face of the warrant, in some way, that the relation of landlord and tenant exists, or existed between the plaintiff and defendant, said to have been in possession, at the time of the entry. *Ib.*

4. ACTIONS OF, CANNOT BE JOINED.—The actions of forcible entry and forcible detainer cannot be joined so that a warrant for forcible entry can be the foundation for a verdict of forcible detainer; in the one, force is the gist of the action; the other is founded on a breach of contract. *Ib.*

5. PRACTICE IN.—Under *Section* 497 of the Code of Practice on traverse of the verdict of a jury, on appeal to the Circuit Court—*Held*: That the jury in

their verdict could not pass upon the question of misjoinder of parties or upon the constitutionality of the law. *Herndon vs. Goff et al.*, 334.

GAMING.

1. WHO LIABLE FOR.—Wherever a gambling table or gambling device is kept, set up or exhibited within the State, all, whether proprietor, clerks, servants or agents, who aid or assist in the keeping, setting up or exhibition, are liable to indictment and punishment. *Trimble vs. The State*, 355.
2. "KENO," A GAMING DEVICE.—The game called and known as "*keno*," is a game at which money or property may be won or lost, and is a gaming device within the meaning of the statute. *Ib.*
3. SAME.—All persons who play at the game commonly called and known as "*Keno*," are guilty of gambling; and the person who sets up, keeps or exhibits this apparatus, contrivance or machine, is guilty of setting up, keeping or exhibiting a gambling device, and is liable to the penalties of the statute. *Portis vs. The State*, 360.

GUARDIAN AND WARD.

1. RIGHT OF WARDS TO LANDS PURCHASED WITH THEIR MONEY.—Where a guardian uses the money of his ward in the purchase of lands, the ward is entitled to the results of the purchase, whether the guardian purchased for himself or his ward, and whether he use the money merely as agent, and not as guardian. *Shelton vs. Lewis, et al.*, 190.
2. SAME, WHAT PROOF NECESSARY, ETC.—The proof must be full, clear and conclusive, and, in such case, the person entitled to the money, may, at his election, charge the trustee, guardian or agent personally, or follow the money into the land and claim the purchase as made in trust for him, and such trust may be established by parol evidence. *Ib.*

See *Wards*, 1.

HEIRS.

See *Construction of Statutes*, 3; *Descents and Distributions.*

HOLFORD BONDS.

See *Construction of Statutes*, 10.

HOMESTEAD.

1. CONSTITUTIONAL LAW—*Construction of Section* 3, *etc.*, *Article XII. Constitution.*—Section 3, Article XII. of the Constitution, respecting the exemption of homesteads, is to be construed in connection with Sections 1, and 2 of same Article, and so construed, it exempts all homesteads from sale on execution or other final process, except in the instances in the sections named, and it does not, by any of its expressions, limit the benefit of this exemption to *married men or heads of families. Greenwood & Son vs. Maddox & Toms*, 648.

2. SAME—*Unmarried men may encumber homesteads, etc.*—While, under the provisions of the Constitution, the homestead of an *unmarried man* is protected from sale on execution, except in the instances therein expressed, yet he is left free to place incumbrances upon it, which a *married man or head of a family* is forbidden to do. *Ib.*

3. SAME.—*Tenant in common, when entitled to homestead.*—Where lands held in common are levied upon, a tenant in common is at liberty to apply for partition, and after partition, by fixing his dwelling thereon, will be entitled to the benefit of the homestead exemption. *Ib.*

HUSBAND AND WIFE.

See *Marriage Contract.*

ILLEGAL CONSIDERATION.

See *Confederate Money*, 2.

INDICTMENT.

1. REQUISITE OF.—The Code of Criminal Practice, except in reference 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. *Edwards vs. The State*, 493.

See *Criminal Law*, 1.

INDORSER.

1. WHAT NECESSARY TO BIND.—To charge an indorser, it is necessary to prove that payment was demanded of the maker within proper time and refused, and that the indorser had due notice thereof, or that the indorsee had used due diligence to make such demand and give such notice, or that they were waived by the indorser. *Winston vs. Richardson*, 34.

INJUNCTION.

1. WHEN SHOULD BE MADE PERPETUAL.—Lands were mortgaged with power of sale, to secure payment of note; note was assigned; assignor and assignee each demand payment in his own right; the lands were advertised for sale. On bill by mortgagor, offering to pay, praying that receiver be appointed, claimants required to interplead, and sale be enjoined. *Held:* That, after interpleader was decided, and payment by receiver, it was error to dissolve the injunction, but that the same should have been made perpetual. *Gardner et al. vs. Hershey et al.*, 552.

INSTRUCTIONS.

1. WHEN PRESUMPTION IN FAVOR OF.—Where an instruction has been asked and refused, and the record states the instruction was given in a modi-

fied form, but how modified is not set forth, it will be presumed that as modified it embodied the law. *Smith vs. Childress*, 328.

See *Practice*, 10.

INTERPLEA.

See *Practice*, 2; *Injunction*, 1.

INSURANCE.

1. POLICIES OF—*What the words "lost or not lost" evidence of.*—Insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, even if that loss be total and the subject matter of the insurance is then non-existent, and this intention is expressly evidenced by the clause "lost or not lost," in the policy. *Arkansas Insurance Company vs. Bostick & Ryan*, 539.
2. SAME—*When contract of insurance becomes complete.*—The contract of insurance, on an open or running policy, does not become complete until a declaration of a desire to insure is made by the assured, and until this is done the contract is inchoate and incomplete, and if not made at all, the risk will be regarded as not having commenced. *Ib.*
3. SAME—*What will not work a forfeiture.*—The fact that, in the application for insurance and the policy, it is understood that the assured are to insure all goods consigned to or shipped by them, in the company, will not, of itself, on the failure of the assured so to do, work a forfeiture of the policy, unless such were the *express* terms of the instrument. *Ib.*
4. SAME—*When act of agent works estoppel.*—Where goods were reported to the agent of an insurance company as having been shipped from a given point, and the agent, by agreement with the assured, entered them as having been shipped from an intermediate way point, whatever may have been the requirements in this respect in the policy, the company will be estopped by the act of their agent from setting up this supposed deviation as a ground of defense. *Ib.*

JUDGMENTS.

1. WHEN MAY BE SET ASIDE, ETC.—A court has control over its orders or judgments during the term at which they are made, and, for sufficient cause, may modify or set them aside at that term, and when so set aside, the parties are remitted back to such rights and remedies, the same as though no order had been made or judgment rendered in the first instance. *Underwood vs. Sledge*, 295.
2. WHEN MAY BE SEVERAL.—Under the Code of Practice, a several judgment may be entered whenever a several suit might have been brought. *Park vs. Meyer*, 551.

See *Administration*, 1; *Commissioner of Claims*, 1; *County Court*, 1; *Practice*, 1, 2, 9; *Replevin*, 2.

JUDICIAL DISCRETION.

See *Courts*, 1; *Commissioner of Court*, 1; *Evidence*, 1.

JURIES.

1. MISCONDUCT OF.—*When defendant cannot complain.*—Where misconduct on the part of jurors has been of injury to a party, it is the duty of the court to set aside the verdict, but the defendant cannot complain where the act or misconduct would have been for his benefit. *Portis vs. The State*, 360.

See *Practice*, 16.

JURISDICTION.

See *Administration*, 4; *Circuit Court*, 1; *Supreme Court*, 1; *Taxes and Tax Titles*, 6; *Unlawful Detainer*.

LABORER'S LIEN.

1. RAILROADS.—*Laborer's lien on, act of July 23d*, 1868, *construed.*—The lien given a laborer, by the act *approved July 23d*, 1868, is *personal* and cannot be assigned or transferred; it must arise out of a contract either express or implied between the parties; the party, seeking to enforce a lien of this character, must bring himself wholly and technically within the statute granting the relief, and there must be such an interest, in the estate subject to the lien, as can, upon process, be sold, transferred and conveyed to the purchaser thereof. *Dano vs. M. O and R. R. R. R. Co.*

2. The first nine sections of the act have reference only to movable property and the labor performed thereon, and the word "*all*," as used in the act, is not to be construed literally, as giving to every laborer a lien for his labor. *Ib.*

3. The remedy afforded, by the act, is summary and should be strictly construed and the *tenth section* of the act is not to be so extended or construed as to give to the laborer employed in ditching, building levees or railroad lines, a lien upon the real estate for his labor, where the labor was done under a contract from the State, but only when the contract was with the owner of the lands upon which the work was done. *Ib.*

4. *Requisites of complaint.*—In an action to enforce a laborer's lien, the complaint should disclose the property and the nature of the estate held by the defendant, and upon which the lien is claimed. *Ib.*

LANDS.

1. TITLE, ETC., TO, DETERMINED BY LOCAL COURTS.—Where the title of lands and the right of possession thereto come in litigation, whether the contract affecting the same be express or implied, direct or in secret trust, the same must be determined by the courts of the State wherein the lands lie. *Clopton & Booker et al.*, 482.

LANDLORD'S LIEN.

1. LIEN OF, WHEN ATTACHES.—The lien of the landlord, for rent, is a charge upon the crop, and accrues as soon as there is any crop upon which it may attach. *Adams et al. vs. Hobbs*, 1.

2. ENFORCEMENT OF, BY ATTACHMENT.—Under the Act of December 28, 1860, the process of attachment was designed to give the landlord a more efficient remedy for the enforcement of his rights under the lien, and the attachment, when issued, relates back, as enforcing the lien, to the time when the lien accrued. *Ib.*

LANDLORD AND TENANT.

1. TENANT CANNOT DISPUTE TITLE.—A tenant, in possession, is not at liberty to question the title of the person under whom he holds, or attorn to a third person. *Simmons vs. Robertson*, 50

2. CANNOT SET UP HOSTILE TITLE.—A tenant, while the relation of landlord and tenant exists, cannot rent from one who has acquired a title hostile to that of his landlord, though it be a better title. *Ib.*

See *Tenants in Common*, 1.

LAW OF NATIONS.

1. INTERCOURSE INTERDICTED.—During war, all trade and intercourse between the citizens or subjects of one of the belligerent States or powers, with those of the other, are interdicted. *Rice vs. Shook, et al.*, 137.

2. CONTRACTS—*Against public policy invalid.*—All contracts made with a public enemy, without the license or permission of the government, are, upon the grounds of public policy, invalid and void. *Ib.*

See *Courts*, 2.

LEGISLATURE.

1. POWER TO MODIFY REMEDY OF CONTRACTS.—The General Assembly has power to alter or modify the remedy as to the enforcement of contracts, but not so as to virtually or substantially destroy or take away the same. *Woodruff vs. Scruggs*, 26.

2. CANNOT CREATE SEPARATE COUNTY COURTS.—While the legislature may create judicial districts, and define the power and jurisdiction of the courts therein created, yet, it has no power to create, for a single specified county, two separate and distinct county courts, clothed with all the powers and duties appertaining to such tribunals, when the justices of the peace are selected from townships, whose area consists of less than six hundred square miles. *Patterson vs. Temple*, 202.

See *Corporations*, 1; *State Scrip*, 1, 2.

LIENS.

1. WHEN WILL NOT PASS BY ASSIGNMENT.—Liens, not reserved by contract or

declared by a court of equity, will not pass by the mere assignment of a note in the ordinary course of business. *Owen vs Reed, et al.*, 122.

2. EQUITABLE LIENS—*May be shown outside of deed.*—The parting with the legal title, and placing the vendee in possession, when relied upon as a defense by the vendee, in a suit by the vendor to enforce his equitable lien, will not prevent the vendor from showing the fact of sale and non-payment of the purchase money outside of the deed. *Refeld vs. Ferrell*, 534.

See *Agents*; *Landlord's Lien*; *Title Bond*, 2.

LIMITATIONS.

See *Possession*, 1; *Statute of Limitations*.

LIQUOR LICENSE.

1. POWER OF SHERIFF TO COLLECT, ETC.—The acceptance of a license issued by the clerk, and tendered by the sheriff, is optional with the dealer and, in the absence of a provision of law to punish, criminally, the sheriff cannot distrain and sell property for the non-payment of the tax. *Straub & Lohman vs. Gordon, sheriff*, 625.

See *Constitutional Law*, 7; *Construction of Statutes*, 13.

MANDAMUS.

1. WHAT PETITIONER MUST SHOW.—The petitioner seeking mandamus must show a clear legal right to the subject matter of his petition; and the writ will not be issued to admit a person to office while another is in under color of title. *Underwood et al. vs. White*, 382.

2. WHEN WILL NOT LIE.—Where the duty imposed by law upon an officer has, from some cause or other, become impossible to be performed, *mandamus* will not lie. *Ackerman vs. Desha Co.*, 457.

See *Courts*, 1; *Registrars*, 1.

MARRIAGE CONTRACTS.

1. WHEN HUSBAND LIABLE, ETC.—The husband is liable for the debts of his wife, created *dum sola*, and no contract entered into between the parties, in contemplation of marriage, can change the responsibility and obligation of the husband in this respect, so as to effect the rights of parties outside of the marriage agreement. *Harrison vs. Trader and wife*, 288.

MARRIED WOMEN.

1. WHEN MAY SUE ALONE.—Where the action concerns the separate property of a married woman, she may sue alone.—*Chaplin vs. Holmes*, 414.

MORTGAGES.

1. FORECLOSURE OF—*Where estate assigned, what averments, etc.*—In a bill to foreclose a mortgage, where the estate has been assigned, the mere alle-

gation that the defendant is the assignee of the mortgage, is not sufficient; the mortgagor should be made a party, and the assignment should be as fully and distinctly stated as any other averment in the bill. *Buckner vs. Sessions et al.*, 219.

2. SAME—*Who necessary party.*—In a suit for foreclosure of mortgage upon real estate, the occupier of the premises must be made a party, and the omission to do so, without showing some adequate reason therefor, is not only a good ground of demurrer, but a valid objection at the hearing. *Ib.*

3. SAME—*Party wishing to redeem, etc.*—A party holding an outstanding title to mortgaged premises cannot affect the complainant's right to a foreclosure and sale by being made a party defendant and offering to redeem. If he wishes to redeem, he should file a cross bill for that purpose. *Ib.*

4. FORECLOSURE—*Who necessary parties.*—It is error to render a decree for the sale of lands, or foreclosure for the purchase money, without making the heirs at law of the deceased vendee, parties defendant. *Kiernan vs. Blackwell, ad., et al.*, 235.

5. WHERE EQUITY OF REDEMPTION OF SOLD, ETC.—Where the equity of redemption in mortgaged premises is sold under a judgment, or under a junior mortgage, which judgment or mortgage is a lien upon the equity of redemption merely, the legal presumption is, that the purchaser only bids to the value of such equity of redemption, and that the land purchased is, in equity, the primary fund to pay the amount due upon the prior bond and mortgage. *Hanger & Moody vs. The State*, 667.

See *Equity Jurisdiction* 2; *Equity Practice* 4; *Title Bond* 1.

MUNICIPAL CORPORATIONS.

See *Corporations.*

NEW TRIALS.

1. MOTIONS FOR, WHEN NOT NECESSARY.—Where the proceedings excepted to, as erroneous, appear in the records proper of the court, and the errors can be examined into and ascertained by simply reviewing such records, such cases may be brought to this court by writ of error or by appeal without a motion for a new trial. *Worthington et al. vs. Welch, ad.*, 464.

2. SAME—*When necessary.*—Where the errors complained of are, in their nature, extrinsic of the records proper of the court, or where the proceedings objected to appear in the records proper, but the errors cannot be ascertained without considering the proceedings in relation thereto, that are extrinsic of such records, such proceedings or matters must be saved by bill of exceptions. *Ib.*

See *Appeals*, 2; *Practice*, 4, 6.

NON-CLAIM.

See *Probate Court* 1.

OBLIGOR AND OBLIGEE.

See *Contracts*, 1.

OFFICE.

See *Quo warranto* 4; *Pardon*, 1.

OFFICER.

See *Pardon*, 1.

PARDON.

1 WILL NOT RESTORE TO OFFICE.—C. while holding the office of probate and county judge, was convicted in the Circuit Court of a felony; he appealed; during the pendency of the appeal he was pardoned by the Governor. On *quo warranto*, he pleaded his pardon; *Held*: That a judicial officer forfeits his office by conviction of a felony and that no pardon can restore him. *Carson vs. The State*, 469.

PAROL EVIDENCE.

1. WHEN WRITTEN CONRACT NOT VARIED BY ADMISSION OF.—The admission of parol evidence to establish a contemporaneous, collateral, substantive agreement, relating to the same subject matter and forming a part of the consideration of a written contract, does not contravene the general rule that parol evidence will not be received to contradict, vary, or in any manner control the legal import of a written contract. *Weaver & Weaver vs. Fletcher & Hotze*, 510.

See *Mortgage*, 4; *Equity Practice*, 4.

PARTIES TO ACTION.

See *Equity Pleading*, 2; *Equity Practice*, 4; *Mortgage*, 4.

PARTITION.

1. WHEN NOT COGNIZABLE IN EQUITY.—Partition cannot be had in chancery when the lands asked to be divided are held adversely, or the title is in dispute, except in cases where the lands are unoccupied and there is only that possession in law, which is connected with the title to the lands. *Byers et al. vs. Danley*, 77.

PARTNERSHIPS.

See *Probate Court*, 3.

PARTNERS.

1. WHEN MAY SUE EACH OTHER.—A partner may sue a co-partner on an express agreement, and an action of covenant may be maintained by one partner against his co-partner. *Blunts vs. Williams*, 374.

PENAL STATUTES.

See *Statutes Construed*, 1.

PLEADING.

1. PURCHASE WITHOUT NOTICE—*What plea or answer must state, etc.*—In setting up a *bona fide* purchase without notice, the plea or answer must state, briefly, the contents of the deed of purchase; that the vendor was *seized in fee* and in possession; the consideration must be stated with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous *to, and down to the time of paying the money* and the delivery of the deed, and, if notice is specially charged, the denial must be of *all the circumstances referred to* from which notice *can be inferred*, and it must show *how the grantor acquired title. Buck et al vs Martin et al.*, 6.

2. SAME—*Defense of, what plea or answer must show.*—The answer or plea of a party claiming to be an innocent purchaser, must state *first*, the deed of purchase, the date, parties and contents; *second*, that the vendor was seized in fee and in possession, and *third*, a *bona fide* payment of the purchase money and want of notice down to the payment of the purchase money and the execution of the deed. *Tuley et al. vs. Ready et al.*, 98.

3. WHERE STYLE OF COURT OMITTED IN DECLARATION.—The omission to give the style of the court in a declaration, is a formal defect, which may be corrected on motion, in the court below, and where no objection is made there, it cannot be urged in this court. *McLeran vs. Morgan, et al.*, 148.

4. DECLARATION—*When suit by firm, what not necessary.*—In a suit by a firm, where the style of the action is sufficiently stated, the names of all the parties and the firm name of the plaintiffs given, it is not necessary to repeat these in the body of the complaint, if they are sufficiently referred to. *Ib.*

5. EQUITY WILL NOT GRANT RELIEF, WHEN REMEDY AT LAW.—Where a party has a full adequate and complete remedy at law, he cannot seek relief in a court of equity. *Moore et al. vs. Duncan, trustee*, 157

6. PLEA—*Pendency of another suit, etc.*—Plea of the pendency of another suit, in a tribunal having concurrent jurisdiction, must distinctly aver that the same parties and the same subject matter are before it, otherwise the plea is demurrable. *Bourland et al. vs Nixon*, 315.

7. PRACTICE, CHANGED BY CODE.—*Sec.* 48, *Chap.* 28, *Gould's Digest* is repealed by the substitution of the amended *Section* 148 of the Code of Civil Practice, and is applicable to proceedings both at law and in equity. *Nordman vs. Craighead, guardian*, 369.

8. REQUISITES OF.—The pleading must contain the facts constituting the cause of action, or grounds in defense when matter in the answer or reply is relied on; and the pleader should file with, and refer to, in his pleadings, in a

manner sufficiently explicit to identify them, such writings as are relied on, and which may not be, strictly speaking, evidence. *Ib.*

9. SAME.—So much of the deed or writing relied on and referred to as may be necessary to show the character and purpose of such reliance, must be set forth in terms or substance in the pleading. *Ib.*

10. CLOUD UPON TITLE—*In proceedings, affidavit not required.*—In a proceeding to remove cloud or doubt from title, the affidavit required by the statute to be filed before action for the recovery of land, or the possession thereof, is not required. *Chaplin vs. Holmes*, 414.

11. SAME—*What complaint must allege.*—The party must allege, in his complaint, either that he is in possession, or some other fact, which renders it impossible for him to vindicate his title at law. *Ib.*

12. SAME—*Color of title in defendant.*—The complaint should allege, by way of recital, or otherwise, such facts, under which defendant claims, as would give defendant some color of title, or such *prima facie* evidence of title as to require proof of extraneous facts to avoid them. *Ib.*

See Administrators, 2; *Answer*, 1, 2; *Bankruptcy*, 1; *Covenants*, 1; *Criminal Law*, 1; *Ejectment*, 1; *Forcible Entry and Detainer*, 2, 3,4; *Laborer's Lien*, 4; *Married Women*, 1; *Partners*, 1; *Practice*, 5, 11, 17, 18; *Replevin*, 1, 2; *Vendor's Lien*, 2.

POSSESSION.

1. WHAT MUST BE, TO OPERATE IN FAVOR OF HOLDER.—Possession, in order that the statute of limitations may operate in favor of the holder, must be adverse, intentional, actual, continuous and unbroken for the full period prescribed by the statute; if there be an interruption of holding, the term of adverse possession is closed and, upon resumption of possession, a new point is made from which limitations will again begin to run. *Byers et al. vs. Danley*, 77.

See *Purchaser*, 1.

POSSESSORY TITLE.

1. DETERMINED BY WEIGHT OF EVIDENCE.—Where, under the pleadings, possession of land is the matter in issue, and each party claims the benefit of limitation upon a possessory title, the rights of the parties will be determined by the evidence. *Rector et al. vs. DuVal et al.*,318.

PRACTICE.

1. JUDGMENTS IN ATTACHMENT, WHERE INTERPLEA—Under the Act of January 9, 1861, where property attached is interpleaded for, the judgment, when against the defendant in the original suit, should be against him with an order of execution against the property attached, in the event the interplea should be determined in favor of the plaintiff. *Adams et al. vs. Hobbs*, 1.

2. INTERPLEADER.—*Judgment on.*—On trial of the interplea, if the property

be found subject to the attachment, the judgment should be that the plaintiff have execution against the property, and if the same is not delivered to the sheriff by the interpleader, on demand, that execution issue, on the return of the facts in the *scire facias* by the sheriff, against the interpleader and his securities. *Ib.*

3. ADMINISTRATION—*Revocation of Letters, etc.*—On affidavit filed, by a party interested in an estate, that the administrator is *insolvent*, it is error in the Probate Court to revoke the letters of administration, without requiring the administrator to give additional bond, and without any showing that his securities were not ample. *Collier, ad., vs. Kilcrease, ad.*, 10.

4. TRIALS, DE NOVO.—Cases, on appeal, from the Probate to the Circuit Courts, should be tried *de novo*, even though no motion be made for that purpose. *Stark, Stauffer & Co., vs. Van Gilder*, 58.

5. SUITS—*Consolidation of.*—An order of court is necessary before several suits pending, as provided in *Sec.* 132, *Chap.* 133 *of Gould's Digest*, can be regarded or treated as consolidated. *Collier ad., vs. Hunter and Oakes*, 74.

6. TRIALS, DE NOVO.—All cases, on appeal from inferior courts to the Circuit Courts, must be heard *de novo*. *Ib.*

7. WHEN DECREE AFFIRMED WITH DAMAGES.—Where it appears from the record that the appeal is taken for delay, the decree or judgment, of the court below, will be affirmed with damages. *Bass et al. vs. Haney*, 105.

8. WHEN CASE STRICKEN FROM DOCKET.—Where no exceptions are taken, nor any appeal prayed for or granted, either in the court below or by the clerk of this court, the case will be stricken from the docket. *Adams, ex. et al. vs. Hepman*, 156.

9. JUDGMENTS—*What grounds of reversal.*—When the Circuit Court, on appeal, fails to pass upon a point which should have been decided, yet, when the decision, if made, would have been adverse to the appellant and not prejudicial to his rights, such failure cannot be considered as a good ground for reversal. *Tiner ad. vs. Christian, admx.* 306.

10. WHERE NATURE OF ACTION RESEMBLES FORM UNDER OLD SYSTEM.—Where the action in its nature, under the Code of Practice, resembles the *form* of an action under the old system of practice, the law for the introduction of evidence and the giving of instructions to the jury under the old system, will ordinarily be observed. *Howell vs. Graves et al*, 365.

11. WHEN MOTION, NOT DEMURRER, PROPER.—When a deed or writing constitutes no part of the averments of the pleading, a failure to file it cannot be reached by demurrer. *Nordman vs. Craighead, guard.*, 369.

12. EXCEPTIONS, WHEN NOT CONSIDERED.—Exceptions taken to the rulings of the court below, but not incorporated in a motion for a new trial, will not be considered. *Blunts vs. Williams*, 374.

13. PRESUMPTION IN FAVOR OF JUDGMENT.—Where the record, on appeal, is so imperfect as not to show the facts or rulings upon which the finding of the court below was based, and no effort is made by the party aggrieved to perfect it, the presumption will be in favor of the correctness of the judgment. *McStea, Value & Co., vs. Mason, ad.*, 395.

14. WHEN LIMITATIONS PLEADED AFTER DEFAULT.—The rule that a default will not be set aside to permit a defendant to plead the statute of limitations has no application when the default has been irregularly taken, or if, in point of fact, the defendant had no notice of the pendency of the suit. *Carnall vs. Clark*, 500.

15. BURDEN OF PROOF—— *Where limitations pleaded to set-off*—The burden of proof lies on the party who substantially asserts the affirmative of the issue and, on replication of the statute of limitations to a plea of set-off, the defendant will not be permitted to affirmatively show that his cause of action accrued within a time not barred by the statute. *Ib.*

16. WHEN EVIDENCE CONFLICTING.—It is the province of the jury to weigh the evidence and find the facts, and this court will not disturb that finding in doubtful cases, or where the evidence is conflicting. *Simmons vs. Smith* 517.

17. MISJOINDER OF CAUSE OF ACTION, ETC—The court, on motion of defendant, at any time before defense, should strike out any cause or causes of action misjoined. *Lyman et al. vs. Corwin*, 580.

18. SAME.—A party, who has a defense by way of recoupment, will not be permitted to seek affirmative relief by making another person, in interest, a party defendant, by way of subrogation. *Ib.*

See *Actions*, 1; *Administration*, 4; *Answer*, 1, 2; *Attachment*, 1; *Appeals*, 1, 2,5, 6, 7, 9, 10, 11, 12; *Bankruptcy*, 2; *Bills of Exchange*, 1; *Construction of Statutes*, 2, 7, 12; *Counter Claim*, 1, 2; *County Court*, 1; *Courts*, 1, 3, 5; *Equity Jurisdiction*, 1; *Equity Practice*, 2, 3, 5, 6; *Evidence*, 2; *Executions*, 2, 3, 4; *Forcible Entry and Detainer*, 1, 2, 3, 4, 5; *Injunction*, 1; *Instructions*, 1; *Judgments*, 1, 2; *Juries*, 1; *Mandamus*, 1; *New Trials*, 1, 2; *Partners*, 1; *Pleading*, 1, 2, 3, 4, 6, 7, 8, 9; *Quo Warranto*, 1, 2, 3; *Scire Facias*. 1, 2; *Supreme Court*. 1, 2; *Sureties*. 1; *Swamp Lands*, 2; *Vendor's Lien*, 2; *Verdict*, 1.

PRESUMPTIONS.

See *Practice*, 13.

PRIVILEGES.

See *Constitutional Law*, 7.

PROBATE COURT.

1. ACTS OF, DURING REBELLION, VOID—The granting of letters of administration by a Court of Probate of this State, acting under authority of the convention of 1861, or while the State was in rebellion, and all acts and proceedings thereunder, were null and void; and the statute of *non claim* did not commence to run, against the demands of creditors of such estate until the granting of letters by a lawful court. *Vinsant, adm'x. vs. Knox*, 266.

2. AUTHORITY OF.—Adams obtained a decree in chancery for the payment of money, or in default thereof, for the sale of lands. After-

wards, without payment, on supposed equitable grounds, by agreement with the judgment debtor and by consent of the Probate Court, an order was made in the Probate Court directing the administrator to enter satisfaction of the decree on the chancery record, and releasing him, as such administrator from responsibility for the amount of the decree. On application of administrator *de bonis non*, to enforce the decree; *Held:* That the Probate Court had no authority to make such order, and the administrator was accountable for the amount of the decree. *Hughes ad. vs. Pike*, 298.

3. HAVE NO COGNIZANCE OF VENDORS LIEN AND PARTNERSHIP.—Probate Courts have no jurisdiction to enforce a vendor's lien or adjudicate and settle partnership claims. *Tiner ad. vs. Christian, adm'x.*, 306.

See *Administration*, 1, 4; *Appeals*, 1; *Equity Pleading*, 3; *Practice*, 4.

PROHIBITION.

See *Taxes and Tax Titles*, 6.

PROMISE.

See *Bankruptcy*, 3, 4; *Consideration*, 1.

PROMISSORY NOTES.

See *Bills of Exchange, etc.*

PROSECUTING ATTORNEY.

1. CANNOT BRING SUIT IN BEHALF OF THE PEOPLE.—There is no law authorizing a prosecuting attorney to bring suit "in behalf of the people of the State of Arkansas," and a suit so brought should be dismissed for the want of proper parties. *Patterson vs. Temple*, 202.

PURCHASER.

1. IN POSSESSION.—*Cannot deny vendor's title.*—A purchaser, entering into possession under his contract of purchase, cannot, so long as he retains such possession, deny his vendor's title. *Lewis and Wife vs. Boskins and Wife*, 61.

2. CANNOT RETAIN POSSESSION AND AVOID PAYMENT.—The vendee, in possession, under a contract of sale, cannot retain possession and avoid payment of the balance of the purchase money, on the ground that the vendor cannot make as good a title as agreed; before he can avail himself of such defense he must offer to rescind the contract. *Peay, receiver, vs. Capp et al.*, 160.

3. WHEN NOT RELIEVED IN EQUITY.—When the purchase money or notes given for the purchase of land, have not been fully paid off, the purchaser can have no relief, in a court of equity, in seeking a decree for title. *Kiernan vs. Blackwell, ad. et al.*, 235.

See *Pleading*, 1, 2; *Sheriff's Sales*, 1; *Vendor and Vendee*, 2.

QUO WARRANTO.

1. WILL NOT ISSUE ON THE RELATION OF PRIVATE PERSON.—The writ of *quo warranto* will only issue on the relation of the Attorney General, in the name of the State, in cases where the whole community are interested, and will not be granted at the instance of an individual for the determination of a *private right*. *Ramsey vs. Carhart*, 12.

2. STATE NOT REQUIRED TO SHOW DEMAND, ETC.—In a proceeding by quo warranto, at the instance of the State, the State is not bound to show a demand for the office, nor to establish any fact, save such as are tendered by a replication, or put in issue by a rejoinder or other plea. *State vs. McDiarmid*, 176.

3. ISSUE IN—*Between whom.—The issue, in quo warranto*, is not between the parties who may be contending for an office, but between the State and the party holding or in possession. *Ib.*

4. WHAT NECESSARY TO ALLEGE.—Relation admitted that respondent was regularly elected, qualified and commissioned sheriff of Johnson county but avers that afterward, and before the expiration of his term of office, by act of the legislature in creating a new county, and changing the boundary lines of Johnson, respondent's place of residence, which was in Johnson, became, and was included within the territory of the new county, whereby respondent became a non-resident of Johnson, and that, by reason thereof, his office became forfeited. *Held* on demurrer: That the non-residence of itself did not work a forfeiture, and the relation, to be sufficient, should have alleged such acts done by respondent as absolutely worked a forfeiture of office. *State vs. Hixon*, 398.

RAILROADS.

See *Laborer's Lien*, 1.

REBELLION.

1. STATES IN—*Status of inhabitants.*—During the late civil war, the *status* of the inhabitants of the insurrectionary States, outside of the territory therein held by the United States, was that of public enemies of the government. *Rice vs. Shook, et al.*, 137.

See *Confederate Courts*, 1, 2; *Courts*, 2; *Law of Nations*, 1, 2; *Probate Court*, 1.

RECORDER.

See *Constitutional Law*, 1.

REAL ESTATE BANK.

1. STOCK MORTGAGE, NATURE OF, ETC.—The stock mortgages executed to the Real Estate Bank, were made for the double purpose of securing the payment of the State bonds, and money borrowed of the bank by the stockholders. *Hunger & Moody vs. The State*, 667.

See *Construction of Statutes*, 9, 10.

RECOUPMENT.

See *Counter Claim*, 1.

REGISTRARS.

1. DUTIES OF, ETC.—Registrars are required, by the act of July 15, 1868, so soon as their duties are closed, to deposit the original books with the clerks of their respective counties, and on failure to do so, mandamus will lie to compel them. *McDiarmid vs. Fitch, et al.*, 106.

REPLEVIN.

2. WHAT PLEA OF NON-DETINET PUTS IN ISSUE.—In replevin, the plea of *non detinet* puts in issue the plaintiff's title to the property, as well as the wrongful detention by the defendant and, to entitle the plaintiff to recover, he must prove both his title and the detention. *Neis vs. Gillam*, 184.

2. JUDGMENT, WHEN FOR DEFENDANT ON PLEA OF NON-DETINET.—Where the plaintiff fails to prove title and detention of property on trial, the defendant will not be entitled to a judgment for return of property or damages on the plea of *non detinet*, unless he plead with the general issue or give notice of matter which, if properly pleaded by avowry or cognizance, would be a bar to the action. *Ib.*

RESULTING TRUSTS.

1. NATURE OF, ETC.—A resulting trust is a mere creature of equity, founded upon presumptive intention, and designed to carry that intention into effect. *Byers et al. vs. Danley*, 77,

2. WHEN WILL NOT ATTACH, ETC.—It will not attach in the person paying the purchase money, if it was not the intention of either party that the estate should so vest in him. *Ib.*

See *Agents*, 1.

RUNNING ACCOUNT.

1. WHAT CONSTITUTES.—To constitute a running account there must be mutual credits between the parties, or an existing credit on one side, which constitutes a ground of credit on the other, or there must be an express or implied understanding that mutual debts shall be a satisfaction or set-off, *pro tanto*, between the parties. *McNeil vs. Garland & Nash*, 343.

SCHOOLS.

1. SCHOOL HOUSES AND SCHOOLS—*Number of, and separate as to whites and blacks.*—The law does not contemplate but one school house and school to each district only, (wherein it provides that separate schools shall be provided for whites and blacks) but in case there should be both white and colored children in the same district, would require separate schools. *Union county vs. Robertson, trustee*, 116.

See *Taxes*, 1, 2, 3.

SHERIFF'S SALES.

1. TITLE OF PURCHASER.—The purchaser, at a sheriff's sale, cannot acquire any greater interest than the judgment debtor possessed at the rendition of the judgment, and where the title or interest so acquired comes in litigation, it devolves upon the purchaser to show what the title or interest of the execution debtor was. *Tuley et al. vs. Ready et al.*, 98.
2. WHEN, BY ORDER OF COURT.—Under the provisions of the Code, all sales, made by order of a court, should be on credit. *Welch vs. Hicks*, 292.

See *Executions*, 2, 3, 4.

SALES.

See *Conditional Sales*, 1.

SCIRE FACIAS.

1. NATURE OF, WHEN DEMURRABLE.—The writ of scire facias occupies the place of both declaration and writ of summons, and when the facts, set up in the writ, are not sufficient to show a cause of action, a demurrer would be a proper response. *Trapnall and Trapnall vs. Terry and Steele*, 70.
2. WHEN MOTION TO QUASH.—Where there is no record in the court, as a foundation upon which the writ could properly issue, it is such a matter in abatement as might be reached by motion, and a party is not necessarily compelled to resort to a plea of *nul tiel record*. *Ib.*

SET-OFF.

1. DEBTS MUST BE MUTUAL.—To authorize a set-off the debts must be mutual and due to and from the same parties; there is no such mutuality between an individual and firm account. *Collier et al. vs. Dyer*, 478.
2. NATURE OF, NOT EXTENDED OR ENLARGED BY THE CODE.—The language of the Code of Practice, respecting set-off, is declaratory and does not extend or enlarge the nature of the demand that may be used as a set-off; it merely recognizes the law as it existed when the Code was adopted. *Bloom vs. Lehman, Newgass & Co.*, 489.

See *Running Account*, 1; *Counter Claim*, 1, 2; *Damages*, 1.

SHERIFFS.

1. LIABILITY IN LEVYING EXECUTIONS, ETC.—Where an execution, against principal and security, comes to the hands of the sheriff, and through neglect, want of diligence, favor or extension of time, by the sheriff, he fails to make the money out of the principal, or the principal become insolvent, the sheriff becomes responsible to the security for the amount he may be forced to pay. *Hill vs. Sewell*, 15.

See *Collector of Taxes*, 1; *Execution*, 2, 3, 4; *Sureties*, 1.

SHERIFF'S DEEDS.

See *Taxes and Tax Titles*, 4.

STATUTES CONSTRUED.

1. PENAL STATUTES—*Effect of repeal.*—Upon the repeal of a penal statute, no penalty can be enforced, nor punishment inflicted for a violation of the law while in force, unless there be some special provision to that effect. *Woodruff vs. Scruggs*, 26.

See *Construction of Statutes.*

STATE SCRIP.

1. NOT RECEIVABLE IN PAYMENT OF COUNTY OR SCHOOL DISTRICT TAX.—The Legislature cannot make the certificates of State indebtedness and Auditor's warrants receivable in payment of county taxes, or school district taxes. *Wells vs. Cole*, 603.
2. FUNDS RAISED—*How applied.*—Where the Legislature authorizes money to be raised for one purpose, the funds so raised cannot be applied to another and different purpose, but each levy is a separate and distinct tax and must be discharged in *money*, or by a warrant drawn on that particular fund. *Ib.*

SPECIFIC PERFORMANCE.

1. Where lands were conveyed by deed absolute, but the conveyance was intended to secure the payment of a note, and the vendee gave an obligation to re-convey on payment, *Held:* on payment of the note, the reconveyance should be made. *Farris and Dunn, vs King et al.*, 404.

STATUTE OF LIMITATIONS.

1. BURDEN OF PROOF, ETC.—Where a plea of the Statute of Limitation, in bar of the right of action, is traversed, the burden of proof is on the plaintiff to show both a cause of action, and the suing out of process within the period mentioned. *McNeil vs. Garland & Nash*, 343.
2. WHEN RUNS AGAINST PROFESSIONAL SERVICES.—The claim of an attorney, for professional services, is not barred by the statute so long as the debt which he seeks to recover for his client remains unpaid, or until final judgment thereon, unless the relationship sooner ceases by mutual agreement, or is otherwise dissolved. *Ib.*

See *Possession*, 1; *Practice*, 14, 15.

STATUTES—PENAL.

See *Statutes Construed*, 1.

SUITS.

1. CANNOT BE BROUGHT AGAINST THE STATE—Under *Sec.* 45, *Art. V, State Constitution* before suits can be brought against the State, the General Assembly must direct by law in what manner and in what courts suit may be brought. *Turner vs. The State*, 337.

See *Practice*, 5.

SUPREME COURT.

1. JURISDICTION OF, IN MATTERS OF COST.—Where it is decided that an inferior court had no jurisdiction in a cause, this court on appeal, can render no judgment for such costs as have accrued in that court but it is proper to render judgment for the costs made in this court against the party bringing suit. *Hightower et al. vs. Handlin and Venneys*, 26.
2. PRACTICE ON APPEALS.—Exceptions taken to the rulings of the court below, but not made the grounds for the motion for a new trial, will be considered waived and not subject to review in this court. *Mills vs. Jones & Reed*, 506.

SURETIES.

1. WHEN PROTECTED IN EQUITY.—When a sheriff, without the consent of the security, through favor or extension of time to a principal, pays off an execution, in his hands, against principal and security, and procures an assignment of the execution to himself, equity will enjoin him from proceeding against the security for the amount so paid. *Hill vs. Sewell*, 15.

See *Attachment*, 1.

SWAMP AND OVERFLOWED LANDS.

1. STATUTES REGULATING SALE OF, ETC.—Where a party enters swamp lands of the State, at private entry, after the same has been offered for sale at public vendue, in pursuance of the Act for that purpose, and pays for the same the amount fixed by law, he cannot be deprived of that title, which is to be evidenced by a patent, by a subsequent neglect of an officer in not performing an act which the law says shall be done, but which is not necessary to his title. *Harrison and Stewart vs. Lewis, Com'r*, 152.
2. CERTIFICATE OF ENTRY, OF WHAT FORCE AND EFFECT.—The regularity of the issuance of certificates of entry may be inquired into, and the certificate may be held voidable for irregularities or fraud, but they are to be held *prima facie* good and regular, and he, who would seek to deprive the holders of their rights under them, must assume the burthen of proof, and show sufficient facts to warrant a court of law or equity to set the certificate aside. *Ib.*
3. TITLE IN FEE, IN WHOM VESTED.—The fee, in swamp and overflowed lands of the State, remains in the State until the execution of deed by the

Governor, when it passes, and the deed is conclusive evidence, in a court of law, of the title of the holder. *Heeler and Pettus vs. Gist*, 200.

4. C. resided on the lands and had done so more than twenty-five years; he took a contract to levee the lands and performed the work. H. went to the Swamp Land Office and entered the lands; two days after this, C. entered the same lands, as part pay for the levee he had contracted to construct across the lands; a contest was had before the land agent, a patent issued to H. and none to C. *Held*, on bill by C. to enjoin suit in ejectment by H.: That under *Section* 13, *of the Act of January* 6, and *Section* 4, *Act of January* 11, 1851, the equitable title of C. was superior to the prior legal title of H. and a perpetual injunction would be awarded. *Casselberry et al., vs. Fletcher et al.*, 385.

See *Commissioner State Lands*, 1.

TAXES AND TAX TITLES.

1. COMMON SCHOOLS, DISTRICT TAX, AMOUNT, BY WHOM FIXED.—The electors of the district, only, have authority to fix the amount of the school tax, and the only limit upon them is, that they shall not levy a less sum than is sufficient to carry on a school for three months in each scholastic year. *Union Co. vs. Robinson, trustee*, 116.

2. SAME, TRUSTEES, POWERS AND DUTIES OF.—It is the duty of the Trustee to call the meeting and to report certain facts and estimates to the electors and to keep a record of their proceedings, but so far as assessing the amount or the levying of the tax is concerned, he has no voice over any other elector. *Ib.*

3. SAME, WHEN ELECTORS FAIL TO ACT.—When the meeting is not attended by a sufficient number of the electors to hold an election, it is the duty of the trustee to lay his estimates before the County Court for their action, and, upon which, the law requires the County Court to make the levy. *Ib.*

4. TAX TITLES, DEED WHEN VOID FOR WANT OF RECITAL, ETC.—Where the law requires an order of court for the sale of property for the non-payment of taxes, and that the sale be made at a specified time, the omission of the sheriff's deed to recite that the sale was made in pursuance of such order, or at the time required, renders the deed void, and such defect cannot be aided by evidence *aliunde*. *McDermott vs. Scully*, 226.

5. SAME, WHERE RESIDENT'S LANDS SOLD AS NON-RESIDENT.—A resident's lands were assessed to a non-resident; the taxes were not paid; the lands were advertised and sold as non-resident lands. On bill by purchaser to confirm his title, *Held:* That under the law then in force, *Gould's Digest, Chapter* 148, the resident owner had a right to redeem, and approving *Gossett, et al vs. Kent, et al.*, 19 *Ark.*, 602. *Kinsworthy, et al vs. Mitchell and wife*, 21 *Ark.*, 145. *Garibaldi vs. Jenkins et al.*, 453.

6. ILLEGAL TAXES, BY WHAT COURTS AND REMEDIES RELIEVED AGAINST, ETC. On bill by plaintiffs, who sue for themselves and all other tax-payers of Scott county, alleging that certain taxes were *illegally* levied, praying that the collector be enjoined from the collection of the same, the court granted a

restraining order. After appearance of parties, on demurrer, the injunction was made perpetual: *Held*:

1st. That the Circuit Courts of this State, under the present Constitution, though creatures of the Legislature, have the same jurisdiction that they possessed prior to its adoption, and they are clothed with all the powers conferred upon them by the Constitution of 1836.

2d. While the present revenue law provides the manner in which a party aggrieved may apply to have the *appraisement* or the *valuation* of his property corrected, there is no provision to correct an *illegal* or *erroneous levy* by the County Court and, in such case, he must look to the superintending control and appellate jurisdiction of the Circuit Courts over the County Courts, and where no remedy by appeal is provided by the act, he would be entitled to relief by *certiorari* or *prohibition;* and under these writs, the Circuit Court may revise the proceedings of the County Court, and if, from the record, it appears that the County Court has proceeded in a matter outside of, or in excess of its jurisdiction, the proceedings may be stayed or quashed, by *prohibition*, to the extent of the illegality, or quashed as to the whole, on *certiorari*.

3d. Where it is desired to correct an error which exists *de hors* the record, as where the levy, on the face of the proceedings to impose it, is a valid lien on land, and extrinsic evidence is required to show its invalidity, neither the writ of *certiorari* or *prohibition* are of any value, and, in such a case, a court of equity will interfere to prevent a multiplicity of suits, irreparable injury or a cloud upon title to real estate.

4th. Where the error or illegality appears of record, and the tax-payer does not choose to avail himself of his remedy by *certiorari* or *prohibition* to *prevent* the evil, he may have his action of trespass, against the officer, of his property; and replevin will also lie to recover personal property seized or sold, in whosesoever hands it may be. Or, where the proceedings imposing the tax are regular on their face and the tax is paid under protest to avoid sale, the party may have his action to recover the money so paid.

5th. Where the proceedings are void upon their face, they form no cloud upon title and no ground of interference by a court of equity, and if they are not void upon their face, but merely voidable or irregular, a court of equity will not take cognizance of them, unless facts are alleged sufficient to bring the matter within some acknowledged head of equitable jurisdiction. *Floyd vs. Gilbreath et al.*, 675.

See *Collector of Taxes*, 1; *Equity Jurisdiction*, 1; *State Scrip*, 1, 2.

TENANTS IN COMMON.

1. Right of Possession as Respects Each Other.—Where parties *in right of title* are tenants in common, if one have the possession and the other enter by favor of, or under contract from him so in possession, the party so entering cannot, while holding possession thus acquired, dispute the title of

the other, or litigate his own right to possession. *Hershey and wife vs. Clark*, 527.

See *Homestead*, 3.

TITLES.

See *Equity Pleading*, 1; *Lands*, 1; *Pleading*, 10, 11, 12; *Possessory Title*, 1; *Purchaser*, 1; *Vendor and Vendee*, 1, 2.

TITLE BOND.

1. EFFECT OF CONTRACT.—Where land is sold on a credit and bond is given to make title on payment of the purchase money, the effect of the contract is to create a mortgage, the same as though the vendor had conveyed the land by an absolute deed to the purchaser and taken a mortgage back to secure the payment of the purchase money. *Lewis and Wife vs. Boskins*, 61.
2. LIEN OF—*Against whom a charge.*—The lien, created by a title bond, exists as a charge or incumbrance on the land, not only against the purchaser, his heirs and other privies in estate, but against all subsequent purchasers. *Ib.*

TRESPASS.

See *Taxes and Tax Titles*, 6.

TRUSTS AND TRUSTEES.

1. POWERS OF, OVER TRUST ESTATE, ETC.—Persons dealing with a trustee, on the faith of the trust estate, are bound, *at their peril*, to take notice of the scope and extent of the trustee's power, and the trustee cannot bind or incumber, by contract or otherwise, the trust estate, except only so far as the power may be conferred or given by the instrument creating the trust. *Owen vs. Reed et al.*, 122.
2. POWERS OF—*How construed.*—The powers of trustees are strictly construed, and no presumptions are indulged in their favor, and in case of necessity for extended powers, the trustee must act under the direction and orders of a court of competent jurisdiction. *Ib.*
3. PURCHASE OF TRUST PROPERTY BY, WHEN SET ASIDE.—A purchase made by a trustee, of trust property, may be set aside, by the beneficiary, on the ground that the same is a fraud either actual or constructive, but the trustee, as such purchaser, will not be allowed to raise the objection. *Peay, receiver, vs. Capps et al.*, 160.

See *Dower*, 3.

UNLAWFUL DETAINER.

1. CIRCUIT COURTS HAVE JURISDICTION IN.—The provisions of the Code of Practice, respecting jurisdiction in actions of unlawful detainer, are not to be construed as taking from the Circuit Courts jurisdiction in those actions. *Halliburton et al. vs. Sumner*, 460.

2. SAME.—Lands were sold by an administrator by order of the Probate Court, but previous to the time of confirmation and subsequent to the time of sale, the same administrator, with the approbation of the Probate Court, rented the lands to another party. On unlawful detainer brought by the purchaser at the administrator's sale, *Held:* That the purchaser was entitled to the possession from the time of ratification of the sale, and he was not deprived of any of his rights by virtue of the lease. *Ib.*

USURY.

See *Legislature*, 1; *Statutes Construed*, 1.

VENDOR AND VENDEE.

1. WHAT THE TITLE MUST BE.—The title purchased must be apparently perfect—good at law—a vested estate in fee simple—it must be a regular conveyance. *Buck et al. vs. Martin et al.*, 6.
2. EXECUTORY CONTRACT—*Where purchase of better title by vendee, etc.*—A person in possession, under an executory contract, buying in a better title than his vendor's, can derive no advantage from it against the vendor, and the same will inure to the benefit of the vendor, under whom he entered, and all that he can demand is the sum he paid for the better title, with interest. *Lewis and Wife vs Boskins, administrator*, 61.

See *Conditional Sales*, 1; *Ejectment*, 1; *Fraud*, 2; *Liens*, 2; *Pleading*, 1; *Purchaser*, 1, 2; *Specific Performance*, 1; *Vendor's Lien*, 1, 5.

VENDOR'S LIEN.

1. NATURE OF—NOT TRANSFERABLE OR ASSIGNABLE.—It is indispensably necessary to the existence of a vendor's lien that the parties should stand in the relation to each other of *vendor* and *vendee*; it arises out of, and is incident to the purchase, and is founded upon an implied trust between the vendor and purchaser, and the law does not authorize the vendor to transfer this lien with the note taken for the purchase money, even though he expressly professes to do so. *Hecht vs. Spears, administrator*, 229.
2. TO ENFORCE, WHAT PETITION SHOULD ALLEGE.—A petition, to declare a vendor's lien and sale, should allege a conveyance or tender of conveyance before suit brought. *Welch vs. Hicks*, 292.
3. WHEN NOTES GIVEN FOR PURCHASE MONEY, ASSIGNED, ETC.—The vendor's lien is *personal*, and 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. *Jones vs. Doss et al.*, 518.
4. WHEN CREDITOR'S RIGHT POSTPONED TO.—When the creditors of a vendee take a conveyance of lands, encumbered with the vendor's lien, from the vendee, without advancing any new consideration, merely as a security for the debts of the vendee contracted prior to his purchase of the lands from the vendor, they will be postponed to the rights of the vendor. *Johnson vs. Graves*, 557.

5. ENFORCEMENT OF, WHEN TENDER OF DEED IMPOSSIBLE, ETC.—Where the holder of a note, given for the purchase money of real estate, desires to subject the land to its payment, and the right to do so depends upon the making and delivery of a deed to the land, to the vendee, he must tender a deed with his bill, or, if the tender is impossible or impracticable, he must offer to make it, when ascertained by the court to whom it should be made; or, if the disability exists upon the part of the vendor to make the deed, when such disability is removed by the court. *Turner, administrator, vs. Lassiter et al.*, 662.

See *Pleading*, 1; *Probate Court*, 3.

VENUE.

See *Construction of Statutes*, 12.

VERDICT.

1. WHEN SET ASIDE FOR EXCESSIVE DAMAGES.—The verdict of a jury will not be set aside on the ground of excessive damages, unless the evidence clearly show them to be so. *Bright vs. Bostick et al.*, 55.

2. WHEN NOT DISTURBED.—The verdict of a jury, or the finding of facts by the court trying the case, sitting as a jury, will not be disturbed unless the same be without evidence to support it. *Smith & Bro. vs. Van Gilder, administrator*, 592.

WARDS.

1. RIGHTS OF—*As against subsequent bona fide debtors.*—The right of wards, to property purchased with their money, may be sustained against a conveyance in trust to secure *bona fide* debtors, notwithstanding such trustee and *cestui que trust* were ignorant of their existing equity at the time of the conveyance. *Shelton vs. Lewis, et al.*, 190.

See *Guardian and Wards*, 1, 2.

WHARFBOAT.

1. WHEN AGENTS OF, CARRIERS.—Where goods are consigned to the owner and delivered to a wharf-boat, it is not a delivery to the owner, but the wharf-boat holds them as agent for the carrier. *Penny & Co. vs. McLeod*, 561.

2. LIABILITY OF, TO CONSIGNEE.—The owners of a wharf-boat may act as agents of both carrier and consignee and, when they agree with the consignee to receive goods for him, they are liable to such consignee if they fail to comply with such agreement. *Ib.*

WRITS OF ERROR.

See *Construction of statutes*, 2; *New Trials*, 1.

WRITS.

See *Scire facias*, 1, 2.