REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

CONTAINING

CASES DECIDED AT THE MAY AND NOVEMBER TERMS, 1878.

JOHN M. MOORE,
ATTORNEY-AT-LAW.

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OFFICERS

OF THE

SUPREME COURT OF THE STATE OF ARKANSAS.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. E. H. ENGLISH,	– –	CHIEF JUSTICE.
HON. WM. M. HARRISON, *HON. JESSE TURNER, HON. JOHN R. EAKIN,	–	ASSOCIATE JUSTICES.

Attorney General,	–	W. F. HENDERSON.
Clerk,	– – –	LUKE E. BARBER.
Reporter,	– –	J. M. MOORE.

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*Appointed to fill the unexpired term of Hon. DAVID WALKER, resigned.
†Elected on the first Monday in September, 1878.

CHANCELLOR,

HON. DAVID W. CARROLL.

JUDGES OF THE CIRCUIT COURTS:

1st Circuit, - - - -	Hon. J. N. CYPERT.
2d Circuit, - - - - -	Hon. L. L. MACK.
3d Circuit, - - - - -	Hon. R. H. POWELL.
4th Circuit, - - - -	Hon. J. M. PITTMAN.
5th Circuit, - - - -	HON. W. D. JACOWAY.
6th Circuit, - - - -	Hon. J. W. MARTIN.
7th Circuit, - - - - -	Hon. J. M. SMITH.
8th Circuit, - - - -	Hon. H. B. STUART.
9th Circuit, - - - -	Hon. J. K. YOUNG.
10th Circuit,- - - - -	Hon. T. F. SORRELLS.
11th Circuit, - - - -	Hon. X. J. PINDALL.
12th Circuit, - - - -	Hon. J. H. ROGERS.

For proceedings in the Supreme Court on the death of Judges and members of the bar, See the end of the volume.

TABLE OF CASES

REPORTED IN THIS VOLUME.

Abbott v. Rowan 593
Adams, Adm'r., v. Boyd 33
Adair et al. adv. Jacks et al 161
Arrington v. McLemore et al 759
Allen v. Bankston, Collector 740
American Land Co. v. Grady et al 550
Anderson et al. v. Levy, Adm'r 665
Anderson adv. Jackman 414
Andrews, Adm'x., v Simms, Adm'r 771
Apperson & Co. v. Burgett, et al 328

Badgett adv. Mitchell et al 387
Bankston, Collector, adv. Allen 740
Barker and wife adv. L. R. & F. S. R. R. Co 350
Barton adv. City of Little Rock 436
Beard et al. adv. Eagle et al 497
Beavers v. Baucum 722
Beecher v. Brookfield 259
Belding et al. adv. James et al 536
Bennett adv. Gates et al 475
Benton County v. Rutherford 640
Bennett v. Hutson et al 762
Berlin v. Cantrell 611

Blackburn v. Randolph 119
Bowles, Adm'r., v. Eddy & Wilbur 645
Boyd adv. Adams, Adm'r 33
Boyd adv. Ryan & Co 778
Brady v. Hamlett 105
Brewer adv. The State 176
Brewster v. Clamfit 72
Brodie et al. v. Watkins and wife 545
Brodie et al. v. McCabe, Collector 690
Brookfield adv. Beecher 259
Burgett et al. adv. Apperson & Co 328

Campbell & Strong v. Savage et al 678
Cantrell adv. Berlin 611
Cannon v. Davies 56
Carroll adv. Garribaldi 568
Carder adv. Smith 709
Cavaness v. Ross 572
Chamblee v. Stokes 543
Chancellor v. The State 815
Chrisman v. Carney 316
City of Little Rock v. Barton et al 436
Clamfit adv. Brewster 72
Clark et al. adv. Wentworth et al 432
Clary et al. v. The State 561
Cochran et al. adv. Livingston, Adm'r 294
Collins et al. v. Underwood 265
Connelly et al. v. Weatherford, Adm'r 658
Cooper adv. Rogers 406
Coolidge, etc., adv. Hill, Fontaine & Co 621
Cravens adv. Stirman 376

Davies adv. Cannon 56
De Bardlekin, Adm'r., adv. Worthington, Adm'r 651
Desha County v. Newman 788

Dickson adv. Gibbs..... 107
Dodd v. The State..... 517
Dodge adv. Schearff et al..... 340
Dodson et al v. Mayor, etc., of Fort Smith..... 508
Dowdle, Gibson & Co. adv. McGill..... 311
Doxey adv. Ferguson, et al..... 663
Duval adv. Tripp & Sons..... 811

Eagle et al. v. Beard et al..... 497
Eddy & Wilbur adv. Bowles, Adm'r..... 645
Ellsworth v. Hale..... 633
Enyart et al. adv. Massie et al..... 688

Farris v. The State use, etc..... 70
Ferguson v. Peden..... 150
Ferguson et al. v. Doxey..... 663
Finnegan adv. Wallworth..... 751
Fry, Collector, adv. Hodgkin..... 716
Fry, Collector, v. Reynolds..... 450
Fry v. Martin, et al..... 203

Gaines et al. adv. Hunt..... 267
Gates et al. v. Bennett..... 475
Garibaldi v. Carroll..... 568
Garth adv. Smithee..... 17
Gartrell adv. Reinhart, Adm'r..... 727
Geisreiter et al. v. Sevier..... 522
Gibbs v. Dickson..... 107
Gill adv. The State..... 129
Gist, Ex., v. Hanley..... 233
Godden, Adm'r., adv. Johnson..... 600
Grady et al. adv. American Land Co..... 550
Gregg v. Gregg..... 89

Hale, Adm'r., adv. Ellsworth 633
Hamlett adv., Brady 105
Hamlett and Wife, adv. Richardson et al. 237
Hanley adv. Gistex 233
Harrison v. Lamar 824
Hendry adv. Mays 240
Hendry v. Willis 833
Hill, Fontaine & Co. v. Coolidge, etc 621
Hobbs adv. Osier 215
Hoback v. Hoback et al. 399
Hodgkin v. Fry, Collector 716
Holland v. The State 560
Holland, Adm'r., v. Rogers 251
Honnett v. Honnett 156
Horner v. O'Shields 117
Hunt v. Gaines et al. 267
Humphries et al. v. The State 713
Hutson et al. adv. Bennett 762
Howard adv. Summers and Wife 490

Jacks et al. v. Moore 31
Jacks adv. Myrick 425
Jacks et al. v. Adair et al. 161
Jackman v. Anderson 414
Jackoway, Judge, etc., adv. Russell et al. 191
James et al. v. Belding et al. 536
James adv. Rodgers 77
Jeffry et al. adv. The State 136
Johnson, v. Godden, Adm'r 600
Johnson adv. The State 174
Johnson adv. Watson 737
Jowers v. Phelps, Adm'r 465

King et al. adv. Young, Trustee, etc 745

Lambeth v. Ponder 707
Lamar adv. Harrison 824
Lanier adv. Mathews 91
Levy, Adm'r., adv. Anderson et al 665
L. R. & F. S. R. R. Co. v. Payne 816
L. R. & F. S. R. R. Co. v. Barker and Wife 350
Livingston, Adm'r., v. Cochran et al 294

Mathews v. Lanier 91
Martin, et al. adv. Fry 203
Martin adv. Phipps 207
Massie et al. v. Enyart et al 688
Mays v. Hendry 240
Mayor, etc., of Fort Smith adv. Dodson et al 508
McCabe, ex-parte 396
McCabe adv., Brodie et al 690
McGill v. Dowdle, Gibson & Co 311
McCracken v. Moody 81
McCrary, Adm'r., adv. Williams et al 470
McCustian v. Ramey 141
McDonald et al. adv. Woodruff 97
McLaughlin et al. adv. Waggoner et al 195
McLemore et al. adv. Arrington 759
Merrell adv. Portis 416
Mitchell adv. Young et al 222
Mitchell et al v. Badgett 387
Moore adv. Jacks et al 31
Moser adv. The State 140
Moody adv. McCracken 81
Myrick v. Jacks 425
Meyer & Co. v. Smith 627

Neal v. Spiegle, Adm'r 63
Necklace v. West 682
Nelson adv. Vernon 748

Newman adv. Desha County 788
Newton et al. adv. The State 276

O'Shields adv. Horner 117
Osier v. Hobbs 215

Payne adv. L. B. & F. S. R. R. Co 816
Peden adv. Ferguson 150
Phelps, Adm'r., adv. Jowers 465
Phipps v. Martin 207
Ponder adv. Lambeth 707
Portis v. Merrill 416
Portis & Bro. v. Talbot & Packard 218

Ramey adv. McCustian 141
Randolph adv. Blackburn 119
Reinhart, Adm'r., v. Gartrell 727
Reynolds adv. Fry, Collector 450
Richardson & May v. Hamlet and wife 237
Robinson v. The State 180
Robinson v. Woodson et al 307
Rogers v. Cooper 406
Rogers v. James 77
Rodgers adv. Holland, Adm'r 251
Ross adv. Cavaness 572
Rowan adv. Abbott 593
Russell et al. v. Jackoway, Judge, etc 191
Rutherford adv. Benton County 640
Ryan v. Boyd 778

Savage et al. adv. Campbell & Strong 678
Schearff v. Dodge 340
Sevier adv. Giesriter et al 522
Shackleford v. The State 539
Shinn v. Tucker 421

Simmons et al. adv. Varner et al. *212*
Simms, Adm'r., adv. Andrews, Adm'x. *771*
Smith adv. Meyer & Co. *627*
Smith v. Carder. *709*
Smithee, etc., v. Garth. *17*
Speigle, Adm'r., adv. Neal. *63*
State adv. Brewer. *176*
State adv. Clary et al. *561*
State adv. Chancellor. *815*
State adv. Dodd. *517*
State use, etc., v. Farris. *70*
State v. Gill. *129*
State adv. Holland. *560*
State adv. Humphries et al. *713*
State v. Jeffrey et al. *136*
State v. Johnson. *174*
State v. Moser. *140*
State v. Newton et al. *276*
State adv. Robinson. *180*
State use v. Spikes, Sheriff. *801*
State adv. Ware. *567*
State adv. Wilson. *557*
Stirman v. Cravens. *376*
Stokes adv. Chamblee. *543*
Summers and Wife adv. Howard. *490*

Talbot & Packard adv. Portis & Bro. *218*
Town of Jacksonport v. Watson. *704*
Trippe & Son v. Duval et al. *811*
Tucker adv. Shinn. *421*
Turner v. Vaughn. *454*

Underwood adv. Collins et al. *265*

Valentine v. Washington et al..... 795
Varner et al. v. Simmons et al..... 212
Vaughan adv. Turner..... 454
Vernon v. Nelson et al..... 748

Waggoner et al. v. McLaughlin et al..... 195
Walworth v. Finnegan..... 751
Ward v. Worthington..... 830
Ware v. The State..... 567
Washington adv. Valentine..... 795
Watson v. Johnson..... 737
Watson adv. Town of Jacksonport..... 704
Watkins and Wife adv. Brodie et al..... 545
Weatherly, Adm'r., v. Connelly and Wife et al..... 658
West adv. Necklace 682
West and Wife v. Waddell et al..... 575
Wentworth et al. v. Clark et al..... 432
Willis adv. Hendry..... 833
Wilson v. The State..... 557
Williamson et al. v. McCreavy, Adm'r..... 470
Woodruff v. McDonald..... 97
Woodson et al. adv. Robinson..... 307
Worthington, Adm'r., v. De Bardlekin, Adm'r..... 651

Young et al. v. Mitchell..... 222
Young, Trustee, etc., v. King et al..... 745

CASES DECIDED DURING THE TIME OF THIS VOLUME AND NOT REPORTED.

Carrigan, Judge., et al. v. Myar.
Matthews v. Edington et al.
M. & St. L. R. R. Co. v. Aften, Collector.
Parker & Worthen v. City of Little Rock.
Shacleford v. The State.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF ARKANSAS,

IN CONTINUATION OF

MAY TERM, 1878.

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33 17
61 232

33 17
75 124

33 17
86 529

33 17
90 176

SMITHEE, LAND COMMISSIONER, VS. GARTH.

1. *Presumptions in favor of legislative action.*

Every reasonable presumption is to be made in favor of the action of the legislative body; it will not be presumed in any case from the mere silence of the journals, that either house has exceeded its authority or disregarded a Constitutional requirement in the passage of legislative acts—unless the Constitution has expressly required the journals to show the action taken.

2. PASSAGE OF BILLS: *Constitutional requirements.*

The Constitution of 1868 contained the following provision, "on the final passage of all bills the vote shall be taken by *yeas* and *nays*, and entered on the journal." Upon the passage of a bill in the House, the journal showed the number of votes in the affirmative and the number in the negative, and the names of those voti g in the affirmative, but there was no entry of the names of the members who voted in the negative. Held, that the failure to enter the names of those voting in the negative, was a disregard of the constitutional requirement, and the bill did not become a law.

APPEAL from *Pulaski* Circuit Court.

Hon. J. W. MARTIN, Circuit Judge.

Henderson, Attorney General, for appellant.

J. M. Moore, contra.

JESSE TURNER, J.:

At the October Term, 1877, of the Pulaski Circuit Court, Henry E. Garth filed his petition stating, that on the 10th day

of October, 1877, he applied to J. N. Smithee, as Commissioner of State Lands, to enter certain vacant and unentered swamp and overflowed lands, granted by Congress to the State of Arkansas, under an act of Congress approved 28th of September, 1850, entitled, "An Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and since confirmed to said State, and by said Commissioner offered at public sale in the manner and upon the notice required by law; and thereupon tendered and offered to pay said Commissioner for said land, the sum of two dollars per acre, the price fixed by law, in a certain warrant issued by the Auditor of the State the 28th of August, 1871, under the provisions of section seven of an act of the General Assembly, approved the 23d of March, 1871, entitled, "An Act to amend an act entitled 'An Act providing for the building and repairing of the public levees of this State,'" commonly denominated "Arkansas State Levee Bonds," of which petitioner was at the time, and still is the owner and holder. That the bond tendered, No. 2,828, was filed and made a part of the record in the cause, and a copy of petitioner's application was also filed, marked "A." That the said Commissioner, contrary to law and his official duty, refused to receive said warrant and rejected his application on the ground, as the Commissioner alleged, that he was not authorized by law to receive the warrants issued under the provisions of said act in payment for swamp lands of the State, with prayer that a writ of mandamus issue, directed to defendant, commanding him as such Commissioner to permit petitioner to enter the land mentioned in his petition, upon payment of the price fixed by law, in said warrant.

The defendant, J. N. Smithee, answered, alleging that the said bonds, issued under the act of March 23d, 1871, were issued in violation of sec. 6, art. x., of the Constitution of 1868,

the same being a loan of the credit of the State, without the consent of the people through the ballot box.

That he cannot by law receive the said warrants in payment of swamp and overflowed lands, because the Constitutional Convention of 1874, by ordinance duly passed on the 14th day of August, 1874 (a copy of which was filed and made part thereof), expressly forbids respondent as Commissioner of State Lands, to receive said warrants in payment for State lands, whether swamp and overflowed or otherwise, and that by an act of the Legislature, entitled an act approved December 14th, 1874, the respondent was further forbidden to receive said warrants in payment for the swamp and overflowed lands of the State.

That by an act of the Legislature, approved April 23d, 1873, it is provided, that in every instance the interest accruing on said levee warrants under the act of March 23d, 1871, shall be levied and collected from the owners of land who are benefitted by the making and repairing of levees, or any ditches or drains, and not in the first instance chargeable on the State.

Respondent denies that the act of March 23d, 1871, was ever complied with by the citizens residing in the swamp and overflowed districts of the State, by presenting their petitions to the Boards of Supervisors of the respective counties, etc., and denies that the application prescribed in sec. 4033 of Gantt's Digest, was ever by the Boards of Supervisors forwarded to the Commissioner of Public Works and Internal Improvements, with the certificate of the County Clerk, etc.

And he denies that the Commissioner of Public Works ever caused to be made accurate plans, surveys and estimates of the work required to determine the practical benefit and utility to the State or individuals.

Denies that the Commissioner of Public Works contracted with the lowest responsible bidder for the construction of all public works contemplated by the act of March 23d, 1871.

And denies that the Commissioner of Public Works ever furnished the Auditor of this State with the certificate, that the contractors had complied with their contracts and completed the same as prescribed by the said act.

That all of the lands improved and redeemed under the said acts were private property, and no property of the State was improved or benefitted thereby.

Whereupon the petitioner moved the court, upon the petition and answer, to award him a peremptory writ of mandamus against the defendant, as prayed for.

And by consent it was ordered that the plaintiff have leave to file a copy of the Levee Bond or warrant tendered as alleged in his petition, in lieu of the original, and that the same be taken as a part of the record in this cause.

The following is a copy of the Levee Bond or warrant, exhibited with the petition:

"Number 2,828. "UNITED STATES OF AMERICA,
"STATE OF ARKANSAS.

"Seven per cent. Levee Bonds:

"It is hereby certified that the State of Arkansas is indebted to J. W. Stansell, or the bearer hereof, for levee work done for said State, in the sum of Five Hundred Dollars ($500), payable thirty years from and after March 23d, 1871, in lawful money of the United States, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July of each year, in the City of New York, on the presentation and surrender of the proper coupon hereto annexed, until the payment of said principal sum.

"Issued by authority of an act of the General Assembly of the State of Arkansas, approved March 23d, 1871, entitled an act providing for the building and repairing of the Public Levees of the State.

In testimony whereof, I have hereunto set my hand and

affixed the seal of my office, at the City of Little Rock, Arkansas, on the 28th day of August, A. D. 1871.

[L. S.] "J. R. BERRY, Auditor.

"HENRY PAGE, Treasurer."

On the 26th day of November, 1877, the following entry appears of record:

Come the parties by their respective attorneys and this cause having been argued and submitted at a former day of this term, and the court being now well and truly advised in the premises, doth order that a writ of mandamus issue out of this court directed to J. N. Smithee, as Commissioner of State Lands, commanding him as such Commissioner to grant the application of the petitioner, Henry E. Garth, to purchase at private entry the swamp land described in his petition, to-wit: The south half of the north half and the south half of the southwest quarter ot section 36, township 18 south, range 22 west, upon payment of the price fixed by law, to-wit: Two dollars per acre, in Arkansas Levee Bond, numbered 2,828, of the denomination of five hundred dollars, tendered by the petitioner in payment for said land, and filed as part of the record in this cause, it appearing by consent of parties that the petitioner tendered the entire bond in payment for said land.

The respondent excepted to the ruling of the court and filed his motion for a new trial, assigning the following causes therefor:

First—The court erred in holding the Levee Bond tendered in this suit to have been legally issued.

Second—The court erred in awarding the writ on the pleadings in this cause.

Third—The pleadings on the part of the defendant show a total want of power in the Auditor to issue the bond tendered,

and under the issues joined, the defendant's answer must be taken as true.

Fourth—The Legislature has no constitutional power to authorize the issuance of the bond tendered, secs. 6, 9 and 10, art. x., of the Constitution of 1868, being a limitation on such powers.

Fifth—The act under which the bond in this case was issued was unconstitutional, in this, that the effect of such act was to loan the credit of the State to individuals in reclaiming their lands, when the consent of the people had not been obtained through the ballot box.

Which motion was overruled by the court, to the overruling of which motion the defendant excepted and took an appeal to this court.

Passing over the question of the constitutionality of the act of March 23d, 1871, which, under the circumstances of the case, we do not feel called upon to decide, we observe that if the act was constitutionally passed, the issuance of the warrant numbered 2,828, constituted a contract between the State and the party to whom it was issued, which neither the Constitutional Convention of 1874, nor the Legislature of 1875 could impair, or in any wise invalidate, because within the prohibition of the latter clause of sec. 10, art. i., of the Constitution of the United States.

But looking into the history of the passage of the act, we have come to the conclusion that the act was never constitutionally passed.

The Constitution of 1868, sec. 16, art. v., provides, that "Each house (of the General Assembly) shall keep a journal of its proceedings and publish the same, the yeas and nays of the members of either house, upon any question, shall be entered upon the journal at the request of five members," etc.

Sec. 21, art. v., provides, that "Every bill and joint resolution shall be read three times on different days in each house before final passage thereof, unless two-thirds of the house where the same is pending should dispense with the rules. No bill or joint resolution shall become a law without the concurrence of a majority of all the members voting. On the *final passage* of all bills the vote shall be taken by *yeas* and *nays* and entered on the journal."

Referring to the journal of the House of Representatives for January 21st, 1871, at page 161, we find the following entry in relation to the act of 23d March, 1871.

"Mr. Waters in accordance with previous notice introduced a bill (H. R. 50) entitled "An Act to amend an act entitled an act providing for the building and repairing of the public levees of this State, and for other purposes,' which was read a first time, and on motion of Mr. Waters, by unanimous consent, the rules were suspended, and the bill was read a second time, and on motion of Mr. Waters was referred to the Committee on Internal Improvements.

The bill was amended and modified in several particulars and referred to the Committee on the Judiciary.

We find the following entry in the House journal of March 13th, 1871, at page 698:

Mr. Preddy, from the Committee on the Judiciary, to whom was referred the bill of the House (H. R. 50) entitled "An act to amend an act entitled an act providing for the building and repairing of the public levees of this State, and for other purposes," reported the same, and submitted the following report thereon, recommending a substitute therefor.

Here follows the report of the Committee on the Judiciary offering a substitute for the original bill embracing certain amendments previously offered to the bill.

On motion of Mr. Prigmore, the report of the Committee was adopted.

We find the further entry in House journal of the 16th of March, 1871, on pages 756 and 757.

The House proceeded to consider the substitute for the bill of the House, (sub. H. R. 50) entitled "An act to amend an act entitled an act providing for the building and repairing of the public levees of this State, and for other purposes."

On motion of Mr. Waters, the bill was further amended by inserting in Section 14, after the word "all" in line one hundred and forty-five, the word "other."

On motion of Mr. Waters; The rules were by unanimous consent suspended, and:

The bill was read a third time by title, and:

On motion of Mr. Tygart; Ordered, that the bill be placed upon its final passage.

The question being put, shall the bill pass?

It was decided in the affirmative; yeas 47, nays 24; not voting 11.

Those who voted in the affirmative are:—Messrs. Alexander, Sr., Barbour, Barron, Cate, Chamberlain, Clayton, Cohn, Espy, Fricks, Fulton, Garner, Goad, Grady, Haskins, Haddock, Hale, Ham, Harris, J. W., Harris, W. G., Harvey, Hargledine, Hallibaugh, Janes, Jenkins, Johnson, Joslyn, Mayo, Minor, Morgan, Neal, Orr, Parker, Peck, Preddy, Prigmore, Robinson, Sumpter, Thompson, Waters, Webb, Whittemore, Wiley, Wood, Young and the Speaker.

So the bill was passed.

This is the entire voting on the House journal touching the passage of the bill. The nays are not entered on the journal.

When the bill reached the Senate, we find the following entry on the Senate journal of March 16th, 1871, page 232.

MR. PRESIDENT:

I am directed by the House of Representatives to inform your honorable body of the passage by the House, of House Bill, No. 50. "An act to provide for building and repairing of levees of this State, and for other purposes."

J. R. RICHARDS, Clerk.

And the following further entries appear on the Senate journal of March 17th, 1871, page 296:

House Bill No. 50; "An act for the building and repairing of levees in the State of Arkansas."

Read once by title, and:

Under suspension of the rules read a second time, and referred to the Committee on Internal Improvements.

These are the only entries on the Senate journal which deserve special notice. It will be observed that when the bill was taken up in the Senate, it was read once by title, and immediately thereafter read a second time under suspension of the rules. There is no showing on the journals that the rules were dispensed with for the first reading of the bill; on the contrary, we think it appears affirmatively that the rules were not suspended.

The journal to be kept by the two houses of the General Assembly, ought to be a complete and perfect record of its proceedings, and if it appears affirmatively on the journal that in the passage of any bill, some mandatory provision of the Constitution has not been complied with, it will be fatal to the validity of the statute.

Judge Cooley, speaking of the journal to be kept by each House of the General Assembly, says: "If it should appear from these journals, that any act did not receive the requisite majority, or that in respect to it the Legislature did not follow any requirement of the Constitution, or that in any other respect the act was not Constitutionally adopted, the Courts may act upon this evidence, and adjudge the statute void.

But whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of the Legislative body; it will not be presumed in any case from the mere silence of the journals, that either House has exceeded its authority, or disregarded a Constitutional requirement in the passage of Legislative acts, unless where the Constitution has expressly required the journals to show the action taken; as for instance when it requires the *yeas* and *nays* to be entered." Cooley's Con. Lim. 135 and 136.

Judge Story, in speaking of the provision in the Constitution of the United States on the same subject, says: "The object of the whole clause is to insure publicity to the proceedings of the Legislature, and a correspondent responsibility of the members to their respective constituents. And is founded in sound policy and a deep political foresight. Intrigue and cabal are thus deprived of some of their main resources by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism and integrity and wisdom, obtain their due reward, and votes are ascertained, not by vague conjecture, but by positive facts." Story on the Con., page 590 and 591.

Mr. Webster, in his speech delivered in the Senate of the United States, on the 16th of January, 1837, by way of protest against expunging the resolutions of the 28th of March, 1834, speaking of this same provision of the Constitution of the United States, said: "The Constitution moreover provides that the *yeas* and *nays* on any question shall, at the request of one-fifth of the members present, be entered on the journal. This provision most manifestly gives a personal right to those members who may demand it, to the entry and preservation of their votes on the record of the proeeedings of

their body, not for one day or one year only, but for all time. There the *yeas* and *nays* are to stand forever as permanent and lasting proof of the manner in which members have voted on great and important questions before them." Webster's Works, 4 vol., page 295.

Professor Walker, in his treatise on American Law, says: "When the *yeas* and *nays* are not called for, members may shun responsibility either by not voting at all, or by having their voices drowned in the mass; and even if their votes be known at the time, it is not recorded for future reference, but when the *yeas* and *nays* are called and entered upon the journal, every member must vote, unless excused, and that vote may be scrutinized at any future period, so that there may be no way of escaping responsibility." Walker's Am. Law, page 85.

In the case of the *Board of Supervisors of Schuyler County, Appellant*, v. *The People, ex re, The Rock Island and Alton Railroad Co., Appellees*, the passage of an act of the Legislature of Illinois, was called in question, because of an alleged non-compliance on the part of the Legislature with a provision of her Constitution similar to that in ours.

Chief Justice Caton, who delivered the opinion of the Court, said: "The Constitution does require that every bill shall be read three times in each branch of the General Assembly before it shall be passed into a law, but the Constitution does not say that these several readings shall be entered on the journals; some acts in the passage of laws are required by the Constitution to be entered on the journals in order to make them valid, and among them are the entries of the *yeas* and *nays* on the final passage of every bill, and we held in the case of *Spangler* v. *Jacoby*, 14 Ill., 297, that where the journal did not show this, the act never became a law."

And in the case of *Walker* v. *Griffith*, decided by the Supreme Court of Alabama, at the December term, 1877, in which the validity of an act of the Legislature of Alabama was called in question, Judge Manning who delivered the opinion of the Court, said: "When the Constitution requires that a particular thing shall be necessary to the validity of an act of Legislation, and that the journal must show that this thing was done; as for instance the passage of a bill by *yeas* and *nays*, which shall be entered on the journals, unless they do show it, the act cannot be accepted as Constitutionally adopted. The thing thus required is an additional means outside of the enrolled act, but in concurrence with the signatures of the Speaker of the House of Representatives, and President of the Senate, authenticating its passage through the two Houses, and renders the forgery of such an act more difficult, and as the passage of it by *yeas* and *nays* cannot, according to the Constitution be shown otherwise than by the journals, they must in respect to it, 'import absolute verity.'" * * * *

The principal objects in requiring the journals to be kept, probably were:

First—That the members might be thereby informed from day to day of the progress and state of the business before them; and

Secondly—That constituencies might afterwards see how their representatives had performed their duties in the public councils. See Law Reporter of June 12th, 1878, page 711.

Recurring to House journal at pages 756 and 757, and comparing the action of the Legislature with Section 21, Article v. of the Constitution, requiring that "on the final passage of all bills, the vote shall be taken by the *yeas* and *nays* and entered on the journal," we find that this important and, as we regard it, imperative requirement of the

Constitution was not complied with. The *yeas* were entered on the journal, but the *nays* were not entered at all.

True, it is stated in the journal, that on the final passage of the bill, the vote stood affirmatives 47; nays 24; and 11 not voting.

If it be said that the affirmative vote shows that a majority of those voting were for the bill, we remark that this may be so, but when we reflect that the negative vote was not recorded at all, and that an examination of the journal shows that in all other cases where votes were taken on the bill, or amendments thereto in its passage through the two Houses of the General Assembly, the *yeas* and *nays*, if taken at all, were taken in full and entered upon the journals, it is well calculated to throw suspicion on the whole proceeding attending the sup-supposed passage of this bill. But whatever may have been the circumstances attending the supposed passage of the bill, it becomes our duty to hold the Legislative department to a strict compliance with a mandatory provision of the Constitution, which in every case on the final passage of a bill, requires that the vote be taken by *yeas* and *nays*, and entered upon the journal.

Manifestly the object of recording the *yeas* and *nays* is not to show that a quorum of the members of the House is present, or that a majority votes for the bill. The journal may show that there was a call of the House before the final vote on the passage of a bill was taken, and that a quorum was present, and indeed all the members present, and the journal may also state that a majority voted for the bill; yet if the *yeas* and *nays* be not entered on the journal, the requirement of the Constitution is not compled with, and the bill does not become a law.

The Constitution says the *yeas and nays* shall be entered on the journal; and we have no right to say that this need not to be done, or that half compliance is sufficient.

It is not sufficient to enter the *yeas* and omit the *nays*, nor to enter the *nays* and omit the *yeas*, and in all cases the *names* of those voting in the affirmative and negative must necessarily be entered on the journal.

Turning to the proceedings of the House of Representatives on pages 756 and 757, of the House journal, we find that in the supposed passage of the bill under consideration, a positive requirement of the Constitution was disregarded; without the observance of which, no valid law can be passed.

The right to decide upon the constitutionality of an act of the Legislature, is a matter of grave importance, and should only be resorted to in cases of a clear violation of the Constitution. In cases of doubt the presumption is in favor of the validity of the law, and this out of deference to a co-ordinate department of the government.

But in the case under consideration our deliberate opinion is, that in the passage of the supposed act of the Legislature it does clearly appear, that an essential and imperative requirement of the Constitution was disregarded and we do, therefore, in full view of the great responsibilities resting upon us, and of the far reaching consequences of the decision we make, pronounce the act of the 21st March, 1871, null and void, and as a consequence that the Auditor's warrant numbered 2,828, mentioned in the petition and issued under the provisions of said act, is also null and void, and created no binding obligation on the State, and as a further consequence that the Commissioner of State Lands was not bound to receive it in payment for the lands mentioned in the petition.

The judgment of the Court below is reversed.

JACKS ET AL. VS. MOORE.

33 31
55 285
55 457

33 31
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672 377

1. VENUE *in trespass on real property.*
   An action for an injury to real property must be brought in the county in which the property is situated.
2. JURISDICTION: *Consent can not give.*
   No consent of parties, express or implied, can give jurisdiction to a court to try a cause.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Palmer, for appellants.
Tappan & Horner, *contra.*

TURNER, J.:

This is an action of trespass, tried in the Circuit Court of Phillips County at the May Term, 1877.

The complaint alleges that on or about the 6th day of May, 1876, Jacks, the defendant in the court below, entered upon the following described tract of land belonging to Moore, the plaintiff, while he was in the possession thereof, to-wit: The southwest quarter of sestion 18, township 1 north, range 4 east, situate in the County of Lee, in the State of Arkansas, and cut the timber growing thereon, and otherwise injured the same; to the damage of the plaintiff $200,

The defendant filed an answer to the complaint, and the cause was submitted to a jury, who, after hearing the evidence, returned into court a verdict in favor of the plaintiff for $200 damages, for which amount judgment was accordingly rendered.

Whereupon the defendants filed their motion for a new trial, which motion was overruled, to which they excepted and took an appeal this court.

We deem it unnecessary to go into the merits of this cause, whatever they may be, for the reason that in our opinion the

Circuit Court of Phillips County had no jurisdiction over the cause of action disclosed in the complaint.

The pleadings show affirmatively that the trespass was committed on real estate situate in Lee County, while the action was instituted in the Circuit Court of Phillips County and prosecuted in that county to its final termination.

The action ought to have been brought in Lee County, where the land is situated.

By an express provision of the Code an action for an injury to real estate must be brought in the county where the land is situated and where the trespass was committed. See Gantt's Digest, sec. 4532.

The language of the Code is unequivocal. The injury and the action is local, and was so at Common Law, and the Code simply follows the common law.

Newman, in his Pleadings and Practice, under the Civil Code of Kentucky, in commenting on provisions of that Code, precisely similar to provisions of our Code, which were in fact copied from the Kentucky Code, says: At Common Law, when the action could only have arisen in a *particular* county, it was local; such as real and mixed actions, actions of ejectment, trespass, *quare clausum fregit*, replevin, etc. * * * * *

In accordance with this Common Law rule, the Code has declared that actions for the following causes must be brought in the county in which the subject of the action, or some part thereof is situated:

First—For the recovery of real property, or of an estate or interest therein.

Second—The partition of real property.

Third—For the sale of real property under a mortgage, lien or other incumbrance or charge.

Fourth—For an injury to real property.

See Newman's Pl. and Prac., 17.

The record does not show any exception taken or question raised in the court below touching the jurisdiction of the Phillips Circuit Court; but then no consent of parties express or implied could give the court jurisdiction, or authority to try the cause.

We being therefore clearly of opinion that the Circuit Court of Phillips County had no jurisdiction over the subject of the action, do reverse the judgment of said court and remand the cause to said court with instructions to dismiss it for want of jurisdiction.

ADAMS, ADM'R OF GEORGE, VS. BOYD.

1. CONTRACT—BILL OF EXCHANGE.

A contracted with B to do certain work and receive in full consideration therefo an order on C who owed B. After the completion of the work this order, the body of which was as follows: "Please pay to * * * the sum of $550 and the same will be credited on your joint note to me" was delivered to A, who held it for nearly two years before presenting it to the drawer. *Held*, that the order was a bill of exchange, payable on demand, that it was the duty of the payee to present it in due time, and if dishonored to give due notice to the drawer; that the delay in the presentment was unreasonable and discharged the drawer from liability; *held* further, that A could not recover the value of the work under the contract.

APPEAL from *Pulaski* Circuit Court.

Hon. T. C. PEEK, Special Judge.

Wassel and *Moore*, for appellant.

Matthews and *Knight*, *contra*.

TURNER, J.:

This is an action brought by F. H. Boyd against Alexander George for the recovery of $550, founded on a written contract bearing date the 4th day of June, 1873, exhibited with

and made a part of the complaint, by which contract the plaintiff agreed to do and perform certain work and labor for the defendant, and to make certain repairs and improvements on certain buildings and other property of the said defendant, and to furnish the materials necessary to enable him to complete the work agreed to be done, all of which is fully and specifically set forth in the contract. It was further agreed that upon the completion of the work, the defendant was to pay the plaintiff the sum of $550 in an order for that amount on J. W. Hopkins and wife, which the plaintiff agreed to receive as full consideration for said work.

The complaint sets out the contract in substance and alleges that plaintiff performed the work stipulated and agreed by him to be performed, and that in consideration thereof the defendant became indebted to him in the sum of $550.

That on or about the 4th of December, 1873, defendant gave to plaintiff an order on J. W. Hopkins and wife for the sum of $550, which sum, if paid by Hopkins and wife was to be applied in payment of the sum which defendant had contracted and agreed to pay plaintiff for performing the work agreed by him to be performed for defendant. That he presented the order to Hopkins and wife in due time which they failed and refused to pay, of which fact defendant was duly informed.

At the April term, 1876, of the Pulaski Circuit Court the defendant filed his answer, in which he admits that the contract is truly set forth in the first paragraph of the complaint, but alleges that the said sum $550 was to be paid in an order for that sum on J. W. Hopkins and wife, and which the plaintiff agreed to receive as full compensation for said work.

Defendant admits that the plaintiff performed the work according to contract, and that he became indebted to the plaintiff in the sum of $550, the whole amount of which has been

paid in the manner promised by the defendant and agreed to be accepted in full payment by the plaintiff, and denies that there were any conditions or contingencies about said payment, and asserts that the same was absolute and unconditional.

That at the time the contract was entered into J. W. Hopkins and wife were indebted to defendant in a large amount for real estate in the City of Little Rock, which was secured by a lien on the same, and that the order above referred to was given with reference to said debt due the defendant, and that afterwards in settling said debt, credit was given to Hopkins and wife for the amount of said order, $550.

Defendant does not know whether said order was ever presented to Hopkins and wife, or if presented, whether the same was ever paid, and denies that he was ever duly informed of its non-payment.

At the same term of the Court, to-wit: On the 6th day of June, 1876, this cause came on to be tried and was submitted to a jury, who after being empannelled and duly sworn, returned into Court the following verdict: "We the jury find for the plaintiff, F. W. Boyd, and assess the damages at $649.29," whereupon the Court rendered judgment against the defendant for the amount so found with costs.

And thereupon the defendant moved the Court to set aside the verdict, and grant him a new trial, assigning the following causes therefor:

First—That the said verdict is not sustained by sufficient evidence, and is contrary to law.

Second—That there was error of law occurring at the trial, in that the Court gave the 4th, 5th, 6th and 7th instructions.

Third—That the said verdict and judgment is contrary to the evidence.

The motion for a new trial being over-ruled, the defendant filed his bill of exceptions, and took an appeal to this Court.

The bill of exceptions discloses the following evidence in this cause:

F. H. Boyd, the plaintiff, after describing the written contract exhibited with his complaint and the circumstances attending its execution, stated that he spoke to Hopkins before he did the work, and told him he was about to take an order from George on him for $550, and he Hopkins said it would all be right as he was owing George, and would as lief pay witness as George. The work was completed in two or three weeks after the date of the contract. Soon after it was done, witness applied to Johnny Adams, (who had drawn up the contract and was attending to George's business) for the order on Hopkins and wife and he put him off, saying he did not have it with him, that it was up at Tucker's Bank locked up in the safe and could not be got. That he applied to Adams as many as fifteen or twenty times for the order, before he obtained it. The order was delivered to him some time in January or February, 1874, but don't remember the exact date. On securing the order, witness, who was living in Argenta, took it home and left it. He did not see Hopkins for a long time after he got it. Hopkins was living in the country on this side of the river ten or twelve miles from town. Saw him several times in Little Rock before he got the order.

In March, 1874, he went out to see Hopkins and tried to get lumber from him, but he refused to let him have it without the money or the order. Witness thought that if he could have got the order sooner from George, he could have worked it, so as to have got the amount out of Hopkins.

Witness presented the order to Hopkins in December, 1875, and he told him he did not owe George anything then, and re-

fused to pay the order or any part of it, and wrote "protested" across the order and dated and signed his name to it. This was the first time witness had an opportunity to present the order to Hopkins. He never got a cent from George for the work done, or materials furnished, and has nothing from him but the order. He took the job and agreed to accept the order expecting to get it when the work was done. Witness don't know why Adams did not give him the order sooner. It bears date June 4th, 1873, and is in the words and figures following:

LITTLE ROCK, ARK., *June 4th, 1873.*

Mr. J. W. Hopkins and wife;

Please pay to F. H. Boyd the sum of Five hundred and fifty dollars and the same will be duly credited on your joint note to me.

ALEXANDER GEORGE,
By JOHN D. ADAMS, Jr.

Endorsed,

Protested, December 13th, 1875.

J. H. HOPKINS.

Witness further stated on cross-examination: That he did not present the order to Hopkins until December, 1875. That the reason was, he (Hopkins) lived a long way off, out in the country, and it was not convenient for him to go and see him, and that he considered Hopkins good any way. That if he happened to meet Hopkins in Little Rock, he did not have the order with him. It was at his house across the river in Argenta. That soon after he did present the order to Hopkins he notified George through Adams that Hopkins refused to pay it, and that he never went to see George about getting the order from him, but always went to Adams, who was attending to George's business.

J. W. Hopkins, a witness for the plaintiff, stated: That some time in 1871, he bought some lots in the name of his wife from George in the City of Little Rock; that he made

payments on them to the amount of $2735. He could not make arrangements to pay the balance due and George placed the notes in the hands of Wassell & Moore, who brought suit in the Pulaski Chancery Court to enforce the vendor's lien for balance of the purchase money. They obtained a decree against witness, and he spoke to Major Moore of the firm of Wassell & Moore, and told him he could not pay the amount of the decree, and proposed to give up the title bond and relinquish all claim to the lots (acting for himself and wife) if he (George) would surrender the notes and cancel the whole proceedings, and thus settle the decree, if George would pay the cost of suit. A few days afterwards Major Moore called witness into his office and told him George accepted his proposition. Moore then drew up a receipt and the matter was settled. Witness delivered up the title bond, and relinquished all claim to the lots and the notes were given up to him. He did not notice particularly about the credits endorsed on the notes. Considered the matter all settled and paid but little attention to the notes. Don't know whether the sum of $550, the amount of the order of F. H. Boyd, was credited on either of the notes or not. He just agreed to lose all he had paid and cancel the whole transaction. Has no recollection of Major Moore having shown him any statement of the credits, or the amount of the claim. This settlement with Major Moore was about the 11th day of July, 1874.

Some time previous to this, before the suit was brought and while he was owing George, Boyd told him he was about to do some work for George and that George proposed to give him an order on witness, and asked if it would be good, witness told Boyd that he was owing George for lots and that the order would be good as he would as soon pay him as George. Boyd came to him and tried to get some lumber, but he refused to let him have it, without the order of George or the money.

Heard no more about it until last winter about the 15th of December, 1875, when Boyd presented the order for $550 that was exhibited here to-day. Witness refused to pay it, or accept it, and told Boyd that he did not owe George a cent. That all matters between them had been settled. Witness took the order wrote on it "protested," dated and signed it. The date on the order is the date when Boyd first presented the order to witness.

On cross examination, witness stated that if the order of George to Boyd had been presented to him at any time before his settlement with George, it would have been paid.

John Dudley Adams, stated: That he drew up the articles of agreement between Boyd and George at the request of the parties, and they both signed them. Boyd did the work and so far as he knew, to the satisfaction of George. Witness drew the order on Hopkins and wife for $550, in George's name as his agent. Boyd did not call for it until some time after the work was done. He met witness on the street and asked him for it. Witness told him it was up at Tucker's Bank, that he did not have it with him, but that he could get it any time by calling on him at his place of business. Some time afterwards, not later than October or November, 1873, he called on witness at his house, and he gave him the order. He got it the second time he called for it. Could have got it at any time if he had called at witness' place of business. The only reason he did not give it to him the first time was because he asked for it on the street when witness did not have it with him. Is certain that it was not later than October or November, 1873, that he gave the order to Boyd. There was no reason why he should have refused to give Boyd the order. The work was done and George had agreed to give him the order, and there was nothing to be made or gained by withholding it. Some time after witness gave the order to Boyd

he met him aud asked him if he had ever collected the order, and Boyd replied: Oh! That order is all right. It is drawing 3 per cent. interest per month for me. Witness heard nothing more about it till about the time the suit was brought or shortly before, when Boyd came to him and told him Hopkins had refused to pay the order and wanted to know to whom he should look for payment of the $550. Witness could give him no satisfaction. The $550 was duly credited on the note of Hopkins to George, and was so credited at the time the notes were placed in the hands of Wassell & Moore. Their receipt for the notes mentions the payment of the $550.

Upon cross-examination, witness further stated that he was the son-in-law of the defendant, George. Had nothing to do with making the bargain between plaintiff and defendant. Was requested to draw up the articles of agreement between them; nothing was said about the time when Boyd was to get the order.

C. B. Moore, a witness for the defendant, stated that he was one of the firm of Wassell & Moore. That they were employed by George in the summer of 1873, to bring suit in the Pulaski Chancery Court to enforce the vendor's lien against J. W. Hopkins and wife, on certain lots in the City of Little Rock. Two notes of Hopkins and wife to George were placed in their hands. On one of the notes there was a credit of $550 endorsed as paid by draft in favor of F. H. Boyd. This credit was on the note when placed in their hands. Suit was brought, a decree obtained and the property was advertised to be sold, when the whole matter was settled in the manner detailed by Hopkins.

When the decree was rendered in the Chancery Court the credit of $550 was taken into the calculation and the amount deducted. Witness made the calculation and drew up the decree and knew that the $550 credit was taken into consideration.

On cross-examination, witness further stated: That when the arrangement was made between Hopkins and George, to settle the matter of the decree, he transacted the business for George. The receipts, cancellation of decree, etc., were drawn up in his office and there signed by Hopkins. Witness is quite sure that the amount of the decree was mentioned and is very sure that Hopkins saw the credit of $550, and knew at the time that it was taken into consideration in calculating the amount that was due on the decree.

A. George, the defendant, stated that Adams drew up the papers between Boyd and himself; that Boyd was to take an order on Hopkins for the amount he was to pay him for the work, $550. Witness supposed the matter was all settled long before the suit was brought, he never heard anything about the order not being paid until a short time before the suit was brought, when Mr. Watkins, Boyd's lawyer, came to see him about it. Witness contracted with Boyd to do the work and agreed to give him $550 for the job, which was more than he would have given if he had been going to pay the cash for it. Hopkins was hard to get money out of. He was owing him and he was glad to get that much settled by the job of work, and as Boyd agreed to accept the order on Hopkins in payment he made the contract with him at $550. Boyd never informed witness that the order was not paid. He never called on him him about it, or asked him for the order.

On cross-examination witness stated that Boyd did the work according to contract, that he never paid him any money, or in any other way, except by the order on Hopkins.

F. H. Boyd, the plaintiff, on re-examination, denied having told Adams that he had ever been paid the $550 by George, or any one else, and was receiving 3 per cent. a month for it from Hopkins, but did say to Adams that previous to this

transaction he had loaned money to Hopkins at three per cent. a month, and that he considered Hopkins good.

J. W. Hopkins, witness for the plaintiff, on re-examination stated that he had borrowed money from Boyd previous to this transaction, and had paid him as much as 3 per cent. a month for it. That he was not aware of the existence of the order and the indebtedness, till the order was presented to him in December, 1875.

Whereupon the plaintiff moved the Court to instruct the jury as follows:

First—The answer admits that Boyd did the work, and that the price thereof was the sum of $550, so much of the controversy is thus established and the jury is to so consider it.

Second—That the mere paper with the order written thereon is of no value nor any consideration for the promise by Boyd to do the work for George; that a promise by Boyd to do the work for George for merely a piece of paper with an order written upon it would be void as being a nude pact, (an agreement without a consideration) and not binding upon Boyd. That the real and true consideration of this contract is the promise by George to pay Boyd the agreed price of the work $550, and that the law in all cases *implies* a contract, that the drawer of an order (in this case George) will pay it to the payee (in this case Boyd) if the drawee (in this case Hopkins) should refuse or be unable to pay.

Third—If the jury believe that George had no moneys on deposit with Hopkins but drew the order on Hopkins merely because Hopkins was indebted to him, then George is not discharged by the delay of Boyd in presenting the order to Hopkins and the giving of notice to George that Hopkins had refused to pay the order, and George is liable in this suit to pay Boyd the amount agreed on $550, as the price or value of the work and labor with interest as claimed from the date of the order, 4th of June, 1873.

Fourth—If the jury believe that defendant gave the order to plaintiff within a reasonable time and Hopkins refused to accept or pay the order, and that George was duly notified of this and payment has been demanded of and refused by him then Boyd is entitled to judgment against George as claimed in the complaint.

Fifth—If the jury believe that George, since he drew the order on Hopkins has had a settlement with him, and that all of Hopkins indebtedness to George was then taken into account between them, and was settled with and discharged by George without any allowance being made to Hopkins of the amount of the order in that settlement, and that no part of the price of the work done by Boyd has been paid to him by Hopkins or by George, then Boyd is entitled to judgment against George as demanded by the complaint.

Sixth—If the jury believe that in the settlement made between Hopkins and George, the amount of $550 of the indebtedness of Hopkins to George was left out by George unsettled for between them, and even if that amount was credited on Hopkins' notes and that when the order was presented to Hopkins, if presented in a seasonable time, he refused to accept or pay the same, that this did not in anywise discharge George from liability on said order.

Seventh—That the order given by George to Boyd on Hopkins and wife is a condition precedent that Hopkins and wife would accept the same if presented in apt time, and that if said order was so presented to Hopkins and he refused to accept or pay it, then George on notice thereof became liable for the amount of the order given by him to Boyd, and Boyd is entitled to judgment in this action as demanded.

The Court gave the first, fourth, fifth, sixth and seventh instructions, and refused to give the second and third. To the

ruling of the Court in giving the fourth, fifth, sixth and seventh of said instructions the defendant excepted.

And thereupon the defendant moved the Court to instruct the jury as follows;

First—If the jury believe from the evidence that at the time the contract was made between Boyd and George, it was agreed and understood, that Boyd should receive in payment for the work an order on J. W. Hopkins and wife, and if at the time the order came into the hands of Boyd, Hopkins and wife were indebted to George, and that the order was not presented for acceptance or payment to Hopkins and wife within a reasonable time, and if then presented, payment was refused, Hopkins and wife in the mean time having settled all indebtedness to George including the said order for $550, the plaintiff cannot recover.

Second—In order to entitle the plaintiff to recover in this case, it must be on the draft, or order, not on the account for services rendered, as the draft being a higher security it extinguished the original contract, and to entitle a recovery on the draft, the plaintiff must bring himself within all the requirements of the law merchant as holder of the draft.

Third—In order to bind the drawer of a bill of exchange or order for money payable at sight, or on demand the same must be presented to the drawer within a reasonable time, and with reasonable diligence, and it is for the jury to say from all the circumstances what is reasonable time aud reasonable diligence in this case.

Fourth—In order to bind the drawer of a bill of exchange or an order for money payable at sight or on demand, it is necessary for the payee to present the same for payment within a reasonable time, and if not paid, to give notice of non-payment to the drawer, as required by the law merchant.

Fifth—If the jury believe from the evidence and the written contract between the parties, which is made a part of the complaint, that Boyd agreed to receive in payment for the work done $550 to be in an order on J. W. Hopkins and wife and which order Boyd agreed to receive as full consideration for said work, and if the order was in fact given by George to Boyd, the plaintiff cannot recover, and this especially if Boyd consulted Hopkins before making the agreement anv learned from him that he and his wife were owing George as much as the amount of the order.

All of which instructions asked for by the defendant were given by the Court.

The record in this cause presents several important questions for our consideration. It will be seen that by the terms of the contract between the parties, that the plaintiff was to perform for the defendant certain specific work for which the defendant was to pay him $550 in an order on J. W. Hopkins and wife, which the plaintiff agreed to receive as full consideration for the work done.

The pleadings and proof show that the work was completed according to contract, and that the order bearing date June the 4th, 1873, for $550, was drawn by the defendant on Hopkins and wife in favor of the plaintiff, to whom it was delivered in the latter part of the year 1873, or early in the year 1874, and that the plaintiff did not present the order to Hopkins until nearly or quite two years thereafter. It appears that at the time the contract was entered into and previous thereto, Hopkins and wife were indebted to the plaintiff for real estate purchased from him situate in the City of Little Rock, for which he had taken their notes and retained a lien upon the property sold. That before performing the work, the plaintiff had a conversation with Hopkins, and told him he was about to take an order from the defendant on him for $550 and that Hopkins

told him it would all be right as he was owing the defendant and would as lieve pay the plaintiff as defendant. After completing the work as provided for in the contract some delay occurred before the plaintiff received the order. He states in his evidence that soon after the work was completed, he applied to Adams, defendant's agent, for the order, who put him off saying he did not have it with him, that it was at Tucker's locked up in the safe and could not be got out. That he applied to Adams repeatedly for it, but he always put him off with some excuse, but at length he delivered it to him some time in January or February 1874.

Adams in his testimony states that the plaintiff applied to him only twice for the order before he obtained it, and the reason he did not get it the first time was that he applied to him on the street for it when he did not have it with him. That he told the plaintiff that he could get it any time by applying to him at his place of business.

It is further shown that some time in the summer of 1873, the notes of Hopkins and wife given to the defendant for the real estate sold by him to them remaining in part unpaid, were placed in the hands of Wassell & Moore for collection, previous to which a credit was endorsed by the defendant on one of the notes for $550 on account of the order for that amount in favor of the plaintiff.

Suit was brought by Wassell & Moore for the defendant in the Pulaski Chancery Court against Hopkins and wife to enforce the vendor's lien against said real estate.

In due time a decree was obtained against Hopkins and wife and the property advertised for sale.

Pending these proceedings, a settlement was had between the defendant and Hopkins and wife by which the balance of indebtedness due from Hopkins and wife to the defendant and all their claim to, and interest in said real estate was cancelled

by mutual consent and the notes delivered up to Hopkins and wife.

At the time of this settlement the $550 order was outstanding in the hands of the plaintiff, and unpaid, although previous thereto the amount of the order had been credited on one of the notes due from Hopkins and wife to the defendant as if actually paid.

What was the effect of the order on the rights of the parties when drawn and delivered to the plaintiff, as provided for in the contract?

Did it operate as an absolute payment to the plaintiff, as contended for by the defendant's counsel, or did a contingent liability on the order attach to the defendant, to be determined by the plaintiff's action as governed by the rules of the law merchant?

It may be plausibly maintained that payment to the plaintiff in the order on Hopkins and wife was an absolute and unconditional payment and released the defendant from further liability to the plaintiff, yet we cannot think this is the legal mport of the contract.

What then is the character of the order delivered to the plaintiff? We think it is unquestionably a *bill* of *exchange*, and that when drawn and delivered to the plaintiff the rights and liabilities of the parties, drawer and payee were to be governed in all things by the rules of the law merchant.

Chancellor Kent, in defining a *bill* of *exchange*, adopts the language of Bagley, who says: "A bill of exchange is a written order or request by one person to another for the payment of money absolutely and at all events." 3 Kent, 74. And Smith, in his mercantile law says: A bill of exchange is a written order for the payment of a certain sum of money unconditionally. Smith Merchant Law, 362.

These definitions, it is true, omit the negotiable element of a bill of exchange, which, though not essential to its validity, is supposed in the definitions of Kyd, Pothier and other law writers.

Tested by these definitions, this order must be regarded as a Bill of Exchange, for it is a written order or request by the defendant to Hopkins and wife to pay the plaintiff $550 absolutely and at all events.

The order then being a Bill of Exchange, let us inquire what were the undertakings, duties and obligations of the parties to it.

The defendant, who was the drawer, undertook to the plaintiff, who was the payee, that the drawees, Hopkins and wife, should pay the order when it became payable, on due presentment thereof, for that purpose, and if the drawees should not pay it when it became so payable and the payee gave him due notice thereof, then he (the drawer) would pay the sum or amount stated in the order to the payee, with such damages as the law allows in such cases as an indemnity.

The plaintiff was bound to present the order for acceptance and payment within a reasonable time after receiving it, and to give due notice of the refusal of Hopkins and wife to accept or to pay the order to the plaintiff within the time prescribed by law; on failure of either of which the defendant is exonorated from all liability on the order.

Hopkins and wife having failed to accept the order are under no legal obligation to the plaintiff, and whether the defendant is released from liability on the order in consequence of the laches of the plaintiff, is a question we must necessarily decide.

Bills of Exchange are usually drawn payable at a certain time after date, or after sight, and in either case they are entitled to days of grace, or they may be drawn payable on demand, or what is the same thing in law, without specifying

the time when payable, in which case they are payable on demand and are not entitled to days of grace.

The order under consideration is in effect payable on demand, and it was the duty of plaintiff to present it in due time to Hopkins and wife for payment, and if dishonored, to give due notice to the defendant of its non-payment.

In the case of bills entitled to grace, payment should be demanded on the third day of grace, and notice immediately given to every party who would be entitled to bring an action on it after paying it.

According to the received interpretation of the law, this notice should go by the first mail after the day next to the third day of grace; so that if the third day of grace be on Thursday and the drawer and *endorser* (if there be one) resided out of town, the notice *may*, indeed be sent on Thursday, but *must* be put into the Post Office or mailed on Friday, so as to be forwarded as soon as possible thereafter. 3 Kent. 105, 106; Smith's Mer. Law, 328, 329; Chitty on Bills, 325, 326, 327, 433, 434, 435; Edwards on Bills, 548, 549.

In the case of a bill or order like this payable on demand, the duties of the payee are but slightly modified.

Such a bill "becomes due at the moment of presentment, and the presentment must be made within a reasonable time after receiving it. What is a reasonable time, is, in the absence of any settled rule, said to be decided in the same way as the like question concerning the presentment for acceptance of bills payable at or after sight, and a longer time for presentment will be allowed when the instrument has been circulated and was apparently meant for circulation, but any delay beyond what the common course of business warrants is, in ordinary cases, *unreasonable*. "The course of business formerly was understood to be to allow the party to keep it, if payable in the place where it was given, till the morning after

the next business day after its receipt; if payable elsewhere, till the next post'' * * * * *

The established rule now is, that if the instrument be payable at a banker's house and in a place where a party received it, it suffices to present it for payment *at any time* during the banking hours on the day after it is received. If it be payable elsewhere, it suffices to forward it by the regular post on the day after it is received, and the party receiving it by post has till the next day to deliver it.'' Smith's Mer. Law, 318, 319; Parsons Mer. Law, 103, 105, 110, 120; Edwards on Bills, 390, 392.

Notice of the dishonor of such a bill or order as this must be given, and with like effect as to the rights and liabilities of the parties thereto, as in other cases of the dishonor of bills of exchange.

What is due diligence in giving notice of a bill to the drawer or *indorser*, (if there be one) is said to be usually compounded of law and fact, and proper for the decision of a jury under the advice and direction of the Court, and the mixed question requires the application of the powers of the Court and jury; and yet in seeming contradiction to this, it has been repeatedly held that the reasonableness of notice or demand, or due diligence when the facts were settled, was a question of law for the Court, and not a question of fact for the jury.

The facts of the case being ascertained, it is the duty of the Court to *declare* the law to the jury, who have a corresponding duty to receive and carry out the law as declared by the Court. See 2 How. 459; 1 Peters, 578; 21 Wend., 643; 4 Leigh, 50; 6 Ohio, 55; 9 Peters, 33.

Having commented briefly on the Law Merchant in its application to the bill or order under consideration, we now direct our attention to the evidence in the cause, as set forth in the bill of exceptions.

The order bears date June 4th, 1873, and appears to have been drawn simultaneously with the execution of the contract between the parties, although it was not delivered to the plaintiff according to his own evidence, until sometime in January or February, 1874; but according to the evidence of the witness Adams, who was attending to defendant's business, it was delivered by him to the plaintiff as early as October or November, 1873.

As a mean between these contradictory statements, as to the time, we may assume that the order was delivered to the plaintiff some time in December, 1873.

The proof shows that it was not presented to Hopkins, nor demand of payment made until the 13th day of December, 1875. During this long lapse of time it does not appear that any efforts were made or steps taken by the plaintiff to collect the order, or fix the liability of the defendant in case of default on the part of Hopkins and wife.

True, it appears that some time in the month of March, 1874, the plaintiff went out to see Hopkins, and tried to get some lumber from him; but Hopkins refused to let him have it without the money, or defendant's order. At this time the plaintiff had been in possesion of the order on Hopkins and wife some three months, yet he failed to take it with him, and so far as we can learn from the evidence, failed to inform Hopkins and wife that he had such order.

In fact Hopkins in his testimony states that he was not aware of the existence of the order until it was presented to him in December, 1875, nearly or quite two years after its delivery to plaintiff. In explanation of the delay and want of diligence in endeavoring to collect the order from Hopkins and wife, plaintiff complains of the defendants delay in delivering it to him.

The contract it is true, does not specify in words when the order was to be delivered, but we think it may be fairly inter-

preted as entitling the plaintiff to the order on the completion of the work.

The order bearing even date with the contract, we must suppose that it was the intention of the defendant to deliver it to the plaintiff when the work was done, and although it was not delivered until five months afterward, it was not because, as Adams states, of any disposition to withhold it, but because of the plaintiff's failure to call for it at his place of business. When it was delivered, it was accepted by the plaintiff without objection, and this acceptance of the order without objection or protest, must be regarded as a waiver of any and all objections that might have been urged against it on account of delay in its delivery.

Some time in the summer of 1873, the notes due from Hopkins and wife to the defendant, were placed in the hands of Wassell and Moore for collection, previous to which the defendant had entered a credit to Hopkins and wife on one of the notes for the amount of the order, thus reducing their indebtedness to him by that amount.

The settlement was made between defendant, and Hopkins and wife, and consequent cancellation of the notes and contract between them some time in July, 1874, nearly or quite seven months after the delivery of the order to the plaintiff; and Hopkins in his testimony, states that if the order had been presented to him at any time before this settlement, he would have paid it; and the defendant in his testimony, speaking of the order, states he supposed the matter was all settled long before the suit was brought, and that the plaintiff never informed him that the order was not paid.

In further explanation of the cause of delay in not sooner presenting the order, the plaintiff states that when he secured it, he took it home and left it. That he was living over the river, at Argenta, and did not see Hopkins to present it to him for a long time after he received it.

On cross examination he further stated that the reason why he did not sooner present the order was that Hopkins lived a long way off, out in the country, and it was not convenient for him to go out and see him, and he considered him good any way. That if he happened to meet him in Little Rock, he did not have the order with him. It was at his house across the river, at Argenta.

The plaintiff states that very soon after he did present the order to Hopkins, he notified the defendant, through Adams, of the non-payment, but whether it was a day, or a week or a month, or longer after its presentment, does not appear.

The evidence, taken as a whole, clearly indicates that the plaintiff from the beginning relied on the solvency of Hopkins and wife, and confided in their ability and disposition to pay the order, rather than on any ulterior or contingent liability of the defendant, and this may account for the plaintiff's delay in presenting the order and demanding payment.

Having decided that the order is a bill of exchange, to be governed by the law merchant as it affects the rights of the parties thereto, and having already considered what were the necessary steps to be taken by the plaintiff who was the payee and holder of the order, to fix the liability of the defendant, we are, therefore, upon a careful review of the testimony, most clearly of opinion that the omissions, neglects and failures of the plaintiff to take the requisite steps neccessary to fix the liability of the defendant upon default of Hopkins and wife, in law operates as a discharge of the defendant from all liability on the order.

But then it is said this suit was not instituted upon the order, but upon the written contract between the plaintiff and defendant.

True, it is not brought distinctively on the order, but is founded on the written contract of which the provision for the

order is a component and essential part, but which the plaintiff would eliminate from the contract and treat as a nullity.

As before shown, the plaintiff bound himself to receive the order in full consideration for the work done, and is therefore not at liberty to ignore or treat it as a nullity. He must stand by his contract, and recover upon the order, if he recover at all.

But it may be urged, there is hardship in this case; that the plaintiff has completed the defendant's work according to contract and received nothing for it. But this cannot be truthfully said, since the plaintiff was paid in an order on Hopkins and wife which he was bound to receive, and if he failed to realize the amount of the order, it was his own fault, for it can hardly be doubted but that by due diligence on his part he could have collected the order from Hopkins and wife, or in case of their default, the liability of the defendant would have been irrevocably fixed.

The law merchant requires certain steps to be taken by the holder of commercial paper in order to fix the liability of the drawer and endorser. This being neglected, they are discharged from all liability on the paper, and this without regard to the consideration proceeding from the holder to the drawer or endorser.

In the light of these conclusions as to the law and facts of the case, we are of opinion that the verdict and judgment were not authorized by either, nor indeed by the instructions of the Court.

The first instruction moved by the plaintiff was properly given by the Court.

The second and third were properly refused.

The fourth ought to have been rejected also, for it assumes that it was not necessary for the plaintiff to present the order and demand payment of Hopkins within due and reasonable

time after receiving it. The assumption we think wholly unwarranted.

The fifth ought also to be rejected. The facts do not authorize such an instruction. The proof is that the amount of the order for $550 was credited on one of the notes long before their settlement with the defendant, and so the latter clause of the instruction is objectionable, as the defendant's liability to pay the order was dependent upon the default of Hopkins and wife after due diligence by plaintiff to collect the amount of the order from them.

The sixth, like the preceding instruction, was not warranted by the facts of the case and, strictly, had no foundation to rest upon. The presentment of the order, if made in due time, would not have fixed the liability of the defendant unless he had been duly notified of such presentment and the default of Hopkins and wife.

The seventh would not have been objectionable if it had been accompanied with an explanation of the law as to the time of presentment and demand of payment of the order and of the notice necessary to fix the liability of the defendant. As the instruction was asked, it was calculated to mislead and leave the jury in doubt, and was properly rejected.

The first and second instructions asked for by the defendant were properly given.

The third ought not to have been given unless with an exposition of the law of the case. The Court in declaring that it was for the jury to say, from all the circumstances, what constitutes reasonable time and reasonable diligence according to the law merchant, without explanation or declaration of the law in its bearings upon the facts of this case, in effect surrendered to the jury what rightly belonged to the Court.

The fourth and fifth were properly given.

The instructions of the Court assume throughout, rightly,

as we think, that the order under consideration was a bill of exchange and governed by the rules of the law merchant, but the Court failed to explain and declare to the jury what the law merchant is, as it regards due presentment and demand of payment of a bill or order, and due notice of the default of the payee; and in thus failing to explain and declare the law in its bearing upon the facts of the case, notwithstanding the facts were manifestly clear and unambiguous, the court in our judgment committed a grave error, and this may account for the verdict of the jury which, we think, was not warranted by the law or the facts of the case.

The Circuit Court should have set aside the verdict of the jury and granted the defendant a new trial.

The judgment of the Circuit Court is, therefore, reversed, and this cause remanded with instructions to said Court to grant the defendant a new trial and proceed with the cause not inconsistent with this opinion.

CANNON VS. DAVIES.

1. PRACTICE: *Reply, Etc.*

   Where the answer sets up no matter of counter claim or set off a reply is improper; it should not be met by a demurrer however, but should be stricken from the files.

2. FORCIBLE ENTRY AND DETAINER: *Ejectment, burden of Proof.*

   An action of forcible entry and detainer was instituted and, the answer putting the title in issue, was changed into ejectment before the repeal of section 2,947 of Gantt's Digest; *held*, that the repeal of the statute did not affect the proceedings, and it properly proceeded as an action of ejectment: *Held, further*, that the burden of proof continued with the plaintiff.

3. EJECTMENT: *Verdict and Judgment.*

   In an action of ejectment the jury rendered a verdict for the plaintiff without any assessment of damages, the Court entered judgment for the plaintiff for possession and damages; *Held*, that the judgment for damages was not sustained by the verdict.

APPEAL from *Mississippi* Circuit Court.
Hon. L. L. MACK, Circuit Judge.
Rose and *Palmer*, for appellant.
Lyles, *contra*.

TURNER, J.:

This was an action of forcible entry and detainer brought by James F. Davies as administrator of the estate of James Stewart, deceased, against James H. Cannon.

The plaintiff alleges that on or about the 15th day of October, 1872, while he was in the peaceable possession of the northeast quarter of section 36, township 11, range 8 east, with all the dwelling houses, barns and sheds thereon, the defendant with violence and by force entered on said land and took possession of one of the houses thereon and continued to hold the same from the plaintiff.

The defendant answered stating that at the time of the service of process in this cause, he was in possession of said land claiming the same as a homestead under the laws of the United State, and by virtue of his entry of the same in the land office at Little Rock, as appears from the Receiver's receipt, which was exhibited with and made a part of the answer; and he states that he did not, while plaintiff was in possession of the premises in question, with violence and by force enter thereon and take possession of one of the houses as alleged in the complaint. The following is the receipt filed with the answer and made a part thereof:

"Receiver's Receipt, No. 6,023—Homestead."

RECEIVER'S OFFICE, LITTLE ROCK, ARK., Nov. 4, 1872.

Received of James H. Cannon the sum of $14, being the amount of fee and compensation of Register and Receiver for the entry of northeast quarter of section 36 in township 11 north, of range 8 east, under the act of Congress approved

May 20, 1862, entitled an "Act to secure homesteads to actual settlers on the public domain."

$14.00 ——————————Receiver.

At the October term of the Court, 1873, the plaintiff filed a demurrer to the first paragraph of defendant's answer which was overruled by the Court; whereupon the plaintiff filed his reply to the first paragraph of the answer setting up a claim to the land under an alleged purchase from the State, as swamp and overflowed land.

To which reply the defendant demurred and the demurrer was sustained. The reply and demurrer were alike irregular and not authorized by the law or practice.

We have have had occasion to observe irregularities coming up from more than one Circuit in the State, and we would respectfully recommend to the Courts and Bar where these irregularities prevail, to be a little more observant of the requirements of the code practice.

There being in the answer no allegation of a counter claim or set off, and the cause being at issue upon the filing of the answer, no reply was admissible. If filed, however, it should not have been met by demurrer, but should have been stricken from the files. See Gantt's Digest, section 4,579.

At the February term, 1874, this cause came on for trial and was submitted to a jury, who after hearing the evidence and instructions of the court, rendered the following verdict:

"We the jury find for the defendant and assess the damages at two hundred and fifty-two dollars ($252) for rent for 1873." Whereupon judgment was rendered against the plaintiff for possession of the premises and for said damages.

And afterwards, at the same term of the court, the plaintiff filed his motion for a new trial, which, on consideration was granted by the court, and the judgment rendered in this cause set aside, and the court being of opinion that the defendant's

answer put in issue the title to the land, ordered that the action proceed as an ordinary action at law in the nature of an action of ejectment upon the issues presented in the first and and second paragraphs of the answer, and it was ordered that the defendant retain possession of the premises upon giving bond and sufficient security, etc., and defendant executing the bond required by law, and the same being approved, it was ordered that the possession of the premises be surrendered by the plaintiff.

At the September Term, 1875, the plaintiff filed his motion to disregard the judgment of the court in this cause on the 12th day of February, 1874, and protested against proceeding to trial thereunder, which motion was overruled, and thereupon the plaintiff filed another reply to the defendant's answer, to which defendant demurred, and demurrer overruled.

This was simply a repetition of the irregular and loose practice already commented upon, and the reply like the preceding one ought to have been promptly stricken from the files.

At the May Term, 1876, it was ordered by the court that Frank L. James be appointed to survey the exterior lines of the land in dispute, and that he make report with map, etc. And at the November Term, 1876, it was ordered that the County Surveyor of Mississippi County proceed to and survey the exterior lines of said land, and report his survey with map, etc. Both of which surveys were made and report thereof, with accompanying plats, etc.

At the same term of the court, this cause came on to be tried, and was submitted to a jury who, having heard the evidence and instructions of the court, rendered the following verdict; "We, the members of the jury, find for the plaintiff." Whereupon judgment was rendered in favor of the plaintiff for possession of the land in controversy and against the defendant for the sum of six hundred and twenty-one dollars ($621) for

damages and for costs. And thereupon the defendant filed his motion for a new trial and assigned the following causes:

First—The court erred in permitting the plaintiff to introdnce testimony to show the character of the land.

Second—The court erred in permitting a map of the land made by Dr. F. L. James to go as evidence to the jury.

Third—The court erred in giving the instructions asked for by the plaintiff.

Fourth—The court erred in refusing to give the third and fourth instructions asked for by defendant, and in modifying the first instruction.

Fifth—The verdict of the jury is contrary to law.

Sixth—The verdict of the jury is contrary to evidence.

Seventh—Substantially the same as the two last.

Eighth—The judgment of the court is not sustained by the evidence.

Ninth—The judgment of the court is not sustained by the verdict of the jury.

Tenth—The judgment of the court is not warranted by the pleadings in the cause.

Which motion was overruled by the court, to which defendant excepted and filed his bill of exceptions and took an appeal to this court.

It will be observed that during the progress of this cause, its character was changed from an action of Forcible Entry and Detainer, to an ordinary action at law in the nature of an action of ejectment, and this was proper, because it sufficiently appears from the pleading that a trial of the cause involved a trial of the title to the premises in question. Gantt's Digest, sec. 2947.

And although the law, under which the change was made, was repealed by the act of March 2d, 1875, this action having been previously commenced, and pending as an action

of ejectment at the time of the passage of the act of 1875, the repealing law did not affect the pending action, or the rights of the parties thereto, but it proceeds to trial as if commenced as an ordinary action of ejectment. In the meantime the relation of the parties is not changed and the trial of the cause should have proceeded as in other cases. But in this remarkable trial the parties, by some sort of legal legerdemain, which we do not profess to comprehend, seem to have changed places and the regular order of proceeding was reversed. The *defendant* introduced his testimony *first*, and the *plaintiff followed*. The court evidently assumed that the burden of proof was on the defendant instead of the plaintiff. This was a gross error; for the plaintiff was bound, first, to make out his case and the title to the land being in issue, he must recover, if he recover at all, on the strength of his own title, and not on the weakness of the defendant's, and this has been the settled rule for centuries.

Several instructions were asked for by the plaintiff, none of which were given.

The court then instructed the jury for plaintiff against the objections of the defendant, as follows:

Fifth—"That ejectment is a possessory action, and may be maintained for possession alone of real estate, provided the right and title to the possession is good and valid; and that the plaintiff need not be the owner of the land in fee simple."

Sixth—"The defendant in this action having, by his answer, put the title of the land in issue, he must recover, if at all, on the strength of his title."

Eighth—If the jury believe from the evidence that the greater part of the land in controversy is swamp and overflowed, and that James Stuart, the plaintiff's intestate, entered this land in the proper land office in 1857, from the State of Arkansas, and held a certificate of purchase for the same, that

any subsequent entry made by Cannon by reason of the Homestead Act or otherwise, would confer no title upon him, and the jury will find for the plaintiff.

Ninth and *Tenth* relate to the supposed requirements of the homestead law.

The court then instructed the jury on the part of the defendant as follows:

First—That under the pleadings in this cause, the jury are to try the question of the legal title and right of possession, and if they find the legal title to the land in defendant at the time of the service of the writ, they will find for defendant.

Second—If you find from the testimony, that at the time of the commencement of this suit, the legal title to the land was in the United States, and that the United States have conveyed their title to defendant, you will find for him.

Third—That if the jury believe from the testimony, that before the plaintiff brought his suit, the defendant procured the certificate of title, they must find for the defendant.

Fourth—That if the jury believe from the testimony that the defendant had the certificate of title from the United States at the time the suit was brought, they must find for the defendant.

The third cause assigned in the motion for a new trial is to the effect "that the court erred in giving the instructions asked for by the plaintiff."

Recurring to these instructions our attention is arrested by the sixth, which is to the effect, "the *defendant* in this action having by his answer put the title of the land in issue, he must recover, if at all, upon the strength of his title."

This instruction reverses the law of the case, and throws the burden of proof on the defendant. It was gross error to so instruct the jury, and this taken in connection with the irregular and unusual manner of conducting the trial, was well cal-

culated to mislead the jury, and is sufficient in itself to warrant a reversal of the judgment.

It is therefore, we think, unnecessary to comment further on other instructions, some of which were proper, and others improper, or to go into, or discuss the merits of the cause as disclosed by the evidence adduced at the trial.

We advert, however, to another error of judgment at the trial:

The ninth cause assigned for a new trial is, "that the judgment of the court is not sustained by the verdict of the jury."

Referring to the record we find that the verdict of the jury was in the following words: "We, the jury, find a verdict for the plaintiff." Whereupon the court rendered judgment in favor of the plaintiff for possession of the land in controversy, and for the sum of six hundred and twenty-one dollars ($621) for damages and costs. As there is no finding of damages by the verdict of the jury, the judgment for damages is wholly unwarranted, and for that cause, and to that extent the judgment would be reversible.

But as the Circuit Court erred in giving the plaintiff's sixth instruction already adverted to, we are compelled to reverse its judgment, and remand the cause, with instructions to said court to grant the defendant a new trial, and proceed with the cause not inconsistent with this opinion.

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NEAL VS. SPEIGLE, ADM'R.

1. VENDOR'S LIEN: *Waived by taking mortgage.*
   Where a vendor of land takes a mortgage upon it, to secure the purchase money, he thereby waives his equitable lien.
2. VENDOR AND VENDEE: *Rescission, cancellation of deed, etc.*

A sold and conveyed land to B, taking from him a mortgage on the land for payment of the purchase money, and stipulating that if the purchase money was not promptly paid at maturity, B should reconvey the land to A, and A should deliver to him his note for the unpaid purchase money. After the purchase note matured, B being unable to pay, they agreed to rescind as agreed in the mortgage, by destroying the deed, mortgage and note, and to meet afterward and burn them. A died soon afterward and before the papers were destroyed. His administrator knowing of the agreement to rescind, afterward united with B in burning the deed, note and mortgage, B at the time concealing from him the fact that he had a few days before caused the deed to be recorded. B subsequently sold the land to D, who was cognizant of all these facts, for about one-third its value. Held: *First*, that the destruction of the papers did not destroy or divest the title conveyed by them. *Second*—That actual notice of the unrecorded mortgage did not defeat the title of the subsequent purchaser. *Third*—But that the agreement of B to rescind precluded A from having the mortgage recorded, and equity would enforce the agreement to rescind, against him or his vendee who purchased with notice of the facts.

APPEAL from *Sebastian* Circuit Court, G. D. in Chancery.
Hon. W. W. MANSFIELD, Circuit Judge.
J. H. Rogers, for appellant.

ENGLISH, CH. J.:

The material allegations of the bill in this case are:

That on the 20th October, 1871, Joseph E. Jones sold and conveyed to W. D. Shaver the southeast quarter of the southeast quarter of Section 32, Township 7 north, Range 29 west, for the consideration of $500, and Shaver conveyed to him Lot No. 1, Section 6, Township 6 north, Range 29 west, forty-seven acres, in payment of $200 of the purchase money, and for the remaining $300 gave him a note payable 25th December, 1872, bearing 10 per cent. interest. To secure the payment of the note, Shaver executed to Jones a mortgage back on the tract sold and conveyed by Jones to him, which contained a provision that if Shaver should fail or be unable to meet said note promptly at maturity, then and in that event the trade was to be cancelled, so far as that Shaver should reconvey to

Jones the land, and Jones should deliver up to him the note; but for the use, occupation and profits of the land, Jones was to retain the tract conveyed by Shaver to him.

That in the month of January, 1873, after the maturity of the note, Jones was taken seriously ill at the house of L. J. Speigle, and during his illness Shaver went to see him, and expressing to him his inability to pay the note, proposed to him to rescind the trade according to the requirements of the mortgage, which was then and there agreed upon by the parties. But as Shaver did not have with him the deed to the land executed to him by Jones, it was definitely agreed between them that at some future day, not far distant, they would meet and rescind said sale according to the terms of the mortgage; and it was further agreed between them that as the deed and mortgage had not been admitted to record, a destruction of them and the note would fully carry out the requirements of the mortgage for the recision of the sale; and Jones expressed to Speigle his wish that this agreement with Shaver should be fully carried out, and the sale of the land rescinded according the terms of the mortgage.

That Jones did not recover from his illness, but died about the 30th of January, 1873, and Speigle was appointed his administrator by the Probate Court of Sebastian County, Greenwood District, where the parties resided and the land was situated.

That on the 5th of February, 1873, a few days after the death of Jones, and after the grant of letters of administration upon his estate to Speigle, Shaver, with intent to cheat and defraud the creditors and heirs of Jones, filed and caused to be recorded in the Recorder's office at Greenwood, the deed executed by Jones to him for said tract of land.

That a few days after the recording of the deed, Shaver came to the house of Speigle and stated the agreement between him and Jones to rescind the contract of sale by the destruction of the deed, mortgage and note, and as the circumstances and agreement were well known to Speigle, and believing it to be right, he consented to carry out said agreement, and upon his part consigned to the flames the mortgage and note, and Shaver on his part burned the deed, Speigle not knowing at the time time that the deed had been recorded.

That John Neal, the brother-in-law of Shaver, and who was his adviser in this fraudulent act, claimed to be the owner of the land by purchase and conveyance from Shaver, and that he purchased with full notice of the above facts and circumstances, and was not an innocent purchaser.

The bill was filed by Speigle as administrator of Jones, against Shaver and Neal, in the Circuit Court of Sebastian County, Greenwood District, and after making, in substance, the above allegations, prayed a forclosure of the mortgage, if the court could not decree a rescission of the sale agreed upon, and cancellation of the fraudulent registration, deed, etc.

Shaver did not answer the bill, and a decree, by default, was entered against him.

Neal, in his answer, states that he purchased the land on the 11th of March, 1873, of Shaver, who was then in possession of it, for $200, and that by deed of that date, Shaver conveyed the land to him.

He denies that he was the adviser of Shaver in the fraudulent matters alleged in the bill, and claims to be an innocent purchaser, etc.

The depositions read upon the hearing are not copied in the transcript, but a bill of exceptions taken by Neal sets out what was proven by the parties. It appears from it that the plaintiff proved all and singular the allegations of the bill, except the

allegation that Neal was the adviser of Shaver in the fraudulent matters alleged. Plaintiff also proved that Neal had notice before Shaver sold and conveyed to him the land, of all the alleged transactions between plaintiff and Shaver, including the execution of the note for purchase money and the mortgage to secure the same, etc. It was also proven that the land was well worth $300, and that Neal in fact paid Shaver but $100 for it, having purchased of him another tract at the same time, which was included in the deed from Shaver to Neal; and that Shaver was in possession of the land when he sold it to Neal.

The court rendered a decree against Shaver for the amount of the $300 note and interest, and condemned the land to be sold to satisfy the decree, and Neal appealed to this court.

I. Had Jones merely sold and conveyed the land to Shaver and taken a note for the unpaid purchase money, he would have had an equitable vendor's lien upon the land for the payment of the note, and appellant having purchased the land of Shaver with notice that the purchase money was not paid, would have taken the land subject to the vendor's equitable lien.

But Jones took a mortgage back from Shaver upon the land to secure the payment of the purchase money note, and thereby waived his equitable lien, and had to rely upon the mortgage. 1 Jones on Mortgages, sec. 207, etc.; Bispham Eq., sec. 355; *Fish* v. *Howland*, 1 Paige, chap. 30: *Young* v. *Wood et al.*, 11 B. Mon., 128; *Mattix* v. *Weand et al.*, 19 Ind., 151; *Harris* v. *Harlan*, 14 Ib., 434; *Shelby* v. *Perrin*, 18 Texas, 515; *Hadley et al.* v. *Pickett*, 25 Ind., 450; *Little et al.* v. *Brown*, 2 Leigh., 353; *Mims* v. *Macon et al.*, 3 Kelly, 343.

II. At the time the deed and mortgage back were burned, Jones being dead, the legal title to the land was in his heirs at law, by virtue of the mortgage, and the equitable title was in Shaver, and the destruction of the deed did not divest Shaver

of his title and vest it in the heirs of Jones. The legal existence of the deed and mortgage continued, though the papers on which they were written were burned. *Strawn* v. *Norris et al.*, 21 Ark., 80.

III. After the title papers were burned, Shaver sold and conveyed the land to appellant, Neal. If there was nothing in the case but the fact that appellant had notice, at the time he purchased the land, of the existence of the unrecorded and unsatisfied mortgage, he would have taken the land discharged of the mortgage: because, under repeated decisions of this court, construing the statute providing for the registration of mortgages, (Gantt's Digest, chap. 98) actual notice of an unrecorded mortgage does not defeat the title of a subsequent purchaser. *Main* v. *Alexander*, 9 Ark., 112; *Jacoway* v. *Gault*, 20 Ark., 190; *Hannah* v. *Carrington*, 18 Ib., 105; *Carnall* v. *Du Val, adm'r*, 22 Ib., 136; *Jarratt et al.* v. *McDaniel et al.*, 32 Ib., 602.

But there is more in this case than mere notice of an unrecorded mortgage. There was a stipulation in the mortgage, that if Shaver should fail or be unable to pay the note secured by the mortgage promptly at its maturity, the contract of sale should be rescinded so far as that Shaver should reconvey the land to Jones, and he should deliver up to Shaver the note. After the maturity of the note, the parties were together, and Shaver expressing his inability to pay the note, the parties mutually agreed that as the deed and mortgage had not been put upon the public records, they would rescind the sale, as provided for by the mortgage, by burning the deed, mortgage and note, but inasmuch as Shaver had not the deed with him, the parties were to meet again soon thereafter, and comply with this agreement. But for this agreement, Jones acting as a prudent man would ordinarily act, might have protected himself against a subsequent conveyance of the land by Shaver,

by causing the mortgage to be recorded. But the death of Jones prevented the subsequent meeting of the parties. A few days after the death of Jones, Shaver went to the house of Speigle, who had become his administrator, and proposed to burn the title papers and note in compliance with the agreement between him and Jones, and Speigle having been present when the agreement was made, and believing it to be right, consigned the mortgage and note to the flames, and Shaver put the deed in the fire in his presence. But for this, Spiegle might, and it would have been his duty as an administrator, to cause the mortgage to be recorded for the protection of the estate which he represented. But the conduct of Shaver deceived him, and induced him to burn the mortgage, and thereby put it out of his power to cause it to be recorded without the trouble and expense of reproducing it.

After the death of Jones, and before Shaver went to Speigle to induce him to burn the mortgage and note, he caused his deed to be recorded, and concealed this fact from Spiegle when he induced him to consign them to the flames, and burned the original deed in his presence. This was an ugly fraud. After having so deceived and deluded Spiegle, he sold and conveyed the land to his brother-in-law, the appellant, who, according to the bill of exceptions, had full knowledge of all of the above facts, for one-third of its value. A court of equity would not have permitted Shaver to take advantage of the fraudulent registration of his deed, but would have opened the agreement upon which the mortgage, note and deed were burned. Nor can the appellant, in equity and good conscience, be allowed to avail himself of a fraud of which he had full knowledge, and which he aided Shaver in attempting to perpetrate by purchasing the land of him.

But we do not think the court below should have rendered a decree against Shaver for the amount of the note and inter-

est to the date of the decree, and condemned the land to be sold to satisfy the decree, but should have enforced the agreement between the parties upon which the title papers and note were burned.

The decree must be reversed, and a decree entered here cancelling the deed from Jones to Shaver and its fraudulent registration, and the deed from Shaver to appellant so far as the land in question is concerned, and the legal title to the land will stand in the heirs at law of Jones, subject to the control which the statute gives of it to his administrator as assets, etc.

The decree of the court below for costs against Shaver and appellant will not be disturbed.

Farris vs. State, Use of Sawyer.

1. Attachment: *Duty of Officer.*

It is the duty of an officer who seizes property under attachment to retain control of it, so he may return it, if required.

2. ——— ———: *Exemption, Supersedeas, etc.*

The fact that a Justice of the Peace was directed by a writ of mandamus, issued from the Circuit Court, to issue to the Constable a supersedeas against the sale of property seized under attachment, and claimed by the defendant as exempt, did not authorize the Constable to restore the property before the supersedeas was in fact issued.

3. Pleading: *Judgment on defective complaint:*

Trial and verdict for plaintiff, judgment reversed because the complaint shows no cause of action.

APPEAL frm *Lonoke* Circuit Court.

Hon. J. W. Martin, Circuit Judge.

Hallum, for Appellant.

Trimble and *Chapline*, *contra*.

HARRISON, J.:

This was an action by the State for the use of R. L. Sawyer against N. J. Farris and his securities, W. E. Dempsey and W. Harris, on the bond of said Farris as Constable of Lonoke Township.

The breach complained of, was the failure of said Constable to deliver up or restore to said Sawyer, a horse seized under an attachment against him, after the filing by him with the Justice of a schedule of his property, including the horse, which he claimed to be exempt from sale under the execution.

Farris, only, made any defense. He filed an answer which denied none of the allegations of the complaint and set up no other defense than that the horse was placed by him in a livery stable, and that the expense of his keeping not being paid, he was sold therefor by the keeper of the stable, and it was, consequently, impossible for him to return him.

To this answer a demurrer was sustained; and although he filed an amended answer, and the sufficiency of such defense is not before us, we deem it not inappropriate to remark, that it was clearly the duty of the Constable so to have kept the property attached, that he could return it, if its return was required If he saw fit to keep the horse at the livery stable he should, himself, have paid for his keeping. The statute is plain: "The Sheriff, Constable, or other officer, shall safely keep all property, taken or seized under legal process and shall be allowed by the court the necessary expense of doing so, to be paid by the plaintiff and taxed in the costs." Sec. 2,851 Gantt's Digest.

In his amended answer, he answered that he offered to return the horse to Sawyer, but he refused to go to the stable to receive him, and he denied that he ever refused to return him.

The jury returned a verdict for the plaintiff, and assessed the damages at $190, for which judgment was entered.

All the defendants appealed.

The appellants insist that no cause of action is shown by the complaint.

The complaint, which is very loosely drawn, and defective in its averments, alleges that the Justice of the Peace was directed by a mandamus from the Circuit Court to issue to the Constable a supersedeas against the sale of the horse, but does not allege or show that such supersedeas was in fact issued. Until the supersedeas was issued, it was the duty of the Constable to keep, and retain possession of the horse, and there could be, before then, no breach of the condition of his bond by the request to return or the non-delivery of him.

The averment that the supersedeas was in fact issued, is therefore, a material one, and its omission fatal to the action.

The judgment is reversed and the cause remanded to the Court below, with instructions, to permit the plaintiff, if so advised, to amend his complaint, and for further proceedings.

BREWSTER VS. CLAMFIT.

1. *Mortgages to Secure Future Advances.*

If *bona fide* and sufficiently definite are valid. When the amount intended to be secured is in its nature indeterminate, or where it may be easily ascertained outside of the mortgage, the failure to set it out, will not vitiate.

2. MORTGAGE; *Mis-description, correction, etc.*

Where a tract of land is misdescribed in a mortgage or trust deed, the equity of the mortgagee or grantee to have it corrected is equal, and prior in point of time to that of a subsequent judgment creditor.

3. STAY OF EXECUTION: *Effect upon Judgment Lien.*

The voluntary stay of execution by the judgment creditor, does not *destroy* the lien of the judgment.

APPEAL from *Crittenden* Circuit Court in Chancery.
Hon. L. L. MACK, Circuit Judge.
Randolph, for appellant.
Adams, *Contra*.

EAKIN, J.:

On the 18th of April, 1871, the complainant Brewster, recovered in the Crittenden Circuit Court, a judgment against Wm. Clamfit, for the sum of $3,992, and costs, in which judgment it is recited that plaintiffs thereupon "order a stay of execution herein for six months." This judgment was based upon a transcript of a Tennessee judgment rendered in the year 1865. There was execution upon the Arkansas judgment, and return of no property found. The greater part of it remains unpaid.

Complainant Brewster, brought this suit in the nature of a creditor's bill against defendants, Clamfit, J. C. Terry, and a number of other parties, holding title to, or claiming interest in divers tracts of land, in order to reach equitable interests of Clamfit in the different parcels, or to claim and enforce equities as a creditor, against vendees affected by fraud. In the progress of the suit the bill has been dismissed as to many of the parties and much of the lands. So far as it has been retained it charges:

That on the 24th day of September, 1868, said Clamfit conveyed by trust deed to O. P. Lyles, a quantity of lands in Crittenden County, of which he was the legal owner, together with the crop of cotton and corn growing thereon, with some personal property such as is usually found upon plantations. This deed recited that Clamfit was indebted to the firm of Price & Terry, in the sum of ——— dollars, "for cash advanced, supplies furnished, and for further sums of money to be advanced to and for said Clamfit, upon acceptances this day arranged and agreed upon," and to certain other parties

named in the deed "in various sums evidenced by judgments in the Circuit Court of Crittenden County, Arkansas; and which judgments after payment of the sums for labor on said place, and the sums so due to Price & Terry, are to be paid in equal annual installments, * * * as far as possible out of the proceeds of said crops to be shipped to Price & Terry." On default the trustee was authorized to sell all the property. Meanwhile the judgments mentioned were to remain in full force, with their liens reserved; and execution might issue for any balances the property might fail to pay. No sums were mentioned as due to any of the parties. With the exception of the account of Price & Terry, (which seems to have been intended to depend upon acceptances then agreed upon, *and* future advances) the amounts could have been ascertained by reference to the records of the Court.

It further appears from the bill and exhibits that the trustee afterwards, on the 13th of August, 1872, in pursuance of his powers, sold the lands and other property, and that they were purchased by J. C. Terry, for the sum of $13,000, which amount was credited upon the debt of Clamfit to Price & Terry, to which Terry had succeeded.

This deed of trust and these proceedings, are attacked by the bill as fraudulent for uncertainty, and as gotten up by collusion amongst Clamfit, Terry, and the other creditors named therein. Also, because personal property to be consumed in the use was to be left in possession of the vendor.

Further; it is alleged that on the 16th day of February, 1872, Clamfit conveyed to said Terry, a certain forty acre tract, reciting that it was intended to be included in the deed of trust, but had been misdescribed, and so left out; and which was also the "chosen and selected homestead" of said Clamfit; also an additional eighty acre tract, which it is not recited was intended to be conveyed in the deed of trust, but

together with the other, is described as the chosen and selected homestead. These tracts it is claimed, are subject to the judgment lien of complainant.

Pending the suit Wm. Clamfit died; his administrator and hiers were brought in, and together with all parties interested in the matters for which the bill was retained, answered:

The purport of the answer is in general to deny the fraud charged in the deed of trust, to show that the debts mentioned therein were *bona fide*; that in accordance with the intention of the parties, they have been taken up by Price & Terry, or by Terry, who succeeded to the business; and that these payments, together with future advances in accordance with the deed, amounted to more than was bid at the sale; that the mistake was properly corrected; that the land subsequently conveyed was a homestead, and the conveyance passed the property free of the lien of the judgment.

The cause was heard upon the pleadings, exhibits, admissions of counsel and evidence, whereupon the Chancellor denied the prayer of the bill regarding the lands and property contained in the deed of trust; and allowed the conveyance to stand with correction of the mistake as to the forty acre tract; but held the eighty acre tract, conveyed on the 16th of February, 1872, subject to the judgment lien, and ordered a sale of it for that purpose. From this decree Brewster appealed: and afterwards a cross appeal, for defendants, was granted here.

Mortgages for future advances, if *bona fide* and sufficiently definite, are valid. In this case, the deed of trust failed to specify the amounts then due, either to Price and Terry, or to any others of the creditors to be secured. In the case of Price & Terry that was not important, as the indebtedness, whether much or little, was to be mingled with future advances, in their nature indeterminate. The deed was sufficient to put

all persons, interested in the property, upon inquiry, and they might have ascertained the whole amount due Price & Terry at any time, by application to the firm. The other debts were judgments of the Circuit Court of Crittenden County, and easily ascertainable. It would have been better if the deed of trust had set out, at least approximately, the several amounts then due the several creditors; and the failure to do so, accompanied by marked *indicia* of fraud in other respects, might have been important. But the proof shows the entire *bona fides* of the whole transaction; and there is no uncertainty in the deed sufficient to vitiate it. No one seems, in any respect, to have been misled by it. As for the complainant, all his rights against Clamfit then rested upon the judgment of another State, concerning which we must presume the parties to the deed entirely ignorant.

The proof further shows that, at the time of the sale under the deed, defendant Terry, or the firm of Price & Terry, to the rights of which Terry had succeeded, had paid off all the other creditors secured, or nearly all, and that his account for these payments and advances, since the execution of the deed, amounted to a sum greater than that bid at the sale, and greater than the value of the property. As to the forty acre tract, which had been plainly misdescribed, the equity of the vendee or grantee in such cases, to have such a mistake corrected, is certainly equal, and prior in time to that of a judgment creditor, who neither acquires a specific lien by his judgment, nor advances any new consideration. His lien is general upon all the real estate of the defendant in the county, but upon such only as he has; and in the condition in which he then has it—subject to prior equities, until, by sale to a *bona fide* purchaser, for valuable consideration, said prior equities be lost. The deed to correct the error should more properly have been made to the trustee; but as it

was made to the chief beneficiary, who afterwards became the purchaser of all the lands, the same object was reached.

It is contended by counsel for Terry, that by the voluntary stay of the execution, the lien of the judgment was lost. We have examined the authorities cited on that point, and find that they do not go to the full extent of holding that a stay of execution *destroys* the lien. Whether or not a voluntary stay of an execution *suspends* the lien during the stay, it is not necessary here to decide, as in that time no intervening rights accrued to any one. Suffice it to say that the stay does not *destroy* the lien.

The eighty acre tract conveyed to Terry by deed of February 16th, 1872, which was not in the deed of trust, was properly found subject to the judgment lien. There is no proof that it ever had been used as a homestead, only that together with another forty acre tract, (which the plat would show to be nearly a mile away) it had been chosen and selected as such. The proof fails to show actual residence on either tract.

Let the decree be affirmed.

ROGERS VS. JAMES.

1. PURCHASE MONEY FOR LAND. *When Security for passes to Assignee.* VENDOR'S LIEN *not assignable.*

Where a vendor of land retains the title as security for the purchase money, and afterwards assigns the land note, the security for its payment passes to the assignee as an incident to the debt. But where the land is conveyed by an absolute deed, reciting the payment of the purchase money, the vendor has no security for its payment but a vendor's lien in equity, which is not assignable either by an *assignment* of the *note* or by *express transfer or assignment* of the *lien.*

2. VENDOR'S LIEN. *When note reassigned by Assignee to Vendor, he may enforce the lien.*

When an assigned note for the purchase money for land, is reassigned to the vendor, or when the vendor takes up the note upon the failure of the vendor to pay it, the debt and lien become reunited in him, and he can enforce the lien in equity.

3. MORTGAGE.

A note for the purchase money of land, the title to which is retained by the vendor as security for its payment, reciting that the land "is to stand as collateral security for its payment," is not a mortgage nor in the nature of one.

4. ASSIGNOR AND ASSIGNEE. *When Assignor Liable. Pleading.*

When the complaint of an assignee against an assignor does not allege that the note was duly presented to the maker for payment, that payment was refused and that the assignor had due notice thereof, it shows no cause of action.

APPEAL from *Dallas* Circuit Court in Chancery.

Hon. T. F. SORRELLS, Circuit Judge.

Compton, for appellant.

Duffee & Hill, *Contra.*

ENGLISH, C. J.:

This was a bill to enforce a vendor's lien, filed on the Chancery side of the Circuit Court of Dallas County, by James J. Rogers, against Jefferson James, and by an amended bill, William P. Rogers was also made defendant.

A demurrer to the bill as amended, filed by the defendant James, was sustained by the Court, and the plaintiff, James J. Rogers, appealed to this Court.

The material facts alleged by the amended bill, are as follows:

On the 24th day of October, 1873, William P. Rogers sold to Jefferson James, the *South-West Quarter* of the *South-East Quarter*, and the *South-East Quarter* of the *South-West Quarter* of Section 21, Township 10, South Range 17 West, containing eighty acres and situated in Dallas County, for $400, of which James paid him $100 in cash, and gave him the following obligation for the balance:

"By or before the first of ———, one thousand eight hundred and seventy-five, I promise to pay W. P. Rogers, or bearer, the sum of $300.00, with ten per cent. interest from date until paid, for and in consideration of a certain tract or parcel of land, to-wit: the South-East quarter, the North-East quarter, North-West quarter, South-West quarter of Section 21, Township ten, (10), seventeen West, for which said land is to stand collateral security for the same.

"October 24th, 1873.

"JEFFERSON JAMES, [SEAL.]"

That by the contract of sale, the note for the unpaid purchase money was to be payable on the first of January, 1875, but by inadvertance, the month of its maturity was omitted in the note, in which also, the land was misdescribed by mistake.

That on the first of January, 1874, W. P. Rogers, the vendor, executed to James, at his request, a deed for the land, which was written by James, and which was absolute on its face, reciting the payment of the purchase money, but upon the understanding that the land was to be still bound for the payment of the note.

That on the 6th of February, 1874, William P. Rogers, being indebted to the plaintiff, James P. Rogers, for the purpose of paying and satisfying said indebtedness, assigned to him the note by the following endorsement thereon:

"I do assign over all my right and interest to the within note to James J. Rogers, for value received of him this 6th day of February, 1874.

"W. P. ROGERS."

The bill alleged that the note had not been paid, and prayed a decree against both defendants for the amount of the note, that the vendor's lien (which plaintiff insisted had been transferred to him by the assignment of the note) be enforced,

and the land condemned and sold for the satisfaction of the decree, etc.

When William P. Rogers sold the land to appellee, and took his note for the purchase money, he retained the title to the land as security for the debt, and had he then assigned the note to appellant, the security would have followed as an incident to the debt. See cases cited and reviewed in *Campbell* v. *Rankin, et al.*, 28 Ark., 407.

But before the assignment of the note to appellant, William P. Rogers conveyed the land by absolute deed, reciting the payment of the purchase money to appellee, after which he had no security for the payment of the note, but a vendor's lien in equity. The note was not a mortgage upon the land, nor in the nature of a mortgage.

It was decided by this Court upon full review of authorities, in *Shall, ad'mr.* v. *Biscoe, et al.*, 18 Ark., 142, that the vendor's equitable lien is personal, and does not pass to an assignee by assignment of a note for purchase money, and this case has been repeatedly approved and followed.

In *Hecht* v. *Spean, adm'r.*, 27 Ark., 229, the vendor in an assignment of a note for purchase money, expressly attempted to transfer his equitable lien upon the lands, describing them, to the assignee, but this court held that the lien could not be so transferred.

Had the note been re-assigned to William P. Rogers, or had he taken it up on failure of appellee to pay it, the debt and lien would have been re-united in him, and he could have maintained a bill to enforce the lien. *Bernays* v. *Field*, 29 Ark., 218; *Turner, use, etc.* v. *Hornor, adm'r.*, Ib. 440. But such is not the case made by the bill.

There are no allegations in the bill to charge William P. Rogers, who was made defendant. It is not alleged that the

note was duly presented to the maker for payment, that payment was refused, and that he had due notice thereof. *Adams, adm'r.* v. *Boyd*, MS.

Decree affirmed.

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33 81
78 397

McCracken vs. Moody.

1. Constitutional Law: *School Warrants; re-issue and cancellation of.*

The first section of the Act of November 30th, 1875, providing for the cancellation and re-issue of county and district school warrrnts, provides that the holders of school warrants previously issued should, upon ninety days' notice, submit the validity of their warrants to a tribunal composed of the County Judge and Clerk, whose decision should be final. If the warrants were not presented, or if presented and rejected, they were to be void; if pronounced valid, the holders were to surrender them and take in lieu thereof a warrant against the school district issued by the County Clerk. *Held,* that the section imposed conditions upon the holders of the warrants not provided for by the law in existence at the time they were issued, and was unconstitutional, as impairing the obligation of the contract. (See also Parsel vs. Barnes Brothers, 25 Ark., 261, from which this case is distinguished. Rep.)

APPEAL from *Nevada* Circuit Court,
Hon. J. K. Young, Circuit Judge.
Henderson and *Caruth*, for appellant.
Smoote and *McRae*, *contra*.

English, C. J.:

Petition for Mandamus, Nevada Circuit Court, June term, 1877, substance of the petition:

That on the 9th of June, 1873, T. K. Edwards, trustee of school district No. 4, Nevada County, issued to H. W. Richardson the following warrant:

"No. 1, Township School Fund, District No. 4.

June 9, 1873.

Treasurer of Nevada County, Arkansas, pay to H. W. Richardson or order the sum of $50.98 out of the school fund.

T. K. EDWARDS, Trustee."

Witness, J. V. HULSE.

That the warrant was assigned to petitioner, Benjamin F. Moody, for value, before the filing of the petition.

That after the delivery of the warrant to him, he, on the 7th of August, 1873, presented it to Wm. L. McDaniel, Treasurer of Nevada County, for payment out of any moneys in his hands belonging to said school district No. 4, and the Treasurer endorsed it "not paid for want of funds."

That on the 25th of September, 1875, McDaniel, as such Treasurer, published a notice, stating that he had in his hands, to the credit of said school district No. 4, the sum of $200, and requiring all persons who held warrants against the district to present them within thirty days for registration; and accordingly on the 12th October, 1875, petitioner presented the above warrant to him for registration, and the same was duly registered as required by law.

That afterwards petitioner presented the warrant to defendant James B. McCracken, then treasurer, of the county, for payment out of any moneys in his hands belonging to said school district, and payment was refused, though he had in his hands funds amply sufficient to pay the same.

Prayer for mandamus to compel him to pay the warrant.

McCracken, the Treasurer, filed a response to the petition, stating in substance, that he could not, if he had funds, pay the warrant of petitioner, because in pursuance of an act of the General Assembly, of 30th of November, 1875, the County Court of Nevada County provided a book in which all scrips and indebtedness, as in said act mentioned, should be

recorded, and that said County Court, at its January term, 1876, made an order requiring all persons holding such scrip or indebtedness (and the warrant of petitioner was such as was contemplated and embraced by said act), to present the same within ninety days from the date of said order for cancellation and re-issue; and caused the said order to be published in the Prescott Banner, a newspaper published in said county; and that the petitioner did not within said ninety days, nor at any time, present said warrant to said court, nor to the Clerk thereof, for inspection, examination, cancellation and reissue, as by law required, etc.

The petitioner demurred to the response, on the ground that the act relied on was unconstitutional and void.

The Court sustained the demurrer, and awarded a peremptory mandamus as prayed, and McCracken appealed to this Court.

In *Parsel* v. *Barnes & Bro.*, 25 Ark., 261, the scrip holders did not bring in their county scrip to be examined, classified, cancelled and re-issued within the time fixed by an order of the County Court, and it was held that the scrip was barred, because at the time it was issued there was a statute authorizing the County Court to make such calls, and the scrip holders took their scrip subject to the exercise of that power by the County Court; that the statute providing for such calls was part of the law of the scrip contracts, and their obligations were not impaired by enforcing the law.

At the time the school warrant in question was issued, there was no statute authorizing the County Court to make an order imposing upon the holder the duty, at his peril of presenting his warrant to the County Judge and Clerk within a fixed time, to be examined and condemned, if deemed by them illegal, and issued by them in a new form, if found to have been legally issued.

The law providing for the issuance and payment of district school warrants, in force at the time the warrant in question was issued, and which was the law of the contract, is embraced in Chapter 120, and in Chapter 37, (Section 1040) Gantt's Digest.

The substance of so much of the law as it is necessary to notice in this case follows:

Each county is required to be divided into school districts, and each district is made a corporation, capable of holding property, making contracts, sueing and being sued, etc.

The electors of a district are empowered at an annual meeting, to elect a trustee and vote a limited school tax, etc., and the trustee is required to report the tax voted to the Clerk of of the county, and he to extend it upon the tax book to be collected by the Collector as other taxes, and paid to the County Treasurer to be kept by him, and disbursed on the warrants of the trustee, etc.

The trustee is made the contracting officer of the corporation, and empowered to purchase and provide property for school purposes, to employ teachers, etc., and to draw orders on the Treasurer of the county for the payment of wages due teachers, or for any other lawful purpose; stating in every such order the services or consideration for which the order is drawn, and the name of the person rendering such services, etc. (Section 5435.)

When a school trustee's warrant, properly drawn, is presented to the treasurer, he is required to pay the same out of any funds in his hands belonging to the district specified in the warrant, and in case there are no funds with which to pay such warrant, to endorse it not paid for want of funds, stating the date of presentment, etc., after which it is made to bear seven per cent. interest until paid. (Section 1040.)

When the warrant in question was issued, the law then in force required no duty of its holder, and imposed no terms or

conditions upon him, but to present it to the treasurer for payment etc., as above shown.

The first section of the Act of November 30th, 1875, Acts of 1874–5, page 30, relates to district school warrants previously issued, and provides in sbstance:

That the County Court of each county shall at its first session after the passage of the act, provide for the cancellation and re-issue of all outstanding school warrants in each school district, etc., and for a uniform system of registering the same, etc., etc.

That the Court shall provide a book in which shall be kept a separate record of the financial condition of each district.

That the Court shall publish in a newspaper in the county, (or by posting, if no paper, etc.), a copy of its proceedings, requiring all persons who hold school warrants or any other certificate of indebtedness against any school district, etc., to present them within ninety days from the publication of said notice, for cancellation and re-issue, and providing if any person fails to present his school warrant within the above specified time, it shall be rejected, and all rejected warrants shall be null and void.

That upon the presentation of warrants, each piece shall be critically examined by the County Judge and County Clerk, who shall determine the validity of said warrants, and for the purpose of which investigation the County Judge may summons witnesses when the validity of any warrant is in doubt. If they shall determine that it has been legally issued, a new warrant shall be issued by the County Clerk against the district where it was given and numbered, and registered in the book provided for that purpose. If any warrant is rejected, it shall be so registered in the same book on a separate page.

The clerk, sheriff and witnesses to be paid their fees by the county.

The second section of the act relates to school warrants issued after the passage of the act.

Thus it will be seen that the first section of the act required the holder of a district school warrant previously issued, to present it for cancellation and re-issue within ninety days from publication of the notice, and on his failure to do so, the warrant was to be rejected as null and void.

He was required to submit his warrant to the examination of a tribunal composed of the County Judge and Clerk, who were to pass upon its validity, and their decision was to be final; if rejected by them, it was to be null and void.

If they found it to be legally issued, he was required to surrender the warrant issued by the trustee of the school district and take in lieu thereof, a warrant to be issued by the County Clerk.

It is insisted that the first section of the act impaired the obligation of appellee's contract, as holder of a warrant issued by the contracting officer of the school corporation, and was therefore in conflict with the clause of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

On the 10th of February, 1865, a Nebraska act was passed, providing for the funding of the warrants of Otoe County, by which it enacted that all Otoe County warrants bearing date prior to January 1st, 1864, and outstanding, should be presented and bonded before the first day of December, 1865, or be forever barred, and that such warrants should thereafter be null and void. The bonds to be issued in lieu of the warrants were to be payable on or before January 1st, 1873, and bear a less rate of interest than the warrants.

Brewer, who held county warrants issued before the passage

of the act, and who failed to present them for funding within the time prescribed by the act, sued the county upon them, and the county insisted that he was bound by the funding act. The Court held the act invalid as impairing the obligation of the contract, but that the action would not lie upon the warrants. *Brewer* v. *Otie County*, 1 Nebraska, 373.

A California act required holders of county warrants to present them for registration by a day fixed, and on failure the warrants to be forever barred. A holder of a warrant failed to present it to the Auditor of the county for registration as provided by the act, and afterwards applied for a mandamus agaist the County Treasurer to compel him to pay the warrant. On appeal, the Supreme Court held the act void, as impairing the obligation of the contract. JUSTICE BURNELL, who delivered the opinion of the court, said:

"As the law enters into the contract, and forms a part of it, the obligation of such contract must depend upon the law existing at the time the contract was made. The contract being, then, complete and operative, the Legislature cannot, by a subsequent act, impair its obligation, by requiring the performance of *other* conditions, not required by the law of the contract itself. The rights, as well as the intentions, of the parties, are fixed and ascertained by the existing law. Therefore, to require the performance of *other* conditions, to make the contract operative, is to impair its obligation.

"The power to impose conditions, after the contract is once complete and perfect, is nothing but the power to impair its obligation, and this the constitution has prohibited. *Robinson et al.* v. *Magee*, 81 California, 9. See, also, *McCauly* v. *Brooks*, 32 Ib. 16.

By a California act of 18th March, 1868, providing for the funding of the unfunded indebtedness of San Diego County, a Board of Commissioners was created whose duty it was made to examine into and pass upon the legality or illegality

of all outstanding warrants, etc., etc., and to allow or reject them; and the act declared that no warrant, etc., should be a legal and valid claim against the county, or be paid, until passed upon, audited and allowed by the Board. Rose was the holder of certain warrants, issued by the Auditor of the county, which had been duly presented to the Treasurer for payment, and endorsed not paid for want of funds, prior to the passage of the act. He had done all the law in existence at the time the warrants were issued required him to do.

He did not submit his warrants to the examination of the Board of Commissioners, but demanded payment of them by the Treasurer from moneys properly applicable thereto, which was refused; and he applied to the Supreme Court to compel him, in the exercise of its original jurisdiction, by mandamus.

The court ordered a peremptory mandamus upon the County Treasurer to pay the warrants, holding that so much of the act as required holders of warrants to submit them to the Board of Commissioners, to be examined, allowed or rejected by them, to be void as impairing the obligation of the contracts. *Rose* v. *Estudillo*, 39 California, 270.

The first section of the act of 30th November, 1875, was unconstitutional for two reasons:

First—It requires the holders of district school warrants to submit their validity to a tribunal composed of the County Judge and Clerk, within ninety days from public notice, and made their decision final; the warrants were to be null and void if not presented within the time fixed, or if presented and rejected. This was imposing a duty upon the holders of warrants, and a condition of payment not provided for by any law in existence at the time they were issued.

Second—The warrant holders were required, if their warrants were pronounced valid by the Judge and Clerk, to surrender them—surrender the contracts of the school corpora-

tion—and take in lieu thereof warrants issued against the school districts by the County Clerk.

The second section of the act relates to school warrants issued after its passage, and warrant holders take them subject to its provisions, and of course must conform to them.

We have not overlooked the fact that the warrant in question was not issued in compliance with section 5435, Gantt's Digest, which requires, as above shown, the school trustee to state in every warrant drawn by him upon the County Treasurer, the services or consideration for which the order is drawn, etc., and section 1040 requires the Treasurer to pay such warrants as are properly drawn only. But the Treasurer in his response, sets up no objection to the warrant—makes no defense—other than that appellant failed to present it for cancellation and re-issue, etc., as required by the act of 30th November, 1875. Had he made the defense in the court below that the warrant was not drawn in the form required by the statute, the court might possibly have permitted the appellee to call before it the officer who issued the warrant, and amend it according to the facts.

Judgment affirmed.

GREGG VS. GREGG.

ADMINISTRATION: *Sale of Real Estate for Payment of Debts.*

An order of the Circuit Court, while it had probate jurisdiction, for the private sale of the real estate of a decedent for the payment of debts, made without notice was erroneous.

ERROR to *Lincoln* Circuit Court.

Hon. J. A. WILLIAMS, Circuit Judge.

L. A. & X. J. Pindall, for plaintiff in error.

HARRISON, J.:

Edmond P. Gregg, administrator *de bonis non*, with the will annexed of James L. Govee, deceased, applied by petition to the Circuit Court of Lincoln County, then, October term, 1874, having original jurisdiction in matters of administration, for an order authorizing and empowering him to sell at private sale to E. M. Apperson & Co., at the price of $24,000, a plantation known as the Home Farm, belonging to his testator's estate, for the payment of the debts of the estate.

The petition stated that the claims—the time for the presenting of which had expired—presented and allowed against the estate, had amounted to $6230, the whole of which except some small portion, not exceeding the interest, remained unpaid; and that in addition thereto, there had been created by Mary E. Govee, the late executrix, who had continued the cultivation of the plantation, a debt to E. M. Apperson & Co., of $10,012.95; and that there was no personal property with which to pay the debts of the estate.

That said E. M. Apperson & Co. were willing, and proposed if the court would authorize the sale, to purchase the plantation at the price of $24,000, and out of which pay the probated debts, and satisfy the indebtedness to themselves, and the remainder they would pay over to the widow, said Mary E. Govee, and the heirs of the testator; and that the widow and the heirs, who were Lucie G. Gregg, Mollie Govee, and James L. Govee, all of whom were of age, had assented to the proposition, and in writing contracted with said E. M. Apperson & Co., to sell the plantation upon those terms.

Whether or not any provision in respect to the plantation was made in the will, in no manner appears.

The widow and heirs did not join in the petition.

No notice of the intended application was given.

The court granted the order, and James L. Govee, one of the heirs, has brought the case here by writ of error.

The widow and heirs had, if no provision as to the plantation was made in the will, most unquestionably the right to sell it and pay the debts of the estate, but it is clear that the court could only direct a sale in accordance with the provisions of the statute concerning sales of real estate for the payment of the debts of the estate, none of which were in this case complied with, and as so provided at public auction. Sections 168—180 Gantt's Digest.

The order of the Circuit Court is therefore reversed and set aside, and the cause is remanded with instructions to transfer the same to the Court of Probate of Lincoln County, for such proceedings as may be had in accordance with law.

MATTHEWS VS. LANIER.

1. EVIDENCE: *of parties.*

When the parties to a suit testify as to matters within the knowledge of both, and material evidence of one party is not contradicted by the other, it must be presumed to be true.

2. *Upon motion for new trial on the ground of surprise* at the trial, and want of opportunity fo produce evidence, the new evidence should be incorporated in the bill of exceptions.

APPEAL from *Mississippi* Circuit Court.

Hon. L. L. MACK, Circuit Judge.

Palmer, for appellant.

Lyles, contra.

HARRISON, J.:

This was an action by the appellee against the appellant on an account for rent.

The complaint alleged that the plaintiff leased to the defendant a plantation for the year 1876, at seven dollars an acre rent for the cleared land, of which there were 337 acres; and admitting a credit of a merchandise account with the defendant of $86.60, demanded the sum of $2272.60.

The defendant in his answer admitted the leasing of the plantation, and at the rent stated, but denied that there were more than 308 acres of the cleared land, or that the rent amounted to more than $2156, which sum he admitted he owed; and he claimed and pleaded a set-off of $1933.03, the particulars of which were stated in the following account:

Felix R. Lanier to John Matthews:		Dr.
Dec. 16, 1875:	To balance due on settlement.....	$1319 43
" " "	" sight draft on Brooks, Neely & Co., for.....	350 00
Nov. 10, 1876:	To cash paid James Anthony for survey in land.....	24 90
" " "	" interest on $1669.43, 10 months and 28 days at 10 per cent.	152 10
" " "	" merchandise as per bill rendered.	86 60
		$1933.03

He, also, exhibited with and as part of his answer, the written contract for the lease, which was as follows:

"This agreement, entered into this 8th day of January, 1875, between Felix R. Lanier of the first part, and John Matthews of the second part, witnesseth: That the said Felix R. Lanier has this day rented, leased and delivered to the said Matthews, his farm in Bend Thirty four, in Mississippi County, Arkansas, for the present year of 1875, at seven dollars per acre for all of the land owned by the said Lanier under fence on said plantation. The land to be measured, and the exact number of acres to be ascertained. And the said Matthews agrees to clear up and put one hundred and fifty acres more of the old field back of the levee in cultivation, clearing all the

timber off of the said one hundred and fifty acres, and fencing the same with good rails; but is to have the privilege of using the cotton-wood poles growing on the land to be cleared up. The land to be cleared at the cheapest rate possible and charged to the said Lanier, and advanced by said Matthews out of the rent of the land now under fence, supposed to be about one hundred and sixty acres. It being understood that the said Matthews is to pay rent on the land now under fence only; but is to cultivate all now under fence, and one hundred and fifty acres additional, which he is to clear up, but is to pay no rent for the new cleared land.

It is further agreed by the parties, Felix R. Lanier and John Matthews, that, in the event the said Lanier shall desire it, the said Matthews is to be bound to cultivate the whole land fenced under this contract, including the old and the new ground, in the year, 1876, and pay the said Lanier seven dollars an acre for all of said land, which will then be about three hundred acres; but the contract for renting the land for 1876 is to be subject to the wish of the said Lanier, the said Matthews being bound to cultivate said land on said terms for the year 1876, if said Lanier desire him to do so.

In the event of a disastrous overflow by which the land could not be cultivated, the said Matthews is not to be liable for the rents exceeding the cost of clearing up the new ground and fencing the same as heretofore specified.

FELIX R. LANIER,
JOHN MATTHEWS."

A replication to the set-off appears to have been filed, but is not in the transcript.

Upon the trial Benjamin Castleman testified for the plaintiff, that he had a short while before surveyed for him all the land in the plantation inside the fence. That there was two fields, one of which contains 185, and the other 168.96 acres, together 353.96 acres.

The plaintiff testified that the field containing according to Castleman's survey 168.96 acres, was the land cleared up and fenced by the defendant. Mrs. Dunavant he said, had some land in his field not inclosed in Castleman's survey, and for which he did not claim rent. He denied the correctness of the charge in the defendant's set-off of $1319.43; "balance due on settlement," and said the correct amount was $942, and upon which he had agreed in writing to pay ten per cent. interest from the date of the settlement. He said he had a settlement with the defendant on the 16th of December, 1875, of matters pertaining to the estate of J. H. Edrington, and as to those he was found indebted to the defendant, $1319.43.

At the same time he had a settlement with him concerning the rent fot 1875. The defendant paid him on the rent $350, by the draft charged in his set-off, and after being allowed his account for the clearing and fencing, which was $575, he owed $377, which it was agreed the plaintiff should receive a credit for on his indebtedness to the defendant.

The defendant read to the jury a survey of the land by James Anthony, the County Surveyor; made after the suit was commenced, according to which there were 166 1-2 acres in one field, and 158 1-4 in the other—in both 324 3-4 acres—and that there were 17 acres in the *sand blow*.

Dr. Dunavant, a witness for the defendant, testified that his wife owned about 17 1-4 acres in the plaintiff's field, the line between which and the plaintiff's land had been run, and for which he said the defendant had paid him rent.

John B. Driver, another witness for the defendant, testified that he was Sheriff of the county, and had had in his hands a writ of possession in favor of Mrs. Dunavant against the plaintiff for the 17 1-4 acres, which he had executed.

The defendant testified that on the 16th day of December, 1875, he had a settlement with the plaintiff of the matters between them pertaining to the estate of J. H. Edrington and

the plaintiff was found indebted to him $1319.43, upon which he agreed in writing to pay ten per cent. interest; and that he gave the plaintiff the draft on Brooks, Neely & Co, for $350, charged in the set off.

He further testified that after making the contract with the plaintiff for the lease, they went to examine the land and he found a sand blow of about 18 acres made by a break in the levee, from one to two feet and a half deep, and he objected to putting it in; but the plaintiff insisted that he should clear it off and cultivate it, and said he would charge no rent for it. He testified also that he had paid rent to Dr. Dunavant for Mrs. Dunavant's 17 1-4 acres by the plaintiff's consent.

The jury returned a verdict for the plaintiff for $999.75.

The defendant moved for a new trial, which was not granted.

One of the grounds of the motion for a new trial, was the giving of certain instructions, to the jury, for the plaintiff.

As these instructions related only to the inquiry as to the number of acres, which as very clearly appears to us, the jury found to be as claimed by the defendant, or even less, we deem it unnecessary to notice them. The answer admits there were 308, and that there was due for the rent $2156.

The number of acres, according to the survey of the County Surveyor, introduced by the defendant, was 324 3-4, and if 17 are deducted for the sand blow, (whether it was included in the 324 3-4 acres or not, does not appear,) there remains 307 3-4, within a fraction of an acre of the number admitted in the answer.

The testimony of the plaintiff, in relation to the first three items in the defendant's set off, was, although he was also a witness, uncontradicted by the defendant and must therefore be presumed to be true. *Miller* v. *Jones*, adm'r, 32 Arkansas, 337; and there was no proof as to the other items of money paid the County Surveyor.

The defendant's set off, then, according to the evidence, stood thus:

Balance due on account of estate of Edrington, after deducting credit of $377	$942.43
Interest on same from December 16th, 1875, to time of trial, eleven months, at 10 per cent	85.67
Merchandise Account	86.60
	$1114.70

This amount, and the $999.75 found due the plaintiff by the verdict, make $2114.45—less by $41.55 than the rent admitted in the answer to be due and is for only about 302 acres.

Another ground of the motion for a new trial was that the defendant was surprised upon the trial by the plaintiff's going into the question of the rent of 1875, and he had no opportunity of bringing in his account of that year against the plaintiff.

In his affidavit in support of this ground of his motion, the defendant swore that only his account of admitted balances, and not his entire account, was before the jury, and that if a new trial was granted he would be able to prove that the plaintiff owed over and above the admitted balances that year, $196.45. What is meant by "admitted balances" we are not able to understand. If there was other evidence than as we have stated it, the bill of exceptions failed to preserve it.

The question of the rent of 1875 was not gone into by the plaintiff further than to show that items in the defendant's set off were not just.

His testimony in regard to those items was not disputed or contradicted by the defendant when testifying himself, and he did not in his motion or affidavit in the least impeach it.

The defendant does not propose to show that the draft charged in the set off was not in fact given to the plaintiff as

a payment on the rent, or that there was not a balance of $377 of the rent, which was to be credited on the plaintiff's indebtedness of$1319.43.

The motion for a new trial was properly overruled.

The judgment of the court below is affirmed.

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65 285

WOODRUFF VS. MCDONALD, ET. AL.

1. FINDINGS OF THE COURT SITTING AS A JURY: *When conclusive.*

The findings of a court sitting as a jury, are in the nature of a special verdict, and are conclusive as to the facts of the case when the evidence is not set forth in full, and exceptions taken to the findings.

2. CONSIDERATION: *Burden of proof.*

A written obligation for the payment of money imports a corsideration, and upon an issue of want of consideration the burden of proof is on the defendant.

3. ————: *Adequacy.*

Where there is any consideration for a contract, its adequacy cannot be questioned at law.

4. CORPORATION: *Stock subscriptions, etc.*

Subscriptions to the capital stock of a corporation were made on a loose sheet of paper which was put in a bound book used as a record of the company, and the contents of the paper, with the names of the subscribers and amounts subscribed, were entered in the book by the commissioners appointed to open books of subscription; *Held,* that this was a sufficient subscription to the stock of the company. (See the opinion as to the effect of irregularities, as between assignee and assignor of the stock. Rep.)

APPEAL from *Pulaski* Circuit Court.

Hon. T. C. PEEK, Special Judge.

Rose, for appellant.

Yonlcy and *Whipple*, *Kimball*, *Faust*, *Benjamin* and *Barnes*, *contra*.

EAKIN, J.:

Appellant sued McDonald, and a number of other defendants, who had joined in the alleged purchase, from him, of

certain shares of stock in the Little Rock Bridge Company; chartered by special act of the General Assembly March 5, 1867.

This act, by section 2, appointed commissioners to superintend the opening of books for stock subscriptions; and also (when $30,000 should have been subscribed) to call a meeting for the purpose of electing five directors, to organize and conduct the affairs of the company. By section 4 it was made the duty of the President and Directors, upon the payment of the capital stock of the company, or any part thereof, to issue certificates of stock to the stockholders, specifying the number of shares to which each might be entitled. These certificates were made transferable under such rules and regulations as the President and Directors might adopt.

The complaint set up four written obligations executed jointly by defendants, on the 14th day of January, 1873, for $1250 each; in favor of complainant, Woodruff; due respectively at 9, 15, 18 and 24 months. These notes, each, recited that they were given in part payment for the assignment and transfer to the makers, by Woodruff, "*without recourse, of his two hundred and fifty shares in the capital stock of the Little Rock Bridge Company.*" Taken altogether, they provide that if default be made in the payment of the first, when due, all shall become payable and bear an increased rate of interest. Such default, it is alleged, was made; and judgment demanded for the whole $5000, with interest as stipulated.

The answer of the defendants is lost; but it is here agreed to have been, substantially, the same as that set up in another case now submitted with this, and, so taken, would show, that they admitted the execution of the several agreements in writing, as alleged. But they denied that either of them had received any assignment or transfer of any shares of stock. They denied that complainant had subscribed for any shares of such stock, or had paid anything for them to the company, or

in short, had any; and further denied any consideration for the notes. They charged fraud and misrepresentation upon complainant in claiming to own said shares, when that was false, and alleged that the certificates which complainant pretended to assign and transfer, and which purported to be for paid up stock, had in fact been issued by collusion between complainant and the Directors of the company, when nothing had been paid thereon.

The case was submitted to the court, without a jury, which found for the defendants, and rendered judgment against plaintiff for costs. Motion for a new trial overruled and appeal granted.

The bill of exceptions shows that the court found the following facts:

First—The passage of the special act of incorporation approved March 5th, 1867.

Second—A book purporting to be the record book of the company, showing that the original stock had been taken by plaintiff and others named, each taking $25,000 of eapital stock. The entry, to this effect, was in the handwriting of Peter Hanger, one of the Commissioners to open books, and signed by plaintiff and A. M. Woodruff, two others of said Commissioners. The subscribers of stock did not subscribe *in this book*, but had affixed their signatures to a form of subscription on a loose paper, which had been kept in the book, and passed with the book into the hands of defendants, but was not now produced. There was no proof that the Commissioners were qualified as such.

Third—Certificates of stock were issued on the 30th of May, 1867, to those who were shown by the books to have been subscribers.

Fourth—A Board of Directors of said company was organized and proceeded to do business.

Fifth—No part of stock was ever paid in.

Sixth—The note in suit was given as part payment for a transfer of said stock. The defendants bought *all* of the stock at the same time, knowing that nothing had been paid on the subscription—and for the avowed purpose of getting the franchise of the company. They paid for the whole in cash $2500, and gave notes for the remainder. The whole purchase price amounted to $25,000. The certificates were regularly transferred at the time of the sale. The defendants expressed the intention to go on with the company, and did actually act afterwards in an assumed corporate capacity, but after a while ceased and allowed the privileges of the charter to expire.

Upon this state of facts plaintiffs asked the court to declare the law to be, that there was a consideration sufficient to uphold the contract sued on, and that the finding should be for the plaintiff. This the court refused to do, but found as a conclusion of law: "That said company was never legally organized, that the said certificates of stock were void, and that there was a total want of consideration to uphold the notes sued on, and that the finding should be for defendants." To this refusal and declaration, the plaintiff excepted, and, as no evidence is brought up, this is the only matter now presented to this court upon appeal.

It is the prevailing doctrine of the Federal and State courts, in some of which it is fixed by statute, and in most adopted as resting upon reason and sound principle, that the finding of a court sitting without a jury, is in the nature of a special verdict, and conclusive as to the facts of the case, where the evidence is not set forth in full and exceptions taken to the findings as not supported by evidence. This court has recognized this practice in the case of *Obermier & Co.* v. *Carr, Thompson & Co.*, 25 Ark., 562.

The written obligations import a consideration, and upon the issues made, the burden was on defendants to show that there was none. See *Richardson* v. *Comstock* for authorities collected, 21 Ark., 69. Do the facts, as found, show that?

This is not like a case of an action by the company against a subscriber to enforce payment of his subscription. In such case, if there be anything so irregular, informal, defective, or illegal in the subscription, that the company itself would not be bound if it had chosen to repudiate it, it might perhaps be well contended that for want of mutuality the contract was void. Nor is this like a case of a proceeding against the company for an abuse of its powers, or for acting without power, or in an unauthorized manner. Such proceedings are on behalf of the State, and in many cases the State alone can proceed to have the acts of corporations declared void.

The question here is, did the defendants acquire by the contract any advantages they would not have had without it, or did the plaintiff suffer any inconvenience, detriment, or loss. In either case the consideration would be good, and in an action at law, its adequacy is immaterial.

It appears from the facts, found by the court, that the subscriptions were made and signed upon a loose sheet of paper, which was put in a bound book appropriated to the records of the company, and the contents of the paper, with names and amounts of the subscribers were entered in the book, by the Commissioners appointed to open books. This was a sufficient compliance with the statute. The subscriptions do not appear to be invalid, and the burden of showing that, if true, was upon the defendants.

The issuance by the company of certificates, before any part of the subscription was paid in, was not expressly authorized by the act; and if it had been done by collusion between plaintiff and the officers of the company, without the knowledge or

assent of defendants, it would have been such a fraud in the sale of the stock, as would have authorized the defendants, upon discovery of the facts, to rescind the contract, or to recoup the amount of the payments on the stock. That, however, would have been because of the fraud, and not strictly for want of consideration. It was not, strictly speaking, the *certificates* which the defendants purchased. It was the *stock*, and the certificates were only evidence that the holders were entitled to hold the stock and transfer it.

The company seems, voluntarily, and for its own convenience, and that of its members, to have issued these certifieates prematurely. We are not prepared to say from the facts that it did so fraudulently, or that its action therein was void. It was certainly done with the full concurrence of all parties interested, including these defendants, and, unless the State should complain, or some creditors, perchance, be misled, we see no reason for interference on the part of the courts.

The plaintiff, and all others of the subscribers, selling together and taking separate notes, or written agreements, denuded themselves of all rights they had as subscribers. These rights were valuable. They gave the subscribers the control of the franchise, which then, it is evident, was considered of great value. It enabled them to proceed and build a bridge over a large river at the capital city of the State, and take tolls, which might have been, and it was expected would be, very profitable. These advantages the vendors relinquished. If they had not sold them to defendants, they might have sold them to others, or gone on and built the bridge and taken tolls.

On the other hand, these advantages were acquired by the defendants, and so far as appears, fully enjoyed without let or hindrance from plaintiff or his original associates, or the State, or creditors of the company, or any one else. The purchasers became the company, and for a while assumed to operate it.

They knew the capital stock had not been paid in. If it were important that it should be, they had a right to pay it, and cure any defects. Whatever may have been the cause of their failure to avail themselves of the advantages acquired, the plaintiff is not shown to have had any agency in it.

Doubtless it turned out that the speculation was a bad one. We may presume that a change in the financial affairs of the community, or changes in the facilities otherwise afforded for crossing the river, caused the bridge to be abandoned. The money paid was a dead loss, and it is natural that the defendants should feel the hardship, and indulge the sentiment that their contract was without consideration. We think, however, that the court below erred in declaring that the facts as found, showed no consideration for the contract.

Let the judgment be reversed and the cause be remanded, with instructions to grant a new trial, and that the cause proceed in accordance with law, and not inconsistent with this opinion.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF ARKANSAS,
AT THE
NOVEMBER TERM, 1878.

BRADY VS. HAMLETT.

1. DECREE: *When it becomes absolute.*

A final decree becomes absolute upon the expiration of the term at which it is rendered, and the court cannot of its own motion, or by consent of parties, open it at a subsequent term, for rehearing; an order entered at the term at which the decree is rendered, granting leave to file a petition for rehearing at the succeeding term, will not keep it within the control of the court. The decree should be opened and the cause continued.

APPEAL from *Bradley* Circuit Court.
Hon. PETER MOSELEY, Special Judge.
McCain, for appellant.

ENGLISH, CH. J.:

John Brady brought ejectment against Thomas F. Hamlett, for possession of two forty acre tracts of land, in the Circuit Court of Bradley County. He claimed title under Auditor's tax deeds, which recited that the lands were forfeited to the State for non-payment of taxes of 1863. Hamlett filed an answer and cross-complaint in the nature of a *quia timet* bill, alleging that he paid the taxes charged on the lands for the year 1863, and that they were returned forfeited by mistake, and praying that the Auditor's deed be cancelled, and he quieted in his possession. On his motion the cause was trans-

ferred to the equity side of the court; heard upon the pleadings and evidence at the September Term, 1875, and decree in favor of Hamlett as prayed in his cross-complaint.

After the decree was entered, an order was made that Brady have leave until the first day of the next term to enter a petition for re-hearing.

On the first day of the March Term, 1876, Brady asked for further time to file a petition for re-hearing, and was granted leave to file it on any day of that term.

At the same term there is an entry stating that, by consent of parties, the court ordered that the decree rendered at the previous term be opened for rehearing, and the cause continued.

The cause was again heard at the September Term, 1876, and the same decree was rendered as on the former hearing, and Brady appealed.

The evidence introduced upon the hearing, and put upon record by bill of exceptions, conduced to prove that Hamlett paid to the Collector the taxes charged upon the lands, for the year 1868, but we cannot consider the merits of the case on this appeal.

The decree rendered in the court below at the September Term, 1875, was final. If the court desired to grant appellant time until the next term to file a motion for a rehearing, it should have opened the decree, and continued the cause, so as to prevent the decree from becoming absolute on the expiration of the term, and kept it within its control. But this was not done, and hence on the close of the term, the court lost its power over the decree, and could not, of its own motion, or by consent of parties, open the decree for a new hearing, at a subsequent term of the court; hence all of the proceedings subsequent to the decree rendered at the September Term, 1875, were *coram non judice*.

Mayor etc., v. *Bullock*, 6 Ark., 282; *Rawdon* v. *Rapley*, 14 Ark., 203.

Appeal dismissed.

GIBBS VS. DICKSON.

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69 118

1. RECORD: *Demurrer part of; judgment, etc.*

A demurrer when filed, becomes a part of the record, and a judgment upon it should be shown by a record entry, and not by bill of exceptions.

2. PLEADING: *Complaint.*

A declaration or complaint on a lease which begins in debt, and concludes in covenant, is not for that reason, demurrable under the code.

3. AGENT, CONTRACT BY: *Right of action on, etc. Private Seals.*

A lease executed by an agent in his own name, from the body of which it is obvious that he intended to bind his principal and not himself, will be treated as the contract of the principal, and he may maintain an action on it. The distinction at law between sealed and unsealed instruments in this respect, has ceased to exist since the abolition of private seals.

4. PLEADING: *Joinder of causes of action.*

Under the code, a count or paragraph on a written lease, may be joined with one on a verbal account stated.

5. EXCEPTIONS: *Motion for new trial, etc.*

No advantage can be had of exceptions reserved at the trial and not made grounds of a motion for new trial.

6. SET OFF: *Practice on failure to reply to plea of.*

Upon the failure of a party to file a reply to a plea of set off, the adverse party should move for judgment upon the plea for want of a reply; and when he fails to do so, but goes into trial as if the issue were made up, he will not be allowed the advantage of it in this court.

APPEAL from *Crittenden* Circuit Court.

Hon. L. L. MACK, Circuit Judge.

M. Peters, of Memphis, for appellant.

Lyles, contra.

ENGLISH CH. J.:

This action was brought in the Circuit Court of Crittenden County by William Dickson, against Thomas Gibbs, and

founded upon the following lease, which is set out in the complaint, made a part of, and filed with it:

"COUNTY OF CRITTENDEN, STATE OF ARKANSAS.

This agreement and contract made this 18th day of February, 1874, between John L. Strong acting for William Dickson of the County of Colbert, in the State of Alabama, party of the first part, and Thomas Gibbs, of the County of Crittenden, Arkansas, of the second part, witnesseth: That said Strong for said Dickson, hath this day rented, and by these presents doth rent, unto the said Thomas Gibbs, his plantation known as *Holly Grove*, in said County of Crittenden, to farm for the year 1874, the said Dickson renting, and the said Gibbs accepting the said plantation on the following terms and conditions:

First—That this agreement is confined to the year 1874, and expires on the 31st day of December, 1874, at which time possession shall be given to William Dickson. A notice of ten days shall he given to said Gibbs requiring possession. If said Dickson shall rent the said lands after the year 1874, then he shall name a price to be paid as rent for the same, and the said Gibbs shall have the refusal of said plantation at the price named.

Second—For the use of the plantation for the year 1874, the said Gibbs agrees to make the following improvements, to-wit: a fence around the plantation ten rails high, the rails to be good substantial rails. On the front of the plantation, commencing at the corner of said fence on the road leading to Malone's, which is the corner nearest the Malone plantation, and ending at the corner below the old Hine house, which corner is that nearest the Ball place, the said Gibbs shall place stakes and riders in the manner customary in the country, the stakes to be well and firmly set in the ground. If the old cotton press now on the place can be repaired at a cost of $50,

then the said press shall be repaired by the said Gibbs, otherwise he may provide his own press and remove the same at the expiration of his lease. The said Gibbs agrees to build the chimneys to all the cabins above the roofs. Whatever additional improvements may be necessary to the comfort and convenience of the tenant, will be at his own expense, and not chargeable to the landlord. The said Gibbs agrees to cultivate all the land which has heretofore been in cultivation, except such as he may be prevented from cultivating by reason of high water overflowing it; to clear the same of bushes and grubs that have grown upon it by reason of the neglect of former tenants, and to leave the same in good condition for another crop. The said Gibbs further agrees to pay all taxes that may be assessed upon the lands of William Dickson lying in township 8 south, range 8 east, for the year 1874, which may be due and payable in the year 1875, and to preserve the improvements from destruction and decay, except such as may result from wear and use, and to turn them over in good order at the expiration of this lease. It is mutually agreed between the parties that in the event the said Gibbs shall not have gathered and removed his crop at the expiration of his lease, he shall be allowed a reasonable time thereafter for that purpose.

In testimony whereof, the said parties of these presents have hereunto set their hands and seals the day and year first above written.

JOHN L. STRONG, [SEAL.]
For William Dickson.
THOS. GIBBS. [SEAL.]"

The complaint is in substance as follows:

"*First Paragraph*—The plaintiff, William Dickson, states that the defendant, Thomas Gibbs, is justly indebted to him in the sum of $1000 damages, sustained by the plaintiff for

and on account of the non-performance of the obligations, stipulations and covenants on the part of said defendant of the certain written contract, covenant and agreement made and entered into by and between the plaintiff and defendant, at etc., on the 18th day of February, 1874, (the original agreement is herewith filed marked exhibit A, and made part of this complaint,) in and by which agreement and covenant in writing, the said defendant rented and leased from the plaintiff (through John L. Strong, plaintiff's agent,) the certain plantation of the plaintiff known as the *Holly Grove* plantation in said county, to farm the same for the year 1874, the said defendant and plaintiff covenanting and agreeing upon the following terms and conditions, to-wit:

(Here the stipulations of the lease are copied.)

"*Second Paragraph*—And the plaintiff avers that under and in virtue of said covenant in writing the said defendant did enter in and upon the lands so leased, and did use, have and enjoy the same for the whole length of time specified and agreed upon, and that plaintiff on his part hath in all things performed his part of the covenants aforesaid.

"*Third Paragraph*—But the plaintiff avers that the said defendant hath not kept and performed his part of the covenants and stipulations aforesaid, but on the contrary the said defendant hath failed, neglected and refused to keep and perform his covenants and agreement, and hath broken the same in this, that the said defendant failed, refused and neglected to make the fence above stipulated for, and to place the fencing around the place as by contract he was bound to do; and the said defendant hath also failed to clear the land of bushes, grubs, etc., and to cultivate the land in the manner stipulated for, together with other and further breaches of his said covenant by non-performonce of the same, by reason of all of which the plaintiff hath sustained damages to amount of

$1000, which amount the plaintiff believes he ought to recover of and from the defendant.

"*Fourth Paragraph*—And the plaintiff further states, that after the making of said special contract in writing, and after the said defendant had used, occupied and had the benefit of said lands and premises under the lease and covenant, to-wit: on the——day of————————, 1875, he, the said plaintiff, by John L. Strong, his agent, and the said defendant did settle and adjust all of the said matters above complained of, which resulted in a balance due the plaintiff of the sum of $1000, which the said defendant agreed to pay, but afterwards refused. And so the plaintiff avers that there is due him from the defendant the sum of $1000 as aforesaid, for which amount he prays judgment against the defendant, and for general relief," etc.

The defendant demurred to the complaint, assigning the following causes of demurrer:

First—The complaint does not state facts sufficient to constitute a cause of action.

Second—The contract sued on is too indefinite and uncertain, and without consideration.

Third—The second count is irregular and insufficient.

There is a record entry in the transcript, showing that the demurrer was taken up and argued, but not how it was disposed of. It only appears from the final bill of exceptions taken on the overruling of the motion for a new trial, that the demurrer was overruled.

The defendant filed an answer with two paragraphs:

First—Covenants performed.

Second—Set-off, alleging that plaintiff was indebted to him in the sum of $1,541.85, over and above his indebtedness to plaintiff, as per bill of particulars filed.

The cause was finally submitted to a jury, and verdict rendered in favor of plaintiff for $498.

Defendant moved for a new trial on the grounds:

"*First*—Error in amount of recovery, the same being too large.

"*Second*—Verdict not sustained by sufficient evidence, or contrary to law."

Motion overruled, final judgment for plaintiff, bill of exceptions, and appeal by defendant.

I. The overruling or sustaining of a demurrer to a complaint, or answer, should be shown by a record entry. The demurrer, when filed, like other pleadings, is part of the record, and the judgment of the court upon it should be entered of record, and not left to be shown by a bill of exceptions.

No doubt the court below overruled the demurrer to the complaint, as stated in the bill of exceptions, and the clerk neglected to make the proper record entry, showing it, or failed to copy the entry into the transcript sent here on appeal.

The complaint is arbitrarily or fancifully paragraphed. It contains, in the Code sense, but two paragraphs, one upon the lease, and the other upon an alleged account stated between the parties.

The paragraph (or count, to use the Common Law and better phrase), upon the lease, sets out and exhibits the instrument, alleges the performance on the part of the plaintiff, assigns specific (as well as general) breaches on the part of the defendant, and lays the plaintiff's damages at $1000.

The objection that it commences in debt and concludes in covenant, is not valid under the Code pleading, which abolishes the Common Law classification of actions. It alleges substantive facts to show a cause of action.

The specific objections taken in the demurrer, that the contract sued on is too indefinite and uncertain, and without consideration, are not well founded.

The lease expresses very clearly the subject and terms of the contract, and the use of the plantation was the consideration for the defendant's covenants to make improvements, etc.

The lease sued on was executed in the name of the agent for the principal, and a deed so executed might not be valid at law as the deed of the principal. Story on Agency, 8 ed., sec. 148, and notes. *State* v. *Jennings*, use, etc., 10 Ark., 446.

But the rule is not so strict in relation to unsealed instruments. If it can upon the whole instrument be collected that the true object and intent of it are to bind the principal and not the agent, courts of justice will adopt that construction of it, however informally it may be expressed. Story on Agency, 8th ed., sec. 154.

In this case it is manifest from the body of the lease, that the plantation belonged to Dickson, and that Strong, in executing the lease, was acting as agent for him, and intended to bind him, and not himself, and private seals being abolished, the lease was not of a higher grade, or more solemn in its character than a parol instrument.

Moreover, the complaint shows that the contract was executed on the part of Dickson. Gibbs was let into the possession of the plantation under the lease, and enjoyed the use of it for the year and this suit is brought against him by Dickson for failure to perform the covenants which he assumed on his part in the lease.

By the Common Law the plaintiff would have been obliged to bring the action of *covenant* upon the lease, because it was under seal, and the damages of the plaintiff for the failure of the defendant to perform his covenants, unliquidated. And in such action he could not add a count upon an *account stated*,

because covenant would lie only upon contract under seal, and not upon a verbal admission of a sum due by the defendant. 1 Chitty Plead., 199–358.

Private seals being abolished, assumpsit would lie on the lease in question, and a count upon an account stated might well be added, if the Common Law system of pleading prevailed in this State; and it surely might be done, as in this case, under the Code pleading.

The count upon the lease is upon a written contract, and the count upon the account stated, upon a verbal contract or admission of the defendant, that a sum of money was due by him to the plaintiff; and the counts (or paragraphs, to use the Code term), may be joined in the same complaint. Gantt's Digest, sec. 4550.

The count upon the account stated is in good enough form.

It follows that the court below did not err in overruling the demurrer to the complaint.

II. The bill of exceptions shows that during the trial, appellant excepted to several rulings of the court, on objections made by him to the admission of evidence offered by appellee, and to the giving of one of the instructions to the jury, moved on behalf of appellee, but none of these exceptions were made grounds of the motion for a new trial, and hence by a well settled rule of practice, were waived or abandoned. *Graham* v. *Roark*, 23 Ark., 19.

III. The evidence introduced on the trial is conflicting, both as to the claim of the appellee and the set-off of appellant.

The testimony of appellee and his witnesses, conduced to prove that appellant failed to make the improvements which he covenanted in the lease to make as compensation for the use of the plantation for the year 1874, and the probable value of such improvements.

The testimony of appellant and his witnesses tended to prove that the improvements were made, etc.

It appears from the evidence that appellant rented of appellee the Holly Grove plantation and other lands, called the Rhea place, for the year 1875.

The bill of particulars filed with the plea of set off was made up principally of charges for repairs and improvements made by appellant upon the two places during the year 1875, and the bill of exceptions states that he proved the items charged in the bill of particulars.

On the contrary appellee introduced evidence conducing to prove that he rented the two places to appellant for the year 1875, for an agreed price to be paid in money, and made no agreement to pay for improvements or repairs; and that the parties accounted together about the rents for the year 1875, and the charges made against the rents, and it was proved that there was a balance due the appellee.

It may be that the preponderance of evidence was against the verdict, but it was not without evidence to sustain it, and it was the province of the jury to judge of the weight of the evidence, and the Circuit Judge, who saw the witnesses, and heard their testimony, having refused a new trial, it is the well settled practice of this court not to overrule his judgment in such cases.

IV. We have above disposed of all the points made in the court below, and properly reserved of record, but the counsel for appellant makes the point here, for the first time, that appellee did not file any reply to appellant's plea of set off in the court below, that the plea stood confessed, and that appellant was entitled to judgment upon the plea.

If appellee did not in fact reply to the plea of set off, or take issue to it in short upon the record by consent, which is frequently done in our practice, appellant should properly have moved for judgment upon the plea before going into a trial before the jury. (*Wing & Co.* v. *Dugan*, 8 Bush, 583,

Scott & Co. v. *Wilson*, 2 Ib., 603.) Had he made such motion, the attention of the counsel for appellee would have been called to the fact that no reply was in, if such was the fact, and he, by permission of the court, might have cured the omission.

The parties manifestly went into the trial under the impression that the issues were made up; the bill of exceptions taken by the counsel for appellant, after stating the pleas interposed by appellant, states that issues were taken to the several pleas, and the cause submitted to a jury, etc. Both parties introduced evidence as to the claim of appellee, and as to the set off of appellant, and instructions were asked as to both, all showing that the plea of set off, as well as the claim of appellant was regarded by the parties as at issue.

Moreover it appears by a record entry that during the pendency of the cause in the court below, papers in the cause were lost or mislaid, and by consent, the parties were given leave to supply them. What particular papers were supplied, under the order, does not appear. It may be that a reply to the plea of set off was in, and lost, or mislaid and not supplied.

Be this as it may, it would be bad practice to permit appellant to avail himself of the want of a reply when, after having failed to move for judgment in the court below on the ground that his plea of set off was confessed by failure to put it in issue, and going into trial, and making a contest before the court and jury as if the plea was at issue. Such a surprise in practice is not to be favored here.

Upon the whole record the judgment must be affirmed.

HORNOR VS. O'SHIELDS.

CERTIORARI: *Practice in.*

The better practice in certiorari, is for a transcript of the record to be exhibited with the petition, and a writ regularly issued and returned. And where it does not appear that the record sought to be quashed was before the court, it did not acquire jurisdiction.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Tappan & Hornor, for appellants.
Palmer, *contra*.

HARRISON, J.:

R. L. O'Shields, administrator of Isaac O'Shields, deceased, applied to the court below for a writ of certiorari to the Probate Court, to bring up the record and proceedings in the matter of allowance of two claims against the decedant's estate, in favor of John J. Horner.

The petition stated that W. E. and C. L. Moore, on the 1st day of June, 1867, in the Phillips Circuit Court, recovered judgment against said Isaac O'Shields for $503.04 and 10 per cent. interest thereon, from that date until paid; and Charles L. Moore and Robert C. Moore, also, the same day, in said court, recovered judgment against him for $202.95, and 10 per cent. interest thereon from said date until paid; and that they afterwards assigned and transferred the judgments to said Hornor.

That on the 5th day of January, 1876, Hornor exhibited certified transcripts of the judgments to P. O. Thweat, who was the petitioner's attorney, and Thweat, at his request, made the following endorsement on them:

"Examined and not allowed. Notice and copy waived.

R. L. O'SHIELDS, Adm'r,
per THWEAT, Att'y."

And at the January Term, 1876, he presented the judgment so endorsed to the Probate Court for allowance against the decedant's estate, and that the Probate Court, allowed the claims and ordered that they be paid as claims of the third class. That Thweat, though the petitioner's attorney in other matters, had no authority from him to make the indorsement upon the claims, or to waive notice of their presentation; that the claims had never been exhibited to himself, and he had had no knowledge of the allowance of the claims, until the time in which he might have appealed therefrom, had elapsed; that there had been no revival of the liens of the judgments, and that the exhibition of the claims to Thweat was not within one year from the date of the letters of administration.

Hornor filed an answer to the petition. He admitted all its statements, except those denying that the claims had ever been exhibited to the petitioner himself, that Thweat had authority to make the indorsement on the claims, or to waive notice of their presentation, as to which he declared that the claims were duly exhibited to the petitioner himself, and that he waived the copy and notice of the presentation, and that the endorsement was made by Thweat at his request.

The record says, that Hornor waived the issuing of the writ, and that the record of the Probate Court was brought in, and it was agreed by the parties that the answer of Hornor should be considered as a return to the writ, and that the cause was heard upon the petition, answer, transcript from the Probate Court, and the testimony of witnesses.

The court affirmed the allowances of the claims, but quashed the classification of them.

No copy of the orders and proceedings of the Probate Court appears to have been made an exhibit with the petition, as properly should have been done, and no such record, if the

same was really before the court below, is in the transcript before us.

The court in the case of *McKay et al.* v. *Jones et al.*, 30 Ark., 148, says: "The greatest extent to which we have gone in sustaining the jurisdiction of the Circuit Court in cases of certiorari, has been to permit the parties, by consent, to waive the necessity of a writ, and try the case upon the transcript filed."

The better practice, however, is for a transcript of the record to be exhibited with the petition, and that the writ be issued and regularly returned.

A record imports absolute verity, an attribute, the agreement of the parties could not impart to Hornor's answer, and in certiorari to inferior courts, the record alone is the subject of consideration, and so far as it extends conclusive.

As therefore the orders and proceedings of the Probate Court were not before the Circuit Court, it acquired no jurisdiction over the subject matter of the controversy.

The judgment of the court below must therefore be reversed, and the cause remanded to it, with instructions to grant leave to the appellee, if so advised, to amend his application by filing as an exhibit to his petition a certified transcript of the orders and proceedings of the Probate Court; and for further proceedings according to law.

BLACKBURN VS. RANDOLPH.

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1. TRANSCRIPT FOR SUPREME COURT. *Original Papers. Practice.*

The practice of sending up with the transcript original papers filed in the cause in the court below, is disapproved; and the clerk directed to make a transcript of the same, and return the originals to the clerk of the Inferior Court.

2. REFORMATION OF DEED. *Privity.*

Where a mistake in the description of land occurs in a series of conveyances, under such circumstances as would entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitle the last vendee to a reformation against the original vendor.

3. ————. *Statute of Frauds.*

The statute of frauds does not interfere with the power of Courts of Equity to reform deeds or other instruments in which the parties intended to comply with the statute and were prevented by fraud, accident or mistake.

4. ————. *Judgment Lien. Priority.*

The equity of the vendee for the correction of a deed, is not displaced by the lien of a subsequent judgment, or execution issued thereunder.

APPEAL for *Desha* Circuit Court in Chancery.
Hon. ————, Circuit Judge.

EAKIN, J.:

Appellants claiming to be the owners of a certain plantation in Desha County, through a series of conveyances from a purchaser under a deed of trust, filed this bill against D. W. Randolph, as surviving partner, etc.; who as a judgment creditor of the original grantor in the trust deed, had caused an execution to be levied on a certain tract of land included in the plantation, and was about to sell the same. The object of the bill was to enjoin the sale and quiet complainant's title, on the ground that by mistake the parcel levied upon had been omitted out of the description of the lands in the trust deed, and that the mistake had been inadvertently carried through all the successive conveyances down to that to complainants. All necessary parties have been made defendants.

It is necessary to state somewhat in detail, so much of the case made by the bill and an amendment, as will render the application of the principles herein announced intelligible.

The plantation was sold and conveyed by George J. Graddy to Henry J. Johnson, in December, 1856. It was described as containing in all, 973 acres, and the numbers of the different

subdivisions were given according to the United States surveys. Amongst others a portion described as the "*South-East Quarter and North-East Fractional Quarter* of Section 20, (South of Deep Bayou) 7 South of Range, 1 East, 193 Acres."

On the 31st of October, 1865, said H. J. Johnson, in pursuance of a previous general agreement with regard thereto, executed a deed of trust of said body of lands, (or what was meant to be such) to Samuel Tate, to secure a large sum of money to be paid to certain levee contractors. Said deed of trust included all the lands purchased from George J. Graddy, except that "South-East Quarter and North-East Quarter of Section 20" was by mistake described as the North-East Quarter fractional, Section 20, 193 acres.

The debt remained unpaid, and on the 25th of March, 1868, said trustee having sold the lands in pursuance of the deed, conveyed them to Bartlett, and Johnson delivered possession. On the preceding day, Bartlett conveyed the same lands to C. R. Sheppard, describing them as the lands conveyed to him by said Tate as trustee. Both deeds were filed for record on the same day. Soon afterwards, Sheppard sold an undivided half of the lands to complainant, S. S. Buck, and still later the other undivided half to her husband, W. A. Buck, since deceased, but who in his life time sold his interest to complainant Drake, who afterwards sold to Winfrey.

It is alleged that throughout all these conveyances, the descriptions of the lands were taken from the deed of trust, and the error each time repeated, without having been noticed by any of the parties. That each grantor intended to convey the plantation by the true numbers, as it laid in a body, and was purchased from Graddy. That *bona fide* and valuable consideration was paid with each purchase, and that throughout, possession of the whole plantation was given to the successive purchasers, and attended their several ownerships.

Meanwhile, on the 27th day of November, 1867, defendant Randolph, as surviving partner of J. J. Michie & Co., recovered judgment in the Desha Circuit Court against defendant, Johnson, for a large sum of money, and on the 2nd day of March, 1872, execution issued thereon, which was levied by defendant Edington, as sheriff, upon said South-East Quarter of Section 20. The land was advertised for sale, and it was this sale which the bill sought to enjoin. Winfrey was made one of the defendants to compel him to accept the title to the lands by the reformed descriptions, so that complainant Drake might be saved harmless on his warranty.

It further appears from the bill and exhibits not controverted that on the 21st day of January, 1868, said Johnson was duly declared a bankrupt by the District Court of the Eastern District of Arkansas, and obtained his discharge on the 12th of November following. From his schedule filed in the proceedings, it appears that the lands were reported as described in the trust deed to Tate. There was also a statement of the incumbrances upon them with the remark that it was impossible to pay them off. No action with regard to the lands seems to have been taken by the assignee.

It is further shown in the amended complaint, that on the 17th day of February, 1866, said Henry J. Johnson, executed to W. Henry Graddy, another mortgage of the same lands describing them as "the premises upon which Johnson now resides, being the plantation purchased by me in or about the year 1856, of and from George J. Graddy, now deceased, lying and being situate in Desha County."

This mortgage was made subject to the trust deed of Tate, and was properly acknowledged and recorded. In 1867, said mortgagee filed a bill against Johnson and others, to foreclose this mortgage, and assert its priority over the trust deed to Tate. It set up the sale by Tate as trustee to Bartlett, and

the subsequent sales to Sheppard, and from him to W. A. and Sallie S. Buck, all of whom were made parties.

At the Fall Term, 1869, a decree was rendered in said cause, confirming the title to said lands in Buck and wife, under said purchases.

An interlocutory injunction issued on the filing of the bill in this cause.

Randolph in his separate answer, substantially denies that it was the intention of said Henry J. Johnson, to include the South-East Quarter of Section 20, in the trust deed to Tate, or that it was included in any of the subsequent conveyances.

He further sets up and charges by way of defense, that said Johnson did not, in fact, make default in the payment of the amount secured by the trust deed to Tate, but paid it off, and combined with Bartlett, to defraud his creditors, and procured an assignment of said trust deed to be made to Bartlett for that purpose, who on his part procured the sale to be made under it by Tate, and executed the deed to Sheppard in pursuance of the fraudulent design. He protests that he is not bound by the decree in the former case, in which title was confirmed in Buck and wife, inasmuch as he was not made a party thereto.

At the April Term, 1872, Henry Johnson was allowed to file as an answer, a claim of said South-East Quarter, of Section 20 as a homestead.

Upon the hearing of the causes on the 12th of September, 1876, it was decreed that "the court doth find for the defendants and dissolve the injunction heretofore granted herein; and remits the respective parties to their rights at law." Damages, on account of the injunction, were, on motion of defendant Randolph, assessed at $500, the same to be accounted for as part of the interest due, etc.

Complainants appealed, and an order was made of record "that appellants have leave to use in the transcript for the Supreme Court, the original depositions and pleadings and exhibits, on file in this cause, and that the *record entries only* need be certified, and leave is further given to withdraw the record in this case of *W. H. Graddy* v. *H. J. Johnson*, and others referred to in complainant's amended complaint, and that they may be used as part of said transcript.".

In accordance with this agreement the clerk has sent up, attached to the transcript, the original papers filed in the former cause.

In passing, this court uses the occasion to express its disapprobation of the practice of sending up with the transcript any original papers filed below.

It was doubtless done in this case to save expense to litigants; but it amounts to a spoliation of the records of the Circuit Court, which may thereby be lost; and, in any case, they are transferred from the proper depositories, where they should always remain for inspection. Where proceedings in another cause, in the same court, are pleaded; the judge may well exercise some discretion in the matter of requiring or excusing the filing of transcripts, inasmuch as its own records are always before it, and need only to be read. But, if not required at the hearing, there should always, in case of appeal in chancery, be an order to file with the other papers in the cause, certified transcripts of such records and proceedings, in other causes, as were used upon the hearing of the cause appealed; so that a complete transcript may be made for this court, without removal of any of the original papers from the proper files. In cases at law, the same end may generally be attained by bill of exceptions. The clerk of this court will be directed at the cost of appellant to make and file with the papers in this cause a transcript of the papers filed in the case of *W. Henry*

Graddy v. *Henry J. Johnson*, as he finds them attached to the transcripts of this cause; and to return the originals to the Clerk of the Circuit Court of Desha County, to be restored to the files of his court.

First, as to parties: it is contended that there is no *privity* between complainants and Johnson, and that, in such case, courts of equity will not interfere to reform a deed, executed by mistake. They claim as the last grantees in a series of conveyances, beginning with Johnson, passing through the trustee, and resting with themselves. If, in either one of these conveyances, the deed of trust, that from Tate or Bartlett, or Sheppard, or Buck, or Drake, there was not a mutual mistake, whereby each party, vendor and vendee, actually supposed the particular piece of ground was described, when in fact it was not, the equity of complainants would, of course, fail.

But it is obvious that, where the same mistake has each time repeated itself, occurring between the vendor and vendee upon each transfer, under such circumstances as to entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and entitle the last vendee to a reformation against the original grantor.

What is meant when the cases say that the mistake will only be corrected between the original parties and those claiming under them in privity, is, in effect, that the court will not interfere in favor of subsequent purchasers who were simply ignorant of the former mistake and may be presumed to have intended to take by the description used, nor against subsequent purchasers by the true description for valuable consideration, without notice of the former mistake. That the remedy is strictly confined to privies is well shown in the case of *Steward and wife* v. *Pettigrew*, 28 Ark., 372, a case which carries the principle of reformation to its rational and most

beneficial extent. There the court interfered in favor of a purchaser at execution sale, and reformed a mistake in the advertisement and the Sheriff's deed, against a subsequent purchaser at execution sale upon a different judgment against the same defendant, whose levy, advertisement and deed described the land truly, and who knew of the former mistake. Here was a total want of privity, and the court proceeded upon the broad ground that an honest mistake in a deed should be corrected against any one who discovers it, and without superior equity seeks to obtain an advantage from it.

It is too well settled, that the statute of frauds does not interfere, in any respect, with the power of courts of equity to reform deeds or other instruments, in which the parties intended to comply with the requirements of the statute, and failed through accident, mistake, or fraud.

The mistake in this case, is palpable. The parcel in question, the southeast quarter of section 20, lies in the middle of a compact body, and makes a very essential part of the plantation. It is not conceivable that any prudent man would be willing to purchase the balance of the lands without it, for the purpose of using them as one plantation. The mistake is one apt to happen. A great majority of intelligent men and excellent lawyers lack the faculty of mapping out in their minds, lands described by the government surveys. In ringing the changes upon the cardinal points of the compass, fractions, sections, township and ranges, more care is necessary to avoid mistakes, than is usually taken. The true description in the original deed from Graddy, giving the quantity, 193 acres, evidently meant it as an approximation. The trust deed describes it as "the N. E. fr. sec. 20—193 acres," instead of "the southeast quarter and the N. E. fr. quarter of sec. No. 20, South of Deep Bayou, containing 193 acres." If the grantor had meant to reserve the southeast quarter he would not cer-

tainly have endangered the title by giving a quantity to cover the whole of his purchase from Graddy. He declared afterwards that he meant to reserve nothing, at a time when such a declaration was against his interests. He does not say now, in simply putting in his claim for a homestead, that he meant to reserve it then. He abandoned possession in favor of the purchasers under the trust deed, when the sale was made. When the trust deed was executed, the agent for the beneficiaries (and one of them), Flournoy, supposed that the description covered the whole plantation, and would not otherwise have accepted it. The same mistake ran through each successive sale, and possession attended each, of the *whole* plantation. Being thus palpable, it must be corrected, unless defendant Randolph has superior equities.

He claims only by virtue of a judgment obtained in 1867, and which ceased to be a lien in 1870, long before the levy of his execution. He is not a purchaser at all; for valuable consideration or otherwise. Whether or not his lien would be prolonged in a contest between himself and Johnson's assignee in bankruptcy we are not called upon to decide. The assignee sets up no claim, and the bankruptcy cannot of itself prolong the lien given by the laws of the State. Even if the lien existed, the equity for correction would be prior in time; and, as this court has repeatedly held, it would not be displaced by the judgment lien, or an execution levied under it.

An objection has been made to the acknowledgment of the deed of trust to Tate. It omits to state that it was made for the "consideration" therein contained, but does use the word "purposes." This acknowledgment would perhaps be considered defective if it were necessary to rule upon that point, as the consideration is certainly material. But the deed of trust, and the sale under it, and all subsequent conveyances, down to complainant's were good between the parties,

and would have transmitted the legal title but for the mistake repeated in each transaction. Considering that as done, which the parties intended should be done, these conveyances give complainant's standing ground in equity, as owners, to protect their rights against any not having superior equity. Moreover, the whole legal and equitable title to this plantation by its true description, as against Henry J. Johnson, has been vested in complainant Sallie Buck, and her husband, by virtue of the decree in the case of *Wm. Henry Graddy* v. *Johnson*, rendered 28th October, 1869. This decree inures to vest the legal title in complainants, as against all persons bound by the decree, and does that wholly independently of the trust deed to Tate, and without the necessity of reforming it. The defendant Randolph as surviving partner, was indeed no party to that suit, and is not bound by it, so far as he had rights, or equities, to be effected. But his utmost right at the time was to enforce his judgment lien, then existing against any estate or interest remaining in Henry J. Johnson after satisfaction of the mortgage to Wm. Henry Graddy. Failing to do that, all his rights vanished with the expiration of his judgment lien, and left the title in complainants unaffected thereby. His judgment, as a personal debt, is lost by the discharge of Johnson in bankruptcy.

Having neither a lien remaining, at the time the execution was levied, nor any rights against the discharged bankrupt under the personal judgment, to support the execution, he is not in condition to question the good faith and fairness of the sale to Bartlett from the trustee, Tate. If he were, the most we could say of that transaction, upon a careful examination of the evidence, would be that the circumstances are suspicious, but not incompatible with good faith. The fraud is not proven, and if it were it would not affect the title of complainants. There is no charge, nor scintilla of proof that

they participated therein, or had any intimation of it. The proof is abundant that they are innocent purchasers for full value.

It appears from the record that, pending the suit, complainant S. S. Buck intermarried with E. S. Blackburn, who was made a party and afterwards died. The result of which was only to change the name of S. S. Buck to S. S. Blackburn.

The Chancellor erred in refusing the relief prayed, and dismissing the bill. The decree must be reversed, and a decree will be entered here vesting in complainant Sallie S. Blackburn and defendant J. T. Winfrey all the legal and equitable title in and to said plantation, that was in Henry J. Johnson at the time of the execution of the deed of trust to said Tate; and perpetually restraining defendants Randolph and the Sheriff of Desha County from proceding any further to sell said "southeast quarter of section 20" by virtue of said judgment or any execution or levy based thereon; and that said Randolph pay the costs in this court and the court below, save the costs of making a transcript of the original papers sent up with the record, all of which must be paid by the appellants.

STATE OF ARKANSAS VS. GILL.

1. CRIMINAL LAW—*In jeopardy. Res judicata.*

Where an indictment is quashed on demurrer, the defendant is not in jeopardy under it, and may be prosecuted under a second indictment for the same offense. To make a judgment sustaining a demurrer to an indictment a bar to further prosecution for the same offense, matter must appear on the face of the indictment, which, in its character, is a legal defense or bar to a further prosecution for the same offense.

It is an essential requisite of a conclusive judgment that it be upon the merits.

2. CRIMINAL PLEADING: *Statute Limitations.*

An indictment is not demurrable because it shows that the offense was committed back of the period bar of the statute of limitations. Matter to avoid the bar may be proven without being averred; and the bar is available to the defendant under the plea of not guilty.

APPEAL from *Hempstead* Circuit Court.
Hon. ——— ———, Circuit Judge.
Henderson, Attorney General, for appellant.

ENGLISH, CH. J.:

The material facts of this case, as they appear in the transcript, are as follows:

On the 5th of January, 1878, John Gill was indicted in the Circuit Court of Hempstead County, for forging an order, the indictment alleging the offense to have been committed on the 5th day of April, 1874.

The defendant demurred to the indictment on the ground that it appeared from its face that the offense was barred by the statute of limitation; the court sustained the demurrer and discharged the defendant from further prosecution for the offense.

Afterwards, on the 15th of January, 1878, the defendant was again indicted in the same court for the same offense, the indictment alleging, to avoid the bar, that the defendant was a fugitive from justice from the 1st day of January, 1875, until the 1st day of September, 1877.

At the July Term, 1878, the defendant filed a motion to be discharged from further prosecution on this indictment: "Because, he says, at the last term of this court a demurrer was sustained to the indictment (in which he was charged with the same offense as in the present indictment), because said indictment contained matter upon its face which was a bar to the action," etc.

The court sustained the motion, and discharged the defendant.

The State took a bill of exceptions showing that upon the hearing of the motion, the first indictment, the demurrer to it, and the judgment of the court sustaining the demurrer and discharging defendant (which are set out), were produced and read; and appealed to this court.

Whether the court below erred in sustaining the demurrer to the first indictment or not, is not a question now before this court, no appeal having been taken from its judgment in that case.

As to the materiality of the allegations of the time of an offense in an indictment, see *Scoggins* v. *State*, 32 Ark., 215. "No person, for the same offense, shall be twice put in jeopardy of life or liberty, but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial, at the same or the next term of said court." Declaration of Rights (1874), sec. 8.

The appellee was not in jeopardy on the first indictment; he was never put on trial under it; the indictment was quashed on demurrer, and this, if formally pleaded, was no bar to the second indictment. Cooley's Con. Lim., 325; *State* v. *Clark*, 32 Ark., 231; *Johnson* v. *State*, 29 Ark., 31.

Judgment reversed and cause remanded, with instructions to the court below to require appellee to plead to the second indictment, etc.

ON MOTION FOR RECONSIDERATION.

ENGLISH, CH. J.:

In the motion for reconsideration, the counsel for appellee invite the particular attention of the court to section 1841 Gantt's Digest. Though we did not notice the section in the opinion, it had not been overlooked in considering the question decided. We did not notice it in the opinion because we thought that whatever might be its true meaning, it had no application to the facts of this case.

The section follows:

"If the demurrer is sustained because the indictment contains matter which is *a legal defence or bar to the indictment*,

the judgment shall be final, and the defendant discharged from any further prosecution for the offense."

This section was copied from the Kentucky Criminal Code, section 169.

Commonwealth v. *Anthony*, 2 Metcalf, 399, is the only Kentucky decision we have found on this section. There it was held that a judgment sustaining a demurrer to an indictment on the ground of misjoinder of offenses, was no bar to a future prosecution.

In *Walls* v. *State*, 32 Ark., 565, Walls was indicted in the Circuit Court of Jackson County for bigamy, and the indictment alleged the bigamous marriage to have occurred in Woodruff County. A demurrer to the indictment was overruled, and the defendant tried and convicted. On appeal to this court, the judgment was reversed, and the case remanded with instructions to the court below to hold the defendant to answer an indictment in Woodruff County, the proper venue for the offense.

Now suppose the court had sustained the demurrer to the indictment, instead of overruling it, and entered judgment discharging the defendant from further prosecution. Surely such judgment would have been no bar, under the above statute, to a new indictment, in Woodruff County, for the same bigamous marriage. And why? Because the matter of defense appearing on the face of the indictment was not, in its nature, matter in bar, or a legal defense to any indictment for the offense charged, but matter in abatement only of that particular indictment.

So we take it, that to make a judgment sustaining a demurrer to an indictment a bar to any further prosecution for the same offense, matter must appear on the face of the indictment which, in its character, is a legal defense or bar to a prosecution for the offense.

In this case the prosecution was for forgery, which is a felony, not punishable by death, and the limitation is three years. Gantt's Digest, section 1664.

The first indictment was found 5th of January, 1878, and it alleged that the offense was committed 5th of April, 1874, which was more than three years before the finding of the indictment.

If the allegation of the time of the offense was material—if the State could not prove on the trial that the offense was committed at a later day, and within the period of the bar, or was not at liberty to prove any matter in avoidance of the bar—then the indictment contained matter which was a legal defense or bar to the prosecution, and the judgment sustaining the demurrer to it was a bar to any further prosecution for the offense, under the above statute.

But "the statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient of the offense." Gantt's Digest, section 1787.

Under the first indictment the State could have proven, therefore, that the offense was committed on any day before the finding of the indictment. The allegation of the time of the offense was not otherwise material.

Moreover, the State would have been at liberty to prove, on a trial, by way of avoiding the bar, that the accused had fled from justice and been out of the State, or that a previous indictment had been pending against him, which had been quashed, set aside, or reversed, etc. Gantt's Digest, sections 1666–7.

The defendant is not obliged to plead limitation, but the bar is available under the plea of not guilty—nor need the indictment aver matter to avoid the bar, but it may be proven on the trial.

It follows that the court sustained a demurrer to an indictment good on its face, and an erroneous judgment quashing a valid indictment on demurrer, or on motion to quash, can be no bar to a subsequent indictment for the same offense, because the accused was not put in jeopardy on the indictment quashed.

Nor for the same reason, as a general rule, is a judgment quashing a bad indictment on demurrer, or motion, a bar to another indictment for the same offense. But the statute in question makes an exception, and that is, when the demurrer is sustained because the indictment contains matter which is a legal defense or bar to the indictment. The Statute is anomalous, and it is difficult to imagine an instance in which a criminal pleader might draw an indictment that would come within its meaning.

It is true, as remarked in the first opinion, that the judgment of the court below quashing the first indictment, on demurrer, is not before us on appeal, but it was, in effect, pleaded in this case as a bar to a second indictment—in other words, as a former judgment of acquittal—and in all cases where the accused pleads a former acquittal, or conviction, or before in jeopardy, the court must look at the judgment pleaded, and the facts of record on which it is based, to determine whether it is a valid bar.

It is also true, as submitted by the learned counsel for appellant, that an erroneous judgment is conclusive between parties and privies, until reversed (*Wells on res adjudicata*, p. 4), but it is likewise true, that it is an essential requisite of a conclusive judgment, that it should go to the merits, and hence must not be based merely upon technical defects in the pleadings (Ib. p. 8), or matter which merely abates the suit.

The following remarks of Mr. Wells on the conclusiveness of judgments rendered on demurrers in civil suits, are appropriate:

"If judgment is rendered for the defendant on demurrer to the declaration, or to material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless.

"But it is equally settled that if the plaintiff fails on demurrer in the first action, from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause as disclosed in the second declaration, were not heard and decided in the first action." *Wells on res ad.*, p. 371.

In this case, in the first indictment, the time of the offense was alleged back of the period of the bar, and nothing being averred to avoid the bar, his Honor, the Circuit Judge, deemed the omission fatal, sustained a demurrer to the indictment, and discharged the accused from further prosecution. The attorney for the State did not think proper to appeal from the judgment, he could not amend the indictment, as a plaintiff may amend a declaration in a civil suit, and he chose to draft, and have preferred by the Grand Jury, the second indictment, in which matter was alleged to avoid the bar, and thereby the omission which the court held to be fatal in the first indictment was supplied in the second.

By the rule laid down by Mr. Wells, as above, the judgment on demurrer to the first indictment was not a bar to the second indictment.

Where a judgment is not in law an immunity against a further prosecution, it cannot be made such by the mere form of entering it.

The motion for reconsideration is overruled.

STATE OF ARKANSAS VS. JEFFREY ET AL.

1. GAMING: *Indictment.*

Where an indictment is based upon section 1564, Gantt's Digest, it should allege the name of the game, if known, or if unknown to the grand Jurors it should so allege.

2. ——— ———: *On the sabbath.*

An indictment for card playing on the sabbath need not allege the game played, the offense being the desecration of the sabbath by playing cards.

APPEAL from *Izard* Circuit Court,
Hon. WM. BYERS, Circuit Judge.
Henderson, Attorney General, for appellant.

ENGLISH, CH. J.:

The appellees were indicted in the Circuit Court of Izard County for gaming, as follows:

"The Grand Jury of Izard County, etc., etc., accuse Dempsey Jeffrey, Willard Hanks, William Green and William Smith of the crime of betting at cards, committed as follows, to-wit:

The said Dempsey Jeffrey, the said Willard Hanks, the said William Green and the said William Smith, on the 10th day of November, 1877, in the county and state aforesaid, (*named in the caption,*) unlawfully did bet two pipes of the value of fifty cents each, and two pairs of suspenders, of the value of one dollar each, at a certain game of hazard and skill then and there played with cards, against the peace and dignity of the State," etc.

The court sustained a demurrer to the indictment, and the State appealed.

The objection taken to the indictment is that it does not allege the name of the game of cards at which appellees bet, or that the game had no name, or that its name was to the grand jurors unknown.

If the State meant to accuse the appellees of betting at some game of cards, the indictment must have been drawn under section 1564 of Gantt's Digest, page 374, which follows:

"If any person shall be guilty of betting any money, or any valuable thing, on any game of brag, bluff, pocre, seven-up, three-up, twenty-one, vingtun, thirteen cards, the odd trick, forty-five, whist, or at any other game at cards known by any name now known to the laws, or with any other or new name, or without any name, he shall, on conviction, be fined in any sum not less than $10 nor more than $25."

This is the 8th section of the gaming act as contained in the Revised Statutes, page 274, and in English's Digest, page 367, and in Gould's Digest, page 371, and which has been repeatedly construed by this court.

It has been the practice under this statute, and we think the better practice, to allege in the indictment, the name of the game of cards at which the accused is charged with betting, or if the name is unknown to the grand jurors, so to allege, or if uncertain, to insert several counts to meet the uncertainty. *James Barkman* v. *The State*, 13 Ark., 705; *Orr* v. *State*, 18 Ark., 540; *State* v. *Grider*, Ib. 298.

In an indictment for card playing on the sabbath, it is not necessary to allege the name of the game played, or betting, the gravamen of the offense being the desecration of the day by engaging in card playing. *Stockton* v. *State*, 18 Ark., 186; *State* v. *Grace*, 21 Ark., 227; *State* v. *Anderson*, 30 Ark., 134.

But the gravamen of an offense under the above statute, is the betting at some game of cards, and the name of the game bet upon is regarded as material to a reasonably certain description of the offense.

It is uncertain whether the indictment in this case, from the language used, was drafted under the 8th section of the gaming act (section 1564 Gantt's Digest) or under the act of 22d January, 1855, which is included in sections 1565 and 1566 of the Digest.

In *Orr* v. *The State*, 18 Ark., 544, this court, commenting upon the two statutes, said:

"The first section of the gaming act relates exclusively to what are known as banking games, etc., and the 8th section provides for the punishment of betting *on games at cards only*. And hence it was held by this court in *Norton* v. *State*, 15 Ark., 71, that it is no offense to bet upon a *raffle;* and in *State* v. *Hawkins*, Ib. 259, that betting at *rondo* was not an offense within the provisions of either section of the gaming act.

"The act of January 22, 1855, which was passed after these decisions, is as follows:

"SEC. 1. If any person shall be guilty of betting any money, or any valuable thing, on any game of *hazard* or skill, he shall, on conviction, be fined as prescribed in section 8, article 3, chapter 51, title Criminal Law, of the Digest (English's) of the statutes of Arkansas.

"SEC. 2. In prosecuting under the preceding section, it is sufficient for the indictment to charge that the defendant bet money, or other valuable thing, on a game of hazard or skill, without stating with whom the game was played.

"The 8th section of the gaming act embracing nothing but betting on games *played with cards*, it was manifestly the intention of the first section of the act of January, 1855, to enlarge the prohibition against betting, and to extend the pen-

alty of the 8th section of the gaming act to betting on any game of *hazard* or *skill*, except the banking games, etc., embraced by the first section of the gaming act.

"When a person is indicted for betting at any *game of cards* embraced by the provisions of the 8th section, it is sufficient for the indictment to charge the betting on a game of cards called *poker*, *seven-up*, etc., naming the game of cards, if it has any, etc. But it is not necessary to charge that the particular game of cards named is a game of *hazard* or *skill*.

"But when a person is indicted for betting on a game not embraced within the 8th section, but embraced by the 1st section of the act of 22d January, 1855, it is necessary, it would seem, to charge the game bet upon to be one of *hazard* or *skill*, as provided by the 2d section of the act last referred to."

In the indictment now before us, the appellees are charged with betting "at a certain game of hazard and skill then and there played with cards." Treating the words "*hazard* and skill" as surplusage (*Orr* v. *State*, ubi. sup.) nothing is left but a general charge of betting at a game played with cards, which is not named.

In an indictment for betting at a game of hazard or skill, under the act of 22d January, 1855, it would be better to allege the name of the game.

Games played with cards, or games of hazard or skill gotten up by other contrivances for the purpose of betting, are rarely without names by which they are known or designated, and if a game has no name, or its name is unknown to the grand jurors, the indictment may so allege.

We are not disposed to encourage needless looseness or uncertainty in indictments.

The judgment of the court below must be affirmed.

STATE OF ARKANSAS VS. MOSER.

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1. INDICTMENTS: *Statutory; what sufficient.*

As a general rule, it is sufficient for indictments for statutory misdemeanors to follow the language of the statute.

2. SAME: *For abusive or profane language, etc.*

Whether profane language used toward or about another in his presence, is calculated to arouse to anger or produce a breach of the peace, would depend upon the relations of the parties, the circumstances under which it was used, the manner of the speaker, etc., which are questions to be left to a jury.

APPEAL from *Izard* Circuit Court.

Hon. WILLIAM BYERS, Circuit Judge.

Henderson, Attorney General, for appellant.

ENGLISH, CH. J.:

The appellee was indicted in the Circuit Court of Izard County under the act commonly known as the "Peace and Tranquility Act," the indictment charging in substance as follows:

"The Grand Jury of Izard County, etc. etc., accuse Robert Moser of the crime of using profane and abusive language, calculated to cause a breach of the peace, committed as follows, to-wit: The said Robert Moser, on the 20th day of September, 1877, in the county, etc., aforesaid, unlawfully and violently did make use of profane and abusive language toward and about and in the presence and hearing of one W. T. Moser, then and there being, by then and there saying to the said W. T. Moser, *go to hell, God damn you*, which language was then and there calculated to arouse to anger the said W. T. Moser, and then and there cause a breach of peace; against the peace and dignity of the State," etc.

The court sustained a general demurrer to the indictment, and the State appealed.

The act provides:

If any person shall make use of any profane, violent,

abusive or insulting language toward or about another person, in his presence or hearing, which language, in its common application, is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault; every such person shall be deemed guilty of a breach of the peace, and upon conviction thereof, shall be punished by fine, etc. Sec. 1512, Gantt's Digest.

What particular objection was taken to the indictment in the court below, does not appear, the demurrer being general, and the appellee not represented by counsel here.

The indictment follows the language of the statute, which as a general rule, is sufficient in indictments for misdemeanors under statutes.

The language alleged to have been used by appellee was certainly profane, and whether it was calculated to arouse the anger of the person to whom it was addressed, and provoke a breach of the peace as alleged, would depend upon the relations of the parties, the circumstances under which the language was used, the manner of the speaker, etc., which would be questions for a jury upon the trial.

We can see no valid objection to the indictment.

Judgment reversed and cause remanded with instructions to the court below to require the defendant to answer the indictment.

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McCustian vs. Ramey, adm'r.

1. Limitation—Statute of: *When it begins to run against an estate.*
   The statute does not begin to run against an estate until the appointment of an administrator.
2. Payment: *To heirs no discharge of liability to administrator.*
   One who holds the money of an estate, cannot discharge his liability to the administrator by payment to heirs.

3. ADMINISTRATOR: *Liability to stranger for funds administered by mistake.*
An executor or administrator receiving money by mistake as assets of his decedent's estate, will not be excused from his liability to refund the same on the ground that the money has been applied by him in the course of administration.

APPEAL from *Washington* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.
J. D. Walker, for appellant.

ENGLISH, CH. J.:

Benjamin Ramey, administrator *de bonis non* of the estate of Aaron Mills, deceased, commenced this suit against William R. McCustian, in the Circuit Court of Washington County, on the 23d of December, 1875.

The complaint alleged, in substance, that about the 16th of July, 1865, the defendant had and received $1400, due and belonging to the estate of Aaron Mills, deceased; and that on the 6th day of March, 1875, letters of administration *de bonis non* of said estate, were granted to the plaintiff by the Probate Court of Washington County; and no part of said sum had been paid, etc.

The defendant answered, denying that he was indebted to the plaintiff, or that he had received said sum of money, or any part of it, as alleged; and alleging that the plaintiff's cause of action did not accrue within three years next before the commencement of the suit.

The cause was submitted to a jury on the 15th of May, 1876, and verdict and judgment in favor of plaintiff for $1141.85, motion for new trial overruled, bill of exceptions, and appeal by defendant.

There was evidence upon the trial conducing to show, that Seth Mills, the first administrator of Aaron Mills, deceased, loaned money belonging to the estate of his intestate to George

Lewis, Jr., and took a note and mortgage upon land, to secure the loan.

That Seth Mills died in February, 1864, and appellant, McCustian, became his administrator, and the note and mortgage came into his hands.

It is probable that the note and mortgage were taken by Seth Mills, payable to himself personally, and not as administrator of Aaron Mills; but the appellant married the widow of Seth Mills, and there can be but little doubt, from the evidence, but that he was informed that the note and mortgage in fact belonged to the estate of Aaron Mills.

The appellee proved by the admissions of appellant to several witnesses, that the mortgsge debt belonged to the estate of Aaron Mills, and that he had in his hands other claims belonging to the same estate.

Appellee was permitted to read in evidence from record E, p. 388, of the Probate Court of Washington County, the following entry:

"Estate of Seth Mills, deceased. Upon the application of Wm. McCustian, administrator of said estate, and it appearing that he has in his possession the sum of $933.60, being the principal and interest of a mortgage debt on George Lewis, and that said debt belongs to the heirs of Aaron Mills, deceased. It is ordered by the court that said administrator be allowed to pay to the heirs of said Aaron Mills, their distributive shares of said amount, and be credited with the same as administrator of Seth Mills, to the extent of the charge against him as such administrator."

Appellee also read in evidence from the same record, p. 672, the following entry:

"In the matter of the estate of Seth Mills, deceased: Comes on this day, William R. McCustian, as administrator of the estate of Seth Mills, deceased, and shows to the court that a

decree has been rendered on the 14th February, 1867, in the Circuit Court of Washington County, in Chancery, in his favor against George Lewis, Jr.; that a large amount of said decree has been paid off and satisfied, and the mortgage premises, in said decree mentioned, sold, and that there is still a balance due on said decree; that said George Lewis has no property, as far as he is able to ascertain, subject to execution; and asks the court to permit and allow him to compromise said claim and demand against said George Lewis, Jr. It is therefore ordered by the court that the said William R. McCustian, as administrator of the estate of said Seth Mills, deceased, be and he is hereby authorized to compromise said claim with the said George Lewis, Jr., and to receive the sum of one hundred and seventy-five dollars in full satisfaction of the balance due on said decree."

The appellee testified that about six months before the trial, and just before the commencement of the suit, he demanded of appellant the money claimed in the complaint, and he said he did not have it.

Appellant testified for himself that he collected the amount due on the Lewis mortgage, as administrator of Seth Mills, and paid it out in good faith in due course of administration, believing it to belong to Seth Mills' estate. He denied telling any one that the money belonged to the estate of Aaron Mills, or his heirs. That he knew nothing about the probate record entry read in evidence by appellee, or upon whose motion it was made. That all the money he received upon the mortgage was collected in 1871.

It was admitted that he was discharged from his administration of the estate of Seth Mills, 4th September, 1873.

He stated in general terms, that as administrator of Seth Mills, he had collected and duly administered the money collected upon the Lewis mortgage, but to whom he paid it, or what particular disposition he made of it, he did not state.

It appears from the testimony of B. J. Johnson, a witness for appellee, that there were seven heirs of Aaron Mills, and that appellant had paid the shares of all but two of them. No payment appears to have been made by him to appellee as administrator *de bonis non* of Aaron Mills.

The court gave the following instructions to the jury, on behalf of appellee, appellant objecting to them severally:

First—"If you find from the evidence that the defendant collected money from George Lewis, or any one else, that he knew was going to the estate of Aaron Mills, you will find for the plaintiff, unless you find that he has paid the same to the administrator of said Mills, or that plaintiff's right of action accrued more than three years before bringing this suit.

Second—"If you find from the evidence, that after the death of Aaron Mills, Seth Mills administered upon his estate, and that after the death of said Seth Mills, the defendant collected money that he knew to be going to or belonging to the estate of Aaron Mills, the statute of limitations would not commence running in favor of defendant until letters of administration *de bonis non* were granted upon the estate of Aaron Mills.

Third—"I charge you, that if you find from the evidence, that the defendant collected or received any money belonging to the estate of Aaron Mills, deceased, after the death of Seth Milis, either as the administrator of the estate of said Seth Mills, or in his individual capacity, knowing the same to belong to the estate of Aaron Mills, no payment made by him to any other person than the executor or administrator of the estate of Aaron Mills, deceased, would be legitimate, and protect him in an action by said executor or administrator, and if you find the defendant did receive such money, you will find for the plaintiff the amount so received, with interest thereon from demand, at the rate of 6 per cent. per annum."

The appellant moved ten instructions, of which the court gave the first, fifth, sixth and ninth, and refused the second, third, fourth, seventh, eighth and tenth.

Those refused are as follows;

Second—"That though the jury may find from the evidence that defendant received money belonging to the estate of Aaron Mills, deceased, the statute of limitation would commence running against said estate from the time the defendant received the same, whether there had been an administrator appointed on the estate of Aaron Mills, or not, unless defendant held the same as a trustee of an express trust.

Third—"If the jury find from the evidence that the defendant, either individually, or as administrator of the estate of Seth Mills, deceased, for three years before the commencement of this suit, held the peaceable, continuing and adverse possession of the money in controversy, they should find for the defendant.

Fourth—"If it be shown in evidence by defendant that he held possession of the money in controversy for three years next before the commencement of this suit, the presumption would be that he held it adversely, and it would devolve on the plaintiff to show that he did not hold it adversely.

Seventh—"If the jury should find from the evidence, that Seth Mills was the administrator of Aaron Mills, deceased, and as such had money in his hands belonging to the estate of Aaron Mills, and loaned the same to George Lewis, and took a note and mortgage to himself individually, and thereafter the same came to the hands of defendant, as administrator of Seth Mills, deceased; and that in due course of administration the same was collected by defendant as such administrator, and by him treated and paid out as assets belonging to the estate of Seth Mills, in the course of such administration, they should not find against defendant for the same.

Eighth—"If the jury believe from the evidence that defendant, as the administrator of Seth Mills, collected and held in his possession money belonging to the estate of Aaron Mills, and that he paid out the same as assets of Seth Mills' estate, and was duly discharged from said administration, he cannot be individually held responsible for such money in this suit.

Tenth—"That upon all the facts proved in this cause, and admitting all to be proved, which the evidences conduce to prove, the plaintiff is not entitled to a recovery in this cause."

I. No doubt, from the evidence, appellant received the money in controversy more than three years before the commencement of this suit, but appellee had no right of action until he was appointed administrator *de bonis non* of Aaron Mills, and his right of action could not be barred by limitation before it accrued. At the time appellant received the money, there was no administrator of the estate of Aaron Mills, to which (the jury found from the evidence) the money belonged, and the statute of limitation did not commence running until an administrator was appointed. *Brown, adm'r*, v. *Merrick et al.*, 16 Ark., 614; Angel on Limitation, page 55; *Murray* v. *East India Co.*, 5 Barn. and Ald. R., 204; 18 Ala., 331; 10 Yerger, 383; 39 Mo., 301.

II. The heirs of Aaron Mills could not sue appellant for the money because they had no direct legal cause of action against him; nor could he legally discharge himself from liability to the administrator, when appointed, by paying the money to the heirs. After the claims of creditors are paid by the administrator, the heirs get the remainder of personal assets by distribution through the Probate Court, as provided by the statute. *Lemon's heirs* v. *Rector*, 15 Ark., 437; *Pryor* v. *Rayburne*, 16 Ib., 671; *Anthony* v. *Peay*, 18 Ib., 24; *Aikins* v. *Guice*, 21 Ib., 164; *Jacks* v. *Adair*, 30 Ark., 625; *Collins et al.* v. *Warner, adm'r*, 32 Ib., 91.

The court did not err in giving the three instructions moved for appellee, nor in refusing the second, third and fourth asked for appellant.

III. "An executor receiving money by mistake from a supposed debtor of the testator, will not be excused from his liability to refund the same, upon the ground that the money has been applied by him in the course of administration.

"The executor and brother of a mortgagee received, after the mortgagor's death, £700, supposed to be due on the mortgage. Afterwards, it appeared, by a copy of an account under the mortgagee's own hand, that a part of the money had been paid by the mortgagor in his life time. To a bill brought to be relieved against this overpayment, the defendant, the executor of the mortgagee, answered and insisted that before any notice of the plaintiff's demand on account of this overpayment, the defendant, as executor of the mortgagee, had paid away the £700 in his testator's debts. Nevertheless, it was determined that the money overpaid should be paid back by the executor, and he be at liberty to sue such creditors as through mistake he had paid, to make them refund. It was said by COWPER, Chancellor, that though this might be a hard case, yet if the plaintiff had a right to be repaid his money, which he had overpaid on the mortgage, the right could not be overthrown by the defendant, the executor, applying the money in any manner he should think fit, any more than if an executor at law should recover a debt, and pay his testator's debts with it, and afterward this judgment recovered by the executor is reversed in error, the executor must restore the money to the plaintiff in error, and his having paid it away in his testator's debts, will not excuse him from paying it back. So, in the same manner, if there was a decree, for the executor to be paid a sum of money by the defendant, and the executor having received the money, pays it away in debts, and

then the defendant, against whom the executor had recovered the decree, brings an appeal and reverses the deeree, the plaintiff in the appeal shall be restored to the money. It would be otherwise if the defendant had delayed the appeal, and willingly stood by whilst the executor paid away this money to the testator's creditors; for this would be drawing the executor into a snare; but nothing of that kind appeared in that case. And it was, moreover, considered that, though the payment of the money by the executor, among the testator's creditors, was an accident which fell hard upon him, yet it was impossible for the plaintiff to make them parties." 2 Lomax on Executors (2nd edition), p. 465–6; *Pooley et al.* v. *Ray*, 1 Peere Williams, 355; *Hircy* v. *Dinwood*, 2 Vesey, Jr., p. 92–3; *Pickering* v. *Lord Stamford*, Ib. 582.

"And if an administrator sell a chattel which was in the intestate's possession at his death, he will be personally liable in trover to one who was in truth the owner, for the value of the chattel, notwithstanding the administrator applied the proceeds of the sale of the chattel to the payment of the intestate's debts in due course of administration, and had no notice of the right of the true owner." 2 Lomax on Executors, (2 Ed.) page 466. *Newsom* v. *Newsom*, 1 Leigh, 86.

The facts in this case are stronger against appellant than in the cases cited. Here the evidence conduces to prove that he was informed that the money collected by him on the mortgage belonged to the estate of Aaron Mills, and yet he attempts to defeat this suit for the money by his administrator, by stating that he collected it as administrator of Seth Mills, and disposed of it in due course of administration. This if true was not a good defense to the suit. In the case last above cited, where the intestate died in possession of a chattel, which came to the hands of his administrator, who in good faith sold it, and administered the money. JUSTICE CARR, said:

"The right of the owner to sue for his property, can never depend upon such circumstances as these. The administrator when he sells property as belonging to his intestate, acts at his peril. If he sells my property he must answer to me for it, however he may have thought himself bound by law to sell, and however fairly he may have applied the proceeds to the debts of his intestate."

It follows that the court below did not err in refusing the seventh, eighth and tenth instructions moved for appellant.

Whether there are any unpaid creditors of the estate of Aaron Mills or not, is not made to appear in the case before us. If not, his heirs will be entitled to have the money collected in this suit distributed among them, after payment of the expenses of administration. If in fact appellant has paid the shares of five of them as stated by the witness, Johnson, it would not be equitable for the appellee to pay them again out of the money recovered of appellant in this suit, but their shares should, by subrogation, be distributed to appellant.

But this being a suit at law by the administrator of Aaron Mills against appellant for money collected by him belonging to that estate, it is no defense, as we have seen, that he paid to some of the heirs their shares, they having no legal right to collect it of him, and the right of action being in the administrator of Aaron Mills.

Judgment affirmed.

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FERGUSON VS. PEDEN.

1. TITLE. *Possession, evidence of:*
Where one dies in actual possession of land, it is *prima facie* evidence that he was seized in fee.

2. ACKNOWLEDGMENT OF DEEDS. *Official character of Clerks of another State need not be attested by Judge of Court.*

The certificate of the clerk of a court of record of another State to the acknowledgment of the execution of a deed, is admissible as evidence without attestation of his official character by the judge of the court.

3. EVIDENCE. *Amendment of Deed by evidence on trial.*

A deed cannot be corrected by parol evidence on the trial, and then offered as evidence of title to the land in controversy.

4 *Limitation. Adverse possession. Color of Title.*

A deed or color of title is not necessary to maintain the statute bar to the extent of the actual adverse occupancy.

APPEAL from *Washington* Circuit Court.
Hon. S. W. PEEL, Special Judge.
J. D. Walker, for Appellant.

HARRISON, J.:

This was an action by Samuel J. Peden against James H. Ferguson, for the recovery of the South-West quarter of the North-West quarter of section thirty, in township sixteen, North, of range thirty-three, West.

The complainant alleged that William C. Posten, died intestate, seized of the land, sometime prior to the year 1870, leaving William S. Posten, John J. Posten and Jane Parks, who had since intermarried with Thomas McAdams, his children, his heirs at law. That John J. Posten, and Jane McAdams and her husband, on the 29th day of October 1874, sold and conveyed their interests in the land to the plaintiff; and William S. Posten, on the 15th day of November 1874, sold and conveyed to him his interest in it; and that the defendant unlawfully withheld from him the possession thereof, to his damage, etc.

The defendant, in his answer, denied that the plaintiff had title to the land; and, as to six acres thereof particularly described, asserted and set up title in himself; alleging that Jane McAdams, and her husband Thomas McAdams, on the 12th day of November 1866, sold and conveyed the tract mentioned in the complaint to James C. C. Patten, who, on said

day, entered into possession thereof, and enclosed with a substantial fence the said six acres; and the same had been so enclosed from that time until the commencement of the suit.

And he denied that he was in possession of the other part of the tract, or withheld the same from the plaintiff.

The jury returned the following verdict: We the jury find the issues for the plaintiff; that the land mentioned in the complaint belongs to him, and he is entitled to the possession of the same, and that the defendant unlawfully withholds the possession of the parcel of six acres, and we assess no damages.

The defendant moved for a new trial, which was refused.

The judgment, as entered, was that the plaintiff recover the land mentioned in the complaint, and his costs, etc.

The defendant appealed.

Upon the trial, the plaintiff was permitted to prove, to which the defendant excepted, that William C. Posten was, and had been for four or five years, in possession of the six acres at the time of his death; which occurred in 1857; claiming it as his own, and exercising ownership over it.

As the plaintiff deduced his title from William C. Posten, the evidence was clearly admissible and proper. Proof that he died in possession of the land was *prima facie* evidence that he was seized in fee. *Carnall* v. *Wilson*, 21 Ark., 62; *Jacks* v. *Dyer*, *et al.*, 31 Ark., 334.

The defendant excepted also to his reading to the jury, after he had proven that the heirs of said Posten were his before mentioned children, the deeds from William S. Posten, and Jane McAdams and her husband; because the acknowledgments of the grantors having been made, the one before the clerk of the District Court of McLennan County, and the other before the clerk of the District Court of Bosque County, in

the State of Texas, the certificates of which were under the clerk's official seal; his official character was not attested by the presiding judge of the county.

No such attestation was required. The statute, sec. 842, Gantt's Digest, is explicit and plain, and is as follows:

"In cases of acknowledgment or proof of deeds or conveyances of real estate taken within the United States or Territories thereof, when taken before any court or officer having a seal of office, such deed or conveyance shall be attested under such seal of office, and if such officer have no seal of office, then under the official signature of such officer."

Nothing is said of any further attestation.

The plaintiff also read the deed from John J. Posten, and it was proven that said John J. Posten was, at the time of the trial, which was on the 27th day of April 1877, only about twenty-four years of age.

The defendant produced a deed from Jane McAdams and her husband, to James C. C. Patten, executed on the 12th day of November 1866, for an adjacent tract of land; and offered to prove, by parol evidence, that it was the intention of the grantors to sell and include in the deed the six acres; and then to read it to the jury: and the refusal of the court to allow such proof, and the deed to be read, was the ground of another exception by the defendant, and of the motion for a new trial.

If such a mistake had happened, a court of equity might, no doubt, have relieved against it, if no right of an innocent purchaser, or other equity, had intervened; but a court of law possesses no such power. The deed was very properly rejected.

The defendant introduced James C. C. Patten, who testified that he purchased the parcel of six acres from Jane McAdams and her husband, on the 12th day of November 1866, and immediately took possession and enclosed it with a good, substan-

tial rail fence, and cultivated the same until the 14th day of February 1871; when he sold and conveyed it to A. S. Vandeventer, and delivered him possession.

He then read the deeds from Patten to Vandeventer; from Vandeventer to Trent, and from Trent to the defendant; and it was proven, that the six acres had been enclosed with a substantial fence, and cultivated from the time of Patten's entry; and that the defendant, and those under whom he claimed, had been notoriously, and with the knowledge of the plaintiff, in peaceable, adverse possession of the same, under a claim of right, continuously, from that time to the commencement of the suit.

The plaintiff, it was conceded, was, and had been ever since his purchase, in possession of the remainder of the tract.

The court instructed the jury, against the defendant's objection, that the time Patten was in possession of the land, should not be computed with the time of the possession of the defendant, and the other persons under whom he claimed; unless they found that he held under some written color of title.

This instruction was erroneous, and should not have been given.

In the case of *Mooney et al.* v. *Cooledge et al.*, 30 Ark., 656, the court, after remarking that if the occupancy in that case had been held under color of title, the occupancy of any part of the tract, for the required time would have conferred title to the limits of the grant, under color of which the entry was made, say: "But, in this case, the adverse possession cannot be said to be under color of title to this acre of land. No deed giving limits or boundaries to this spot was ever made; and when an entry is made, under such circumstances, the rule is that the possession reaches no further than there is an actual occupation by some defined certain limits, indicated by an enclosure, or something of a like notorious character." 3 Wash.

on Real Prop., 135–156; Willard on Real Estate, 355; Tyler on Eject. and Ad. Pos., 863; *Humbert* v. *Trinity Church*, 24 Wend., 604.

Justice Cowen, in delivering the opinion of the court in *Humbert* v. *Trinity Church*, said: "So long as a man is in possession of land, claiming title, however wrongfully, and with whatever degree of knowledge that he has no right, so long the real owner is out of possession, in a constructive as well as an actual sense. It is of the nature of the statute of limitation, when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy. To warrant its application in ejectment, the books require *color of title*, by deed or other documental semblance of right in the defendant, only when the defense is founded on a *constructive adverse possession*. But neither a deed nor any equivalent muniment is necessary, where the possession is indicated by *actual occupation, and any other evidence of an adverse claim exists*. The muniment is but one circumstance by which to make out an adverse possession."

No notice seems to have been taken of the infancy of John J. Posten, during a part of the time of the adverse possession. Until he arrived of age, the statute of limitation did not commence running against him; and it was not a bar to the plaintiff's right of recovery of the undivided share purchased of him.

The judgment should not have been entered for the whole tract; but, inasmuch as the defendant set up no claim to any more than the six acres, it was not an error to his prejudice, or one of which he might complain.

Because of the error above shown, the motion for a new trial should have been sustained; the judgment is therefore reversed, and the cause remanded that a new trial may be had.

HONNETT VS. HONNETT.

52 Ark 425 DURESS. *Marriage.*

If one having seduced a woman, marries her through fear of the natural and probable consequences of his crime, it would not, in the absence of force or threats of bodily harm at the time, be such duress as would avoid the marriage.

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.
H. Carlton and *Read Fletcher* for appellant.
Bell and *N. T. White*, *Contra*,

EAKIN, J.:

This bill was filed on the 17th of April, 1876, by complainant against her alleged husband, setting up their marriage on the 6th day of the same month, and that afterwards he had treated her continuously with *open insult*, *contempt*, *unmerited reproach* and *studied neglect*. That he had *publicly proclaimed her a prostitute*, and used concerning her, other vile epithets, and that her condition had been rendered intolerable. Prayer for divorce, alimony and general relief. There was also a separate petition for an order to restrain the defendant from selling or disposing of his property to defeat alimony, to which petition he responded on the 20th of the same month, denying the marriage, and also his intention to dispose of his property.

Complainant followed her bill on the 9th of May, 1876, with a motion in open court for attorney's fees, and alimony *pendente lite*.

On the 11th of May, defendant filed his answer and cross bill, setting up in substance that by conspiracy and threats, he had been forced to undergo the marriage ceremony, against his own free will, and praying that the marriage might be annulled.

The complainant answered the cross bill on the 12th, denying all conspiracy, force or fraud, and stating that the defendant after having seduced her under promise of marriage, had married her at the urgent request of friends, as a reparation of the evil. On the 10th of June, the court below ordered defendant to pay her $100 as attorney's fees, and the sum of thirty dollars per month for maintenance, *pendente lite*.

A voluminous mass of testimony was taken, upon which the cause was heard. The chancellor found that the defendant had never of his own free will, consented to the marriage on the 6th of April; that his apparent consent had been procured by force and threats of violence to his person, such as to put him in fear of his life or great bodily harm; that he never recognized her as his wife, and that the marriage was void. It was so decreed, and the motion for alimony and attorney's fees denied.

Complainant appealed, and an order was made in this court, on the 6th of February, for a further allowance; pending the appeal.

Without detailing the mass of testimony appearing in the transcript, this court finds upon a careful review of the same, the following substantial facts: That the complainant was a young woman of good character and social position. That defendant began paying her the usual attentions incident to courtship whilst she was quite a girl, about fifteen or sixteen years of age; that he persisted in them for a course of years so as to monopolize her society, gained her love and confidence, and under promise of marriage violated her chastity. Early in the year 1876, she became *enciente* from this connection. It became known to her relatives during the absence of defendant on a trip to New Orleans.

They considered her ruined and abandoned by defendant, and despaired of his return. She however clung to her confidence, and continually asserted that he intended to return, and do her the only justice which remained in his power.

Meanwhile great excitement prevailed amongst the friends of the families, most of whom seem to be Israelites. Defendant returned on the 6th of April, and went peaceably and unmolested from the steamboat to his place of business. He was there called upon by numbers of his friends, who reproached him with his conduct, and by arguments, expostulations, and by threats of a grave character urged him to an immediate marriage. He requested time to make up his mind. but was told that the matter would not admit of delay. The only direct threat emanated from the brother in law of complainant, who remarked if he did not marry complainant, he would never marry another woman. He explains the threat in his deposition to mean, that he would follow him up and disgrace him wherever he went, even if he went to Germany, and that he had been offered money for the purpose. There is some evidence also that he was told that if he did not marry the woman he would be *lynched*, not by parties present, but by others in the community.

During this pressure and these expostulations, defendant was much moved. He shed tears and trembled, and seemed sorely perplexed. He was appealed to by the portraits of his parents which hung in the room to act honorably in this matter, marry the complainant, and make all things right. He was assured that they might still live happy and respected. He was very reluctant to consent, but yielding to these influences, whether from fear or from remorse, finally did so; to the great satisfaction of all concerned. He went with a friend to the clerk's office to procure his own license, and several hours afterwards came with a friend to the house of complain-

ant's brother in law, where she resided and where the ceremony was duly performed. He remained but a short time afterwards, and left; since that time he has refused to live with her or even visit her, and to justify himself, announced on divers occasions and to different persons, that she was unchaste, and had been guilty of intercourse with other men. Of this he does not offer one *scintilla* of proof, or ground of suspicion, beyond his own declaration. The character of the lady save as to this matter, is established by the most conclusive testimony.

Afterwards, being put upon trial, by some association of which he was a member, for his conduct towards the lady; he announced that he had made her his wife, and that it was no longer the business of the members to enquire into his private affairs. It seems that he was acquitted on these grounds.

Taking the whole testimony, it is impossible for this court to determine the true motives that actuated the defendant in consenting to the marriage. He was certainly under no fear of bodily harm from those around him, who were urging him to it. They offered none and allowed him to go to and fro without hindrance. He might, possibly, have been in general fear of the consequences of his act, from the natural impulses of resentment on the part of her relations, as he well might be; and may have failed in the courage necessary to meet the consequences. He may have feared the frowns of his people, and loss of caste and confidence, or the withdrawal of their aid. He may have been actuated by genuine emotions of remorse induced by the appeal to his parents. Certainly the influences, whatever they were, were irresistible. He consented with the greatest reluctance.

Meanwhile, the complainant took no part in any of the proceedings, nor does she seem to have been aware of them, although she, doubtless, knew ner friends were urging the marriage. She

remained passive and trusting until defendant came to the house, and led her from her sick room to be married. His refusal to remain with her, caused great distress to herself and her friends, and this, with the reasons assigned, caused the filing of her bill.

It is difficult to speak with calmness and patience of the conduct of the defendant throughout this affair, towards the helpless victim of his selfish passions. In marrying her he did what he ought to have done, and we prefer, in case of doubt, to attribute his action to the better motives of remorse and a sense of justice. His highest motive would have been to save, in some degree, the character of the confiding woman whom he had ruined—to relieve the shame and anguish of her condition, to give her his name, and his child a legitimate father; and to win back the confidence and friendship of his people.

But if his motives were lower, and he feared the natural and probable consequences of a treachery and a crime, and married to escape them; it would not be such duress as would avoid the marriage in the absence of any force, or direct threat of bodily harm at the time the act was done. It would be shocking to allow one to escape the probable and natural consequences of such an outrage, by a marriage, and then having obtained security, to immolate his victim by repudiation of his act. She, at least, was no party to any fraud or duress.

The Chancellor, we think, erred in his findings from the evidence.

Had there been actual duress, it was a tort, which defendant could waive; and we find him afterwards, when under no other duress than fear of expulsion from an association, owning his marriage as a voluntary act, and claiming immunity under it.

The equity of complainant for a divorce on her part, must rest upon the ground of such indignities to her person as rendered her condition intolerable.

After the decision of this court in the case of *Rose* v. *Rose*, 9 Ark., 507, we cannot hesitate to declare, that without any fault of hers, to abandon his wife on the day of marriage, with declarations indicating a fixed and unalterable determination never to live with her or treat her as a wife, and to add to this insult, the deeper injury of traducing her character, without the shadow of proof, was an indignity calculated to crush to earth any woman of ordinary sensibilities.

We think the Chancellor erred also in denying her the relief prayed in her bill, both as to divorce and alimony.

Reverse the decree, and remand the cause with instructions to dismiss the cross bill, and grant a divorce to complainant, with suitable alimony and attorney's fees, to be ascertained by reference to a Master, or in any other mode the Chancellor may deem most fitting in accordance with equity practice.

JACKS ET AL. VS. ADAIR ET AL.

1. NEW TRIAL: *Limitation on, for grounds newly discovered.*

The limitation of three years upon an application for a new trial, in cases appealed to the Supreme Court, runs from the date of the judgment of the Circuit Court. 33 161 / 59 444 / 33 161 / 60 55

2. SAME: *Bill of review not superseded by*

The bill of review is not superseded by the statute which authorizes the Circuit Court to vacate or modify a judgment for grounds discovered after the term at which it was rendered. The statute extends to cases at law a new remedy, without taking away any which existed in equity, and as to the latter is cumulative. 33 161 / 61 348 / 33 161 / 63 144 / 33 161 / 74 156

3. JUDGMENTS OF SUPREME COURT: *Review by inferior court; injunction against.*
A judgment or decree of the Supreme Court cannot be reviewed, altered or modified by an inferior court for error upon the record; but for matters arising after the judgment or decree of the Appellate Court, and which would render it inequitable to carry it into execution, it may be *enjoined.*

4. BILL OF REVIEW: *After affirmance in Supreme Court; Prohibition against.*
A bill of review for new matter discovered after affirmance in the appellate court, is permissable; but leave to file it must first be obtained, if not from the Appellate Court, at least from the Chancellor. It rests in his sound discretion to grant or refuse it. But, if he should err or abuse his power in this regard, the remedy is not by prohibition from the Appellate Court.

5. SAME: *Limitation on.*
Against bills of review for newly di covered evidence, there is no positive statutory bar.

EAKIN, J.:

In accordance with the opinion of this court, delivered in the first case and reported in 31 Ark., p. 616, judgment was, on the 19th of May, 1877, entered here on the supersedeas bond, in favor of Martha Griffin, as administratrix, etc., against Eli T. Diamond and Thomas M. Jacks, and also against John P. Moore, as surety, for the sum of $4883.05, and interest thereon from the 26th day of March, 1874, and the further sum of $488.30, being 10 per cent. interest on the judgment, and execution was ordered.

On the 24th day of July, following, the defendants below, Diamond and Jacks, filed in the office of the Lee County Circuit Clerk a motion for a new trial, on the ground of newly discovered testimony, upon which said Clerk, by order of the Judge of the County Court, issued an interlocutory injunction against the execution from this court.

On the 30th of October, following, Ira A. Webster, who seems to have been then recently appointed in Ohio, as the administrator of Benj. F. Griffin's estate, answered the petition, appending thereto a demurrer, assigning for cause, *first*, that the final decree was rendered more than three years before the petition was filed: and amongst others a *fifth*, that due

diligence had not been shown in procuring the evidence. The answer, with a large mass of testimony, not necessary now to be noticed, is sent up with the transcript.

The demurrer was sustained on said first and fifth grounds, petition refused, and the interlocutory injunction dissolved, with damages assessed at $300, for which judgment was rendered in favor of said administrator against Jacks. Appeal granted and bond for supersedeas filed. The transcript of these proceedings was filed here on the 30th day of January, 1878.

Afterwards, the original appellee Martha Griffin, moved this court for an alias execution on the judgment rendered here in May, 1877, setting forth the facts as above stated. Appellants responded, relying upon the second appeal and supersedeas, and the filing of the transcript here, as effective to retain in force the interlocutory injunction issued below; filing at the same time their motion to renew the injunction here.

Before any action had been taken upon either of said motions, on the 22d of June, 1878, said Webster, as administrator, etc., appeared here and applied for a prohibition; suggesting and showing by proper exhibits, not only the foregoing proceeding, but also: That pending them, on the 9th of February, 1878, said Diamond and Jacks had filed a bill in equity in the Circuit Court, to review the original judgment or decree of that court, and to enjoin the judgment of this court, and that an interlocutory injunction had been issued, as prayed. Further, that the cause below had been heard, upon demurrer to the bill, and motion to dissolve the injunction, on the 7th of May, 1878, when the court had overruled the demurrer, continued the injunction and ordered the suit to progress.

An inspection of the Bill of Review exhibited, discloses that it is based substantially upon the same grounds as the former petition for a new trial, to-wit; that long after the de-

cree rendered below in the original cause, the defendant, Jacks, discovered that James Adair was at the time of the compromise of the rights of the legatees of Dennis Griffin, himself the real owner, by purchase, of the whole interest of B. F. Griffin, deceased; that he had concealed this fact when he pretended to act as said Griffin's attorney, and during the progress of the suit; whereby the decree had been rendered in favor of the administratrix of said Griffin, when, if the facts had been known, the decree should have been for Jacks and Diamond, The bill further alleges that the estate of said B. F. Griffin is wholly insolvent; that the administration is in Ohio; that said Webster has no means nor assets of any kind in his hands; that his administration was taken for the sole purpose of defending this suit, as that of his predecessor Martha Griffin, had been for the purpose of prosecuting the original one, and that James Adair and his wife were also insolvent. These are the main features of the bill, wnich contains also allegations tending to show due diligence, and the usual formal requisites.

The Judge of the Circuit Court waives notice of the motion for prohibition, and these matters are all now submitted together, on argument and brief of counsel.

It is convenient to consider first the motion for a new trial and the proceedings thereon; as their determination will affect the several motions for an alias execution, and to continue or renew the restraining order first issued by order of the Judge of the County Court. The motion for a prohibition must rest on different gounds wholly jurisdictional.

The application for a new trial was made shortly after the affirmance of the decree here, but more than three years after it had been rendered. The cause had not been remanded, but execution had been ordered from this court, returnable here.

The remedy sought was statutory, in derogation of the common law principle that the judgments of the Circuit Court at law, cannot be altered by the same court after the close of the term, except by bill in Chancery, in a direct attack for fraud. Section 3596, of Gantt's Digest, authorizes the court in which a judgment or final order has been rendered or made, to vacate or modify it, after the term in certain cases specified; one of them being by granting a new trial for the cause, and in the manner prescribed in section 4692. By section 3601, the party seeking thus to vacate or modify a judgment or order may obtain an injunction to suspend proceedings on the whole or a part thereof, to be granted by any officer authorized generally to grant injunctions, upon proper showing by affidavit or exhibition of the record. Section 4692, to which reference is above made, provides that when grounds for a new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by petition, filed with the Clerk not later than the second term after the discovery, on which a summons shall issue as on other complaints, etc. It is further provided, that no such application shall be made more than three years after the final judgment was rendered.

In case of a decree appealed, and affirmed in this court, and retained here for execution, to what judgment or order does the statute refer? Not to the decree of affirmance in this court. The court below cannot certainly vacate or modify that. Waiving the question whether the court below can entertain such a petition at all during the pendency of the appeal here, and before the cause is remanded, when the record shows that the whole matter has been removed from the control of the inferior court; if that court can act at all, it must act on its own judgment, or order, and not upon that rendered here. It seems obvious that the judgment or order rendered below, in

case of affirmance, must give the point of time from which to estimate the limitation for a motion for a new trial.

The Circuit Court, then, did not err in sustaining the demurrer to the petition on the ground that it had not been filed within three years. The statute makes no exceptions, and it is not within any manifest equity of its provisions to make one in a case like this. The appellant had the option to dismiss the appeal, and rely upon his petition at any time within the three years, upon the discovery of new evidence, and there is no more reason for extending the statutory limit where an appeal has been taken, than exists when it has not. The appeal is his own and creates the obstacle against filing the petition below, if any exists, pending the appeal. He ought not to be allowed to experiment with an appeal, and rely upon it, until its futility be shown by affirmance of the judgment; and then have a still further extension of three years to file a petition for a new trial. This would enable him, at least at his option, if not of his wrong, to make an indefinite extension of the limitation dependent upon the delays incident to this court.

This conclusion decides also the motion for a renewal of the injunction granted on the petition, and renders it unnecessary to rule in this case, whether an appeal with supersedeas should continue an injunction dissolved. The judgment of the court below upon this branch of the submitted matters must be affirmed. If this were all before us it would follow, also, that an alias execution should go in the original case. It is proper, however, that the discretion of the court in ordering or refusing it, for the present, should be influenced by the matters brought to its notice by the application for a prohibition.

The bill of review, against the prosecution of which the motion for a prohibition is directed, seeks to review a decree, after appeal and affirmance, and which has not been remanded. The first question presented *in limine* is, whether, since the

code, bills of review are proper at all, in any case. Or does the statutory remedy to vacate and alter judgments and orders supersede the old practice in equity?

Its language is certainly broad enough to apply to cases in equity as well as at law, although perhaps not the aptest to have been used if the Legislature had had both in view. It may be said of the code generally that it applies to both modes of proceeding whenever its provisions are of a positive and mandatory nature, exclusive of all other modes. Yet it does in the outset, (sec. 3,) recognize and adopt proceedings in equity as distinct from those at law; and for the rules governing proceedings in equity, we must look to the old chancery pleadings and practice, as they obtained when the code was adopted. These are proper yet, unless altered by the code as above indicated. Indeed, the general scope and purpose of the code of civil practice, recently enacted, seem rather directed to assimilating proceedings at law with those in equity, than to the alteration of the established chancery practice in any important degree.

Under provisions of law precisely like ours in this respect, these views have been held by the Supreme Court of Kentucky, and the old practice as to bills of review has been continued under the Code. This was announced in the case of *Bush* v. *Madeira's heirs*, 14 B. Monroe, and has been since followed without question (see *Mitchell* v. *Berry*, 1 Met., 609; *Baker* v. *Grundy's heirs*, 1 Dan., 282; *Peak* v. *Percefull*, 3 Bush., 218. The correct view of the statute in question seems to be this: that it extends to cases at law a new remedy, without taking away any which existed in equity, but, as to the latter being cumulative, where any difference might exist. It is noticeable that the word "decrees" is not used, which is the apt and ordinary designation of final orders in equity; and there are other indications in the language and context of the

provisions in question, that they were primarily intended for cases at law, and for new trials of facts found by a jury, or a court sitting as such.

The graver and more difficult question is, can a bill be brought in the court below to review a decree after appeal and affirmance, whether remanded for execution, or in process of execution here. For if it might be done after remanding, it is not to be presumed that such right was intended to be precluded by retaining it here for execution. And as incident to this jurisdiction, it devolves upon us to inquire whether the process of this court may be enjoined. The question presented by this motion for a prohibition, is, as remarked, purely one of jurisdiction. If the Circuit Court has power to entertain such a bill, the merits of the cause must be decided there. However erroneous the proceedings may be, however gross the mistake about to be committed, no considerations of hardship or convenience should induce this court to exercise the delicate and dangerous power of prohibition, for the prevention of that which may be corrected by appeal.

Under our system of judicature, this court has no original jurisdiction over the merits of cases, except in a very few special cases. But the channels to it from all inferior courts are kept open, and converge to it as a center. The necessity for its controling power by prohibition does not exist here, as it does in the King's Bench in England. There it is used, principally, to restrain, within permissable bounds, those courts whose jurisdiction is, as it were, by sufferance and permission of the Common Law, such as the Ecclesiastical, the Maritime and other special courts, from which no appeal lay to the King's Bench. It must often correct and restrain by prohibition, or not at all. It is the King's prerogative writ, applicable indeed to his own inferior courts of Common Law, but principally useful to keep within bounds those peculiar

courts not proceeding by the usual course of law. In America the writ is still proper and useful, but is more rarely called in requisition, inasmuch as the Supreme Courts have generally appellate powers only, but have them either mediately or immediately from all judicial tribunals whatever; and may thus preserve uniformity of proceedings and check all encroachments. There may be undoubted and palpable cases of usurpation of jurisdiction, as if a Court of Chancery should presume to try an indictment, the County Court an action of ejectment, or the Circuit Court some matter exclusively committed to some other jurisdiction. These exceptional cases would afford proper occasions for the exercise of the power of prohibition, and the Constitution has armed this court with due powers for the purpose; but to go further and entertain motions for prohibition in cases of even doubtful jurisdiction, might be a dangerous and very embarassing interference with the powers, duties and wholesome efficiency of those superior courts of original jurisdiction, which are charged with the speedy and general administration of the laws, for the benefit and protection of the citizens.

It results from the nature and supremacy of this court that no inferior tribunal can review, alter, or modify its judgments or decrees, for any supposed error, or for any matter which might have been considered here. Hence there can be no review for error upon the record.

It has been well settled, however, that for matters arising after the judgment or decree of an Appellate Court, which would render it inequitable to carry the judgment or decree into execution, it may be enjoined. That detracts nothing from the dignity or supremacy of the superior tribunal. It presents new equities for original jurisdiction.

With regard to bills of review for new matter, discovered after affirmance of decree in the Court of Appeals, the first,

and only English case is that of *Barbon* v. *Searle*, 1 Vernon, 416. That was a bill filed in Chancery for newly discovered matter after an appeal and order in the House of Lords. It prayed an answer and discovery as to the matters alleged, in order that by the discovery the complainant might be capacitated to apply to the Lords for such relief as he might require; and expressly disclaimed any design to impeach the order of the Lords. Upon demurrer and argument, the court ordered that, inasmuch as the Lords were not then sitting, whereby to have a direction touching said matter, and if they had been, that an answer could not be put in there, on oath; and inasmuch as *there ought to be a discovery*, to put complainant in position to apply to the Lords for such relief as they might see fit to give, the defendant should answer; but that no further proceedings be thereupon had, without the further order of the court.

Chancellor Walworth, in the case of *Stafford* v. *Bryan*, 2 Paige, 45, considered this as an authority *against* the power of the Court of Chancery to entertain a bill of review, after the decree of the court for the correction of errors; basing his opinion on the ground that it was a bill for discovery only; and that the court refused to allow complainant to go further after answer, without leave first to be granted. The case is nevertheless an authority directly in point, to show that the court did not consider any decree, of even the highest tribunal, a positive bar to the enforcement of a plain equity afterwards brought to light, and which could not be determined in the case, when adjudicated. The Court of Chancery did entertain jurisdiction to go as far as it could, and as far as was necessary towards that relief, upon the express grounds that the House of Lords could not entertain original jurisdiction to enforce an answer. Thus far it was obvious that the Court of Chancery must give relief, if it was to be had anywhere, to the extent of revealing the rights of the parties upon the facts

to be disclosed by the answer, referring it to the Lords to grant relief when the matter might be presented.

Under our system, this court has not the power to grant the relief upon any disclosure of new matter after the term, and the want of this power may create the necessity in our Courts of Chancery to proceed to the relief itself.

The most eminent text writers have accordingly considered this as an authority, that a bill of review is permissible after an affirmance by the Appellate Court. (See Barbours Ch. Pr., vol. 2, p. 23; Story's Equity Pleadings, 88; Daniel's Ch. Pr., chap, 34, sec. 5), and the general current of American authority has been in the same direction.

In the case of *Singleton* v. *Singleton et als.*, 8 B. Monroe, p. 367, the court say: "An affirmance does not fix unalterably the rights of the parties, but only renders the decree irreversible by the party against whom it is affirmed, for any errors which he assigned, or might have assigned, or for any error arising on facts known and which he might have introduced into the record. A judgment affirmed may be enjoined. After affirmance against one party, the opposite party has been allowed to reverse for errors assigned by him. After affirmance a bill of review may be brought upon facts newly discovered." See also *Hawkins* v. *Lambert*, 18 B. Monroe, 670. The original court is the proper tribunal for this purpose (*Beasely* v. *Mershon*, 6 Bush., 424). The same principle has been several times asserted by the courts of Virginia and Tennessee, always with the distinction between bills of review for error of law, and those for newly discovered matter.

Without multiplying citations it may be taken as the result of American authorities, that whilst all deny the power of the Court of Chancery, after the action of a Court of Appeals, to review its decrees for matters which might have been assigned as error, they either expressly announce, or with

very few exceptions, concede this power for newly discovered facts; and it must exist of necessity somewhere, or there would in many instances be a total failure of justice. This court cannot entertain jurisdiction of a bill of review of its own decrees. Such bills are not of an appellate character, but when founded upon newly discovered facts, as this is, are of original nature.

Upon the appeal of a bill of review from the Circuit Court of the United States for the District of Kentucky, which bill had been filed after a decree upon the subject matter in the Supreme Court, Mr. Justice Nelson in his opinion said:

"Nor will a bill of review lie in the case of newly discovered evidence after the publication or decree below, when a decision has taken place on appeal, unless the right is reserved in the decree of the Appellate Court, or permission is given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery, and House of Lords in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in Chancery suits."

Southard, et als v. *Russell*, 16 Howard, 547.

And he cites in support of this view, the case in 1 Vernon, 416, and that in 2 Paige, 45, together with several other authorities, some of which however, are but little in point. It is to be observed that this was upon an appeal of the case, and a consideration of the merits and practice; and not upon a prohibition or question of the powers and jurisdiction of the Circuit Court. Whether or not it would be prudent, or in consonance with the constitutional powers and design of this court to establish this practice here, is a question not necessary now to decide.

If it were conceded that a bill of review ought not to be filed in the court below after an affirmance here, without the leave of this court reserved or afterwards granted, it would be error in the court below to allow it, just as it would be improper to allow a bill of review in ordinary cases without leave of the court where filed. But it would not be such defect of jurisdiction as to evoke our interference by prohibition.

Under our constitution the Circuit Courts are the great reservoirs of all unappropriated jurisdictions. They are the general resort when rights are to be enforced, or wrongs prevented or redressed, and there is no other tribunal competent. Section 2, Article vii, of the Constitution, provides that "the Circuit Court shall have jurisdiction in *all* civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution." This court has no jurisdiction exclusive nor concurrent, to entertain bills of review of this nature.

In any case leave to file a bill of review for new matter is necessary, if not from this court, at least from the Chancellor. It rests in his sound discretion, and it devolves upon him to be very careful that the decrees of the court be not trifled with, or brought into contempt by frivolous or vexatious applications for review, intended for oppression or delay. But if he should err or abuse his power in this regard, the remedy cannot be by prohibition, without an abuse of power here which might lead to disastrous consequences. All things should be done in due order.

The points have been made by counsel, that this bill is barred by time, and the complainant's have not obeyed the former decree. These too, are not jurisdictional questions, and we deem it proper to refrain from their discussion. We may indicate in this opinion that for newly discovered evidence, there is no positive statutory bar. Whether the Chancery Courts

should by analogy follow the limitation of three years, prescribed by the statute for motions for a new trial; or that of five years prescribed in Gould's Digest, chapter 28, section 128, for bills of review in cases of bills taken *pro confesso* against defendants not summoned; or whether they should in the exercise of their discretion, be governed by the equities of the particular case as affected by staleness or laches, are questions better left in the first instances to their discretion.

Bills of review of this nature are not matters of right, but depend upon sound discretion.

The motion for a prohibition must be refused at the cost of petitioners.

The decree of the Chancellor in the second case of *Jacks* v. *Adair*, dismissing the petition for a new trial, and rendering a judgment for damages on the injunction, must be affirmed.

In the case of *Jacks* v. *Adair*, in which judgment was rendered against him, in May, 1877, being the first of those named, and on which on the motion for an alias execution, the death of said Mary Ellen Adair was suggested, and Ira A. Webster, as adm'r, *de bonis non* of said Benjamin F. Griffin, appeared and was made a party, the clerk will issue execution for damages awarded on the appeal, and costs in the name of said Ira A. Webster, adm'r. *de bonis non*, and not for debt until further orders.

STATE OF ARKANSAS VS. JOHNSON.

INDICTMENT: *Endorsemnnt of the names of witnesses on.*

The omission to endorse the names of witnesses examined before the Grand Jury, on an indictment at the time it is found, is no cause for quashing the indictment.

APPEAL from *Jefferson* Circuit Court.

Hon. J. A. WILLIAMS, Circuit Judge.

Henderson, Attorney General, Met. L. Jones and *Thos. B. Martin*, for appellant.

ENGLISH CH. J.:

Anthony Johnson was indicted in the Circuit Court of Jefferson County for a misdemeanor (extortion) in the office of Constable. He moved to set aside the indictment because the names of the witnesses who were examined before the Grand Jury were not written at the foot of, or on the indictment, as required by the Statute. The Court sustained the motion, and the State appealed.

The practice in England was to endorse the names of the witnesses intended to be examined before the Grand Jury, upon the bill when it was prepared, and the witnesses so endorsed were sworn in open court, and the bill, with the names of the witnesses upon it, was sent to the Grand Jury, and the witnesses were called before them, and examined. 1 Arch. Cr. Pr. and Pl., 98.

Here, the foreman is empowered to administer oaths to witnesses appearing before the Grand Jury (Gantt's Digest, Sec. 1758) and when the indictment is found, the names of all witnesses who were examined must be written at the foot of, or on the indictment. Ib., Sec. 1778.

In our practice the putting of the names of the witnesses who were examined before the Grand Jury on the indictment, serves several useful purposes: It furnishes information to the Clerk in issuing subpœnas for the State; to the Prosecuting Attorney in calling witnesses at the trial, and it advises the accused of the names of the witnesses upon whose testimony the indictment was found, which may be important to him in preparing for trial.

The statute should not, therefore, be disregarded, but should be complied with.

But the names of the witnesses are not part of the indictment, and it has been held in Iowa that they are not part of the record, and need not be transcribed in making out a transcript of the record for the Supreme Court on writ of error. *Harriman* v. *The State*, 2 Green, 284.

Mr. Wharton says: "The practice is for the Attorney General (in Penn.) or, in Englrnd, the Clerk of the Assizes, to mark on the back of each bill the witnesses belonging to it; though it has been held that the omission is not fatal. 1 Wharton, American, Cr. L., Sec. 478.

Our opinion is, that the failure to put the names of the witnesses examined before the Grand Jury upon the indictment at the time it is found, is not cause for setting aside or quashing the indictment. But as it may be important for defendant, in preparing for trial, to know the names of the witnesses on whose testimony the indictment was found, the court should, on his application, require a list of the witnesses to be furnished him.

See *Commonwealth* v. *Knapp*, 9 Pickering, 497.

The judgment is reversed, and the cause remanded with instructions to the court below, to require the appellee to plead to the indictment, etc.

State of Arkansas vs. Brewer.

Indictment: *Affray and Assault and Battery cannot be joined.*

A count for an affray and one for assault and battery, cannot be joined in the same indictment under the criminal code practice. But if the count for an affray is so drawn as to include a charge of assault and battery, as it may be, the parties, one or both, may be convictod of the latter offense, if warranted by the evidence.

APPEAL from *Baxter* Circuit Court.
Hon. FRANKLIN DOSWELL, Special Judge.
Henderson, Attorney General, for the State.

ENGLISH, CH. J.:

The indictment in this case is as follows:

"The Grand Jury of Baxter County, etc., etc., accuse A. J. Brewer and G. C. Albritton of the crime of an affray, committed as follows, to-wit: The said A. J. Brewer and the said G. C. Albritton, on the 10th day of July, A. D. 1877, in the county, etc., aforesaid, mutually, by agreement, and unlawfully did fight to, with and against each other to the terror of citizens of the State of Arkansas then and there being, against the peace, etc.

"And the Grand Jury, etc., etc., accuse A. J. Brewer of the crime of an assault and battery committed as follows, to-wit: The said A. J. Brewer on the 10th day of July, A. D. 1877, in the county, etc., aforesaid, in and upon one G. C. Albritton then and there being, unlawfully did make an assault, and him, the said Albritton, then and there unlawfully did strike, beat, bruise, wound and ill treat, against the peace, etc.

"And the Grand Jury, etc., etc., accuse G. C. Albritton of the crime of an assault and battery, committed as follows, to-wit; The said G. C. Albritton on the 10th day of July, A. D. 1877, in county, etc., aforesaid, in and upon one A. J. Brewer, then and there being, unlawfully did make an assault, and him, the said A. J. Brewer, then and there unlawfully did strike, beat, bruise, wound and ill treat; against the peace," etc., etc.

Brewer demurred to the indictment for misjoinder of offenses, the court sustained the demurrer, and the Prosecuting Attorney declined to elect on which count of the indictment he would prosecute. Brewer was discharged, the cause dismissed, and the State appealed.

The first count in the indictment was no doubt drafted under the act of 23d July, 1868, Gantt's Digest, Sec. 1508, which provides that: "If two or more persons shall, by agreement, fight, to the terror of any citizen of this State, the person or persons so offending shall be deemed guilty of an affray, and shall be fined in any sum not less than $10 nor more than $100, or be imprisoned in the county jail not less than one nor more three months, or both."

The common law definition of an affray is "the fighting of two or more persons in some public place, to the terror of the King's subjects; for if the fighting be in private, it is not an affray, but an assault," etc.

In the above statute, as well as in the first count of the indictment, the words "public place" are omitted, and hence we conclude that the count was drawn under the statute.

The second count charges Brewer with an assault and battery upon Albritton; and the third count charges Albritton with an assault and battery upon Brewer.

Though, by the common law, several defendants may be included in an indictment for several distinct misdemeanors of the same kind, if severally charged, yet it is within the discretion of the court to quash such indictment. *State* vs *Nail et. al.*, 19 Ark., 563.

Two persons may commit an assault and battery, each upon the other, at the same time, but each would be guilty of a distinct and several offense, and if severally charged, may, by common law, be joined in the same indictment, but the court has the discretion to quash the indictment. *State* v. *Lemon et. al.*, 19 Ark., 577.

But now by Section 1783 of Gantt's Digest: "An indictment, except in cases mentioned in the next section, must charge but one offense, but if it may have been committed in

different modes, and by different means the indictment may allege the modes and means in the alternative."

The next section does not provide, among the exceptions mentioned, that an affray and an assault and battery may be charged in the same indictment.

In *Childs et. al.* v. *The State*, 15 Ark., 204, the parties were indicted as for an affray at common law, and each of them convicted of an assault and battery, and this court held that the allegations of the indictment were not such as to warrant the conviction, because it was alleged that they fought in a public place, but not that they fought each other.

Chief Justice Watkins, who delivered the opinion of the court, said: "There can be no doubt that if counts for an assault be added in an indictment for an affray, one or all may be convicted of the assault, if the evidence falls short of proving an affray."

But the trouble now is, since the passage of the above statute, that if in an indictment for an affray, counts be added charging the parties with an assault and battery upon each other, as in this case, more than one offense is charged in the same indictment, which is not permissible.

In this case the parties are charged in the first count with fighting together by agreement, etc., and no doubt under such count, if the State fails to prove all the material elements of an affray as defined by the statute, the parties may be convicted of an assault and battery, if the proof warrants it, and this is clearly indicated in the above opinion of Chief Justice Watkins.

In the definition of an affray, assault and battery are included. But the indictment (for common law affray) does not necessarily charge the affray in such terms as to include also an adequate technical allegation of an assault and battery. It may evidently be so drawn as to do this; and, on principle,

if it does, there may be a conviction for assault and battery, or for simple assault, on the indictment for affray. But if the indictment is otherwise drawn (as in *Childs et. al.* v. *State*, *sup.*) there cannot be such conviction. 2 Bishop on Cr. Pro., Sec. 46; *State* v. *Allen*, 4 Hawks, 356; *State* v. *Stanley*, 4 Jones, N. C., 290-2.

In this case the parties were charged with a statute affray committed by fighting together by agreement, and under such charge, if the State fails to prove the material elements which constitute the offense, one or both of the parties may no doubt be convicted of an assault and battery, if warranted by the evidence. It was therefore unnecessary to add the counts for assault and battery.

When the Prosecuting Attorney intends to charge in an indictment but one offense, but finds it necessary to allege the offense in different forms or modes by adding counts, which he may well do in some cases, to meet contingencies in the evidence, and the indictment thus drawn seems upon its face to charge several offenses which may not be joined, and is demurred to on that account for misjoinder, he may avoid the demurrer in the manner indicated by this court in *State* v. *Jourdan*, 32 Ark., 203.

Affirmed.

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ROBINSON VS. STATE OF ARKANSAS.

1. CRIMINAL PRACTICE: *Filing indictment.*

Where the record shows that an indictment was returned into court by a Grand Jury through its foreman, the Supreme Court will not reverse a conviction under it, because the entry fails to show that it was returned by the foreman "in the presence of" the Grand Jury. It will presume that the Circuit Court would not have permitted it to be returned in their absence.

2. SAME: *Excusing jurors accepted by the parties.*
Where a juror discloses his incompetency after he is accepted by the parties it is not error in the court to then excuse him.

3. SAME: *Admitting incompetent evidence by consent.*
A prisoner has no cause to complain of an admission of testimony, which he as well as the State reads in evidence.

4. JURIES: *How judges of the law.*
In criminal cases the jury must take the law from the court, but where the issue involves a mixed question of law and testimony, they are necessarily the judges of the law and testimony, in order to determine the criminal intent, etc.

ERROR to *Pulaski* Circuit Court.
Hon. J. W. MARTIN, Circuit Judge.
Farr and *Newton*, for plaintiff in error.
Henderson, Attorney General, contra.

ENGLISH, CH. J.:

John Lindsay, Smith Kellum and Peyton Robinson were jointly indicted in the Pulaski Circuit Court, for murdering Andrew Taylor by shooting him with pistols. They were charged with murder in the first degree. On arraignment, the prisoners pleaded not guilty; Robinson elected to sever, was tried, the jury found him guilty of murder in the second degree, and fixed his punishment at imprisonment in the Penitentiary five years. He filed a motion for a new trial, which the court overruled, and he took a bill of exceptions; final judgment was rendered against him, and he brought error, and obtained from this court an order for stay of execution until the errors complaint of could be heard.

I. The record entry showing the presentment of the indictment to the court, as copied in the transcript is as follows;

"Proceedings, April 23d, 1878.

"This day the Grand Jury, through their foreman, return into court a true bill of indictment against John Lindsey, Smith Kellum and Peyton Robinson for murder, first degree, which

is filed by order of the court and numbered 130 on the present docket."

Here follows the indictment, and then:

"Filed in open court this 23d April, 1878."

It is insisted by counsel for plaintiff in error, that the above entry shows that the indictment was returned into court by the foreman of the Grand Jury alone, unaccompanied by his fellows. Such may be the literal construction of the entry, but we do not believe that the Circuit Judge would have permitted the indictment so to be returned.

The statute in force to the time of the adoption of the Criminal Code of procedure declared that "All indictments found, and presentments made by a Grand Jury, shall be presented to the court by the foreman, in the presence of such jury, and shall be there filed and remain as records." Gould's Digest, chap. 52, sec. 87.

This statute introduced no new rule, but was declaratory of the Common Law practice. *Green* v. *State*, 19 Ark., 185.

The Kentucky Criminal Code provides that: "The indictment must be presented by the foreman, *in the presence of the Grand Jury*, to the court, and filed with the Clerk, and remain in his office as a public record." Sec. 120.

Section 120 of our Code, which was taken from the Kentucky Code, is in these words: "The indictment must be presented by the foreman of the Grand Jury, to the court, and filed with the Clerk, and remain in his office as a public record." Gantt's Digest, sec. 1779.

Our Code makers have omitted, by inadvertance, we suppose, the words "*in the presence*" between the word "*foreman*" and the word "*of*" where they occur in the Kentucky section from which they copied.

The practice has been the same since the adoption of the Code, as before—for the Grand Jury to go into court in a

body, and for the foreman to present the indictment to the eourt in the presence of his fellows.

As well permit the foreman of a Petit Jury to return a verdict into court in the absence of the other jurors, as to allow the foreman of a Grand Jury to present an indictment in court in the absence of his fellows. See 1 Wharton Cr. L., sec. 500.

We have no idea that the Circuit Judge permitted the foreman of the Grand Jury, in the absence of his fellows, to present the indictment in this case in court, though the Clerk, by an unskillful and unusual entry, has left room for such an inference. Had the attention of the court below been directed to the form of entry, by a motion to set aside or quash the indictment, or by motion in arrest of judgment, no doubt the court would have ordered the informality to be cured by a *nunc pro tunc* entry. *Green* v. *State*, 19 Ark., 178.

II. The *third* and *fourth* grounds of the motion for a new trial are stated in the motion as follows:

"*Third*—Because the court, of its own motion, excused Isaac Prairie, who had been found competent to serve as a juror in said cause, and who had been accepted by the parties, because the said juror stated that upon reflection he did not think that he could find a party guilty of a crime, the punishment of which would be death.

"*Fourth*—Because the court of its own motion, and against the objection of defendant's attorneys, excused one —— Boddeker, who had been found competent to serve as a juror by the court, and had been accepted by both the State and defendant, because said juror stated to the court that he, after reflection, had come to the conclusion that he was biased, because defendant had been trading with him."

These are mere statements in the motion for a new trial. The bill of exceptions fails to show that the persons above named were accepted as jurors, and afterwards excused by the

court; nor does the record entry of the empanneling of the jury, show the facts stated in the motion, or that the rulings complained of were made by the court.

We may remark, however, that Prairie was an incompetent juror, under the statute (Gantt's Digest, sec. 1911, 7th clause), and properly excused by the court. *Boddeker* was not legally incompetent, but as he stated that he was actually biased, the court had the discretion to excuse him. Ib., sec. 1910; *Benton* v. *State*, 30 Ark., 343; *Lavender* v. *Hudgins*, 32 Ib., 766.

III. In an amendment to the motion for a new trial, a further cause is stated, thus: "Because upon the trial of this cause the testimony of E. C. Andrews, taken before John H. Howe, a Justice of the Peace for Pulaski County, in the case of the State of Arkansas against Smith Kellum, was, by consent of parties, read as testimony by both the plaintiff and defendant."

The testimony of *E. C. Andrews* is set out in the bill of exceptions, and at the end of it is the following statement in parenthesis:

"This evidence taken before Esquire Howe read by consent also evidence before coroner."

We deem it unnecessary to express any opinion as to whether the court should have permitted the prisoner on a trial involving his life and liberty, to waive the important constitutional right to be confronted with a witness against him, as it seems from the above amendment to the motion for a new trial, that the testimony of Andrews, taken before the committing magistrate in Kellum's case, was, by consent, read in evidence by both the State and the prisoner. Surely the prisoner has no cause to complain here that the testimony was admitted, when he as well as the State. read it in evidence.

IV. The prisoner asked the court to instruct the jury as follows: "This being a criminal case, you the jury, are the

exclusive judges of the law as well as the evidence. But you are not to make the law, but to determine the law applicable to this case."

The court refused to give this instruction, and its refusal is made the *fifth* ground of the motion for a new trial.

The court properly refused to give the instruction in the language in which it was drawn.

The sense in which the jury are the judges of the law in criminal cases was well expressed by Chief Justice Watkins, in *Pleasant* v. *State*, 13 Ark., 360—372.

The jury must receive the law from the court, but in cases where the issue involves a mixed question of law and testimony, they are necessarily the judges of the law and testimony in order to determine the criminal intent, etc.

V. The second ground of the motion for a new trial, as stated in the motion is, that after the cause was submitted to the jury, and while they were considering of their verdict, Henry G. Clay, one of the bailiffs in charge of the jury, at the request of L. D. Cassinelli, one of the jurors, procured for him a half pint of whiskey. which he drank in the jury room, while the jury were deliberating and considering their verdict, etc.

In support of this ground for a new trial, the affidavit of Henry G. Clay was read, who states in substance, that on the night of the 5th of June, 1878, while in charge of the jury, and while they were consulting of their verdict, he at the request of L. D. Cassinelli, one of the jurors, procured for him at the store of Garibaldi, one half pint bottle of whiskey, and delivered it to him, and he, claiming to be sick, drank the whiskey, or part of it in his presence, in the jury room, and while the jury were deliberating of their verdict, etc.

The State read a counter affidavit made by three of the jurors who state in substance, that on the second night that

the jury were out in the case, about one or two o'clock, after the jury had lain down on benches, tables and floor, and were generally asleep, Cassinelli, one of the jury, appeared to be very sick, was groaning, vomiting and purging, and manifested much distress, and by his groans and other noises awoke most of the jurymen. He called for whiskey several times, stating that if he could get some it would relieve him. After several efforts some was obtained at Garibaldi's, which seemed to relieve him. He did not appear to be intoxicated. The jury had previously agreed upon their verdict as far as Cassinelli was concerned.

No doubt Cassinelli was very much in want of whiskey, and the bailiff seems to have furnished him with a liberal dose, but it appears that nothing grew out of it to the prejudice of the prisoner. This court has frequently condemned the furnishing of ardent spirits to jurors, or the permitting of them to obtain it, pending a trial. See *Pelham* v. *Page*, 6 Ark., 536; *Palmer* v. *State*, 29 Ib., 255.

The better practice in case of necessity, would be to furnish it under the direction of the presiding judge.

VI. The sixth ground of the motion for a new trial is thus stated in the motion:

"Because that since the trial he has discovered and learned that he can impeach the testimony of Wesley East, a witness on the part of the State, who testified on the trial that the defendant (Robinson) handed a pistol to John Lindsey, who killed Andrew Taylor. That he can show by Major Hunley Sevier and Thomas Steel, that the said Wesley East is a man of very bad moral character, and wholly unworthy of belief."

This statement is verified by the oath of the prisoner.

An application for a new trial on the ground of newly discovered evidence, should be corroborated by the affidavits of other persons than the accused, and if possible those of the

newly discovered witnesses themselves. *Pleasant* v. *State*, 13 Ark., 362; *White* v. *State*, 17 Ib., 404; *McPherson* v. *State*, 22 Ib., 228.

No excuse is shown for not procuring the affidavits of Sevier and Steel.

Whether in any case a new trial should be granted on the ground of newly discovered testimony to impeach a witness examined on the trial, it is not necessary to decide in this case.

VII. The *Seventh* ground of a motion for a new trial is that the verdict was contrary to law and the evidence.

We deem it unnecessary to say much about the evidence.

There was testimony conducing to prove that Andrew Taylor, an old negro man, was shot with pistols by Kellum and Lindsay, at McAlmont's station, on the St. Louis, Iron Mountain and Southern Railway, about seven miles from Little Rock, in the afternoon of the first day of April, 1878. At the time he was killed he seems to have been unarmed, and making no hostile demonstrations.

It appears that at some previous time, he and Kellum had had some difficulty, and that he had shot at Kellum. He came to the store of Peyton Robinson on the morning of the day that he was killed, where Kellum and Lindsay were, and one or both of them whipped him. It was not proven that Robinson took any part in the whipping. He went with Kellum and Lindsay to the station house, near which Taylor was killed. It is not shown that he had any malice against Taylor or any motive to aid in killing him. He was intoxicated and in bad company. There is some evidence that immediately before or after the killing, he handed Lindsay a pistol. Upon the whole we cannot say that there was no evidence to sustain the verdict.

VIII. The *First* ground of the motion for a new trial, is stated as follows in the motion:

"Because defendant says that since the trial of this cause he has discovered the testimony of Frank Walker, by whom he could have proven, and now expects to prove, that he, the said witness, on the first day of April, 1878, the day the murder of Andrew Taylor is said to have occurred, was at the grocery store of Peyton Robinson, in Pulaski County, and saw the defendants, Lindsay and Kellum, whip the said Andrew Taylor, and the said defendant, Peyton Robinson, tried to prevent the said Kellum and Lindsay from whipping or injuring the said Andrew Taylor. That this occnrred on the first day of April, 1878, between the hours of ten and twelve o'clock a. m., of said day. That he could have proven, and now expects to prove by said Frank Walker, that he, the said witness, after leaving the said grocery store of Peyton Robinson, went to Pattison's Mill, and then came back and went down the railroad in the direction of St. Louis, and when he had gone about ninety feet north of the signal or whistling post, on said railroad, he saw three white men and one colored man; that one of the white men was Peyton Robinson, and that the colored man was Andrew Taylor. That witnesses stopped near said railroad, a little north of a large log, near the road, and about thirty feet from said parties. That said Robinson came and sat on the log near where witness was. That Lindsay and Kellum spoke of killing or shooting the colored man, and that witness heard the defendant, Peyton Robinson, entreat the said Lindsay and Kellum, not to shoot or kill the colored man, and that witness heard Lindsay and Kellum say to the defendant, Robinson, that it was none of his business. That witness then saw the said Robinson, get on his horse and leave, but returned in a few minutes and ask Lindsay for the keys of his grocery store, and that Lindsay about this

time commenced shooting Andrew Taylor. That this occurred about two or three o'clock p. m., of the first of April, 1878, all of which will appear by the affidavit of said Frank Walker, herewith filed, marked A, and made part hereof. That the defendant and his attorneys used due diligence in preparing his case for trial; and that the above mentioned testimony, newly discovered, has come to his knowledge since his trial, and that he verily believes that if said testimony had been adduced on his said trial, it would have been competent to prove the issue in his favor, and would have changed the verdict."

This statement is verified by the oath of the prisoner.

The supporting affidavit of Frank Walker follows:

"I, Frank Walker, do solemnly swear that on the first day of April 1878, I passed the grocery store of Peyton Robinson, and called or stopped at said store to get a drink. While I was near the store, and after I left it, a colored man came up to the store; Kellum and Lindsay commenced whipping him. I did not see Lindsay whip him, but he urged Kellum and encouraged him to whip him. I know Peyton Robinson and also Kellum and Lindsay. Peyton Robinson tried to prevent Kellum and Lindsay from whipping or injuring the colored man, telling them not to hurt or kill the colored man, but Lindsay and Kellum told Robinson to mind his own business. This happened some time between ten and twelve o'clock, at Robinson's store, near the St. Louis, Iron Mountain and Southern Railroad, about three-quarters of a mile from McAlmont's Station, etc. When I left the store, I went to Pattison's mill, and then came back and went down the railroad towards St. Louis, north of Lasker's store, and about ninety feet north of the signal or Whistling post; I saw three white men and a colored man; Peyton Robinson was one of the men. I stopped near the railroad, a little north of a log, near said railroad. I was about thirty or forty feet from said

parties. Peyton Robinson came and sat on the log near where I was. The other two men spoke of killing or shooting the colored man. I heard Peyton Robinson tell the other men not to kill or hurt the colored man; he told them the colored man had done nothing to them, and that they ought not to hurt him. They told Peyton Robinson to mind his own business, and leave them. Robinson got on his horse and left, but returned in a few minutes and asked John Lindsay for his grocery keys. Lindsay refused to give them to him, but commenced shooting the negro. I should have sworn to the above facts if I had been examined as a witness. I did not tell any one that I knew anything about this case until after I heard Peyton Robinson was convicted. On last Saturday, the 8th day of June 1878, I saw C. F. M. Robinson, and informed him of what I knew about the case. He is the first man I mentioned to as to my being present at the killing. He is the only person I ever told that I knew anything about the case. I am a daily laborer on a farm. I reside in Pulaski County, seven miles north of Little Rock. I was up the railroad when the trial commenced."

The affidavit of C. F. M. Robinson, the father of the prisoner, was also produced and read. He states, in substance, that he had no knowledge of the witness, Frank Walker, until Saturday, June 8, 1878, after the trial of his son, when the said Frank Walker made known to him the facts as stated in Walker's affidavit; nor did he know until the said 8th day of June that there was such a man as Frank Walker, when Walker informed him that he was a witness of the occurrence at the store of the defendant on the first of April, 1878, and that he was present and saw all that was done, and heard all that was said by defendant, north of Lasker's store, at the time of the killing of Andrew Taylor, etc. All of which evidence was newly discovered to affiant and the attorneys of defendant.

We are satisfied from comparing the statement of Walker with the testimony introduced at the trial, as set out in the bill of exceptions, that the alleged newly discovered evidence is not cumulative.

The general statement in the motion, that the prisoner and his attorneys used due diligence in preparing his case for trial, would not be sufficient without stating or showing facts constituting such diligence.

It appears, however, that the defendant was arrested and lodged in jail shortly after Taylor was killed, and continued in prison until the time of the trial, and had to depend very much upon his father for the preparation of his defense so far as procuring witnesses was concerned.

We are under the impression that if Walker had been present at the trial, and testified what he states in his affidavit, and the jury had believed him to be worthy of credit, their verdict might possibly have been more favorable to the prisoner than it was.

The State filed no counter affidavit to impeach the credibility of Walker, or the father of the prisoner.

On this ground the judgment must be reversed, and the cause remanded for a new trial, and plaintiff in error will be tried anew as if upon a charge of murder in the second degree he having, in effect, been acquitted by the verdict of the jury of the charge of murder in the first degree.

RUSSELL ET AL. VS. JACOWAY, JUDGE, ETC.

33 191
61 252
33 191
e73 68
j73 73
73 76
d73 77

33 191
88 164

1. PROHIBITION, WRIT OF: *Office of and when granted.*

The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done by such usurpation.

2. *Removal of County Seat; Jurisdiction over.*

The removal of the County Seat is a matter of local concern, over which the County Court has exclusive original jurisdiction; the Circuit Court has no authority to determine the result of an election for removal in the first instance, and before the County Court has acted in the premises, and where it assumes to do so, a writ of prohibition will lie from this court.

Petition for writ of Prohibition.

Rose for the Petitioners.

Mansfield, *contra*.

HARRISON, J.:

This is an application by Thomas J. Russell and Jacob L. Shinn, for a Writ of Prohibition to the Circuit Court of Pope County, to restrain proceedings on a writ of certiorari sued out of it by William B. Young and others, to the County Court of said county.

The facts upon which the application is made, as stated in the relator's petition and admitted, are the following:

At the July term, 1878, of the County Court of said county, a petition, signed by one-third of the electors of the county, was presented for the removal of the county seat from Dover to Russellville, or Atkins, and an order was thereupon made for the submission of the question of removal, and, as to which of the places proposed, to the electors at the general election on the second day of September following. As shown by the abstract of the returns of the election, 1240 persons, a majority, as appeared by the polls returned by the assessor, of the whole number of electors of the county, voted for the removal, 707 against it, and 1104 for Russellville, but who were not such majority, and 687 for Atkins. On the 18th day of October thereafter, before the County Court had proceeded further in the matter, William B. Young, David West and ten other electors and tax payers of the county, applied to the judge of the Circuit Court, in vacation, for and obtained a

writ of certiorari to the County Court, to bring before the Circuit Court the order of the County Court, the poll books with the returns of the election from the townships of Clark, Griffin, and Independence, and the clerk's abstracts of the votes, that said returns and abstracts might be quashed, and the result of the election declared by it; representing and setting forth in their petition, that although the abstract showed 1240 votes in favor of removal, only 1057 persons, and not a majority of the electors of the county, in fact, voted for it. That the clerk of the County Court, upon a suggestion that the returns from the townships of Clark, Griffin, and Independence, did not show the true result of the election in those townships, before proceeding to compare the same, notified the judges and clerks of the election in said townships to appear and amend them; and that in accordance with such notification they came before him and the justices of the peace he had called to his assistance, and made such changes and alterations in the same, as to make it appear by the abstract of returns, that a majority of the electors of the county had voted for the removal, and that 202 of the votes in favor of removal were cast by persons who did not reside in the townships in which they voted.

The relators appeared before the Circuit Judge, and opposed the application, for want of jurisdiction over the subject matter; which fact was recited in the order granting the writ.

A supersedeas to stay the proceedings of the County Court was also asked for, and granted.

The office of the writ of prohibition, is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted, unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done by such usurpation. Bac. Abr. Title Prohibition; Williams *ex parte*,

4 Ark. 537; Blackburn, *ex parte*, 5 Ark. 27; *Ex parte* Smith, 23 Ala. 94; *Arnold et al.* v. *Shield et al.* 5 Dana, 18.

The Constitution gives to the Circuit Court a superintending control, and appellate jurisdiction, over the County Court, Art. vii., sec. 14; but to the latter "*exclusive original* jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastards, vagrants, the apprenticeships of minors, the disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and *local concerns*," of the county. Art. vii, sec. 28.

The removal of the county seat is manifestly a local concern of the county, over which the County Court has exclusive original jurisdiction; and its authority to determine for itself, whether the conditions exist upon which the removal is required, is unquestionable. Blackburn *ex parte*, *supra*.

But it is said the Legislature has made no provision for a contest of the election before the County Court. To this we reply, without expressing any opinion as to the conclusiveness of the returns: so, neither, has there been any made for a contest before the Circuit Court. For the Circuit Court to assume to determine, in the first instance, and before the County Court has acted in the premises, whether a majority of the electors have, or not, voted for the removal, is to withdraw the matter entirely from its jurisdiction. The statute has made it the duty of the County Court, if a majority of the electors of the county were in favor of the removal, at its next regular term, to order another election to determine which of the places—Russellville or Atkins—the removal should be; but by the Circuit Court's assumption of jurisdiction in the case, all further proceedings of the County Court have been prevented, and stayed, and the question as to such removal, the speedy settlement of which is of great importance to the people of the county, left undetermined, and the matter continued in doubt and uncertainty,

until the final decision of the certiorari; for which wrong an appeal, or writ of error, could not afford a remedy, or correction.

The writ of prohibition asked for, will be issued, and the supersedeas ordered by the Circuit Judge, vacated.

WAGGENER ET. AL. VS. MCLAUGHLIN ET AL.

1 TAX TITLE: *Purchase by tenant; claim for penalties and improvements.*

Where land becomes forfeited to the State for non-payment of taxes by neglect of the owner, his tenant may terminate the tenancy by delivery of the possession, or protect himself from eviction by a future purchaser from the State, by advancing the taxes and holding a lien for re-imbursement, or if the lands are sold for taxes at public sale, during the tenancy, without his fault, he may purchase and set up his title thus acquired, against that of his landlord. But he cannot use his possession which he holds as a tenant, as a basis to acquire title as an *actual settler*, and thereupon found a claim hostile to his landlord. Equity will regard him and all persons holding under him, except purchasers without notice, as trustees for the benefit of the landlord, and will not permit them to speculate on such a purchase, but will allow them only the actual amount paid *in money* to the auditor or the cost of scrips used, in the purchase. No per centum beyond the legal rate of six per cent. should be allowed him, nor any penalties or costs upon subsequent taxes paid by him. Beneficial improvements made by such purchaser may be allowed.

2. PRACTICE IN EQUITY: *Limitation.*

Where such purchaser is the tenant of a receiver in court, it is proper to bring him in by rule, to compel him to surrender possession to the receiver, and the statute of limitations as to actions does not apply.

APPEAL from *Crittenden* Circuit Court in Chancery.

Hon. L. L. MACK, Circuit Judge.

Randolph, for appellant.

Adams, *contra*.

EAKIN, J.:

This is a branch and continuation of the case of *Waggener et al.* v. *Lyles et al.*, in which an opinion was delivered here

on the 5th December, 1874; and an order made remanding it, with instructions.

Pending the former appeal, a portion of the property in controversy, was on the 20th of February, 1871, forfeited to the State for non-payment of the taxes of 1869, to-wit: *Part of Spanish Grant No. 2290*, and also the *southeast and the southwest quarter of section 27, in township 7 north, of range 9 east.*

Meanwhile, the Receiver, Berry, seems to have continued, nominally, to be recognized as such, although he did nothing more than to transfer the custody and control of the property to George W. Cheek as a tenant. He collected no rents from Cheek; but the rents, whatever they were, were disposed of by agreement amongst the parties interested. All matters in litigation seem to have been compromised amongst the original litigants, before the decision of the case here; and perhaps for that reason no action has since been taken, in the court below, in accordance with the mandate of this court on said 5th, December 1874.

George W. Cheek, holding nominally under the said receiver, had, pending the appeal, sub let to John McLaughlin the Mound City property, described as "part of Spanish Grant, No. 2290—108.00," and to D. C. Robinson the two quarter sections above described in section 27; who were holding, as tenants of Cheek, when the time for redemption expired in 1873.

On the 14th of April, 1873, each applied to the Auditor of State to purchase the respective portions of land, held by them under sec. 172 and 173, chap. 148, of Gould's Digest, by which citizens or heads of families and *actual settlers* upon lands forfeited to the State for taxes, were authorized to purchase the same of the Auditor, upon payment of the amount of taxes due thereon, with penalty and costs. They made the neces-

sary affidavits to this end, and received deeds from the Auditor, McLaughlin paying for his portion the sum of $2892.90, and Robinson, the sum of $123.68; which sums included the taxes of 1869–70–71 and 72.

About the same time Robinson conveyed all his interest to McLaughlin.

There have been intermediate conveyances since then, of shares of these lands from McLaughlin to others, and reconveyances back to him and to his wife, which it is unnecessary to notice, as all the interests, under these purchasers from the State, became united again in McLaughlin's estate after his death. It is in proof that, before purchasing from the State, McLaughlin advised Cheek, his landlord, that the time for redemption was about to run out, and that others were looking after the land with a view to its purchase; to which Cheek responded that McLaughlin did not know what he was talking about.

After his purchase from the auditor, McLaughlin repudiated the tenancy and claimed the property as his own, refusing to pay rents. A contest then began for possession, through orders of the court below, regarding the property; based upon the idea that it was still in the custody of the law, from having been ordered into the hands of Berry, as receiver. On the 9th of December, 1873, Robert B. Burton, was by the Crittenden Circuit Court appointed receiver to fill the vacancy occasioned by the death of Berry, and in January following, by agreement of attorneys, the appointment was confirmed here, where the appeal was still pending. It was ordered that said Burton be recognized as such receiver, as well in this court as in the court below.

Thereupon the parties to the original suit, making common cause against McLaughlin, began proceedings in the court below to remove him from possession, and to compel restitu-

tion to the Receiver Burton. Application was made by petition to the Hon. John W. Fox, Circuit Judge, for the purpose, who for some reason did not act. On the 13th of May, 1874, the petition was granted by the Hon. John E. Bennett, then an associate justice of this court, who afterwards, by writ of assistance, put the property in the hands of Burton.

McLaughlin and his co-tenants, afterwards applied to his honor, Judge Hutton of the Circuit Court, who sitting in Chambers on the 29th of July, 1874, ruled that the injunction had been improvidently awarded by a judge having no jurisdiction, dissolved it, and ordered Burton to restore possession to McLaughlin and his co-tenants.

Afterwards it seems from an order in the transcript without date or file mark, that the Circuit Court ordered Burton to bring an action of forcible entry and detainer for the lands, against James McLaughlin, as guardian, and Mary McLaughlin, as executrix; John McLaughlin, having died in possession leaving a son, and devisee of these lands, Francis P. A. McLaughlin. When the action was brought does not appear in the transcript, (which throughout is wonderfully careless, and regardless of the rules of this court) but we might infer from a paper, bound up with the transcript, that it was pending on the 25th of October 1876; and dismissed on the 3d of November of the same year; at the cost of the plaintiff.

Resort was again had to the chancery proceedings; and after several attempts, all the parties interested were brought in on a rule to show cause why the lands should not be surrendered to the receiver; and those holding it punished for contempt.

Respondents to the petition, in showing cause, set up the purchases from the State; and amount of taxes paid, with penpenalties and costs; and also claims for valuable

improvements; for all which no one had paid or offered to pay them.

They also relied upon two years' possession as a bar under the statute of limitations.

Upon the hearing, the court appointed a special master to report "the amount paid the State as taxes for said lands by John McLaughlin, and by D. A. Robinson, with *one-hundred per centum* per annum thereon, and the amount of taxes since paid thereon by John McLaughlin and his successors, with twenty-five centum per annum thereon from the date of payment, and the value of all improvements thereon," made since the payment.

The receiver reported on the first of November, 1876, as follows:

Amount paid by McLaughlin to Auditor for taxes,	$2,892 50
Amount paid by Robinson to Auditor for taxes...	133 06
100 per cent. on both sums.....	3,025 36
Taxes for 1874.....	234 09
Penalty for 1874 and 1875.....	117 04
Taxes for 1875.....	133 86
Penalty.....	33 46
	$6,570 37
The improvements of a permanent character were reported, with valuations swelling the amount to..... ...	$7,148 37

To this report, the parties moving for the rule, consisting of those interested in the fund in court as represented by the receiver excepted; objecting only to such parts as allowed *any interest or penalty on the amount of taxes paid*, and as to *all or any sum for improvements*.

The court overruled the exceptions, and ordered that upon payment to the said Mary A. McLaughlin, and Francis P. A. McLaughliu, of the said sum of $7,149.37, the receivership of

said Burton, should be extended over the property in controversy, and the deed from the auditor cancelled.

From this order the original parties to this suit excepted and appealed.

The report of the master is in accordance with directions. The question is upon the correctness of the Chancellor's views in making the reference. He evidently supposed that the act of January 10th, 1857, (See Gantt's Digest, Sec. 2267), applied to this form of proceeding; and to the circumstances attending the supposed acquisition of the titles from the State. If so the directions were proper.

The Receiver, Berry, appointed in the original cause, was not discharged by the former appeal, nor was the control of the property taken from him during its pendency. He remained reeeiver until his death. The proper course would have been then, to have applied here for the appointment of a successor. That was not done, but the appointment of Burton made below, was ratified here in such a manner as to settle it, *in this case*, beyond further question, that all the property in the original suit, must be considered to have remained in the custody and under the control of its Receiver. That little use was made of him until the contest for possession arose, does not affect his status.

John McLaughlin and Robinson were tenants of property thus in custody of the court, paying rent to one of the parties to the suit, by agreement and consent of the receiver, and of all others interested. Formally they were sub-lessees of Geo. W. Cheek, who was lessee of the receiver; but substantially, and for all practical purposes, they had possession under the court, of property in its custody for the benefit of litigants.

When the property became forfeited to the State for non-payment of taxes, by neglect of the receiver, they might have terminated the tenancy by re-delivery of the possession, or

protected themselves from eviction by a future purchaser from the State, by advancing the taxes and holding a lien for reimbursement, or, as has been held in this court in *Ferguson* v. *Etter*, 21 Ark., 160, if the lands had been sold for taxes at public sale during their tenancy, without their fault, they might have bid, and set up title thus acquired against that of the Receiver. The fact that the property was in the custody of the court did not, of itself, prevent the collection of revenue and could not retard it.

But they availed themselves of a possession which they held as tenants, as a basis to acquire title as actual settlers, which no one else under the circumstances could have acquired against them. They had no right to make use of a possession thus acquired, to found upon it a claim hostile to the landlord. If they had intended that, they should have restored possession, that the landlord might be free to contest the validity of the forfeiture to the State, and have the advantage of possession.

When they purchased from the State. under these circumstances, they became constructive trustees for the benefit of the owners of the property in court, and subject to the control of the court with regard to said property, as fully as when they held under it as tenants. This trust remained, throughout, attached to John McLaughlin, and falls upon his widow, heirs, devisees, or any holding under him in privity of blood, or otherwise; save purchasers for valuable consideration, without notice. The proceedings, by rule to show canse, were apt for the purposes intended, and the statutes of limitations as to actions do not apply.

The validity of the forfeiture, and the sale from the Auditor is not important, and should not therefore be cancelled. The deed may stand good to divest the property from the State, if she had any by the forfeiture; and to vest it in the devisee of McLaughlin, and his widow, who claims legal title to a portion; all to hold as trustees for the purposes of this suit.

The Chancellor erred in directing an allowance for penalties on subsequent taxes, and 100 per cent. on the amount paid the Auditor.

Considering McLaughlin and Robinson throughout as trustees, they cannot derive any benefit to themselves from their purchases, or in any manner speculate upon the property. They should be allowed the actual amount paid, *in money*, to the Auditor when the lands were bought, or if scrips were used, the cost of the scrips in money, or if that cannot be ascertained, the average costs of such scrips at the time.

No per centum beyond the legal rate of 6 per cent. should be allowed upon the amount paid the Auditor, nor upon any subsequent taxes paid by McLaughlin, or for him. Nor should he be allowed penalties or costs, allowed to accrue upon subsequently paid taxes, although actually advanced. He had repudiated his tenancy; had the pernancy of the rents and profits; and should have kept the taxes down out of them. That duty results, moreover, from the constructive trust.

Improvements, under the circumstances, are not allowable of right. Such as are reported seem to have been prudently made, and beneficial to the property. If the Chancellor should think it equitable under the circumstances to allow them to the extent of the rents and profits, it will not be held erroneous.

Reverse the order from which the appeal is taken, as well as the order directing the account; and let the cause be remanded to proceed under its original style, and as one cause with that of *Waggener et al.* v. *Lyles et al.*, decided here upon appeal in December, 1874, save in so far as changes of parties may have become necessary; and with directions that an account be retaken, charging said Jas. K. McLaughlin as guardian, and Mary McLaughlin as executrix, with the full value of the rents and profits of said Mound City property, and said two quarter sections in section twenty-seven, from the time said John

McLaughlin ceased to pay rent, with interest at the rate of 6 per cent. from the time they were due; with such allowances out of said rents as the Chancellor below may see fit to direct for improvements; and crediting them with the money or value of other funds paid to the Auditor upon the purchase of the lands, as may be shown by proof, and with all taxes subsequently paid without penalties or costs, and at the real value in money, with interest on all sums paid at the rate of 6 per cent. from the time of payment; and upon a balance being struck, and upon payment by the Receiver of said amount to said McLanghlins, so in possession, or their agents, they be ordered to deliver possession of all said property to the Receiver appointed in this cause, or to be appointed in his place. And with further instructions to the court below, to proceed in said cause in all respects in accordance with law; and not inconsistent with the opinion heretofore rendered therein, or this opinion.

FRY VS. MARTIN, ET AL.

MORTGAGE. *Unrecorded, void.*

A mortgage or deed of trust not filed for record, is void, as against subsequent purchasers from the mortgagor.

APPEAL from *Chicot* Circuit Court in Chancery.
Hon. T. F. SORRELLS, Circuit Judge.
Reynolds for Appellant.
Garland, *Contra*.

ENGLISH, C. J.:

On the 20th September, 1876, Reuben M. Fry filed a bill for injunction, on the chancery side of the Circuit Court of

Chicot County, against James R. Martin, trustee, etc., and William B. Street, alleging, in substance, as follows:

That Plaintiff, Fry, on the 24th of June 1873, purchased of John M. Woodward certain lots and an adjoining acre of land, which are described, situated in Lake Village, for the price of $5000.00, of which he paid $3000.00 at the time, and assumed the payment of two notes for $1000.00 each, executed by said Woodward to defendant, William B. Street, dated May 10th, 1873, and payable 1st of April, 1874, and 1st of April, 1875, with interest thereon at ten per cent. from 15th April, 1873, at the counting room of Martin & Hillsman, Memphis, and secured by a lien on the property so purchased, being notes made by said Woodward in part payment for said property in his purchase of it from Street on the 10th of May, 1873. (A copy of the deed from Street to Woodward, and a copy of the deed from Woodward to plaintiff, Fry, are made exhibits.)

That at the time plaintiff purchased the property, he found filed for record the deed from Street to Woodward, in which it was recited that said two notes were secured by lien on the property, and plaintiff being advised that the purchase money was a lien on the property, presumed that it was to this lien that reference was made, as no deed of trust or mortgage was found of record or filed for record from Woodward to Street, or to any one else to secure said notes; and being desirous of buying said property, and willing to secure the payment of said notes as part of the purchase money, and to risk providing for their payment before foreclosure could be made to enforce the lien in the event he might not be able to meet them at maturity, he made the purchase stated. That owing to the financial condition of the country he would not have made the purchase if he had known of the existence of the deed of trust to secure the payment of said two notes—he would not have run the risk of losing what he had paid by a

sale on twenty days' notice, upon the men failing to meet the notes at maturity.

That Street had in fact, as plaintiff after his purchase ascertained, received from Woodward a deed of trust, wherein defendant, James R. Martin, is made trustee, said deed made to secure the said two notes from Woodward to Street, and assumed by plaintiff as aforesaid. That this deed of trust was in the hands of said trustee before the sale to plaintiff, and it was by the wish, and direction of Street to Martin, as plaintiff is informed and believes, withheld from record, and in order that the knowledge of its existence might not interfere with any sale Woodward might attempt to make to plaintiff of said property. That at one o'clock p. m. of June 24, 1873, the day plaintiff received and filed for record his deed from Woodward, and after the deed of plaintiff had been filed in the forenoon of said day, said deed of trust was filed for record, and, as the record states, recorded 3d day of July 1873, the deed of plaintiff being recorded on the 24th day of June 1873, the day on which it was executed and filed for record.

That plaintiff had paid on said notes the sum of $500, on the———day of————and that the remainder of said notes is still unpaid. That plaintiff is not at this time able to pay the balance due on said notes. That he regards the property worth fully the price agreed upon, and vastly more than the balance now due, and that at the time a sale would be to him a great sacrifice. That an attempt to enforce the payment of said notes by means of said deed of trust, by any parties who aided, advised or directed its being withheld from record, to enable the said Woodward to sell to plaintiff, would be a fraud upon his rights, and be the means of depriving him of property that he might otherwise be able to save to himself and family.

That the said trustee has, by written notice advertised that he will, on the 2d day of October, 1876, sell at public auction for cash in hand the said property, and that all equity of redemption is waived. (A copy of the notice made an exhibit.) That by this sale defendants not only seek to sell the property on terms not agreed upon by plaintiff, but also to deprive him of the right to redeem the same; which right of redemption he is advised would remain to him if sold under a decree to enforce the vendor's lien, which defendant, Street, might obtain by suit, of which plaintiff is advised he could have no just cause to complain.

Prayer for order restraining Martin from selling the property as advertised, and that on the final hearing he be perpetually enjoined from selling under the trust deed.

A temporary injunction was granted.

The defendants demurred to the bill, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and plaintiff declining to plead further, the temporary injunction was dissolved, the bill dismissed for want of equity, and defendant's damages assessed at $128.73, and plaintiff appealed.

The deed from Street to Woodward reserved a lien on the property to secure the payment of the two notes described in the bill.

In the deed from Woodward to Fry, which was signed by both parties, Fry assumed and bound himself to pay these two notes as part of the consideration of his purchase of the property from Woodward.

The deed of trust from Woodward to Martin, is not exhibited, but it is alleged by the bill and admitted by the demurrer, that it was not put upon record, nor filed for registration in the Recorder's office, until after Woodward had conveyed the property to Fry, and that it was withheld from registration by

direction of Street, for the purpose of enabling Woodward to sell the property to Fry.

Upon these facts Fry took the property under the conveyance from Woodward discharged of and unencumbered by the deed of trust from Woodward to Martin as trustee for the benefit of Street. *Neal* v. *Speigle, adm'r.*, MS. and cases cited. Martin as such trustee had no legal right or power, as against Fry, to advertise and sell the property under the provisions of the trust deed.

It is true that Street had a lien upon the property to secure the payment of the two notes, which lien was expressed in the face of, and reserved by his deed to Woodward, and in the deed from Woodward to Fry, the latter had assumed and bound himself to pay these notes at maturity, and it is true that he had failed to do so, and the notes were overdue when Martin advertised the property for sale under the deed of trust; but Street had no remedy as against Fry under the trust deed, either by causing the trustee to sell the property, or by bill in equity to foreclose the trust deed. He should have filed a bill in equity to foreclose and enforce the lien reserved in his deed to Woodward, and might have made Woodward as well as Fry, who had purchased the property and assumed the payment of the notes, a defendant. Or in this case, instead of demurring to the bill, he might have answered, and by cross bill, claimed a foreclosure of his lien.

The decree must be reversed, and the cause remanded to the court below for further proceedings, etc.

PHIPPS VS. MARTIN.

33 190 207 491

1. WITNESSES. *Husband and wife.*

Husband and wife are not competent witnesses for or against each other.

2. LIMITATIONS. *Exceptions, Replevin.*
Three years is the limitation in the action of replevin; but the statute makes an exception in favor of infants.
3. PARTUS SEQUITUR VENTREM.
The brood of an animal belongs to the owner of the dam.
4. TITLE, EVIDENCE OF. *Declaration of Owner.*
Declarations of the owner of property as to the title to it, are competent evidence of the title, but not conclusive.

APPEAL from *Marion* Circuit Court.
Hon. ———— Circuit Judge.

ENGLISH, CH. J.:

On the 25th of January, 1875, William J. Martin, an infant, by his next friend, Mary E. Martin, brought an action of replevin before a justice of the peace of Marion County, against John P. Phipps, for a bay mare with a star in her forehead, a bay filley with a white hind foot, and a dark bay mule colt. The filley and mule colt were offspring of the mare.

There was a jury trial before the justice, and the jury could not agree upon a verdict. When the case was called for trial again, it was dismissed for want of jurisdiction, on motion of the defendant, and plaintiff appealed to the Circuit Court.

The case was tried in the Circuit Court by a jury, the defendant relying for defense on the three years statute of limitations, and a general denial of plaintiff's cause of action; the verdict was for plaintiff, motion for a new trial overruled, final judgment on the verdict, bill of exceptions, and appeal by defendant.

The grounds of the motion for a new trial were:

First—Verdict contrary to law, evidence and the instructions of the court.

Second—Court erred in refusing to permit Nancy Phipps, wife of defendant, to testify in his behalf.

Third—Court erred in giving the 3rd, 4th and 6th instructions moved for plaintiff.

Fourth—Court erred in refusing 7th and 8th instructions asked for defendant.

Fifth—Judgment contrary to law, etc.

1. The form of the verdict was: "We the jury find for the plaintiff in all the material issues, and we find the bay mare worth $60, the filley $50, and the mule $25."

The judgment was for the property, or if not delivered, its value as found by the jury.

The verdict and judgment were substantially in good form.

On the trial, Ann Jones, the widow of William Jones, and the mother of Mary E. Martin, plaintiff's next friend, and the grand mother of plaintiff, and also the mother of Nancy Phipps, wife of defendant, testified in substance, that plaintiff William J. Martin, was fourteen years of age in March, 1875. That William Jones, her husband and grand father of plaintiff died about the last day of May, 1871, and on the last Saturday before his death, he gave the bay mare in controversy, to the plaintiff. That her husband had owned and raised the mare from her folding, and had never sold or given her away before he gave her to plaintiff. That he deeded her to plaintiff, and at the same time pointed out the mare where she was standing near the yard, and when he was lying in bed.

That her daughter Nancy, who married defendant Phipps, never owned the mare, but defendant obtained possession of the mare, after he married Nancy, and after the death of William Jones, and claimed her ever afterwards. That the filley and mule colt were the offspring of the mare after she went into possession of defendant.

The testimony of Ann Jones, was corroborated by that of Mary E. Martin.

The plaintiff also introduced a deed of gift for the mare executed to him by his grandfather, William Jones, dated 26th May, 1870, duly acknowledged and recorded.

The defendant proved declarations of William Jones, conducing to show that the mare belonged to his daughter Nancy, while she lived with her father, and before she married defendant.

The evidence as to the title of the mare was conflicting, but the question of ownership was fairly submitted to the jury, under the instructions of the court, and their verdict was not without evidence to sustain it.

2. The defendant offered to introduce his wife, Nancy, as a witness in his behalf, and to prove by her that the mare in controversy belonged to her while she lived with her father, and when she married defendant, but the court excluded her as an incompetent witness for her husband.

This ruling was in accordance with the decision of this court, in *Collins* v. *Mack*, 31 Ark., 684, where the subject was fully discussed.

3. The 3rd, 4th and 6th instructions, given by the court on behalf of plaintiff, against the objection of defendant are as follows:

"(3). You are instructed that the statute of limitations does not run against the plaintiff in this suit, if you find from the evidence that he was a minor under the age of twenty-one years at the commencement of the suit.

"(4). You are instructed that the filley and mule in controversy, are the property of the legal owner of the bay mare in question, if you find from the evidence that the said mare is the mother of said filley and mule.

"(6). A mere declaration that property belongs to another made by the owner, does not confer the title, though it may be some evidence of it."

Three years is the limitation to the action of replevin. (Gantt's Digest, Sec. 4120; *Ford* v. *Ford*, 22 Ark., 135) but Sec. 4130, Gantt's Digest, makes an exception in favor of infants, and it was proven that plaintiff was an infant when the suit was commenced, hence the court did not err in giving the *third* instruction moved for plaintiff.

The *fourth* instruction was also properly given. The filley and the mule being the offspring, or increase of the bay mare in controversy, followed her condition as to ownership. *Partus Sequitur Ventrem.* The brood of an animal belongs to the owner of the dam. Burrill's Law Dic.

The *sixth* instruction was doubtless given in relation to the declarations of William Jones, introduced in evidence by defendant, that the mare belonged to his daughter Nancy. These declarations appear to have been made before the execution, by William Jones, of the deed of gift to plaintiff, and were competent evidence, but not conclusive.

4. The *seventh* and *ninth* instructions moved for defendant and refused by the court, follow;

"(7). If the jury find from the evidence that plaintiff neglected or failed to commence his suit for over three years from the time his right of action accrued, they must find for defendant.

"(9). If the jury find that the bay filley and mule colt have been bred and raised by the defendant, while the dam was in his lawful possession, the plaintiff cannot recover for them."

Both of these instructions were properly refused by the court, as above shown.

Affirmed.

VARNER ET AL. VS. SIMMONS ET AL.

1. COUNTY SEAT: *Removal, etc.*

Where an act providing for the removal of county seats is repealed, a provision of the act that there shall not be a second removal for ten years becomes inoperative.

2. ———: *Same,*

A provision of an act for the removal of county seats that whenever an election has been held *in pursuance of this act*, and the county seat changed in compliance therewith, it shall not be lawful to change the couunty seat again under ten years, does not apply to a removal had under the provisions of a prior act.

APPEAL from *Lincoln* Circuit Court,
Hon. T. F. SORRELLS, Circuit Judge.
L. A. & X. Y. Pindall, for Appellants.
Cunningham, contra.

ENGLISH, CH. J.:

It appears from the transcript in this case, that the Commissioners appointed by the Governor to locate the county seat of Lincoln County, under the act of March 28th, 1871, creating the county, located the county seat at Mason's place, and the location was approved by the County Court at its July term 1871.

That in February 1872, the county seat was removed to and permanently located at Star City, under the provisions of the act of March 15th, 1869. (Gantt's Dig., chap. 34.

That on the 6th of October 1876, W. F. Varner presented to the County Court a petition purporting to be signed by 873 persons, styling themselves citizens of the county, for the removal of the county seat from Star City to Varner's Station, on the Little Rock, Pine Bluff and New Orleans Railroad, and praying the court to make an order for an election to ascertain if a majority of the voters of the county favored the proposed removal, etc.

The petition was accompanied by an abstract of title to the particular quarter section of land to which it was proposed to remove the county seat; and an offer of Varner to donate to the county a sufficient quantity thereof, not exceeding ten acres, as a site for court house, jail, etc.

At the time the petition was presented to the County Court, John G. Simmons and three other persons were permitted to file a plea setting up the former removal of the county seat as a bar to the proposed removal.

The court sustained the plea and dismissed the petition, and Varner appealed to the Circuit Court, where on a trial anew a like judgment was rendered and Varner appealed to this court.

The application for the removal in question was made under the provisions of the act of March 2d, 1875, (Acts of 1874-5, p. 201,) by which act, chapter 34, Gantt's Digest, title "County Seats," was expressly and without reservation, repealed.

The repealed statute contained this provision: "Whenever an election has been held, and the county seat may have been removed in compliance therewith, it shall not be lawful to remove the county seat again under ten years," etc. Gantt's Dig., sec. 973.

At the time the present petition for removal was presented to, and heard by the County Court, ten years had not transpired from the time of the removal of the county seat from Mason's place to Star City, but the provision of the repealed statute above copied was no bar to the proposed removal.

The appellees do not show in their plea that they had any special private interests which would be affected by the removal of the county seat from Star City, but whatever may have been their personal interests in that location, the public policy was paramount, and they could not avail themselves of a repealed statute (and a statute which the Legislature had the

constitutional power to repeal) to defeat the proposed removal, or rather to prevent the County Court from making the order prayed by appellant to submit the question of removal to the electors of the county. *Moses et al.* v. *Kearney*, 31 Ark., 261.

There is, however, the following provision in the act of March 2, 1875:

"SECTION 9. Whenever an election has been held *in pursuance of this act* and the county seat changed in compliance therewith, it shall not be lawful to change the county seat again under ten years."

The election by virtue of which the county seat was removed from Mason's place to Star City, was not held "*in pursuance of this act*," but was held, and the removal made under the provisions of the act of 16th of March 1869 (Gantt's Dig., chap. 34). which this act expressly, and without reservation, repealed.

The court below erred in sustaining the plea in bar interposed by the appellees, and its judgment must be reversed and the cause remanded for further proceedings.

It does not appear in the transcript before us that the 873 persons whose names were subscribed to the petition for removal were qualified voters of Lincoln County, as required by sec. 3 of the act of March 2, 1875, and this must be the subject of inquiry in the court below on a rehearing of the petition.

The court below does not appear to have passed on the sufficiency of the petition, on the accompanying abstract of title and proposed donation, but merely to have held the plea in bar sufficient, and for its error in holding the plea good its judgment is reversed as above indicated, and the case remanded for a rehearing on the petition and accompanying documents, etc., with liberty to the appellees to interpose any other

appropriate objection to the prayer of the petition which they may have. (See section 1 of the removal act).

OSIER VS. HOBBS.

CONTRACT TO PAY: *None implied for gratuitous services.* 33 215 68 147

Services intended at the time to be gratuitous, cannot afterwards be used to raise an implied contract to pay for them.

APPEAL from *Wooodruff* Circuit Court.

Hon. J. N. CYPERT, Circuit Judge.

B. D. Turner, for appellant.

EAKIN, J.:

This action was brought before a Justice of the Peace, to recover compensation for care and attention bestowed by the wife of appellee Hobbs, upon the child of appellant. It was taken by appeal to the Circuit Court, and submitted to the Judge sitting as a jury.

The effect of the evidence, as presented in the bill of exceptions, is: that the child, which was feeble and sickly and very young, was given by appellant Ozier's wife to Mrs. Hobbs, to be raised. It seems the mother was then in a dying condition. Mrs. Hobbs took the child and kept it some two years or more, rendering it fair motherly attention. During this period appellant did many acts of neighborly kindness to Hobb's family, sending them provisions, furnishing teams, etc. It affirmatively appears that neither party intended to charge for services, to the child on one hand, or for articles or labor furnished on the other.

Ozier, having learned that the child had been corrected by the son-in-law of Mrs. Hobbs, took it away. She was much

mortified by this, and Ozier afterward told her that he had only taken it temporarily, and meant to return it after her son-in-law left. She made some answer which induced him to believe that she did not desire or urge it, and he never did.

It seems further that Mrs. Hobbs had bought a sewing machines in the expectation that Ozier would pay for it. When the note became due he refused to do so. This, with other reasons, induced Hobbs to sue for the past services of his wife with regard to the child.

The court refused, at the request of appellant, to declare the law to be:

"*First*—If the plaintiff and wife, at the time the child was taken to their house to be raised, and during its continuance there, did not intend to charge for board and attention rendered to it, he has no cause of action in the case.

"*Second*—If it was understood by and between plaintiff and his wife, and the defendant, during the time the child was at their house, that no charge was to be made against the defendant for board and attention to the child, the plaintiff cannot, afterwards, claim compensation and maintain this action."

The court, instead, made the following declaration:

"Upon the evidence in this case, the defendant is liable to the plaintiff for a reasonable compensation for the care of the infant of said defendant, less the value of the contributions made by the defendant;" and upon that found for the plaintiff the sum of $50. The court based this finding and conclusion on the ground that defendant permitted the wife of plaintiff to receive his child, an infant, from his (defendant's) wife on her death bed, *under the belief* that the plaintiff's wife was to have the child, and raise and care for it as her own, and permitted her to have the care and charge thereof for two years and six months; that he made sundry advancements or contributions of provisions, medicines and clothing, amounting

to $175, towards the support of the child, neither party intending to charge the other for these favors, and that defendant afterwards took the child away, *pretending* that the child was mistreated, and that against the assent of plaintiff.

The general principle is well announced in the instructions asked; that, services intended at the time to be gratuitous, cannot, afterwards, be used to raise an implied contract to pay for them; and this was *the case* made by the paper filed before the Magistrate. It was a simple account against Wm. J. Osier, in favor of Isaac Hobbs, for "board, attention and care" of the child, *at the request* of the defendant, from June 16th, 1872, to August 1st, 1874, $300. According to the findings of the court *in this action*, the declarations of law asked by defendants should have been given, and the judgment should have been in his favor.

There is nothing in the whole case to indicate that plaintiff intended or desired to proceed against the defendant on the ground of his wrongful conduct in taking away the child, in violation of his supposed implied contract (which was found by the court to be a fact) to allow plaintiff's wife to keep and raise the child as her own; nor is there any proof of damages incurred by plaintiff or his wife, on account of the tortious conduct of defendant, resulting from loss of future services. We do not mean to say that the injury to the feelings of the wife, in depriving her of the society of the child, to which she may have become very much attached, and her mortification on account of the unjust censure of her conduct, implied by defendant's pretences, might not have been estimated in the assessment of damages by a jury or a court sitting as such, in an action properly framed for the purpose. We merely mean, that in this action and on the proof there is error in the judgment.

Let the judgment be reversed, and the cause remanded for a new trial.

PORTIS & BRO. VS. TALBOT & PACKARD.

JUDGMENTS: *Correction of errors in, when and how may be made.*

When there is an error in the entry of a j idgment, which is clearly shown by other parts of the record, and its correction is necessary to make the record consistent, it may be corrected at any time, even after the term; and the court will of its own motion correct it by *nunc pro tunc* order, and will annul all that may have been done under an execution issued on it.

APPEAL from *Jefferson* Circuit Court.

On motion by *Appellees* to set aside sale, etc.

Met L. Jones, for Appellants.

McCain & Kimball, for Appellees.

EAKIN, J.:

On the 7th of June 1878, the appellees, John H. Talbot and Willard L. Packard, under their firm name, recovered of James M. Portis and William N. Portis under their firm name of Portis & Bro., the sum of $1678 28-100, with interest thereon at the rate of 6 per cent. per annum from date till paid, and their costs; and also, in the same judgment they recovered of James M. Portis individually the sum of $123 67-100 and costs.

And also in the same judgment, they recovered of William N. Portis, individually, the sum of $605 50-100 and costs.

From this judgment *Portis & Bro.* and *William N. Portis*, on the 22d of February 1878, prayed an appeal from the Clerk of this court, which was granted. They executed and filed a supersedeas bond signed W. N. Portis alone with three sureties. The cause was advanced as a delay case, and the judgment of the court below affirmed here, on the 15th of June 1878.

By obvious mistake, the judgment was entered here against the *appellants* and their sureties for $1678 28-100, with interest from 7th of June 1877, and the further sum of $167 82-100, being ten per cent. damages, with costs; and also the further sum of $605 50-100, with like damages and costs.

The mistake consisted in rendering James M. Portis liable, as one of the appellants, for the individual judgment against William N. Portis. He had only asked the appeal from the firm judgment, and was not a party to the supersedeas bond. The judgment against himself individually was not appealed. It was intended that the judgment here should follow that below, and be against the firm of Portis & Bro. for the larger amount, and William N. Portis alone for the lesser.

Execution issued from this court on the 1st July 1878, against both the Portis's, and the sureties for *both* amounts, with interest, damages and costs. It was levied upon certain lands and lots, as the property of William N. and James M. Portis, which were sold and purchased by Talbot & Packard, the judgment creditors, for $600, which was credited on the debt, less the fees paid $22 25-100.

On the 17th of August following an alias execution was issued, in terms which accorded with the judgment as it was intended, that is, it ran against the firm of Portis & Bro. for the larger debt, damages and costs, and against William N. Portis and the sureties for the smaller debt of $605 55-100 damages and costs. Upon this execution was endorsed the credit for $600, proceeds of the first sales, less fees.

Upon a bill filed in the Jefferson Circuit Court in the month of September following, an interlocutory injunction was issued by the County Judge, restraining the Sheriff from levying this latter execution upon the property of the sureties in the bond, before he should have exhausted all the property of the principals: and ordering and directing him to levy upon lands pointed out by complainants. This order was afterwards sustained and continued by the Chancellor until further orders.

The bill upon which this injunction was granted, being exhibited here, discloses that the injunction was ordered on the

grounds that the Sheriff refused to levy upon property pointed out by the principals, and was about to levy upon the property of the sureties in preference.

On the 2d November, 1878, the appellees, in whose favor the execution issued, moved this court for a writ of prohibition against the Circuit Court, to inhibit it from proceeding in the cause, and on the 9th they moved to set aside and annul the sale on the first execution, on the ground that they acquired no title by the purchase, and were misled in bidding by the representations of W. N. Portis, with regard to their ownership, and also on account of error in the execution, in not following the judgment.

In fact the first execution did follow the judgment *entry* of this court, but not as it should have been. The second execution was in accordance with the proper judgment as affirmed here, but there was no proper judgment *entry* to authorize or support it.

The error in the entry was a plain clerical misprision, arising naturally from the anomalous nature of the judgment below, which was the result of an arbitration, and included in one entry, three distinct judgments, one against the firm of *Portis & Bro.*, one against *William N. Portis*, and another against *James M. Portis*, the last of which was not appealed. It escaped the attention of the court in reading the record; but it is of the nature of those which may be corrected at any time, even after the term; inasmuch as it is clearly shown by other parts of the record, and the correction is necessary to make the record consistent.

The court will now make the correction, of its own motion, by a *nunc pro tunc entry*, as of the same date; and annul all that was done under the first execution, and recall the second. This will leave nothing upon which the suit for injunction can operate; and will supersede the exercise of the doubtful

power of prohibiting the Circuit Court from proceeding in a matter within its general jurisdiction; upon the grounds that in the particular case, it may seem to be proceeding erroneously. We do not doubt that the Circuit Court, in this case, upon being advised of the action of this court will make such ruling as to costs as it may deem equitable, and end the matter there. It does not seem to be a case for damages. There will be nothing left to restrain.

Let the entry here be corrected *nunc pro tunc*, to conform to the judgment below as affirmed, with proper costs and damages against the appellants and sureties, and in all other respects as originally intended; set aside all that has been done under the first execution, and recall the second.

With regard to the costs of $22.50, which seems to have been expended by appellees (plaintiffs in execution) upon their purchase under the sale, a question may arise. The application to set aside the sale, is made by themselves upon two grounds. One is that they obtained no title, and were induced to bid by the misrepresentations of William N. Portis; another, that the execution was irregular. There is no answer to the motion, and the eourt might perhaps grant the relief on the first ground alone, which if the execution had been regular, would have entitled appellees to execution for those particular costs also. Inasmuch however, as the mistake in the judgment entry entered into the execution rendering it excessive, at least as to James M. Portis, and the sale was made under such circumstances of irregularity, as to induce the court to set it wholly aside, and would have induced the court to do so, had the defendants in the execution applied for relief on their part, no costs as to it can be awarded. It was as much the duty of appellees as that of appellants to notice the error in the entry. Either party might have had it corrected on proper motion at any time, and a proper execution issued; and the attempt to

avail themselves of it in its erroneous form, cannot entitle appellees to reimbursement of costs expended in the effort.

Let a new execution issue on the judgment as corrected.

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YOUNG ET AL. VS. MITCHELL.

1. PLEADING: *Denials, how must be made.*
   A denial must be direct, not argumentative. The former rules of equity in regard to answering the allegations of a pleading are the same under the Code. He who submits to answer must do so fully and fairly.
2. CONFEDERATE MONEY: *Consideration.*
   Confederate Treasury notes, issued and circulated as money, were a good consideration for a contract,
3. EXECUTIONS: *Equitable title subject to.*
   The vendee of real estate holding a bond for title, has an equitable interest which is subject to executions.

APPEAL from *Hot Springs* Circuit Court in Chancery.
Hon. ——— ———, Circuit Judge.

HOWARD, SPECIAL J.:

Belle J. Young and others, heirs of R. R. Young, filed their complaint in equity, in June, 1873, in the Hot Springs Circuit Court, against A. F. Mitchell and George W. Lawrence, in which it is stated:

That on the 29th day of July, 1863, Reed R. Young, father of the plaintiffs, purchased from Andrew F. Mitchell a tract of land in Hot Spring County, for the price of $5600, of which $5000 was paid, and the remainder to be paid when the land was surveyed and a deed made for the same; that at the time, Mitchell executed the following memorandum in writing:

"Received of R. R. Young, five thousand dollars in part pay for my tract or parcel of land, lying and being in the Magnet Cove, in Hot Spring County, and State of Arkansas,

and containing about three hundred and seventy-two acres, more or less—which I bind myself to make or cause to be made a good and sufficient title to the same at any time when I may be requested to do so, or as soon as I can do so.

"Given under my hand, this 29th July, 1863.

"A. T. MITCHELL."

That the said memorandum was not filed because it was burned when the court house of Hot Spring County was burned, in 1873; that the matter rested thus until 1866, when Young and Mitchell, having differed about the payment for the land, agreed to arbitrate, and did so, and that an award was made that Mitchell should have the lands surveyed and give to Young a deed, Young paying $650 with 6 per cent. interest, from July 29th, 1863, till paid, to be paid in one or three months; that at the time fixed, Young was ready to pay, but Mitchell purposely avoided him; that in 1867 or 1868, Young removed with his family to Tennessee.

That on the 18th day of January, 1868, the defendant, Lawrence, filed an account against Young, and an affidavit for attachment before a Justice of the Peace; that an attachment was issued and levied upon this land by the Constable; that the Justice made an order for the defendant to appear, and he not appearing, he entered judgment for Lawrence, who took a certified copy for the same, and on the 2d March, 1868, filed the same in the Circuit Clerk's office; that in June, 1868, Lawrence had execution issued and levied upon this land, and in September following, at regular sale, the land was sold and bought by Lawrence for the pittance of $60.

The plaintiffs then charge the sale and deed void for several reasons, which will be noticed hereafter.

The bill then charges, that Young died November 4th, 1868, leaving these plaintiffs his only heirs; that efforts have been made to settle the matter; that the land was worth $3040;

that Lawrence's acts were fraudulent; that plaintiffs have always been ready to pay the $650; that Lawrence has been in possession since January 1st, 1869.

Plaintiffs pray that the attachment proceedings and sale of the land be decreed to be void; that the deed to Lawrence be cancelled, and that Mitchell be required to make to plaintiffs as heirs of Young, a good and sufficient deed to said lands.

To this bill, as exhibits, are copies of the proceedings before the Justice and the Sheriff's deed to Lawrence.

On the 29th of August, 1873, Lawrence answered and made his answer a cross-bill.

He admits the purchase, the correctness of the memorandum and of the description of the land, and of the statement of the arbitration and award. He admits suing Young, and all the steps taken in that suit and subsequent pleadings; but denies any irregularity or illegality; and states that the sale of the lands was open and public; that he purchased all of Young's interest and exhibits his Sheriff's deed. He admits Young's death, but does not know who are his heirs. He asks that his answer be taken as a cross-bill, and that upon payment by him of the residue of the purchase money, his title be confirmed, the Youngs and Mitchell be enjoined from further interfering with him in his possesion of the land, and for all other relief.

On the 3d of October, 1873, Mitchell filed his answer and made it a cross-bill.

He denies that Young purchased the tracts of land as alleged, or that he executed any such memoranda, or receipt, as is in said complaint set forth; he states that he entered into a verbal contract with Young for the purchase of these lands for the sum of $5650, in Confederate money, for which he gave him some kind of receipt, the terms of which he cannot remember; that Young failed to pay the $650; that Confederate money was illegal currency; that Young promised to pay the residue

immediately, but has not done so or been willing to do so. That Young and himself agreed to submit their matters to arbitration, (he states the award with some variations, but attacks its validity;) that Young did not pay the sum awarded at the time fixed or any other time, and that therefore he has no claim or interest of any kind in said lands; denies that he avoided Young or that Young was ready at the time to pay the residue; states that he has never received anything of the least value to him or any consideration whatever for said lands, and that the said $5000 was worthless; that he has no knowledge of the death of Young, or who are his heirs.

Mitchell substantially admits the statements in the original bill, of the proceedings in the suit by Lawrence; adopts the objections of the plaintiffs to the sale and deed, and states others which will be hereafter noticed.

The prayer of the cross-bill is that the original bill be dismissed, the deed to Lawrence set aside, etc,

At the March term, 1877, of the court below, the cause was submitted on these pleadings and exhibits, Lawrence's deed in testimony, an agreement that the copies of the arbitration papers filed as an exhibit were true and correct copies, and an agreement that the pleadings of each party were to stand as answers to the several cross bills filed.

The court, without making any special findings, decreed Young's original bill, and Lawrence's cross bill be dismissed, that Lawrence's deed be cancelled, Mitchell's title quieted, possession of the land given to Mitchell, and that he recover costs from the other parties. From this decree, both Young's heirs and Lawrence appeal.

The lands in controversy are east half of the southeast quarter of section 19; the west half of southwest quarter, section 20, and northwest quarter, section 20, township 3 south, range 17 west.

It is claimed by both Lawrence and Mitchell, that the plaintiffs cannot succeed, because their heirship to Young having been denied, it has not been proven. Lawrence says, whether said plaintiffs are the heirs he does not know, and calls upon them to make proof thereof.

Mitchell says he has no knowledge of the death of R. R. Young, or that complainants are his heirs, and denies the same, and asks that proof be made thereof.

Neither of these is a sufficient denial. The issue each was required to make, was not whether he knew these allegations to be true, or whether he was willing to admit them to be true, but whether they were in fact true; * * if he was without legal information on the subject, he could have traversed them in that form. Gantt's Digest, 4569; *Trapnall* v. *Hill*, 31 Ark., 357.

There is much said in both the pleadings and arguments of counsel, of an arbitration of the matters in dispute between Mitchell and Young, and an award in October, 1866. But these proceedings appear never to have been completed, adopted, or acted upon, by either party in any particular. We deem it unnecessary to further refer to them.

The answer of Mitchell to the allegatious of the bill of Young's heirs, is unsatisfactory and evasive. The complainants set out a memorandum, which is a receipt by Mitchell, of a portion of the purchase money, and an agreement "to make a good and sufficient title when requested so to do, or when he could do." They state that they cannot file this paper because it was placed among other papers, in an arbitration suit between Mitchell and Young, in the court house of Hot Springs County, and destroyed when that building was burned in the year 1873. Mitchell denies that Young purchased the land "as alleged in said complaint," or that he "executed any such memoranda or receipt as in said complaint set forth." He

says he does not know, nor has he any means of knowing whether this paper was burned. But he does say he made a verbal contract with Young, for the sale of these lands, that a portion of the purchase money was paid in confederate money, and that he gave to the agent of Young, a receipt of some kind in writing. showing that said nominal sum of five thousand dollars was paid on said tracts of land, but whether in said receipt said nominal sum of five thousand dollars was mentioned as five thousand dollars simply, or five thousand dollars in confederate money, he cannot recollect.

These denials and allegations are not such as are required. A denial must be direct, not argumentative. The former rules of equity with regard to answering the allegations of a pleading are the same under our system. He who submits to answer must do so fully and fairly. Any effort to escape from a direct answer is not tolerated. 1 Nash. Pl. and Pr. 175; Newman Pl. and Pr. 511, *et seq; Guynn, et al* v. *McCauley, et al*, 32 Ark. 105; Gantt's Digest, 4569.

But in direct connection with this manner of answering, Mitchell insists that what he received from Young was in "confederate money," that this was an illegal eurrency, that it was of no legal value whatever, and that it has never been of any value or benefit to him. He nowhere offers to return the currency: he does not ask for a rescision of any contract. He treats the entire transaction as a nullity: and, upon this ground of absolute failure of consideration, he appears to have relied for the relief asked by him from, and granted to him by the court below.

In a long and unbroken line of authorities from *Smith* v. *Thorington*, 8 Wall. 1, to *Williams* v. *Bruffey*, 6 Otto, (96 U. S.) 176, the Supreme Court of the United States has maintained the doctrine that notes issued by the confederate government, and actually circulating as money, supported the

consideration of contracts. In *Thorington* v. *Smith*, that court decided that a contract for the payment of confederate treasury notes, made between parties residing within the so-called confederate states, could be enforced in the courts of the United States, the contract having been made on a sale of property in the usual course of business.

In *Delmos* v. *Insurance Company*, 14 Wallace, 651, the court says: "This court has decided that a contract was not void because payable in confederate money; and notwithstanding the apparent division of opinion on this question, in the case of *Hanauer* v. *Woodruff*, we are of opinion that on the general principle announced in *Thorington* v. *Smith*, the notes of the confederacy actually circulating as money at the time a contract was made, may constitute a valid consideration for such contracts.

In *Williams* v. *Bruffy*, the court says: "The same general form of government, the same general laws for the administration of justice, and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the constitution, they are in general, to be treated as valid, and binding. As we said in *Horn* v. *Lockhart:* "The existence of a state of insurrection and war did not loosen the bands of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in times of peace."

And this court, in a well considered and exhaustive opinion, said, in *Berry* v. *Bellows*, 30 Ark., 214: "It may be safely

asserted that no court entitled to respect would now decide that when a creditor, acting for himself, accepted Confederate money in payment of a debt at any time during the war, when, and in a Southern State where it circulated as currency, such payment did not extinguish the debt."

There remain the matters disputed between the complainants and Lawrence. Young's heirs and Mitchell set up the following objections to Lawrence's title.

I. The defendant, Young, had no such estate in said land as was subject to execution, being a mere equitable interest.

II. The proceedings and judgment of the Justice of the Peace do not show the attached lands were within his teritorial jurisdiction.

III. The return of the Constable does not show there was no personal estate within his township or county upon which to levy the attachment.

IV. It does not appear from the Justice's transcript the account was filed before writ issued.

V. The transcript of the judgment and proceedings in attachment does not show a writ was levied upon the lands mentioned in the Sheriff's deed to Lawrence.

VI. There was no bond filed by defendant, Lawrence, as required by law before issuance of execution by Clerk of Hot Spring Court, and under which the Sheriff sold this land, as required by sec. 30, chap. 26, Gould's Digest.

VII. No bond was at any time filed in the attachment suit before the Justice of the Peace, or in the Hot Spring Circuit Court, as is required before execution can issue.

VIII. There was no advertisement as required by law of the sale under which Lawrence claims title.

IX. In and by the face of said deed it appears that the levy, advertisement and sale of said lands were each and all on the same day.

X. Said supposed legal proceedings and deed under which Lawrence claims are otherwise fatally defective and void.

It is only necessary to refer to our statute and the construction which this court has placed upon it to meet the first objection. "Our statute is very comprehensive, and declares all real estate subject to execution, whereof the defendant, or any person for him is seized in law or equity. The vendee of real estate holding a bond for title, is in equity considered as the real owner, whether he had paid the purchase money, or actually taken possession or not, subject only to the legal and equitable rights of the vendor for the unpaid purchase money. *Hardy* v. *Heard*, 15 Ark. 187; Gantt's Digest, 2630. Clearly in our above stated view of this contract, Young had an interest which could be sold. He was in the condition of a vendee with bond for title.

Most of the objections relied on by the appellant can be disposed of easily. The record of the proceedings shows that there was filed an account and an affidavit as required by the statute.

The plaintiff, Lawrence, seems to have complied with all the requirements of the statute in instituting and prosecuting his case. The account was properly filed and the affidavit for an attachment was made. The writ was properly issued. The record is sufficient upon these points.

No bond was required to be filed with the Justice before an attachment could issue. *Stewart* v. *Houston*, 25 Ark., 311.

It is objected that the levy in this case was made upon land without stating in the return of the Constable that there was no personal property which could be reached by the writ of attachment. We are asked to say that this failure of the office to make that affirmative statement should invalidate everything done in the proceedings, and declare them void. There is no statement that anything was improperly done. It is not so

claimed. Simply the return does not so show. The statute is as follows:

"Whenever the Constable to whom any writ of attachment, issued by any Justice of the Peace, shall be directed, can find no personal property upon which to levy the same, he may and shall levy such writ upon any lands, tenements or town lots, belonging to the defendants in such execution, which may be subject to execution and make his return accordingly, describing in such return the lands, tenements or town lots, so levied upon." Gould's Dig. chap. 16, sec. 35.

In a former statute, upon attachments before Justices of the Peace, the Constable was authorized to attach slaves, when he could find no other property whereon to levy such attachment. In so making an attachment, he stated the fact, and that appears to have been sufficient.

It appears in this case that the Constable made a levy upon certain property, which he designates. It is necessary that he should show in his return, which has never been directly attacked affirmatively, that every provision of the statute has been strictly observed. We think, in this case, the officer has obeyed the requirements of the statute. Must he be held to have gone further? We think not.

The Supreme Court of Iowa in treating this question say, (in an opinion by a dissenting judge, which was afterwards adopted as the law): "It is then stated, as a legal proposition, that it should affirmatively appear by the officer's return that the provisions of the statute had been strictly observed, as the jurisdiction of the court depends entirely upon a legal levy. The only return required by the act, is that the inventory and appraisement shall be annexed and returned with the writ. How then, can it be assumed that the return must show affirmatively that the provisions of the statute had been strictly observed? A legal levy is by no means dependent upon, or the sequence of, such a return. 3 C. Green's R., 398.

In construing a similarly worded statute, the Supreme Court of Kentucky, use this language. * * * * * * * * "The motion was made upon the ground that the officer had no right to levy upon slaves, when, as assumed, other personal property to a sufficient amount had been shown to him; and, if it be conceded that the fifteenth section of the execution law, applies to attachments, it is only directory to the officer and does not render the levy either void or voidable."

In *Isham* v. *Downer*, 8 Conn., 282, the court in considering this question, where the court below had instructed that neither the plaintiff, nor the officer who served the plaintiff's attachment, was bound to take the personal estate of the debtor, but that the real estate was liable to be taken, notwithstanding his ownership and possession of personal estate, say; "But it is said, that the statute contains a new and positive direction, that an attachment shall be served, by attaching the goods or chattels of the defendant, or if none can be found, by attaching the person or land of the defendant. If this construction be adopted, there must be a total absence of personal property, to justify taking the person or land of the defendant, or making any other service."

This court has in several cases stated the rule in this respect. *Rose* v. *Ford*, 2 Ark., 26; *Henry* v. *Ward*, 4 Ark., 150; *Elliott* v. *The Bank*, 4 Ark., 437; *McNabb* v. *The Bank*, 4 Ark., 555.

We are of the opinion, then, that the sale to Young was valid and upon good consideration; that Young had such an interest in the lands as was subject to sale; that Lawrence purchased the interest of Young; that Mitchell is entitled to the balance of the purchased money; namely, $600, with interest from July 29th, 1863, at the rate of 6 per cent. per year; and that upon payment of this sum Lawrence should be decreed to have title to the lands and be quieted in the possession of the same.

Decree reversed and cause remanded for further proceedings in accordance with law, and not inconsistent with this opinion.

GIST, EX., VS. HANLY.

LIEN. *Of attorney for his fees and cost:*

An attorney has a lien upon the securities in his hands for his fees and costs, as well as upon a judgment recovered upon them. Section 3622, Gantt's Digest, so far as it extends, is but a declaration of the law as it was before. Where an attorney has attached property for the collection of a debt, the lien of the attachment enures to the benefit of the attorney for his fees and cost advanced in the action, and cannot be defeated by any settlement made by his client and the debtor, without his consent.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Tappan & Hornor, for Appellants.
Brown, Contra.

HARRISON, J.:

Thomas B. Hanly was employed as an attorney by William H. Ford, a non-resident of the State, to bring suit by attachment in the Phillips Circuit Court, against Thomas C. Gist, on two writings obligatory or bonds, made by said Gist to John N. Herndon, each for $3500, dated December 27th, 1859, and payable with interest from date, respectively, on the 1st of January, 1861 and 1862, and the bonds were placed in his hands for that purpose. Ford at the time of his retainer paid him $225, and agreed to pay in addition thereto, eight per cent. of what might be recovered.

Hanly accordingly brought suit on each bond, in the name of Herndon, for the use of Ford, which suits were commenced on the 12th day of February, 1868, and the

attachments were levied on fifteen hundred acres of the defendant's lands.

The defendant filed a motion, in each case, to dismiss the suit upon the ground that the bond was given in the purchase of slaves.

Before the motions were determined, Gist died, and the suits were revived against his executor, Thomas Gist.

Afterwards, Ford and said Thomas Gist, without the consent or knowledge of Hanly, compromised and settled the suits; and Gist paid Ford $1500, in full satisfaction and discharge of the bonds, and agreed to pay the costs, and Ford gave him a receipt against the bonds, and an order to Hanly for them.

Hanly refused to surrender the bonds, and he filed this complaint in equity against Ford, Herndon, and Thomas Gist, as such executor of John C. Gist, to enforce his lien on the bonds for the remainder of his fee, and $15.75 costs in the suits, paid by him, stating therein the foregoing facts, and charging collusion between Ford and Gist to defraud him.

Only Gist answered the complaint, or made any defense. He denied the charge of collusion, or any knowledge that any thing was due the plaintiff, and denied that he had a lien on the bonds or debts settled by him. He offered to pay the costs advanced by the plaintiff.

The court found that Ford was indebted to the plaintiff, on his fees, and for the costs advanced, $405.75, and for which he had a lien on the bonds or claims, and decreed the payment of the same by Gist out of the goods and property of his testator's estate.

Gist appealed from the decree.

That an attorney has a lien on the judgment he has recovered for his client, for his fee and the costs advanced by him, is beyond controversy; and it is as well settled that he has a similar lien on the securties in his hands.

Hollis v. *Claridge*, 4 Taun. 807; *Furlong* v. *Howard*, 2 Scho. & Lep. 115; *Ex-parte Nesbit*, Ib. 279; *Taylor* v. *Popham*, 13 Vesey, 59; *Twort* v. *Dayrell*, Ib. 195; *Pemberton*, *ex-parte*, 18 Vesey, 282; *Stevenson* v. *Blakelock*, 1 Maule & Seld. 535; *Pleasants* v. *Kortrect*, 5 Heis. 694; *Howard* v. *Osceola*, 22 Wis. 453; *Keenan* v. *Dorflinger*, 19 How Pr. 153; *Story on Agency*, sec. 383.

But it is contended that he has no lien whatever until after the judgment, and that his client may compromise or settle the suit with the opposite party without his consent, and without paying his fee; and we are referred to section 3622 of Gantt's Digest. That section, so far as it extends, is but declarative of the law as it stood at the time of its enactment, and makes no change. By no possible construction can it be held to have taken away the lien of the attorney upon the papers and securities in the cause. That the law gives such lien before judgment the authorities abundantly show.

Pleasants v. *Kortrecht*, *supra*; *Howard* v. *Osceola*, *supra*; *Keenan* v. *Dorflinger*, *supra*; *Jones* v. *Morgan*, 39 Ga. 310; *Rasquim* v. *Knickerbocker Co.* 12 Alb. Pr. 324; *Hutchinson* v. *Howard*, 15 Vt. 544; 2 Kent's Com. 640.

The attorney is virtually an assignee of a portion of the judgment, or of the debt or claim, equal to his fee, and the advances which he has made for his client. For the parties then to make any arrangement or settlement between themselves, without his consent, by which his right might be defeated, would be a fraud upon him, against which he is entitled to protection. As has been said, a party should not run away with the fruits of the cause, without satisfying the legal demands of his attorney by whose industry those fruits are obtained.

It does not appear that any other defense was set up against the bonds than that they were given in the purchase of slaves,

or that there was any valid defense againt them, nor is it shown that the lands attached, were not of sufficient value to satisfy the debt.

The lien of the attachments also enured to the benefit of the appellee, and the parties for that reason had not the right, by a compromise or settlement between themselves, to release the attachments. In the case of *Pleasants* v. *Kortrecht*, above cited, the solicitors impounded a trust fund by attachment for the benefit of their client. The client, without their knowledge or consent, compromised his case and dismissed the suit. The court say; "We think that whenever the solicitor has succeeded, by his professional services, in securing a fund by attachment, and thereby fixing upon it the lien of his client, his own lien, like that of his client, attaches, both however subject to be defeated by the loss of the fund on final hearing or trial. *Prima facie*, the fund attached is subject to be appropriated to the satisfaction of the attaching creditor's lien, and along with his lien, that of his solicitor goes *pari passu*."

The appellee's connection with the suits, and the levy of the attachments were facts which the appellant must necessarily have known, and they were sufficient to put him upon inquiry as to the lien, and the appellant's settling with Ford in the face of these facts without the appellant's consent, was at his peril.

It is also insisted that the appellee should have verified his claim as a demand against the estate of the appellant's testator.

This objection is wholly untenable. As has been shown, it is part of the demands upon which the suits against his testator were brought, as to which no presentation to the executor or verification was required, and which has been appropriated to the estate by the appellant.

Although, as it seems to us, the appellee might have enforced his liens by an application to the court in the cases in

which they arose, this does not exclude the jurisdiction of the court, in an original suit in equity, to afford the relief. No such objection, however, was raised in the court below, or in this.

The decree is affirmed.

RICHARDSON & MAY VS. HAMLETT AND WIFE, ET AL.

33 237
77 108

VENDOR AND VENDEE: *Mortgage: Agreement for purchase money will be enforced.*

An agreement between the vendor and vendee, that the latter shall execute to the former a mortgage upon the land, to secure payment of the purchase money, will give the vendor or his assignee the same rights in equity as if the mortgage had been executed.

APPEAL from *Chicot* Circuit Court in Chancery.

Hon. T. F. SORRELLS, Circuit Judge.

Reynolds, for appellants.

Rose, contra.

HARRISON, J.:

This was a suit in equity by Richardson & May, the appellants, against John C. Hamlett and Alice R. Hamlett, his wife, and James W. Abell and Emma G. Abell, his wife, the object of which was to establish and enforce a lien on certain lands for the payment of a note given for purchase money.

The complaint alleges that Samuel P. Weisiger, in his individual capacity and also as executor of Lucy Weisiger, deceased, and Thomas N. Lindsey, on the 22d day of September, 1873, sold the lands to John G. Morgan for $12,000—for $4000 of which sum the said Morgan gave them drafts on T. H. and I. M. Allen & Co. of New Orleans, and for the remainder, two notes for $4000 each, payable respectively in one and two years, from the 1st day of January, 1874, bearing 8 per cent.

interest from the latter date until paid; and that the said Weis iger and Lindsey executed to him a deed for the lands.

That it was in the sale and purchase of the lands also agreed that Morgan should execute to the vendors a mortgage on the lands, to secure the payment of the drafts and notes, which agreement was stated in the deed, but that the mortgage was never executed.

That Morgan died in 1875, intestate, leaving a widow, Emma L. Morgan, and the said Alice R. and Emma G., and Lula L. Morgan, who is an infant, his heirs at law, and that the said John C. Hamlett is the administrator of his estate.

That the said Emma L. Morgan, in consideration of the transfer to her and the said Lula L. of certain property belonging to his estate in Alabama, and other matters not stated, released to the defendants her dower, and as the guardian of said Lula L. her interest also, in the lands and other property of the said John G. Morgan's estate in Arkansas. That the defendants are in possession of the lands. That the drafts and the note first due, have been paid. And that the plaintiffs are the assignees and holders of the second or last note, which with the exception of $840.48, paid on the 10th day of May, 1876, is still due and unpaid.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and dismissed the complaint.

Had there been no agreement for a mortgage or other security, there could be no question that the vendors would in equity have had a lien on the lands for the purchase money, which, as it appears upon the face of the deed, that the purchase money was not paid, would have enured to the plaintiffs upon the assignment of the note to them, according to the provisions of sec. 564, Gantt's Digest (Act, 1873). Yet,

though they contracted for a different security, from which the presumption arises that it was not their intention to rely on that, the failure of the vendees to give the mortgage, did not have the effect to deprive them of the security bargained for, much less of all security whatever.

Equity looks upon that as done, which ought to have been done. Judge Story says: "All agreements are considered as performed, which are made for a valuable considaration, in favor of persons entitled to insist upon their performance. They are to be considered as done at the time, when, according to the tenor thereof, they ought to have been performed. They are, also, deemed to have the same consequences attached to them; so that one party, or his privies, shall not derive benefit by his laches or neglect; and the other party, for whose benefit the contract was designed, or his privies, shall not suffer thereby." 2 Story Eq. Jur. sec. 64 g; 1 Perry on Trusts, sec. 231; *Craig* v. *Leslie*, 3 Wheat. 563; *Atwood* v. *Vincent*. 17 Conn. 565; *Jackson* v. *Small*, 34 Ind. 241.

The rights of the plaintiffs are, therefore, the same as they would have been, had the mortgage been executed in accordance with the agreement.

Under what authority Lula L. Morgan's interest was released by her guardian, does not appear, but that is not a matter for our consideration. Not being a party to the suit, her rights, whatever they may be, will not be in any way affected by the decree, it being a principle everywhere admitted, that the rights of no one shall be decided in a court of justice, unless he be present.

We are of the opinion that the complaint does contain sufficient equity, or such facts, as constitute a cause of action, and that the demurrer ought to have been overruled; the decree is therefore reversed, and the cause remanded for further proceedings.

33 240
55 545

MAYES VS. HENDRY.

1. VENDOR'S LIEN. *Taking security presumptive waiver of.*

The acceptance of other security raises a presumption that the vendor intended to waiver his equitable lien on the land for the purchase money, but it is a matter of intention, subject to proof.

2. ————: *The Remedy.*

It is not necessary to the enforcement of a vendor's lien in equity, that he should first exhaust his remedy at law. Upon a valid agreement for the sale of land, the vendor until conveyance, holds the legal title in trust for the vendee, and after conveyance, the vendee holds it charged with a trust for the purchase money.

3. PRACTICE. *Time of answering.*

It is within the discretion of a chancellor to permit an answer to be filed after the time allowed for filing it, which will not be interfered with by the Supreme Court, except in cases of plain abuse or manifest mistake. It is not enough that a defendant has a meritorious defense. It must be used in a fit time.

4. ————: *Necessary parties must be in court:*

Although want of necessary parties must be taken advantage of by answer or demurrer, yet if from the nature of the case, a complete and final settlement of the rights of the parties before the court, cannot be had amongst themselves, the chancellor should, of his own motion, order other necessary parties to be brought in.

APPEAL from *Washington* Circuit Court.

Hon. ————, Circuit Judge.

J. D. Walker, for appellant.

L. Gregg, for Appellee.

EAKIN, J.:

Appellee, Alexander Hendry, on the 20th of September, 1875, filed a bill against Samuel and Joseph Mayes, to assert and foreclose an equitable vendor's lien for the purchase money of certain lands, alleging that he sold to them, and conveyed to Samuel Mayes a third interest in a certain tract upon which there was a mill, for the sum of $2500, also one-sixth in the same tract which belonged to John Hendry, but which said appellee had a right to sell, for the sum of $1250, for which said John Hendry executed the conveyance.

Also, the entire amount of a certain other tract, lying adjacent, for the sum of $1300, which appellee and his wife at the time conveyed, and attempted to describe properly in the deed. The bill sets forth the true description, and offers to correct any errors in the conveyance, if such there be. The deed being in possession of defendant, Samuel Mayes.

The entire consideration of the said sale, composed of said several tracts, was $5050, to be paid as follows: $1000 to the order of complainant, on or before January 1st, 1875, with interest at the rate of 15 per cent. per annum, from its date of June 15th, 1873.

There were due from said complainant, two notes to W. F. Wilson, one for $600, dated June 11th, 1872, due at twelve months with interest at the rate of twenty per cent. per annum till paid; and the other for $132.50, dated January 1st, 1872, due at one day, with interest at the rate of 15 per cent. per annum until paid. The former of these notes was secured by a trust deed to Wilson, on most of the real estate conveyed, except the mill property, but it included the residence. Said Samuel Mays being aware of this incumbrance, agreed as a part of the consideration of the purchase, to pay these notes to Wilson within a short time, not exceeding twelve months, and it was further agreed between complainant, said Wilson, and said Samuel Mays, that said Wilson would continue to hold his trust deed as a security for his notes and interest, and so much therefore of the purchase money, was left on open account between complainant and Mays. In part performance of this agreement, said Samuel, afterwards paid up the interest on said Wilson's notes to the first day of July, 1874.

For the remainder of the purchase money, said Mays executed a certain other note, which complainant had cashed in bank, and also gave him mules and other property, leaving

unpaid only the first named note, and the principal of the Wilson notes with interest from the first day of July, 1874.

Joseph Mays united with Samuel in the execution of the first note. At that time he was insolvent. The complainant alleges that he did not take his name as security, or rely upon it as such, but because he offered to sign, and complainant supposed from the representations of the parties, that he had an interest in the purchase. He with said Samuel has since been in possession.

Prayer for an account between complainant and defendants, and a decree for the whole amount due, which is averred to be $2,247.20, or thereabout at the time of filing the bill; that his vendor's lien may be declared therefor, and the lands sold on default of payment, and for general relief. No account is sought of the sum due Wilson, nor is there any prayer that a portion of the unpaid purchase money be appropriated to his debt.

At the October term succeeding, Joseph Mays disclaimed, and Samuel demurred. The demurrer was overruled as to all the points specified, except for the cause that inasmuch as it appeared from the bill that Joseph Mays was a surety on the first note, there was as to that no equity for a vendor's lien. This was cured by an amendment causing the bill to appear as above recited.

The other causes of demurrer overruled were, for want of equity; want of certainty in the description of the lands; and failure of the bill to show title in complainant.

After amendment, defendant Samuel Mays, was by order of court, allowed until the 15th of December, 1875, to file his answer. He failed to do so, and at the next April term, the bill was by order of court taken as confessed. About two weeks afterwards at the same term, defendant moved to set

aside the said order, and for leave to answer, tendering at the same time a sworn answer with his motion, all of which is brought on the record.

The grounds of the motion were in effect, that he had a meritorious defense; that his answer was drawn, verified and left with one of his attorneys, prior to the 15th of December; that the attorney left home, and was unavoidably detained until about the 25th, and that defendant supposed it had been filed, that the parties on both sides had been engaged in taking depositions, and there was a pending agreement for further depositions when the decree *pro confesso* was taken, that complainant shortly before the interlocutory decree had been taken, had amended his bill as to material allegations.

With regard to the answer exhibited and tendered with the motion, it may suffice to say, that it traversed many of the material allegations of the bill, and presented matter which, if sustained by proof, would have materially affected the decree in favor of defendant. Upon its face it is meritorious.

On the 1st of June the court refused the motion to set aside the interlocutory decree; the amendment made at the time of taking it, was withdrawn by complainant; and a final decree was rendered.

The decree finds the sale of the several interests and parcels of land, as set forth in the bill, describing more particularly the metes and bounds of the second tract; that defendant Samuel Mays agreed to pay therefor, the aggregate sum of $5050. That he had paid all of said amount except $1000, and interest thereon at 15 per cent. per annum, from June 5th, 1875, which was to be paid directly to plaintiff, and except also the sum of $732.50, due to Wilson on the two notes held by him, and which the defendant assumed to satisfy, and the interest of which he had paid up to July 1st, 1874; that complainant was not released from his liability on said notes, nor

in anywise secured against the same, save by defendants promise to pay Wilson; that there was due and owing complainant the sum of $2446, consisting of principal and interest on said notes; that the $600 note of Wilson was a prior lien with interest from July 1st, 1874, amounting at the time of the decree to $830; that the defendants entered upon the posses sion of the lands at the time of the purchase, and that Joseph Mays had no interest; that he was insolvent and not accepted as surety, and that complainant retained his vendor's lien.

It was ordered that complainant recover the sum of $1616, being the balance due after deducting said sum of $830, with interest on $1132.50 thereof, at 15 per cent., and interest on $485.50 at the rate of 6 per cent. from the date of the decrees.

Time was given for the payment of said sum of $1616, and upon default it was ordered that a special *fieri facias* might issue to the Sheriff, as commissioner, to carry out the decree and make sale of enough of the property to pay said sum of $1616, and in case of deficiency, that execution issue for the remainder; and that said defendant hold said premises subject to the payment of said sum of $830, in addition to complainant's lien, which last sum is held as "yet due of the purchase price agreed to be paid to said Samuel Mays." Defendant appealed.

There was no error in overruling the demurrer, as to all the points, except as to that regarding the waiver of the vendor's lien, by the acceptance of Joseph Mays as surety on the note. Upon this point we may presume the demurrer was properly sustained, although the bill was amended to meet the objection, and as it appears now in the transcript, shows circumstances which rebut the waiver. The rule as recognized in this court is, upon this point, that the acceptance of other security raises a presumption that the vendor meant to waive his equitable lien for the purchase money; but it is nevertheless a matter of

intention. The vendor may show, from circumstances, that such was not the intention, and in that case the lien will be protected, although other security be taken. As to other matters the bill shows sufficient equities upon its face to entitle complainants to some relief. The supposed uncertainty in the description of the lands, should have been met by a motion to make the complaint more definite and certain, and not by demurrer. It is not plainly defective as it stands

The lands are described by courses, distances, measurements and contiguous boundaries. If these measurements and contiguous boundaries exist, the lands may be located by them. If they do not, that should be shown by answer. There must, in all descriptions of lands, otherwise than by the government surveys, be marks and monuments, or contiguous boundaries, of which the court cannot take judicial cognizance. If they are such as may be found by persons acquainted with the locality, they must be taken for granted as existing, unless denied.

If the boundaries of the last tract be imperfectly described, enough, nevertheless, appears in the bill to show that there was a sale of a certain tract lying east and north of the Mill tract, which the complainant conveyed by what he supposed to be the true boundaries; that he has not control of the deed, which is in defendant's possession, and that he is willing to correct the description if it is erroneous. Although, under the Code of Practice, he could not file a bill merely for discovery of the former description; yet, in a bill filed to enforce other plain equities, he may well proffer, on behalf of defendant, and to do him complete justice, to correct any error he may point out, which would work to his prejudice. If the defendant refuses to point out any, it must be presumed, not only that the description is true, but sufficiently definite to enable a competent surveyor to locate the land.

It is contended that the complainant below, having executed

deeds of the lands, and divested himself of the legal title, cannot now enforce his equitable vendor's lien, without having first exhausted his remedy at law. In other words, that a proceeding to enforce his equitable lien is upon the footing of a creditor's bill to reach equitable assets, and cannot be brought without first showing judgment at law, return of *nulla bona*, insolvency, or something else, to make it clear that complainant is remediless at law. The analogy of the cases does not hold good, inasmuch as this is not a bill to reach equitable assets, but rather to reach a legal estate, and subject it to equities which a Court of Equity alone can recognize and enforce. It is simply to declare a trust for the purchase money upon specific property, which trust is raised in equity and continued until the debt becomes barred, and is based upon the same idea and is indeed part of the doctrine of specific performance. That doctrine is that upon a valid agreement for the sale of land, the vendor, until conveyance, holds the legal title in trust for the vendee, and after conveyance, the vendee holds it charged with a trust for the purchase money. Although this trust rests upon no express contact—is the mere creation of courts of equity, and is guarded and qualified carefully to protect innocent purchasers—there is no reason why, as between parties and those bound by notice, it may not be considered as specific as any resulting or other implied trust.

It is not easily comprehensible what is meant by saying that it is neither a *jus ad rem*, nor a *jus in re*, and that it has no existence until a bill be filed to enforce it. It is plainer language to say that it does not bind innocent purchasers, before *lis pendens*, and that it is merely personal to the vendor, and does not pass to the assignee of the debt. Within its scope, however, as carefully guarded by courts of equity, it is a specific lien co-existent with the debt—binding from the beginning, as well before suit as after, all who take the land with notice.

These principles were recognized and declared very forcibly and clearly by this court more than twenty years ago, in an opinion delivered by the present Chief Justice (See *Shall* v. *Biscoe*, 18 Ark., 142), in which the nature of this equitable lien was thoroughly discussed. Nothing indeed is left to be added.

The enforcement of such liens has been the common practice in this State since that time, and it has never been considered necessary to allege or show that the remedy at law had been exhausted.

The action of the courts of the several States in America, has not been uniform with regard to this equitable lien. In some it has been rejected wholly, and in others received only in a modified form. The courts of Maryland and Indiana have held that the remedy at law must be first exhausted. But the weight of American authority is in favor of the English doctrine. When the lien is recognized at all, it is best that it should be efficient, and rest upon the idea of a trust, which follows the lands, with notice of its existence, and which like other trusts may be specially enforced in favor of the vendor without regard to the general solvency of the vendee. It does not conflict with this view, to hold that it is merely personal to the vendor and does not pass to the assignee of the debt. It is the satisfaction of the vendor alone which is contemplated in equity, and those who take the notes are supposed to have given full value, and to have relied upon their legal rights upon them.

The failure of the bill to show that the legal remedy of complainant had been exhausted, did not therefore affect its equity. Upon the whole we find no error in overruling the demurrer.

Ought the court to have granted leave to defendant to file his answer after default and the order to take the bill as con-

fessed? The answer appears on inspection to be meritorious, and the court might well, in furtherance of justice, have allowed it to be filed. But this was a matter within the discretion of the Chancellor. The Circuit Courts are the great reservoirs of original jurisdiction, entrusted with the active administration of justice amongst the citizens. It is the duty of the presiding judges to preserve the order of business in their courts, and see to it that cases proceed with dispatch, and in due course of practice. For these purposes a large discretion must of necessity be entrusted to them; and this court is ever loth to interfere with that discretion, except in cases of plain abuse, or manifest mistake.

The judges are chosen by the people, are learned in the law, and have weighty responsibilities, which they are doubtless anxious to discharge with fidelity. Presiding in the court they have personal cognizance of the conduct of suitors and attorneys, and are better able to judge of matters of laches, than this court can from the meagre contents of the transcript.

It is not enough to have a meritorious defense. It must be used in apt time, or the business of the courts might be interminably delayed. Suitors on both sides have rights, and neither should be allowed to delay the other, unreasonably. In this case, time was given beyond the return term of the summons, to answer. The time was ample, and the answer actually prepared, but not filed, either at the time designated nor afterwards; until, at the next term the bill had been taken *pro confesso*. Suitors are bound by the action of their attorneys in matters of practice, and although this may seem to us a case of hardship, we cannot say that the Chancellor abused his discretion, or that there was error in refusing leave to file the answer out of time. Upon default of answer the decree may be rendered on the bill and exhibits. Nothing else is confessed, and there are no issues.

We come now to the final decree, rendered upon the bill and exhibits, taken as confessed. It seems to us clearly such as a Court of Chancery should not have pronounced, inasmuch as it fails to make a definite and final settlement of the rights of the parties actually before the court.

The sale to Mays was not a sale of an equity of redemption, subject to a prior lien. It was a sale of the whole subject matter, at full value of the property, with the understanding that upon payment of the price agreed, Mays was to take the property discharged of all liens. To effect this it was agreed between all parties interested, that a part of the purchase money should be appropriated to the discharge of Wilson's $600 note, which constituted the lien; another part to Wilson's other note upon complainant, for which there was no lien; and the balance to complainant. The vendor's lien is set up for *the whole*, and so allowed by the court, but the decree is only for the payment to complainant of so much as was to be paid to himself, and so much as was to be paid to Wilson on the lesser note not secured by lien—and no order whatever is made for the payment to any one of the balance of $830, which is left in defendant's hands, evidently for the purpose of being paid over to Wilson. The sale should have been ordered for the whole amount of the sum found due, and the money should have been brought into court and applied to the discharge of the lien—or, if deemed advisable, and Wilson had been willing, the amount of Wilson's lien might have been fixed, declared and continued as a charge upon the lands in defendant's hands. As it now stands, if defendant should fail to pay Wilson, and the latter should collect the debt of complainant, he would be obliged to renew the suit for the enforcement of the remainder of his lien. The decree is incomplete.

Again, if it should turn out that more is due on Wilson's note than the amount recited in the decree, which may be the

case, the defendant would be bound to pay it all to save the land, and a new litigation would spring up between him and complainant for reimbursement.

The court, in Wilson's absence, takes the account of what is due him and fixes the amount to be paid him by Mayes. On the supposition that Wilson has a lien the court leaves so much of complainant's lien unexecuted, and orders a sale of the lands for the remainder, without any action upon Wilson's lien, or prayer for its enforcement. This is adjusting the rights of parties by halves—without that complete and final settlement which chancery should always endeavor to acomplish—and the necessity for which is often the only ground of jurisdiction.

If the sale had been merely of an equity of redemption, subject to a prior lien, and that equity had been estimated at its value with reference to the burden, the complainant might have foreclosed his vendor's lien without any reference to the older encumbrance, and had a sale of the equity for the payment of the purchase money. But this is not such a case. The sale, by agreement of all parties, was to be made a clear sale, and the purchase money appropriated to relieve the older lien. It was for full value. The rights of the parties, as between themselves, cannot be adjusted, without an account with Wilson, and that cannot be taken unless Wilson be made a party. If being a party he should elect to let his debt remain as a lien upon the land and give further indulgence to defendant, discharging the complainant, the amount due complainant might then be ascertained in a manner to bind all parties, and close the litigation. in which case the land might be sold subject to Wilson's lien, which also would be clearly ascertained.

Although under our Code, the want of necessary parties must be taken advantage of, by demurrer or answer, or it will

be deemed to be waived, this is to be understood only of such cases as in their nature allow of a complete and final settlement of the rights of the parties before the court, amongst themselves. When this cannot be done, it is made the duty of the Chancellor to order the other necessary parties to be brought in (see sec. 4481 of Gantt's Digest), and this he should do of his own motion at any stage of the cause, when the necessity becomes apparent, otherwise parties by consent, or failure to demur, or declining to insist on proper parties by answer, might compel a court to proceed to nugatory decrees which would settle nothing, and leave a subject matter open to litigation. *Simms et al.* v. *Richardson & May*, 32 Ark., 297

No proper decree can be entered in this cause without making Wilson or his representatives parties. The Chancellor erred in attempting it, and for this cause the decree must be reversed, and the cause remanded, with instructions to the court to direct Wilson to be made a party and brought in, and to allow complainant to amend his bill with apt averments for the purpose and also to allow defendant to answer the whole bill, and for other and further proceedings not inconsistent with this opinion.

HOLLAND, ADM'R VS. ROGERS.

1. EVIDENCE. *Pleadings as.*

Where there is an amended complaint filed in a cause, the original can no longer be used as evidence in its original state; the pleadings as amended must be considered altogether.

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2. SAME. *Construction of pleading.*

A complaint alleging an indebtedness "for the sale, release of a tract of land," and "for lands sold and conveyed and released, etc., does not necessarily imply a conveyance with general warranty. Where the whole transaction discloses that the vendor was to convey any such interest as he had, a deed of "bargain, sale or quit claim" of his interest in the land is sufficient, and admissable as evidence under the allegations of the complaint.

3. DEEDS. ———

A simple bargain and sale of land in writing, in words of the present, and upon sufficient consideration is a conveyance, transmitting the title from the grantor to the grantee, with or without covenants of warranty, and is no less a conveyance because it contains also clauses of quit claim or release.

4. AGENCY. *Proof of by statements of agent.*

The transactions and declarations of an agent, are not of themselves evidence of his agency as against the principal.

ERROR to *White* Circuit Court.

Hon. J. J. CLENDENIN, Circuit Judge.

B. D. Williams, for plaintiff in error.

Coody, contra.

EAKIN, J.:

After the case of *Watkins, surv.* v. *Rogers*, 21 Ark., 298, was remanded; the plaintiff by leave of court, amended the declaration by striking out the words, "a good and sufficient deed" of conveyance, and inserting the words "a quit claim deed." Mrs. Walker having died pending the appeal, the suit was revived against John G. Holland, appointed administrator *ad litem* for the purpose. Afterwards on the 3rd of November, 1869, the plaintiff took a non-suit, procured the appointment of said Holland as regular administrator, and on the 20th of January, 1870, presented to him the same claim which had been in litigation, as follows:

"Mary J. Watkins, alias Walker, (Estate of)

"To Thomas J. Rogers, Dr.

"To amount agreed to be paid for the sale, release of tract of land, to-wit: The northeast quarter of section 8, township 6, north range 9 west, being the amount of claim due from Alex. S. Walker, her former deceased husband, to the said Rogers ..... $ 358 19

Interest from December 12th 1856 until December 12th, 1869, fifteen years at 6 per cent..... 279 38

$ 637 57"

This account after litigation, was allowed and classed by the Probate Court. Holland appealed to the Circuit Court, when it was submitted to the court sitting as a jury.

The court found as facts, that Mrs. Walker, through her agent Bond, applied to the plaintiff to purchase a piece of land which she had formerly owned, but for which plaintiff had a tax deed, to enable her to perfect a contract for the sale of the same lands to Stamps. That she agreed to pay plaintiff the same amount which he paid for the lands, and also the amount which her former husband, Alex. Walker, owed him. That for this consideration, he sold to her the land, and conveyed it by quit claim deed, which she accepted. That the amount of plaintiff's claim, including the debts due from Alex. Walker, and the sum paid for the tax title, agreed to be paid by her, was $350, which remained unpaid. Judgment was rendered accordingly. Motions for a new trial, and in arrest were overruled, and an appeal taken with bill of exceptions.

The first, second and third grounds of the motion for a new trial, embrace the admission in evidence of the quit claim deed from plaintiff to Mrs. Walker; the amended declaration in the former suit; the tax deed of the sheriff to plaintiff, and a certain other deed executed by William G. Turner, as trustee, to J. W. Stamps, to all of which defendant objected on the ground that they did not show a full and sufficient conveyance without which the plaintiff should not recover.

The defendant had read as evidence, the original declaration for this purpose. It was certainly allowable to the plaintiff to show that the declaration was afterwards amended. It could no longer be used as evidence in its original state, to bind the plaintiff, or the whole benefit of the amendment would be lost. The court allows or disallows amendments to pleadings in its discretion, but after allowance, the pleadings stand as amended, in place of, or supplemental to those originally

filed, and must be considered altogether. The object of amending is to correct mistaken, improvident, or imperfect allegations, and to allow the pleader to stand on grounds better considered.

Plaintiffs deed to Mrs. Walker, bore date of 12th December, 1856. It was for the expressed consideration of $100.00, for which it went on to declare, "I have bargained, sold and quit claimed, and by these presents do bargain, sell and quit claim unto the said Mary J. Walker, and her heirs," etc., "all my right, title, interest, estate, claim and demand, both at law and equity, and as well in possession, and in expectancy of, in and to all," etc., describing the land.

The sheriff's deed to plaintiff, was in ordinary form executed on the 26th day of March, 1857, reciting the tax sale on the 12th day of March, 1855, and the purchase by plaintiff of said lands for the taxes, etc., for the years 1836 to 1854.

The other was a deed executed on the 21st day of January, 1859, by William G. Turner, as trustee for Quarles, and his wife Emily Sophronia, and Thomas Watkins, conveying to Stamps, certain lands which he had contracted to purchase of Mary J. Walker in her lifetime, including those in question. As to this deed, it may be said in passing, that its bearing *pro* or *con* in this case is not apparent. The relations of Mary J. Walker, to the parties in it are not disclosed. Its admission cannot have affected either side.

As for the rest, they were properly admitted to show the consideration for Mrs. Walker's promise. This was not like the former suit. No special contract had been set up as in that, of a consideration precedent to be performed on plaintiffs part; his account filed, and a complaint which he thought it proper to file in the Probate Court, was for a sum of money for the "sale, release of tract of land," and for "lands sold and conveyed and released," etc.

This language, descriptive of the consideration, did not imperatively demand proof of its strict technical accuracy, and if it had, it did not necessarily imply a conveyance with full warranty. In common parlance sales of land, and conveyances in accordance therewith, often mean sales of such interest as the vendor has. When a strict compliance with a contract to convey is demanded, the best practical rule of construction is well laid down in *Witter* v. *Briscoe*, 13 Ark., 422, as follows:

"Where a party agrees to convey land, and there is nothing said as to the nature and extent of the title to be conveyed, nor anything connected with the transaction, going to indicate the particular species of conveyances intended; the law implies a deed in fee simple, and with covenants of general warranty."

Here the whole transaction is disclosed. The plaintiff had bought lands of Mrs. Walker at tax sale. She had contracted to sell them to Stamps, and desired to perfect the title. She did not require, for this purpose, any other conveyance from plaintiff than of such interest as he had acquired by the Sheriff's deed. That put her *in statu quo*; as she would have been if she had paid the taxes, and as she was with regard to the other lands. It is not reasonable to suppose that a conveyance with full warranty was intended.

A simple *bargain and sale* of land, in writing, in words of the present, and without any more is a conveyance, operating under and by virtue of the statute of uses, always upon sufficient consideration. It was devised in England, as a common assurance, soon after the passage of the statute (see Blackst. Com. Book 2, p. 338) and has become the most common mode of conveyance in the United States. It is more than a quit claim, or a release; it actively effects a divestiture of title from the grantor, and transmits it to the grantee, with or

without covenants of warranty, and it is no less a *conveyance* in the strictest sense because it may also have clauses of quit claim or release. It comes within sec. 832 of Gantt's Digest, and passes to the grantee any after acquired title of the grantor. At least in the present case there can be no question of its efficacy in this respect, as such was its obvious intention, expressed upon the face, The deeds were properly admitted.

It is objected that the plaintiff was, himself, permitted to testify; and also that he was permitted to prove Batte's agency for Mrs. Walker, by Batte's statement to himself. His testimony, in substance, was, that Mr. Bond came to see him about the land and *it was agreed between them*, that if Mrs. Walker would pay him what Alexander Walker owed him, and what he had paid for the land, he would let her have it. The amount of his account against Walker, for land and all, was about $350. He and Bond counted it up. He had several notes and book accounts. None of the notes were payable to himself. He did not remember the cost of the land, but knew when he was talking with Bond. Batte brought him a deed and he signed it, the same read in evidence. He came in right of Mrs. Walker. She was at Batte's house at the time, and Batte came directly from there, and stated that he represented Mrs. Walker. Batte is dead. Mrs. Walker never raised any objection to the deed. In connection with this, Bond in his testimony said, that he went to see plaintiff at Mrs. Walker's request; that Rogers told him Mrs. Walker could have the land, if she would pay what it cost, and what Alexander Walker owed him. He reported that to Mrs. Walker, and she said she would do it. Witness was not her agent generally. He did not recollect that he reported her acceptance back to plaintiff, nor does he state whether he informed her or not of the amount of the debt, or in what it consisted. The plaintiff does not state in his testimony how,

or through whom or when his proposition was accepted. His theory of the matter, seems to have been that the transaction was closed by the interview with Bond.

It was not improper to receive this evidence for what it might be worth to the court. It did not apply to any personal communications, or transactions with Mrs. Walker. In other respects his competency was not affected, as has been repeatedly held. The transactions with Bond and Batte, and their declarations were facts—parts of the *res gestae*—but not of themselves competent to prove the agency of either party. That required proof *aliunde*, and when proven, might be connected with their declarations. The court was fully warranted by the circumstances in concluding that Batte did, in fact, represent Mrs. Walker in accepting the deed. She was at Batte's house, and Batte came from his house to plaintiff; procured his signature to the deed; and, afterwards it was placed upon record. There was no objection from her then, or thereafter. That Bond acted for her in asking propositions from plaintiff is well proven.

Other grounds of alleged error relate to declarations of law by the court and findings of fact. The points involved in them are sufficiently covered by this opinion, and do not require further notice.

Although it sufficiently appears that at the time plaintiff had the conversation with Bond, he was the owner of the notes against Walker, and estimated them as a part of the debt due him from Walker, there is a total failure of proof that Mrs. Walker was ever advised by Bond or anyone else of that fact, or that she ever notified plaintiff of her acceptance of the terms proposed by him to Bond. Perhaps, if she had, she would be bound by them in full, and held accountable for communications made to Bond in her behalf. But there is no proof on that point.

It seems also, that Walker, whose estate was insolvent, owed plaintiff a small individual debt—about $20. The cost of the land was about $80. The deed prepared in Mrs. Walker's behalf and brought, by Batte, to plaintiff for execution, expressed the consideration of $100. He executed it without objection or any explanation made to Batte. No circumstance is shown, to affect Mrs. Walker with any knowledge of other debts, or even to put her on enquiry. Bond merely says that he told her she could get the land by paying what Alex. Walker owed, and the cost of the land. She remarked that she would do it. It is fair to presume she had in mind only the individual debt of her deceased husband, and meant only to assume that. She got the benefit of the deed, was enabled to complete her contract with Stamps, and ought to be held accountable for all she agreed to give, but not for outstanding debts of her husband, which for all that appears, she knew nothing of. Bond was not her agent to contract. He did nothing that would have bound plaintiff to make the deed, or that can now bind her with his private knowledge of circumstances not communicated.

We think the court below erred in finding that these notes constituted a part of the debt she agreed, or ought, to assume. There is no positive proof, nor, outside of the deed, any strong presumption, of the assent of the minds of the parties in the terms of any contract of sale, so far as regards the amount to be paid. In such cases, at law and in the absence of proof of fraud or mistake in equity, the deed itself must give the terms of the contract. The judgment upon the proof should not have exceeded the amount paid by plaintiff for the land, and the individual debt of Walker, with interest at 6 per cent. For such excess it is erroneous.

Let it be reversed, and the cause remanded for a new trial.

BEECHER VS. BROOKFIELD.

1 WITNESSES: *Husband and Wife.*
A wife is not a competent witness for or against her husband.
2. PLEADING: *Allegations in, must be proved.*
Fraud, when alleged, must be proved if denied.

APPEAL from *Poinsett* Circuit Court in Chancery.
Hon. L. L. MACK, Circuit Judge.
Rose, for appellant.
Brown, contra.

ENGLISH, CH. J.:

The bill in this case was filed on the Chancery side of the Circuit Court of Poinsett County, by Todd W. Beecher against Joshua S. Brookfield, as administrator *de bonis non* of William G. Arledge, James C. Brookfield, and J. Logan Smith, as Sheriff of said county.

The object of the bill was to open, on allegations of fraud in obtaining them, two decrees rendered in said court, in favor of Joshua S. Brookfield, as such administrator, against the complainant. The case was heard upon the pleadings and evidence, the bill dismissed, and complainant appealed.

Some leading facts appear from the pleadings, which are not controverted and which may be briefly stated for the better understanding of the matters disputed between the parties.

On the 4th of March, 1867, Beecher executed to James C. Brookfield a note for $3000, due at twelve months, bearing interest from date at 10 per cent. On the same day, to secure the payment of the note, Beecher executed a deed of trust, with power of sale, upon town lots and lands, in which Joshua S. Brookfield was made trustee. On the 20th April, 1870, James C. Brookfield, the payee of the note, and beneficiary in the deed of trust, assigned them personally to himself as administrator of Wm. G. Arledge, deceased.

On the 29th of January, 1869, Beecher executed to James C. Brookfield a note for $4798.37, payable at twelve months, with 10 per cent. interest; and on the same day, to secure the payment of the note, executed a mortgage upon other town lots, lands and personal property. On the 20th of April, 1870, James C. Brookfield assigned the note and mortgage personally to himself, as adminstrator of the estate of Arledge, and as administrator *de bonis non* of Wm. R. Lipscomb, indicating in the assignment what portion of the debt each estate was to have; and on the 6th of May, 1872, as administrator of Lipscomb, he assigned the interest of that estate in the note and mortgage to himself as administrator of Arledge.

On the 1st of June, 1873, James C. Brookfield resigned his administration of the estate of W. G. Arledge, and on the 3d of September, 1873, Joshua S. Brookfield was appointed administrator *de bonis non* of said estate.

In November, 1873, Joshua S. Brookfield, as such administrator of the estate of Arledge, brought two suits on the Chancery side of the Circuit Court of Poinsett County, against Beecher and James C. Brookfield, one to foreclose the deed of trust, and the other to foreclose the mortgage, and on the 13th of January, 1874, obtained the two decrees which the bill in this case seeks to open for fraud. James C. Brookfield was the solicitor of Joshua S. Brookfield in the two suits; and at the time the bill in this case was filed, August 28th, 1875, special executions upon the decrees were in the hands of J. Logan Smith, Sheriff, etc.

There is no allegation in the bill or amendment that James C. Brookfield practiced any fraud or unfairness upon appellant, to induce him to execute the first note and deed of trust, or the second note and mortgage, or that they were without consideration.

The bill alleges that the consideration of the first note was $400 in money loaned appellant by James C. Brookfield, and

outstanding debts and liabilities of appellant, which Brookfield agreed to discharge and take up.

The bill also alleges that the consideration of the second note was goods that had been, prior to the date of the note, and during the year 1867, 1868 and 1869, sold by said Brookfield to appellant, and money that had been paid to him, and advanced on his account, and goods and moneys to be thereafter sold and advanced by Brookfield to him, and for outstanding debts and liabilities of his, which Brookfield had agreed to discharge and take up.

At what time the relation of attorney and client between James C. Brookfield and appellant commenced, is not alleged or shown by the bill. But by an amendment to the bill it is alleged that said Brookfield was, long prior to the execution of the above notes, deed of trust and mortgage, a licensed attorney, and engaged in the practice of the law, and was, by express contract, agreement and understanding, from the year 1859 to the year 1875, the standing attorney, counsel and legal adviser of appellant, and employed to attend to all cases in the courts, both at law and in equity, in which appellant was a party, and that during that time appellant reposed full confidence in the legal ability and integrity of said Brookfield, and acted on his legal advice in all matters. And it is further alleged that appellant executed the notes, deed of trust and mortgage on his advice as such attorney, but, as above stated, there is no allegation that Brookfield practiced any fraud or unfairness upon appellant in procuring the execution of the notes, deed of trust and mortgage. In other words, the execution of said instruments is not impeached, but it is the after conduct of Brookfield that appellant complains of in the bill and amendment.

The gravamen of the complaint is that after the execution of the second note and mortgage, appellant placed in the hands

of James C. Brookfield a large number of claims for collection, and which he was to collect and place to his credit. That he collected money upon the claims, and appellant also made him payments, which were not credited before or when the two decrees of foreclosure were taken. That after James C. Brookfield brought the two foreclosure suits as attorney for Joshua S. Brookfield, his brother and partner in the practice of law, and who succeeded him in the administration of the estate of Arledge, he fraudulently induced appellant to make no defense to the suits, and to let the decrees be taken on default, promising him that he should have the benefit of all just credits; and that he failed to allow such credits, and took the decrees for largely more than was due, and afterwards caused special execution to be issued upon them for the sale of the property embraced in the deed of trust and mortgage. The credits appellant claims are specifically alleged.

James C. Brookfield, in his answer, denies that he was the attorney of appellant when the foreclosure suits were commenced, that he induced him not to defend the suits, and that he was entitled to any credit which had not been allowed him. The answer is specific as to every credit claimed by appellant.

The appellant took the deposition of his wife, but the court suppressed it on motion of appellees, and it was not read upon the hearing, and will not be regarded as evidence. The wife was not a competent witness for her husband, *Collins* v. *Mack* 31 Ark., 684.

Appellant read upon the hearing the depositions of Wm. G. Arledge, Jr., and wife Silvester, but neither of them proves that James C. Brookfield in any manner induced him not to defend the foreclosure suits, or that he was entitled to any credit claimed by him.

The deposition of appellant, which was read upon the hearing conduces to prove that he was induced not to defend the

foreclosure suits and to let the decrees be taken by default, by James C. Brookfield, and that he was entitled to credits not allowed when the decrees were rendered, but in every material matter his testimony is flatly contradicted by the deposition of Brookfield, which was read on the part of appellees.

Upon the contradictory pleadings and conflicting evidence, the court below found, as recited in the decree, that the two decrees which the complaint sought to set aside and reopen, were rendered by the court upon due and legal notice, that the allegations of fraud in obtaining said decrees were not sustained by sufficient proof, and that, therefore, the court could not set aside the decrees, and could not adjudicate the other matters of relief sought by the complaint, and hence the bill was dismissed.

The counsel for appellant submits that the *onus probandi* was upon Brookfield, and that if the depositions of the two were balanced, appellant must prevail in the suit.

After the deed of trust and mortgage were executed, and before they were foreclosed, had appellant filed a bill against Brookfield to cancel them on the ground that they were executed to him, under his advice or procurement, when the relation of client and attorney existed between them, and that there was fraud or unfairness in their execution, the burthen of proving there was no fraud or unfairness might have been upon Brookfield.

Or if appellant had answered the bills to foreclose the deed of trust and mortgage, and shown that the relation of client and attorney existed between him and Brookfield when the instruments were executed, and charged fraud or unfairness on the part of Brookfield, he might have put the *onus probandi* upon him.

In either of such cases the authorities cited by counsel for appellant might have been applicable. See Bigelow on

Fraud—attorney and client—p. 192 to 222. 2 Leading Cases in equity, White & Tudor, 4 Am. ed., p. 1216, etc.

But no such case is made by the complaint now before us. Suits were brought by Joshua S. Brookfield as administrator of Arledge to foreclose the deed of trust and mortgage. James C. Brookfield brought the suits as his attorney against himself and appellant. Whatever may have been his relation to appellant in other matters, he placed himself in an antagonistic position to him in bringing these suits against him. The appellant made no defense to the suits, though duly served with process. He was allowed such credits as were endorsed upon the notes, and decrees taken for the balances appearing to be due upon them. Some eighteen months after the decrees were entered, and when executions upon them were in the hands of the sheriff, he filed this bill to open the decrees for fraud in obtaining them, alleging that James C. Brookfield, the attorney of the plaintiff in the suits, had induced him not to interpose any defense to them. This allegation is denied, and in the depositions of the parties there is oath against oath. Why should Brookfield be required to disprove an affirmative allegation made by appellant? For what reason should he be held to prove a negative, that he did not induce appellant not to defend the suits? He did not bring the suits as appellant's attorney, though he had been his attorney in other matters.

How could he have proven a negative if the duty had been imposed upon him? Could he have produced witnesses to swear that they were present at every interview between him and appellant, from the time the suits were commenced to the time the decrees were taken, and that he said nothing to appellant, at any time, to induce him not to interpose any defense to the suits? This is hardly probable. It was the duty of appellant to defend the suits if he had any meritorious

defense. If he thought proper to let the decrees be entered without defense on any promise, or advice, of Brookfield, who was not his attorney in the suits, but acting for the plaintiff in them, he should have taken the precaution, in so grave a matter, to have some means of proving it. We see nothing in the case to take it out of the general rule, that a party who alleges fraud, must prove it.

Decree affirmed.

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COLLINS ET AL VS. UNDERWOOD,

MARRIED WOMEN. *Contracts of.*

The contract of a married woman, unless for the benefit of herself or her separate estate, cannot be enforced against her estate.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Palmer, for Appellee.

HARRISON, J.:

The plaintiffs in this case as administrators of Charles Collins, deceased, sought to subject the property of the defendant, which she held as separate estate during her coverture, to the payment of a note executed by her jointly with her late husband, Q. K. Underwood, to the plaintiffs intestate for $264.41, dated the 13th day of August, 1874.

The complaint alleged that the note was given in settlement of an account for the board and tuition of their daughter, and that it was the intention of defendant, in the execution of the note, to make the same a charge upon her separate estate.

In her answer she denied that she had, in making the note, intended to create a charge, or that it was a charge upon her estate.

The proof was that the daughter of the defendant and her said late husband, had been a pupil in the State Female College, at Memphis, of which Dr. Collins the plaintiff's intestate, was president, the fall session of 1873, and the spring session of 1874. Her board and tuition not being paid, Dr. Collins wrote several times to her father asking payment, who replied giving excuses and promising payment.

The defendant was present at the commencement exercises in June, 1874, at which time her daughter graduated, and remained several days at Dr. Collins' house, and whilst there, expressed much mortification because her daughter's bills had not been paid, and saying that she had some time before given her husband the money with which to pay them, but that he applied it to other purposes. Before leaving she paid a part of the account, and as she said, out of her own means.

Dr. Collins, afterwards, went to Helena to see the defendant's husband about the account, and it was settled by the execution of the note. Underwood was insolvent, which fact was known to Dr. Collins when he took the note, but he knew the defendant had separate property, out of which she led him him to believe, she would pay the note; and he looked to her for payment.

The court upon the hearing, refused the relief prayed, and dismissed the complaint for want of equity.

The plaintiffs appealed.

It was held in the case of *Stillwell and wife* v. *Adams et al. ex'rs*, 29 Ark., 346, that a married woman cannot create a charge upon her separate estate, except by a contract in relation to it, or for her personal benefit; and the doctrine was approved in *Henry* v. *Blackburn*, 32 Ark., 445.

There is no evidence that the note was given for the benefit of either the defendant or her estate; but it plainly appears, that it was given in the satisfaction or settlement of her

husband's debt, whose duty it was to provide for the support and education of his children.

The decree is affirmed.

HUNT VS. GAINES ET AL.

TAX SALE: *Purchase by one receiving rents.*

A purchase of lands at tax sale by one who is receiving the rents and profits, and ought to keep down the taxes, can never strengthen his title.

APPEAL from *Chicot* Circuit Court in Chancery.

Hon. T. F. SORRELLS, Circuit Judge.

Valentine, and *Street* and *Garland*, for appellant.

Rose, *contra*.

STATEMENT.

EAKIN, J.:

On the 4th day of December, 1858, Frances M. Terry, her trustee, Abner Gaines, and her husband, George G. Terry, sold and conveyed to William F. Smith and Daniel W. Adams, for $20,000 in cash, and a balance secured by notes, a plantation designated as the "Vaucluse Place," with all the stock, corn, fodder, hogs, horses, thirty average mules, farming implements, one-half the sheep, and all other property on the place.

The credit payments, for which a lien was reserved, were secured by five several notes, for $12,954.75 each, payable at one, two, three, four and five years, with interest at 6 per cent. from the 1st day of January, 1859. The lands were set forth by the usual descriptions of the government surveys.

On the 5th of December, 1860, Wm. F. Smith, executed to his own order, endorsed and delivered to J. J. Persons & Co.,

of New Orleans, twenty promissory notes for $5000 each, due respectively, October 9th, 1861; October 30th, 1861; November 12th, 1861; November 20th, 1861: November 24th, 1861; December 8th, 1861; December 18th, 1861; December 31st, 1861; January 8th, 1862; January 30th, 1862; March 21st, 1862; March 25th, 1862; March 27th, 1862; March 30th, 1862; March 31st, 1862; April 6th, 1862; April 12th, 1862; April 17th, 1862; April 23d, 1862; April 30th, 1862; all to bear interest at the rate of 10 per cent. per annum, from maturity.

To secure their payment he executed to Daniel W. Adams and James H. Duncan, of New Orleans, and the survivors of them, a deed of trust of the plantation then known as the "Vaucluse Plantation," setting forth lands by the government surveys, together with other lands not included in the description of said plantation, in the original conveyance. Also 105 negro slaves, and the horses, mules, stock, cattle, and farming utensils on the place. They were authorized to sell on default, pay the notes, and reconvey the balance of the lands, property or proceeds, to the grantor. This was duly filed for record, December 24th, 1860.

A large portion of these lands were sold for taxes of 1866, as delinquent, on the 15th of April, 1867, and bid off by Chapman & Carlton. No deed appears to have been executed to them. The lands were allowed to become delinquent again for taxes of 1867, and on the 29th day of May, 1868, they were again sold, and bid off by A. L. Gaines, a tax deed for said lands so purchased was not executed until March 12th, 1873, when one was executed by the Clerk of the Court.

On the 19th of December, 1866, in a suit, by attachment, of *Jno. Cate* v. *Wm. F. Smith*, a part of the same property, with other lands not included in either mortgage, was attached. The lands were subsequently sold under order of court in the

attachment suit, on the 20th December, 1869, and purchased by Abner L. Gaines, who obtained the Sheriff's deed.

At the April Term, 1867, suit to foreclose the first mortgage was brought in the Chicot Circuit Court, in the name of "The Crescent City Bank," for the use of herself and of James B. Johnson and Thomas S. Serrills, who severally held the last four notes of the first mortgage. At the December Term, 1867, the lands were condemned to be sold for the lien, and a Commissioner appointed. The sale was duly made, and the lands purchased by Abner L. Gaines, for the sum of $500, to whom the Commissioner executed a deed on the 8th day of June, 1868. The debt, as ascertained by the decree, upon all four of the notes, amounted to $51,819 of principal, and $27,774 96-100 of interest. In this suit said Smith, Adams, Duncan, and the members of the firm of J. J. Persons & Co., were made defendants, and order of publication made against them as non-residents.

Out of these complications arose the present suit, which was begun on the 12th day of August, 1870, and is brought by Thomas H. Hunt (under the firm name of Thomas H. Hunt & Co.), and other creditors of William F. Smith, against said Smith, Abner L. Gaines, "The Crescent City Bank," Jas. B. Johnson, Thos. S. Serrill, Dan. W. Adams, James H. Duncan and the firm of J. J. Persons & Co.

Complainant alleges that he is the owner of two of the notes of Smith, secured by the second mortgage (due November 21st and December 28th, 1861), and that he believes all the others have been paid; or, if not, are held by parties unknown, whom he desires to make defendants, when discovered.

He charges that said Gaines and Smith, in pursuance of a fraudulent agreement, made an arrangement with the Crescent City Bank, and others holding the paper of Smith, secured by the first mortgage, ostensibly for the benefit of Gaines, but

with money furnished by Smith, whereby the payment of a large sum in cash, and a further payment upon time, the mortgage notes were transferred to said Gaines. That Gaines, having come into possession of the four notes, brought the suit in the name of the Crescent City Bank, for her use and that of Johnson and Serrill, without the knowledge of either of them, and bought in the property, upon the sale for foreclosure.

That in further pursuance of the fraudulent design, Smith omitted to pay the taxes for 1866, and the lands were purchased in by Gaines as delinquent; and that doubting the validity of the sale, he allowed them to be again sold for the taxes of 1867, and to be again purchased by Gaines. That in each case the lands were bought for the benefit of Smith and paid for with his means. The proceedings in Cate's attachment suit are recited and the purchase of the lands under that sale by Gaines for the sum of $1500.

Further he alleges that Gaines falsely pretends that Smith owes him money, but that in fact he is indebted to Smith in a large sum, and that these proceedings were designed to hide Smith's property from his creditors; that Gaines in all these proceedings was the trustee of Smith; that the decree of foreclosure of the first mortgage was fraudulent, inasmuch as the notes had been in a great part paid by money furnished by Smith, and that complainant was not a party to the first mortgage suit, and knew nothing of the fraudulent intent. He prays that all these deeds to Gaines may be cancelled; that an account be taken of what is due on the first mortgage notes, and also of the amount due from Gaines to Smith, and a decree for that against Gaines, as well as for the rents and profits of what he made, or should have made, on the plantation, and that the residue, if more than the first mortgage notes, be paid to complainants, and that his lien be declared on

the land and personal property, subject to any unpaid portion of the first mortgage; and for foreclosure and sale.

A decree *pro confesso* was entered against Smith, Adams, Duncan and J. J. Persons & Co.

Gaines, answering, denies all fraudulent arrangement regarding the purchase from the bank, but says that with his own money he bought from the bank an interest in the mortgage note it held, to the extent of $4500 with the privilege of purchasing the remainder on the same terms. He admits that he did so at Smith's request, as an act of friendship, but with his own money, without fraudulent intent. He denies that he came into possession of the four notes sued on, or caused the suit. He merely recommended an attorney to the bank, and had no connection with Serrill and Johnson; says that his purchase at the foreclosure sale was fair, legal and without fraud. He bought the land at the tax sales with his own money, and without any understanding with Smith, intending the purchase as a security for his claim, and so with regard to the purchase under attachment. He denies his indebtedness to Smith, denies all fraud and collusion, and prays that his answer be taken as a cross-bill, and his title to the property confirmed.

James B. Johnson, answering, says that he was the holder of one of the first mortgage notes, which he had placed in the hands of Hays & Adams, of New Orleans, for collection. Through these attorneys and Gaines, acting for Smith, it was agreed, that upon the payment of 25 per cent. in cash, and a credit payment to be made on the 1st of June, 1867, Smith was to be released from the balance. The credit payment failed, and the mortgage notes were forwarded to Johnson Chapman, Esq., for foreclosure. Gaines never had any interest in the notes or the suit. He joins in the prayer of the bill for relief.

Serrill, answering, says he owned two of the first mortgage notes, which were forwarded to Chapman for foreclosure. Gaines had no interest in them at all nor right to sue. He also joins in the prayer of the bill.

The bank, answering, says it placed one of the first mortgage notes in the hands of Hayes & Adams. These attorneys agreed with Gaines, acting for Smith, that upon a cash payment of $4500, and a future payment of a further sum amounting in all to 50 per cent., Smith was to be released. The cash payment was made, and on the failure of the other, which was to have been made on the 1st of January 1867, the note was forwarded to Chapman for foreclosure. Gaines never had any right or title to it. The bank joins also in the prayer of the bill.

Wm. F. Smith does not answer the original bill, but answering the cross-bill of Gaines, denies all fraudulent collusion as to the purchase of the notes. He says that he was a discharged bankrupt, and furnished the money to purchase an interest in the notes for his (Smith's) benefit. The whole agreement was for his benefit and was not intended as a purchase, but a payment. The arrangement, if carried out, would have been with his money. Any assignment to Gaines was without his knowledge, and would have been a fraud on him. Gaines did not furnish the money, and had no right to the lands purchased. Did not know of any fraud on Gaines' part until he found him claiming the lands as his own. He says he paid the purchase money of the lands bought at the sale under the decree, and that Gaines bought the tax titles with intent to defraud him. He himself furnished all the moneys expended, and says that Gaines owes him about $4500, and denies that Gaines had been in possession of the lands for a year, or any period of time, before filing his cross-bill. He says also that the purchase under attachment was made for his benefit.

Upon these pleadings, and a mass of exhibits and depositions, the cause was submitted to the court, which decreed that the title of the lands (describing them) be confirmed to Gaines, and that he recover costs. Complainant appealed.

OPINION.

The testimony in this case is, on both sides, vague and unsatisfactory; and between Gaines and Smith hopelessly irreconcilable. The onus of the proof of fraud lies upon the complainant and appellant, otherwise the parties must stand upon their rights as shown by their deeds, and the records of the courts.

Upon this point it is sufficient to say, that whilst the evidence indicates that the whole action of Gaines was prompted, originally, by a desire to assist Smith in keeping his property, and working through his embarrassments, there is no preponderance of evidence that he intended to do so fraudulently, or at his own expense, without retaining securities for moneys advanced; or that he ever used funds of Smith in such manner as to raise a resulting trust in any of the lands in Smith's favor.

He was the friend of Smith and disposed to indulge him. It would have been to Smith's advantage during the continuance of these friendly relations, that Gaines should purchase and hold the first mortgage notes, and the second mortgagees were not interested in the amount to be paid for them. It is very plain that the first mortgage notes were not worth their face value, as their amount largely exceeded the value of the lands which constituted their principal security. It was absolutely hopeless, that any of the property embraced in the first mortgage would become available for the notes secured by the second. The utmost right of the *cestuis que trust* under the second mortgage, was to redeem the land by paying off the

first mortgage notes, a thing which they never offered to do—nor do not now—and obviously cannot, since the amount acknowledged to be due and unpaid, admitting all credits, claimed—quadruples the value of the lands. It is a matter of indifference to them whether the lands, under the decree of sale, brought $500 or the full amount of the debt. Even if the second incumbrancers were not made parties, so as to cut off their equities of redemption, they could only redeem from the purchaser by paying the full amount of the actual balance due from Smith, when the foreclosure was made. If they were made parties, their rights, as to the lands bound by the first lien, are entirely gone—unless there were fraud in obtaining the decree. The exhibit of the proceedings in the former suit shows that, by the bill, both the trustees in the second mortgage, and J. J. Persons & Co., the beneficiaries, were made parties defendants. If they were served, this was enough, inasmuch as it is not shown that the complainants were aware at the time that the present complainants had any interest in the notes secured, and would, perhaps, be enough to bind all the beneficiaries of the second mortgage in any case. (See *Pindall et al.* v. *Trevor & Colgate*, 30 Ark., p. 250.) The transcipt of the record shows that publication against them as non-residents in that case was duly prayed, and the decree recites that afterwards proof of publication was duly made. No contest is made as to the validity of the proof, and we may well hold that the trustees and J. J. Persons & Co., were parties to the former decree, and that it would bind all assignees of the notes—especially when it is not shown that they were known to the complainants in that suit, and had peculiar equities requiring their presence.

The question is not important in this case. There is no offer to redeem. The validity of the sale rests wholly on the question of fraud. The proceedings were regular and contain

nothing on their face, or in connection with matters in pais, to show any fraud or mal-practice calculated to affect the material right of the present complainant. The credits were not allowed for the sums paid by Gaines to the Crescent City Bank, and, through Adams, on the note held by Johnson. It is not plain from the proof that such credits were intended to have been made. Gaines, then, was evidently endeavoring to support Smith, and to carry him through his embarrassments, but it cannot be inferred that he meant to lay out his own money for the purpose, without security for advances. The proof conduces to show that he contemplated a subrogation to the rights of the creditors, to the extent of re-imbursement—meaning to give Smith the benefit of the discount. In that view, which, to say the least, consists with the proof, there was no fraud in foreclosing for the full amount, which the subsequent incumbrancers could complain of. If there had been any fraud in the purchase from the Commissioner, at the sale, at an inadequate price, of which there is no proof, it would only affect the rights of the complainants in that suit. They were represented by attorneys and made no complaint. With regard, therefore, to all the lands sold by the Commissioner in that suit to Gaines, the decree of the Chancellor in this case, confirming his title, was correct.

It remains to consider of the rights of complainants as to lands included in the second mortgage, and not embraced in the Commissioner's deed.

Some of these were purchased by Gaines for the taxes of 1866 and 1867. This was evidently done by the joint consent and concurrence of Gaines and Smith, whilst they were in amity. It was done to strengthen title. It cannot ever have that effect with those who are taking the profits and ought to keep down the taxes. This was Smith's case, and Gaines bought by understanding with him. It gave Gaines no other

right against Smith, or the encumbrancers, than that of simple re-imbursement for cash actually paid (or scrips at currency value), with 6 per cent. interest, upon the particular tracts so lying outside the Commissioner's deed. Subject to this burden, which should be allowed Gaines out of the sales, the lands are subject to the second mortgage. It is not necessary to determine the validity of the tax sales. The taxes were due and were paid, and the lands disburdened.

The lands bought at the sale under attachment, should also be held subject to complainant's debt. The second mortgage lien is superior.

The Chancellor erred in refusing the relief sought with regard to all the lands embraced in the second mortgage (or trust) deed, and not in the lien retained upon the sale to Smith and Adams. Let the decree be reversed and the cause remanded for further proceeding, consistent with this opinion.

STATE OF ARKANSAS VS. NEWTON ET AL.

1. *Agency.*

The State Treasurer and his bondsmen are liable for the official conduct of his deputy.

2. STATE TREASURER; *Duty and Liability as to funds of the State.*

It is the duty of the State Treasurer to receive from his predecessor in office the moneys and securities of the State in his hands; and to receive from the Collectors of revenue the balances certified by the Auditor to be due from them, and if he accepts in lieu thereof the receipt or check of a depository, with whom the same was left by the officer, he becomes liable therefor on official bond.

3. EVIDENCE. *Balances.*

In an action on the official bond of the State Treasurer, a copy of his accounts from the Auditor's books, properly certified, is *prima facie* evidence of the state of his accounts; and the jury should be instructed not to go into the accounts, but to take the balance certified by the Auditor, unless the accuracy of the items are impeached.

4. ———: *As affecting sureties.*

A copy of accounts rendered by the State Treasurer, being statements made by him to the State in the performance of his official duties, is *prima facie* evidence against him and his sureties, in an action on his official bond; the surety is bound by the acts and declarations of the principal, when they are within the scope of the business, and a part of the *res gestae.*

APPEAL from *Pulaski* Circuit Court.

Hon. J. W. MARTIN, Circuit Judge.

Henderson, Attorney General, for the State.

——— *Contra.*

SMITH, SP. J.:

This was an action against Robert C. Newton and the sureties on his official bond as Treasurer of the State, in which the defendants had the verdict. The breaches assigned are:

First—That during his term Newton had received $14,557.86 in United States currency, and $32,525.73 in Arkansas treasury certificates, the property of the State, which he had suffered to be kept in the bank of Stoddard Brothers & Co., who, afterwards, and before the funds were drawn out, suspended payment and became bankrupts, and so the said funds were never paid out and disbursed by him, nor delivered to his successor, nor otherwise accounted for, but on the contrary became lost to plaintiff.

Second—That knowing said funds to be in the hands of said bankers, he had neglected to demand and receive the same of them.

The answer denied the receipt of the funds and the acts of negligence complained of, and averred performance of the condition of the bond.

Newton was Treasurer from May 23d, 1874, to November 12th, 1874. Before entering upon his office, the defendants executed this bond, the condition of which is, that Newton shall faithfully perform the duties of his office. He gave no personal attention to his office, but entrusted the management

of it to a deputy, one James A. Martin. In the time of his predecessor, Henry Page, many of the County Collectors had fallen into the habit of paying the revenue through Stoddard Brothers & Co, The course of business seems to have been thus: The Collectors deposited in the bank the State taxes collected by them. By settlement with the Auditor, they ascertained the exact balance against them. Stoddard Bros. & Co. then procured from the Treasurer acquittances for the balance by giving him checks upon themselves. These instruments were nothing more than memorandum checks, although it does not appear that the word "memorandum" was written across the face of them. They were in the ordinary form of bank checks, not intended, however, for immediate presentation, but simply as evidences of indebted- by the drawer to the holder.

As a consequence of this pernicious practice, when Page retired from office, there were $18,000 belonging to the general revenue funds which should have been in the treasury, but for which checks drawn by Stoddard Brothers & Co. on themselves, had been substituted. Newton's deputy took these checks and receipted to Page for the whole revenue fund. About $7000 were afterwards paid on account of these checks. Of the residue, payment seems never to have been demanded, although the bank continued to be a going concern, and apparently solvent until after Newton's term had expired.

Martin kept up the evil system which he found established in the office. In this way $600,000 or $700,000 of the State's revenue were allowed to pass through this devious channel. Stoddard deposes that he settled for nine-tenths of the revenue —perhaps for nineteen-twentieths of it. Martin says that he saw not one of these Collectors, nor any representative of them, except Stoddard. He gave receipts to Stoddard to be delivered to the several Collectors, and accepted checks in pay-

ment of their dues. Upon the checks so taken there was a further loss of $36,083.59.

We think it would be a reproach to the administration of justice if, upon this state of facts, the plaintiff could not recover.

We shall speak of Martin's acts as the acts of his principal, for, in contemplation of law, they are his acts. Martin was the servant of Newton, and not the agent of the State; Newton selected him and put him in his place. The State did not even pay Martin's salary. Gantt's Dig., secs. 2798, 2799. The above cited statute expressly makes the Treasurer responsible on his official bond for the conduct of his deputy. The deputy is the mere shadow of the officer. The moral responsibility for this defalcation doubtless rests upon Martin and not upon Newton; but as regards civil liability, their acts cannot be discriminated. It is proper to remark, however, that the evidence shows that Newton was not aware of what was going forward in his office.

The substantial ground upon which a recovery was resisted is, that the funds for which the Treasurer receipted, never actually came to his hands. If this was not a good defense, or if it was one which the defendant could not interpose, then it must be conceded that the verdict and judgment below were wrong.

This precise question came before the Supreme Court of the United States in Girault's case, 11 Howard, 22. Girault was a Receiver of public moneys. An action was brought on his official bond against him and his sureties. The condition of that bond was the same as the one before us. The breach assigned was the receipt and non-payment of public moneys. The second plea alleged that after the making of the bond, Girault, as Receiver, gave receipts for moneys paid on the entry of certain lands therein specified, and returned the same to the

Treasury Department, and that no part of said moneys was paid to or received by Girault. The third plea was the same, except it alleged the receipts to have been given for lands entered by Girault for his own use. The District Court adjudged these pleas to be sufficient on demurrer; but the Supreme Court say that they are bad and that the principle on which they are founded is indefensible. We quote their language, "The condition of the bond is that Girault shall faithfully execute and discharge the duties of his office as Receiver of Public Moneys. The defendants have bound themselves for the fulfillment of these duties, and are of course responsible for the very fraud committed upon the government by that officer, which is sought to be set up here in bar of the action on the bond. As Girault would not be allowed to set up his own fraud for the purpose of disproving the evidence of his indebtedness, we do not see but that upon the same principle they (the sureties) should be estopped from setting it up as committed by one for whose fidelity they have become responsible."

This case is distinguishable from *United States* v. *Boyd*, 3 Howard, 29. There a Receiver had entered government lands in his own name, and in the name of others for his benefit, without paying for them, except by charging himself in his account with so much money received, and had permitted another party to make entries, taking, instead of money, checks on a bank which proved to be worthless.

The court say that these acts made Boyd a defaulter to the Government, and would have subjected his sureties to liability, if there had been an official bond covering the period when the acts were done. But by some oversight the Receiver had been permitted to enter upon the duties of his office without a bond; the acts, out of which the defalcation arose, had been committed before the bond was executed, and the lan-

guage of the bond not being retrospective, the sureties could not be held for past misconduct.

The same principle, that sureties are not responsible for the previous delinquences of their principal, unless they expressly so stipulate, runs through the cases of *United States* v. *Giles*, 9 Cranch., 212; *Farrar* v. *United States*, 5 Peters, 373; and *United States* v. *Eckford's Executors*, 1 Howard, 250. So in *Bryan* v. *United States*, 1 Black, 140, it was ruled that the surety was not liable for money received by his principal after the expiration of his term of office. But it is plain that the acts here complained of occurred while Newton was in office, and after the making of the bond. And that bond is broad enough to cover the faithful performance of all his official duties. The condition of it might be broken by acts of omission or commission, by a failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, as well as by doing what such a person would not have done. Wharton on Negligence, sec. 1; *Railroad Company* v. *Jones*, 5 Otto, 439.

The paying over of the moneys that come into the Treasury is only a part of the Treasurer's duty. It was Newton's duty, upon his accession to office, to receive the public moneys, evidences of debt due the State, and other securities and papers of value that were in the hands of his predecessor. It is provided by the law that he shall receive and keep all moneys of the State not expressly required to be kept by some other person. Gantt's Digest, sec. 2803. It was also his duty to receive from the County Collectors the State's revenue shown to be in their hands by their settlements with the Auditor. These amounts he was required to receive in certain specified funds. It was his further duty to keep these funds after they were received, in the vault for that purpose provided by the State, and he was expressly prohibited from depositing any

portion of them in any bank or banking-house, or with any firm or corporation. Gantt's Digest, sec. 2814.

How have these duties been performed? Instead of demanding and exacting the funds prescribed by law, the Treasurer has taken the obligations of individuals. These are at his own risk. *Board of Justice* v. *Fennimore*, 1 Coxe (N. J.) 190 and 242. He is certainly in no better position than if he had taken counterfeit money. In that case it could not be said that he had received the money, or that there had been any valid payment by Page or by the collectors. Yet his liability on his official bond would be unquestionable. *United States* v. *Morgan*, 11 Howard, 154 and cases there cited.

This case cannot be distinguished in principle from the common case of a Sheriff who receives in satisfaction of an execution something else than money. In so doing he exceeds his authority, and it is no payment unless the plaintiff chooses to consider it so. The judgment creditor still has his remedy against his debtor, and may proceed against him, disregarding the attempted payment. But it has never been doubted, so far as we are aware, that the Sheriff is liable for a breach of official duty. *Randolph* v. *Ringgold*, 10 Ark., 279.

The reception of these checks were an accommodation to Page and the collectors. It was the same in effect as if Newton had advanced so much money for them at their request, and had applied it for their benefit. Conceding the illegality of the transaction, it was for the State to object. *Miltonberger* v. *Cooke*, 18 Wall., 421. The State had her election to treat these checks as so much money received by Newton. He so treated them himself, as is manifested by his retention of them during his whole term of office, and by his charging himself with the amount of them in his quarterly statements to the Auditor. The State was ignorant of the true situation of affairs, and had not the same means of knowledge that Newton

possessed. By his conduct she was deceived and misled to her injury. If the State had known that Page was a defaulter, she would have pursued him upon his bond. But his sureties may now be dead, may have left the State or may have become insolvent. Against these collectors the State had a summary remedy in case they failed to pay their balances into the Treasury within fifteen days after settlement with the Auditor. In this event the delinquent collector forfeited his commission and incurred a penalty of 25 per cent. on the amount so wrongfully withheld, besides interest on the same at the rate of 5 per cent. a month until payment was made; and to enforce collection of the debt and of these enormous penalties, the State could, without submitting her claim to any judicial tribunal, have her distress warrant and levy upon and sell the goods and chattels, lands and tenements of such delinquent and his sureties. Gantt's Dig. secs. 5247, 5248. Furthermore the non-payment by a collector of the amount found due from him upon settlement is by statute made embezzlement and a felony. Gantt's Dig. sec. 1371.

But according to the system pursued by Newton, it did not appear that there was any default. Page had his receipt; the collectors their quietus; and the books showed that the whole revenue had been paid in. Thus the State, influenced by the acts and declarations of Newton, has altered her position with regard to these debtors. It would operate as a fraud upon her for Newton to be now permitted to deny what he has heretofore affirmed. He cannot relieve himself from liability by showing that his deputy violated the law. This would be to take advantage of his own wrong. Nor are his sureties in any better attitude; for they have undertaken for the fidelity, not only of Newton, but of his subordinates.

To reach this conclusion, we are not constrained to hold to the doctrine of *Baker* v. *Preston*, 1 Gilmer (Va.) R. 235 and

State v. *Grammar*, 29 Ind., 530, that the entries made by an officer in his books are conclusive evidence of the state of his accounts. It is well settled that they are open to explanation and consideration. *United States* v. *Boyd*, 5 Howard, 29; *Hatch* v. *Attleborough*, 97 Mass., 537.

Receipts likewise are generally examinable, especially when they have not been acted upon by third persons. Cases of duress, fraud, mistake, accident or surprise may be readily imagined when it would work the grossest injustice to hold otherwise. Nor is there anything conclusive in the certified transcript from the Auditor's office. The statute provides that "when a debt due to the State appears upon the books of the Auditor, or any other public officer, whose duty it shall be to audit and keep an accurate account of such debt, a copy of the balance due upon the books of such Auditor or other officer, certified by him to be a correct and true balance, shall be sufficient evidence of such indebtedness." Gantt's Dig. sec. 2452. The word "sufficient" must be interpreted "*prima facie*." *C. & F. R. R. Co.* v. *Parks*, 32 Ark., 131. The production of a copy of the account from the Auditor's books, properly certified, made a *prima facie* case for the plaintiff, and dispensed with other proof of the same facts and results. The Auditor makes up the Treasurer's account, adjusts the same on his books, and the account thus stated stands as and for the sum for which the Treasurer is liable. The defendants might then show any errors, mistakes or omissions of credit in making up the account which prejudiced them, subject to the restriction contained in sec. 5687, Gantt's Dig. which prohibits the allowance of any set off, except such as has been exhibited to and allowed by the Auditor, unless upon proof that the defendant is now in posession of vouchers which could not be produced to the Auditor when the account was made up.

There is no occasion to decide, and we do not decide, that Page and the Collectors are released. There is both reason and authority for saying, that a public debtor is never discharged until the money which he owes gets into the hands of an officer entitled to receive it. *Taylor* v. *Auditor*, 2 Ark., 174; *United States* v. *Patterson*, 7 Cranch., 575. It may be that the State can resort to the bonds of each and every one of these officers for injuries, to which their own official wrong and negligence have in any degree contributed, though evidently she can have but one satisfaction.

Nor is it for us to determine whether or not Newton may have his action against the former Treasurer and the several collectors; although it is probable that the maxim "*in pari delicto*," etc., would not bar a recovery against them. In *Miltinberger* v. *Cooke*, *supra*, an Internal Revenue Collector for a district in Mississippi, whose duty it was to collect the cotton tax, received, instead of currency, drafts on a commission merchant in New Orleans, who had previously promised to accept. And notwithstanding the unlawfulness of the arrangement was urged upon the court, it was held the Collector might recover of the drawer.

All that we decide is, that it is futile for these defendants to say that Newton or his deputy falsely pretended to have received money, gave his receipts therefor, and charged himself therewith, when in fact he had not received it. Such acts themselves constitute a malfeasance in office for which the defendants are liable.

The case of *Edwards* v. *Taylor*, 4 Bibb., 353, cited as in point for appellee, has to our minds no just analogy. There the deputy of an incoming Sheriff receipted to the retiring Sheriff for the amount of the fee bills, delinquent taxes and uncollected fines, remaining in the office when the new officer took possession. And it was held that the principal and his

securities were not bound by this act of the deputy. But upon what grounds? Because, by the law of Kentucky, the new Sheriff was under no obligation to receive from his predecessor such fee bills, taxes and fines, for collection. We have already shown that by the laws of this State, it is the Treasurer's duty to receive from his predecessor the moneys and securities of the State in his hands, and to receive from the Collectors the balances certified by the Auditor to be due from them.

The argument, that the officer and his sureties are not responsible for the illegal and unauthorized acts of the deputy, prove too much. We believe it to be one of the considerations which induced the policy of requiring bonds of the officers to protect the public against such acts. And as a matter of abstract justice, it is more in consonance with reason and right that the defendants should suffer for the neglect and unfaithfulness of Martin than the State, who was not responsible for his appointment, and had no means of controlling his actions, because this was directly within the condition of their bond.

And the argument that the defendants should not be held for this miscarriage, because the funds never actually came into the Treasury, would release Page as well as Newton, and show that no one was really liable, for there is no doubt that the $18,000 deficit was incurred by the same method of settling the revenue through Stoddard Brothers & Co., that was pursued during Newton's term. Such a result would be no objection, if it was the law, but we have taken a different view.

Counsel for the appellees have discussed elaborately the doctrine of the appropriation of payments in this class of cases. We are not sure that we correctly apprehend the drift of their argument on this subject. It appears from a somewhat confused record, in which the statements of the witnesses are

sometimes contradictory and sometimes unintelligible, that at the time Newton took office, there were in Stoddard's Bank about $88,000, of which $70,000 belonged to the Industrial University, and the remainder to the State. Of this University fund a portion was afterwards collected, say $34,000. Add this last amount to the $7000 collected on account of Stoddard's checks given to Page and transferred to Newton, and it reduces Stoddard's indebtedness to the extent of $41,000, which is more than the $36,083.59 afterwards lost by Martin in settling with the Collectors. Now assuredly the collections on account of the University fund ought not to be credited upon the amount due to the State. This fund is raised by the sale of the lands, or of agricultural scrip, donated by the Act of Congress, approved July 2, 1862. The State has no beneficial interest in this fund, but holds it as the trustee of an express trust, and under a guaranty that it shall never be lost or diminished. The Treasurer is her financial agent to receive this fund and to disburse the annual interest thereof, under the direction of a Board of Trustees for said University.

Nor was any injustice done the defendants by the application of the $7000 collected by Newton on the checks received by him of his predecessor. According to the view we have taken it makes no practical difference to the defendants in what manner this payment is applied. If applied to the reduction of Newton's indebtedness arising out of his deputy's dealings with the Collectors, his indebtedness on account of his transactions with Page will be increased to a corresponding amount, and vice versa. In point of fact the credit seems to have been applied according to the wishes, or at least with the acquiescence of all parties who had any interest in the matter, and it is now too late to disturb it.

It would serve no useful purpose to examine in detail the various grounds of the motion for a new trial, or to criticise

the numerous prayers for instructions granted and refused in the trial court. Suffice it to say, that the Judge at Circuit tried this case upon a wrong theory, to-wit: That defendants were liable only for such sums as actually came into the State Treasury. Hence he erred in the admission and rejection of testimony, and in his directions to the jury; and especially erred in not granting the plaintiff a new trial. If the jury had found a special verdict embodying the facts proven by the witnesses for the defendants, and upon which they relied for their discharge, it would have been the duty of the court to enter judgment for the plaintiff, for, conceding all that the evidence for defendants tends to prove, it fails to show any thing that will excuse them. There is no substantial controversy about the principal facts in the case.

We shall only discuss such of the matters raised by the record as we think will be of assistance to the court and counsel upon a second trial.

And first with regard to the pleadings; it has been a matter of doubt whether the pleader, by his original complaint, intended to assign one or two breaches. It avers the receipt and non-payment of certain funds and deposit of the funds in a place forbidden by law, whereby they were lost. The complaint was not divided into paragraphs. It may be advisable to amend the pleadings by stating the facts as they really occurred.

The amended complaint is seriously defective in that it does not show how the funds came into the hands of Stoddard Brothers & Co., or that Newton had any control over them. We cannot say that it is the business of the Treasurer to hunt up the property of the State that may be lying around loose.

All the testimony tending to show turbulance and civil commotion in the State, and disaffection of some of the collectors to the existing State governments in the months of May and

June, 1874, should have been excluded. Such a state of affairs, if it existed, would not vary the duties of the Treasurer, nor enlarge his discretion.

It was error to exclude from the jury the copy of the certified balance as taken from the Treasurer's books. No reason has been assigned in support of this ruling, and we imagine no plausible reason can be suggested. The balance seems to have been properly certified.

Sections 2451, 2452, Gantt's Digest, expressly make such a transcript competent and legal evidence. And it was pertinent to the issues. A copy of the accounts rendered by the Treasurer, being statements made by him to the State in the performance of his official duties, is evidence not only against him, but his sureties. They are entries made against the interest of the parties making them, and the surety is bound by the acts and declarations of his principal, being within the scope of the business as part of the *res gestae*. See *United States* v. *Gaussen*, 19 Wallace, 198.

The court should have told the jury not to go into the accounts, but to take the balance certified by the Auditor, unless the accuracy of the items was impeached; and that it was no error to charge Newton with the amount of his receipts to Page and the collectors. The circumstance under which the receipts were executed being undisputed, the propriety of charging Newton with their aggregate amount was a question of law.

The judgment of the Pulaski Circuit Court is reversed and this case remanded, with directions to give the plaintiff a new trial and to proceed in conformity to this opinion.

SEPARATE OPINION.

EAKIN, J.:

Whilst I concur in remanding this cause to the Circuit Court for a new trial, I am unable to assent, in all respects, to the reasons given by the majority.

The record presents but one valid issue. Did Newton, as Treasurer, receive the funds charged to have come to his hands? Upon this issue the jury found for the defendants. The errors complained of in the motion for a new trial may be classed:

First—In permitting parol proof to go to the jury, to contradict the balance as shown against Newton on the Auditor's and Treasurer's books, and to show that he never had the funds in hands as Treasurer, and also parol proof to show the turbulent condition of the country at the time of the transactions.

Second—In refusing to admit, as evidence, the certificate of the succeeding Treasurer, as to the balance due from Newton, on the Treasurer's books.

Third—In giving and refusing instructions.

Fourth—That the verdict was contrary to instructions, and

Fifth—That it was contrary to evidence.

These points, presented by the record, are to be considered with reference to the sole issue, that is, the receipt of the funds by the Treasurer.

The evidence tended to show that Newton entrusted the whole management of the office to his deputy, Martin, and knew nothing, personally, of the business; that Martin, as such deputy, when he went into office took from Page, the former Treasurer, checks of Stoddard's bank upon itself for a balance of $18,000, then said to be on deposit there; that he receipted to Page for the funds represented by said checks, with the understanding that if the funds were not paid, the

receipt should not stand good; that about $7000 was paid by the bank and about $11,000 lost. That Martin had meantime, in pursuance of the course of business used by the former Treasurer, settled with divers county collectors, by taking from them checks of the same nature upon the same bank, for the sums which appeared from their settlements with the Auditor to be due the Treasury, and giving them receipts, and charging the Treasurer with them on the Treasurer's books. It is not shown what use was made of these receipts either by Page or the collectors. The receipts themselves are not given in evidence, but proved orally. Stoddard testifies that this course was pursued for convenience and dispatch of business. That he was in the habit of taking up these checks from the treasury from time to time, in large quantities, and that they were given in the hurry of business. There is no positive proof that it was done to defraud the State, nor that Martin ever derived any pecuniary benefit therefrom. Every cent which actually came into the treasury was accounted for. The bank failed before all the checks had been taken up, leaving the deficit for which Newton is sued. During the transactions the bank was solvent.

Evidence of the disturbed condition of the country, and the contest then going on between two State governments in Arkansas, was admitted against the plaintiff's objections. This evidence had no bearing upon the Treasurer's duties, although it may have had some upon the question whether, or not, he acted in good faith in continuing this mode of receiving through Stoddard's Bank, in contravention of the law. This element of intention often enters into the consideration of an equitable estoppel. But, upon the whole, it is not apparent that this evidence had any influence upon the verdict, under the instructions. If an error at all to admit it, it was not such an error as to require reversal.

I think it was error to refuse to admit, on the part of the plaintiff, a certificate of the Treasurer, showing from his books a statement of the balance due the State from Newton. It seems admissible under sec. 2452 of Gantt's Digest. But the same state of account was shown by the certifieate of the Auditor, and by the original books of the Treasurer, and the present Treasurer's evidence taken in court. The State does not seem to have been prejudiced by the refusal. There is no controversy about any fact which the certificate would have proved, if admitted.

The main, and indeed only important question arising on the record is: Was Newton positively estopped from denying, or explaining, the receipts so proved to have been issued, in order to rebut the *prima facie* case they made of money received. This leads us to discuss the nature of equitable estoppel, as applied to receipts.

Certainly, to take these checks for money was a plain violation of the statute, and a breach of the bond. This much goes of course, but that is not the issue—which is, did Newton receive the funds into his hands as Treasurer? It is rather in the nature of a misfeasance than a non-feasance. There is no proof that Martin declined to receive any money or effects tendered by Page or the Collectors, nor does it appear, except from inference, that when they sent the checks to the Treasury by Stoddard, or carried them there, they had moneys in hand which they would have paid over if the checks had not been taken. The Treasurer took the checks in the confident expectation that the bank would send and take them up—as it did a large amount of them. They may have regarded them as mere memoranda. In any case, he had no authority to take them, and it was, in effect, as if the Treasurer had received nothing. Unless his receipts estop him from this defense, neither he nor his sureties could be held responsible in this action.

Receipts are acts, not contracts. They are memorials of facts: and, as a general rule susceptible of oral explanation or contradiction. The exceptions to this rule are of two classes:

First—and by far the most numerous, are receipts which embody a contract, such as to repay, or account, or redeliver, or do some other thing. The exclusion of evidence to vary or contradict these, stands on the same grounds with contracts. It is a question of law for the court.

Second—Those which are designedly and intelligently, or even carelessly, given under circumstances calculated to mislead third persons as to their rights; and where, if repudiated or varied, the rights of others would be prejudiced, from having relied upon the receipts as true. As against those so liable to be prejudiced, the maker is estopped from denying them. Whether in any given case such an equitable estoppel arises, must always be a mixed question of law and fact, and should be left to a jury, with instructions as to the application of the law, if the fact be found. Whether the circumstances, surroundings, and conduct of the maker exist as facts which create the estoppel, is for the jury. Whether, if found to exist, they are to be taken as effective to make an estoppel, seems more properly a question of law for the court.

In this regard, the instructions actually given, refused, or modified by the court below, taken as a whole, are unsatisfactory, and may have misled the jury to suppose that, in any case, without regard to the circumstances under which the receipts were given, or to the action of other State officers with regard to these receipts, they might be explained to show that the money and effects were not actually received, and that because in a literal sense they had never gone into the Treasury, the Treasurer could not be held accountable for them as effects received.

The instructions are defective and misleading, rather in what they fail to express, than in actual language. The whole case

should have been given to the jury, with instructions to the effect that if they should find the receipts had been given by Martin without mistake or fraud inducing him thereto, with the intention to mislead, or put off their due guard those officers of the State whose duty it was to have prosecuted the claims against the former Treasurer and the Collectors: or given with such careless and culpable negligence, as to amount to constructive fraud, and that other officers relied upon those receipts, and were diverted from their duty to the detriment of the State, then they should hold the defendants to the *prima facie* case made by the receipts, and consider the effects as having been actually received into the Treasury. But if otherwise, to find according to the facts.

I perceive no other material error in the record, and on these grounds alone concur in the order to reverse, and remand for a new trial.

Hon. Elbert H. English, Chief Justice, did not sit in this case.

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LIVINGSTON, ADM'R. VS. COCHRAN, ET AL.

1. ADMINISTRATION; *Confirmation of sale; what amounts to.*

   An order of the Probate Court directing an administrator to make a deed to lands sold under a previous order, is a virtual confirmation of the sale.

2. SAME: *Probate Judge not allowed to purchase at probate sales.*

   A Probate Judge should not be allowed to purchase lands at a sale ordered by himself.

3. BONA FIDE PURCHASER.

   The purchaser of the bid of a Probate Judge, with knowledge that he was Judge, and had made the order of sale, and purchased for his own benefit, is not an innocent purchaser.

4. SPECIFIC PERFORMANCE: *Party seeking must be blameless.*

   A party seeking the aid of chancery to compel specific performance of a contract for the sale of lands, must come with clean hands, and there must be no fraud or breach of trust in the sale.

5. DOWER: *Not barred by probate sale.*

A widow's dower in the lands of her deceased husband, is not affected by a probate sale of them for payment of his debts.

6. SAME: *When barred by limitation.*

While the heirs of a deceased husband are in possession of his lands, the statute of limitation does not run against the widow's claims for dower: Otherwise, where a purchaser is in possession holding adversely.

APPEAL from *Fulton* Circuit Court.

Hon. WM. BYERS, Circuit Judge.

Henderson and *Caruth*, for appellant.

Rose, *contra*.

ENGLISH CH. J.:

It appears that the original bill and exhibits in this case, filed in the Circuit Court of Fulton County, 15th of March, 1870, were destroyed, and at the March Term, 1871, by order of court, and waiver of notice by defendant, substituted.

The bill was filed by Thomas Cochran against Lorenza D. Bryant, as executor of Harrison Dunham, deceased, to correct an error in the description of one of three tracts of land sold by defendant under an order of the Probate Court of Fulton County, and to compel him to make a deed to plaintiff for the three tracts.

On their application the widow and heirs of Dunham were made defendants, and filed answers and cross-bills.

The Probate Court having revoked the letters of Bryant, and appointed W. T. Livingston, public administrator of Dunham, with the will annexed, he was substituted as defendant at the May Term, 1876, and answered the bill.

On the final hearing, upon the pleadings and evidence, the cross-bills of the widows and heirs of Dunham were dismissed, and a decree rendered in favor of Cochran, in accordance with the prayer of the bill, from which Livingston, administrator, and the widow and heirs of Dunham appealed.

It appears that Harrison Dunham made his will 2d March, 1857, by which he appointed Lorenzo D. Bryant, his executor; that he died sometime in the year 1858, and that his will was probated, and letters of executorship granted to Bryant at the May Term, 1858, by the Probate Court of Fulton County. The probate records having been destroyed, the probate of the will, and the grant of letters were proven by secondary evidence.

It also appears that Dunham owned at the time of his death the northeast quarter of section 10, southeast quarter of section 3, and the southwest quarter of northeast quarter section 3, in township 20 north, range 8 west; contiguous tracts, situated near Salem in Fulton County, which are the lands in controversy in this suit.

In November, 1859, Bryant, as executor of Dunham, applied to the Probate Court for an order to sell lands to pay debts, representing the personal property to have been exhausted, and it is reasonably certain from the pleadings and evidence in this suit, that he intended to apply for an order to sell the lands above described, and that they were in fact sold under the order of sale made by the court, and in the return of the sale they were described thus: Northeast quarter section 10, southeast quarter section 7, and southwest quarter of northeast quarter section 3, township 20 north, range 8 west—360 acres.

The southeast quarter of section *seven* is not contiguous to the other two tracts, and the evidence conduces to show that it was not owned by Dunham, but that the southeast quarter of section *three* was owned by him, is contiguous to the two other tracts, and that its misdescription was a clerical error.

The lands were sold on the 16th December, 1859, on a credit of twelve months, for $390, and returned as purchased by S. W. Cochran; but it appears that he transferred his bid to

Thomas Cochran, the complainant in this suit, who gave his note for the purchase money, with Samuel W. Cochran and E. C. Hunter, as sureties, payable twelve months after the day of sale, with interest at ten per cent. from maturity, and took possession of the lands.

In the year 1866, the note not having been paid, Bryant, as executor of Dunham, sued Cochran upon it, and before judgment, he paid the debt and interest to Bryant's attorney, on a promise that a deed would be made to him for the lands. After payment he was informed that the above error in the description of one of the tracts had been discovered, and on subsequent application to the Probate Court, an order was made correcting the error, and directing Bryant, as executor of Dunham, to make him a deed, which he failed to do, and hence this suit was brought.

I. We think upon all of the facts and circumstances disclosed in the pleadings and evidence, appellee, Cochran, made a case for the correction of the error in the description of the tract of land in question, under repeated decisions of this court. *Stewart et al.* v. *Pettigrew*, 28 Ark., 373. *Blackburn et al.* v. *Randolph et al. MS.* The error, however, had been corrected by an order of the Probate Court, before the bill in this case was filed, as more particularly shown below.

II. It is submitted by counsel for appellants that the order of the Probate Court for the sale of the lands should be treated in this suit as null and void, because it is not made to appear that Bryant, as executor of Dunham, gave public notice of the intended application for the order of sale, as required by sec. 175, chap. 4, Gould's Digest, then in force.

The bill does not allege that the notice was given, nor does the answer and cross-bill of Dunham's heirs allege that it was not given, and the depositions are all silent on the subject.

It was certainly the duty of the executor to give notice as

required by the statute, and it was the duty of the Probate Court to see that the notice had been given before making the order of sale, and the granting of an order of sale without such notice would be an error and ground for reversal of the order on appeal. But when the order comes in question collaterally, as in this case, and not in a direct proceeding to review it, it cannot be treated as null and void because such notice is not shown to have been given, as repeatedly held by this court. *Rogers et al.* v. *Wilson et al.*, 13 Ark., 507; *Montgomery et al.* v. *Johnson et al.*, 31 Ib., 83; *Gwyn et al.* v. *McCauley et al.*, 32 Ark., 107; *Sturdy et al.* v. *Jacoway*, 19 Ib., 499.

III. It is objected by counsel for appellants, that the sale was not confirmed by the Probate Court.

It appears that the sale was made in accordance with the order of the court, as to time, place, terms, etc., and reported to the court by the executor. It is also shown that Enos G. Hunter, who was Probate Judge at the time the order of sale was made, and at the time the sale was reported, endorsed upon the return of the sale "*approved*," and signed it officially. He also swears in his deposition that the sale was regularly made and reported, and approved by him as Probate Judge, etc. He was, however, a bidder at the sale, and speculated upon his bid, as will be shown below, and we are not disposed, on that account, to attach any value to his approval of the sale.

But it appears that before the burning of the court house, and the probate records, etc., and after appellee had paid his note for the purchase money of the lands, and after the error in the description of one of the tracts had been discovered, and after *Enos C. Hunter* had ceased to be Probate Judge, and another person had become presiding judge of the court, appellee filed a petition in the Probate Court to have the error

in the description of the land corrected, to which Bryant, executor of Dunham, appeared by his attorney, and the court, upon the evidence adduced, made an order of record at the May term, 1867, correcting the mistake, and directing the executor to make appellee a deed for the lands.

This order is not subject to the objection that the judge who made it was interested in the matter, and may be treated as a virtual confirmation of the sale. But the purpose of the application was to correct the mistake in the description of the land, and no other matter seems to have been inquired into or passed upon by the court. Whether there was fraud or unfairness in the sale does not appear to have been the subject of inquiry. The executor refused or neglected to make a deed under the order, and appellee had to resort to chancery for specific performance, and the court below was not precluded by the order, nor is this court thereby precluded, from enquiring whether there was fraud in the sale.

IV. In the answer and cross-bill of Dunham's heirs, it is alleged that the lands were worth at the time of the sale $1500; that Enos C. Hunter, the Judge of the Probate Court, Samuel W. Cochran, J. Shelby Shaver, and Lorenzo D. Bryant, executor of Dunham, in furtherance of a previous conspiracy (they being the principal land-buyers in the vicinity of Salem) procured the order of sale, and so planned that the lands were not appraised, in order that they might more effectually be sacrificed, and agreed and confederated not to bid against each other, Bryant to get the proceeds of sale, and the others to divide profits. That Hunter bid off the lands at the sale at the nominal sum of $390, and had the sale reported in the name of Samuel W. Cochran, and in furtherance of said scheme and conspiracy, Thomas Cochran, with full knowledge of said conspiracy, paid to Hunter, Samuel W. Cochran and Shaver, $100 each immediately after the sale, and executed his

note to the executor for the amount bid by Hunter for the the lands, with Samuel W. Cochran and Hunter as sureties.

It is also alleged that the personal property was sufficient to pay the debts of the estate, that they had in fact been paid at the time the order of sale was procured, and that there was no necessity for selling the lands to pay debts, but these allegations were denied, and not proven; nor was it proven that the order of sale was procured in pursuance of the alleged conspiracy to purchase the lands; and it was proven, by the deposition of Hunter, that the lands were appraised before the sale, and brought over two-thirds of their appraisment value.

It was proven by several depositions that after the lands were advertised, Hunter, Shaver and Samuel W. Cochran made an agreement to purchase them at the sale in partnership; that Shaver and Samuel W. Cochran failed to get to Salem until the sale was over; that Hunter, being the highest bidder, became the purchaser of the lands at the sum above stated, and that the lands were returned by the executor as sold to Samuel W. Cochran. That shortly after the sale, Thomas Cochran paid Hunter, Shaver and Samuel W. Cochran $100 each, profits on their purchase; the bid was traded to him, and he gave his note to the executor for the amount of Hunter's bid, with Samuel W. Cochran and Hunter as sureties.

Hunter states in his deposition that he thought the lands were worth more than he bid for them, or he would not have purchased them.

Appellee denies, and it was not proven, that he was a party to the agreement made between Hunter, Shaver and Samuel W. Cochran, to purchase the lands. He states that the lands sold for their full value at the sale, but ascertaining that he could trade them advantageously to John L. Miller for lands owned by him, he was induced on that account to advance to Hunter, Shaver and Samuel W. Cochran, $100 each upon their bid.

All of the witnesses who testified in relation to the value of the lands, except Hunter, deposed that the lands brought their full value at the sale.

A Probate Judge should not be permitted to purchase lands at a sale ordered by himself, for he might be tempted to order a sale to the prejudice of persons interested in the estate.

Moreover, it is his duty to see that the sale has been conducted fairly, and in accordance with law and the order of sale. When the land is sold upon credit, as in this case, it is incumbent on him to see that the sureties of the purchasers are responsible, and finally to confirm the sale if properly made, or to set it aside and order a re-sale, if illegal or improvidently made.

In this case the Probate Judge, who made the order of sale, entered into an agreeement with two other persons to purchase the lands on speculation; he bid them off at the sale, and disguised his bid by causing the lands to be returned as sold to one of his partners, and he and his two partners soon after the sale sold the bid to appellee for a profit of $300, and he signed appellee's note as surety for the amount bid for the lands at the sale. He deposes that he approved the sale as Probate Judge. But he was not an impartial judge. He was interested in the sale. Had he disapproved the sale, set it aside, and ordered a re-sale, he and his partners would have been obliged to refund to the appellee the profit which they had made upon their bids. In approving the sale, he also passed upon his own solvency as a surety upon appellee's note for the purchase money, which was indelicate.

We quote with approbation, the following remarks of Lord Campbell, in *Dimes* v. *Grand Junction Canal*, 3 House of Lords Cases, 793, where a decree was held voidable because the Lord Chancellor, who was disqualified from interest, sat as judge in the cause: "I take exactly the same view of this

case as do my noble and learned friends, and I have very little to add to their observations. With respect to the point on which the learned judges were consulted, I must say that I entirely concur in the advice which they have given to your Lordships. No one can suppose that Lord Cottenham could be in the remotest degree influenced by the interest he had in this concern, but, my Lords, it is of the last importance that the maxim that no man is to be judge in his own cause, should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honor to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals, because an individual, who had an interest in a cause, took part in the decision. And it will have a most salutary influence on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

The Honorable Enos C. Hunter may have been as innocent of any wilful or intentional wrong in the matter now before us, as Lord Cottenham was in the case before the House of Lords, but as matter of law, and for example, we feel constrained to condemn his conduct.

In *Imboden* v. *Hunter*, 23 Ark., 622, Hunter, through another, purchased property at a trust sale, made by him as trustee, and a bill was brought to set aside the sale. Justice Compton, delivering the opinion of the court said: "It is a stern rule of equity, that a trustee to sell for others, is not allowed to purchase, either directly or indirectly for his own

benefit, at the sale. He cannot be both vendor and purchaser. As a vendor it is his duty to sell the property for the highest price, and as a purchaser it is his interest to get it for the lowest, and these relations are so essentially repugnant—so liable to excite a conflict between self-interest and integrity, that the law positively forbids that they shall be united in the same person. And it matters not, in the application of the rule, that the sale was *bona fide* and for a fair price. The inquiry is not, whether there was fraud in fact. In such a case the danger of yielding to the temptation is so imminent, and the security against discovery so great, that a court of equity, at the instance of the *cestui que trust*, if he applies in a reasonable time, will set aside the sale, as of course. The rule is not intended to remedy actual wrong, but is intended to prevent the possibility of it. The situation of the party, *itself*, works his disability to purchase. * * * * * The rule is not confined to persons who are trustees within the more limited and technical signification of the term, or to any particular class of fiduciaries, but applies to all persons placed in a situation of trust or confidence with reference to the subject of purchase. It embraces all who come within the principle; permitting no one to purchase property and hold it for his own benefit, when he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account and for his individual use."

All that is above said in relation to trustees purchasing at sales made by them, applies, on principle, to the case of a Probate Judge purchasing at a sale made upon his own order, and which he is obliged to have conducted fairly, and for the benefit of creditors, legatees or distributees of the estate.

Appellee traded for the bid of Hunter and his partners, paid them a profit of $300 upon it, and became the purchaser of the lands, by substitution, with a full knowledge that Hunter

was Probate Judge, that he made the order of sale, that he bid off the lands at the sale for the benefit of himself and his partners, and was speculating upon his bid. Appellee cannot be treated as an innocent purchaser.

Upon the above state of case, appellee applied to the court below, sitting in chancery, for specific performance of the sale—to compel the executor of Dunham to make him a deed for the lands so purchased; and against the protest of the heirs of Dunham, the relief which he prayed was granted; and we are asked to confirm that decree, and thereby sanction the misconduct of the Probate Judge.

A party seeking the aid of chancery to compel the specific performance of a contract for the sale of lands, must come into court with clean hands, and there must be no fraud or breach of trust in the sale. Bispham's Equity, sec. 372.

The appellee does not appear in court with clean hands. The conduct of the Probate Judge in relation to the sale was, in the eyes of the law, fraudulent, and involved a breach of public trust, and such a sale cannot be enforced for the benefit of appellee, who purchased his bid with the full knowledge of the facts.

It was an error in the court below to decree to appellee title to the lands, and so much of the decree must be reversed, and his bill dismissed.

V. It appears that shortly after the probate sale, appellee sold the lands in controversy to John L. Miller, who went into possession of them, made valuable improvements on them, and continued in possession until after the institution of this suit, and died pending the suit, and before Dunham's heirs filed their cross-bill. One witness states that the improvements made by him were worth from $1200 to $1800.

The cross-bill of Dunham's heirs was filed on the 27th of April, 1875, over fifteen years after the probate sale.

It seems that Dunham left some heirs, sons and daughters, five of whom, with the husbands of the married females, joined as complainants in the cross-bill. It is alleged that one of the sons, William M., died in 1872, leaving Cynthia Dunham, his mother, his heir, and she joins in the cross-bill, claiming his share in the lands. One of the heirs, Adaline, is alleged to be a minor, and sues by Cynthia Dunham, her mother, as her next friend. Drucilla, one of the heirs, and her husband, John Richardson, did not join in the cross-bill; they were made defendants therein, but no process appears to have been issued against them, and their appearance was not entered.

The cross-bill, after alleging fraud in the probate sale of the lands as above shown, avers that John L. Miller died since the commencement of the suit in possession of the lands, and that John M. Chestnut, who became his administrator, permitted the lands to be sold for taxes in May, 1872, bought them in the name of Miller's heirs; and afterwards procured a Clerk's deed therefor in the name of said heirs. That Chestnut died, and R. R. P. Todd succeeded him in the administration of Miller's estate.

The cross-bill prays that Todd, as administrator of Miller, be made defendant, and required to bring into court said tax deed to be cancelled, that the probate sale of the lands be set aside, that an account of the rents and profits of the lands be taken, and decreed to complainants in the cross-bill, and that they have possession of the lands, etc. They do not offer to refund to appellee the purchase money he paid to Bryant, as executor of Dunham, for the lands, nor make the heirs of Miller defendants to the cross-bill.

Todd, as administrator of Miller, entered his appearance October the 1st, 1875, but filed no answer.

To his answer to the cross-bill, appellee added a demurrer.

The case was submitted at the May term, 1876, and the decree rendered at the November term following.

When the adult heirs of Dunham became of age, is not alleged in the cross-bill, nor shown by the depositions.

What the rights of Miller's heirs may be in the premises as against the cross-complaints, the court below could not adjudicate, nor can we, on this appeal, because they were not made defendants.

Whether the application of the cross-complainants, or such as were adults, to set aside the probate sale for fraud, was made in apt time, or whether their remedy was barred by limitation, we cannot determine upon the pleadings and evidence before us.

So much of the decree of the court below as dismisses the cross-bill of Dunham's heirs, must therefore be affirmed, with the modification that it be dismissed without prejudice.

VI. On the 8th of May, 1876, Cynthia Dunham, widow of Harrison Dunham, filed a cross-bill claiming dower in the lands in controversy, alleging that no provision was made for her by the will of her deceased husband, that she had not assented thereto, that she had not relinquished dower in the lands, and that dower had not been assigned to her. She makes no defendants to her cross-bill for dower, and none of the parties appear to have answered it.

Her right of dower was not affected by the probate sale of the lands, by the executor, to pay the debts of her deceased husband.

Had there been no sale of the lands, and had the heirs of Dunham remained in possession of them after his death, the statute of limitations would not have run against her in their favor, because it would have been their duty to assign her dower in the lands. But shortly after appellee purchased the lands at the probate sale, he sold them to John L. Miller (by

exchange for other lands) who entered upon and improved them, and it appears held them adversely for the full period of limitation before she filed her cross-bill claiming dower in the lands, and Miller's heirs were not made defendants to her cross-bill.

Her right of dower appears to have been barred by limitation, and for that reason, perhaps, the court below dismissed her cross-bill. See *Danley* v. *Danley* et al., 22 Ark., 263; *Stedham and Wife* v. *Matthews* et al., 29 Ark., 660.

So much of the decree of the court below as dismisses her cross-bill for dower is affirmed, with a modification that the dismissal be without prejudice.

ROBINSON VS. WOODSON, ET AL.

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1. EVIDENCE: *Must be confined to the pleadings.*
   Where there is no plea of payment, proof of it is not admissable.
2. SAME: *Not admissable against admission of pleading.*
   If a defendant would introduce proof contrary to the admissions of his answer, he must first apply for leave to amend it, and accompany the application with his affidavit that the admission was made by mistake or inadvertance.
3. VENDOR'S LIEN: *When waived.*
   A vendor executed a deed, expressly reserving a lien on the land for the purchase money, and afterwards executed a second deed to the same vendee, acknowledging payment of the purchase price, when, in fact, it was *not* paid. Held, that the lien in the first deed was a contract lien like a mortgage, which was in effect conveyed to the vendee by execution of the second deed, and under the second the vendor had the same equitable lien as if the first had never been made.

APPEAL from *Jefferson* Circuit Court in Chancery.
Hon. J. A. WILLIAMS, Circuit Judge.
Bell and *N. T. White*, for appellant.
H. Carlton, *contra*.

ENGLISH, CH. J.:

The bill in this case was filed in the Jefferson Circuit Court, by J. Alexander Woodson against David A. Robinson, to enforce a vendor's lien for purchase money of Lots 3 and 4, in Block 4, Drew White's Addition to the City of Pine Bluff, sold and conveyed by Woodson to Robinson, February 20th, 1873, for $900, of which $500 was paid in cash, and a note executed by Robinson to Woodson for $450, payable 1st of February, 1874, with interest at 10 per cent.

Before the hearing the court permitted the bill to be amended so as to make Virginius D. Wilkins, who held the note as collateral security for money, etc., advanced by him to Woodson, a co-complainant, and a decree was rendered for his use for the amount of the note, and the lots condemned to be sold for its satisfaction, from which Robinson appealed.

I. It was proven that the note sued on, at the time of its execution, or within a few days after, was placed in the hands of Wilkins by Woodson, as collateral security for a debt which the latter owed the former, and for money advanced upon it, and that he held the note continuously from that time to the commencement of the suit. Upon these facts, Wilkins might have brought the bill to enforce the lien, and made Woodson, as well as Robinson, defendants (*Crawly* v. *Riggs et al.*, 24 Ark., 563); or he might have joined in the bill as co-complainant with Woodson when it was filed, as he was permitted to do by amendment before the hearing. *Reynolds, Adm'r, et al.* v. *West*, 32 Ark., 244.

The appellant was not prejudiced by the allowance of the amendment making Wilkins a party.

II. Appellant does not allege in his answer that he had paid the note, or deny the allegation of the bill that it had not been paid. On the contrary, he states that he had "always been ready to comply with his part of the contract, and to pay said money if said note was cancelled."

In his deposition he swore that he had paid the note in money to Woodson in March or April, 1873, long before it was due, and further on he swore that he had paid it to Woodson in County scrip.

Woodson swore that the note had not been paid to him in money or scrip, and Wilkins swore that appellant promised him to pay the note after its maturity. Both Wilkins and Woodson deposed that at the time the note was placed in the hands of Wilkins as collateral security, appellant was notified of it.

There was no allegation in appellant's anawer on which he could predicate proof of payment of the note before suit.

If after the sworn answer was filed, he desired to make proof that he had paid the note before suit, he should have applied to the court for leave to amend his answer and accompanied the application by affidavit that the admission in the answer of his willingness to pay the debt was made by mistake or inadvertance in the drafting of the answer. *Reynolds, Adm'r, et al.* v. *West*, 32 Ark., 249.

There is some confusion in the depositions about the note sued on, and one deposited for keeping in the safe of August Blum, but it is not necessary to attempt to clear up this confusion. The preponderance of the evidence is that appellaut did not pay the note sued on, and the court so found.

III. The defense made by appellant's answer was that Woodson had waived his lien on the lots for the unpaid purchase money.

It appears that at the time of the sale of the lots, Woodson made appellant a deed, reserving a lien on its face for the payment of the note for balance of purchase money, which deed was not recorded, and a few days after he made him a second deed, acknowledging the payment of the purchase money, and making no reference to the note for $400, which was recorded.

Appellant relied upon the execution of the second deed as a waiver of Woodson's lien upon the lots for the payment of the note. The object of executing the second deed seems to have been that it might not appear upon the public records that appellant was indebted to Woodson for the lots, and hence the first deed showing the indebtedness was not recorded, and the second deed which did not show it, was recorded.

By the first deed, Woodson conveyed title to the lots to appellant, reserving in the face of the deed a lien for the payment of the note for balance of purchase money, which was a contract lien, and like a mortgage. This lien was all the interest which Woodson had in the lots after the execution of the first deed. By the second deed, this interest was in effect conveyed to appellant—that is, Woodson divested himself of the contract lien which he had reserved upon the lots by the first deed. After the execution of the second deed he had no contract lien upon the lots. But he had just such lien, and no other, as he would have had if the first deed had not been made, and he had in the outset executed to appellant a deed acknowledging the payment of the purchase money, when in fact $400 of the purchase money had not been paid, which is an equitable vendor's lien—that is, a lien which does not depend upon stipulation or contract, but is the creature of a court of equity (*Swan* v. *Benson*, 31 Ark., 729), and based upon a principle founded in morals and good conscience, that the vendee should not be permitted to keep the vendor's land and not pay for it.

Appellant swears that Woodson intended, by the execution of the second deed to waive and abandon all lien upon the lots, but Woodson swears to the contrary. We have stated above the legal effect of the execution of the second deed, and if the conflicting oaths of the parties be regarded as of equal value and balancing each other, just such effect should be given

to the execution of the second deed as the law attaches to it.

Decree affirmed.

McGill vs. Dowdle, Gibson & Co.

1. Statute of Limitation: *Promise to pay debt of another.*

A note was executed by one partner in the name of the partnership. Afterwards the other partner, on presentation of the note to him, promised to pay it, not denying that it was a partnership note. In a subsequent suit on it, he denied by answer that it was a partnership note, alleging that it was executed for the separate debt of the other partner, without his knowledge or consent. Held that the execution of the note was the only matter in issue, and that the promise to pay was admissible to prove it, and was not inadmissible as a parol promise to pay the debt of another, under the statute of frauds.

2. Partners: *Who are.*

If parties, after they become partners, have a common interest in the unsettled business of a former concern, or in its profits and losses, they are between themselves partners in that business.

APPEAL from *Little River* Circuit Court.

Hon. L. J. Joyner, Circuit Judge.

Williams & Battle, for appellants.

Harrison, J.:

This was an action by Dowdle, Gibson & Co. against John M. McGill and A. J. McGill, upon a note purporting to have been executed by them in their partnership and firm name of J. M. McGill & Bro., for $400, dated October 20th, 1875, and payable one day after date.

A. J. McGill made no defense, and judgment was taken against him by default.

John M. McGill in his answer averred that the note, though given in the firm name, was given by A. J. McGill for his several and individual debt, without his knowledge and consent, and denied that it was his note.

The issue was tried by the court, which found as conclusions of fact, that the note was made by A. J. McGill, personally, for goods purchased in his name by John M. McGill, ostensibly as his agent, from the plaintiffs, but in fact for the use and benefit of both defendants, and in respect to which they were partners; and that it was their joint note.

John M. McGill moved for a new trial, which motion was overruled, and judgment was entered against him; whereupon he appealed.

The appellant testified in his own behalf; that A. J. McGill, gave the note in settlement of a debt of his own to the plaintiffs for goods purchased from them whilst he was merchandising and doing business alone, and before the partnership between him and the appellant was formed. The goods he said were purchased for A. J. McGill, who was his brother, by himself, as his agent, but he was not then his partner, and had no interest whatever in his business. The note was given after they became partners, but in the absence of the appellant from home, and without his knowledge, and without any authority from him; and when he returned and learned from A. J. McGill that he had given the firm's note for his debt to the plaintiffs, he expressed his dissatisfaction, and told him he had done wrong.

On cross-examination he admitted that the note was presented to him shortly after it was given by the plaintiff's attorney, and said, he may have promised to pay it, but did not remember distinctly whether he did or not; and he admitted, that after the suit was brought, he requested the attorney of the plaintiffs' to take no further proceedings in it, until he should return from St. Louis, where he was then going; and that, he told him he would stop over at Little Rock, and would see and settle with the plaintiffs. He also admitted that he never at any time in-

formed the plaintiffs' attorney that A. J. McGill did not have authority from him to give the firm's note for the debt—or denied his liability on it.

He had before the goods were purchased, he said, filed his petition in bankruptcy, and had not then obtained his discharge, and that their partnership was not formed until after he had obtained it. That A. J. McGill, when the partnership was formed, had a small remnant of goods on hand, which with whatever other assets of his business and property he had, went into the firm. He had no knowledge, he said, of any liabilities of A. J. McGill, except the debt to the plaintiffs; if there were any they were not assumed or paid by the firm, and he was in no way liable for them.

William D. Hawkins, the plaintiffs' attorney testified for the plaintiffs, that about the date of the note an agent of the plaintiffs called at his office in Rocky Comfort, and showed him an account or note of A. J. McGill, and asked his opinion in regard to its collection. He told him it would be a better claim, if it was against J. M, McGill & Bro. The agent then left and went to the store of J. M. McGill & Bro., and soon after returned with the note sued on, which he left with the witness for collection, and told him that A. J. McGill had promised to pay it on the first of December. John M. McGill was then absent, but returned in a day or two, when he went to see him, and asked him if the note would be paid on the first of December. He replied that he could not pay it then, but would by the first of March. About the first of March he called on him again for payment of the note. He asked further time, and promised to pay it as soon as he was able. He was afterwards instructed by the plaintiff to bring suit on the note, and did so.

After the suit was commenced, John M. McGill came to him and requested that nothing further should be done in it, until

his return from St. Louis, and promised that he would stop over at Little Rock, where the plaintiffs did business, and would settle with them; and he accordingly took no further step in the suit until after his return. At no time did he deny to the witness his liability on the note, or intimate anything of the kind, and he never heard of his denying it until he filed his answer, which was done shortly after his return from St. Louis.

He had lived in Rocky Comfort, where the defendants did business, several years, and was living there when A. J. McGill was carrying on business in his own name, and knows when the change in the business from A. J, McGill to J. M. McGill & Bro. took place. When A. J. McGill was conducting business in his own name, John M. McGill was usually about the store. There was no change of store or house, and the business was conducted by the same parties and, as appeared, in the same way as before, and the change, so far as he was able to see, was in name only.

An exception was taken by the appellant to the ruling of the court compelling him, upon his cross-examination, to testify concerning the promises made by him to the plaintiffs' attorney to pay the note, and also in allowing the plaintiffs' witness to testify to the same facts; and the admission of this evidence is the first ground of the motion for a new trial.

It is insisted that these were promises to pay the debt of another, and not being in writing, were within the statute of frauds, and parol evidence of them inadmissible.

The action was on the note, of which he appeared on its face to be one of the joint makers, and against him as an original promissor, and not as promising to pay the debt of another.

The execution of the note was the only matter in issue, and this his promises very directly tended to prove.

The evidence was competent, and the ruling of the court in respect to its admission correct.

The second ground of the motion was that the court erred in its declarations of law. There were two, to which the appellant excepted. The first was a statement of the evidence, and not of the facts, which it tended to prove—followed by a conclusion therefrom, which was nothing more than a conclusion of facts. As an instruction to a jury, it would have been improper, as instructing them as to the weight of the evidence, but inasmuch as the trial was by the court, which had itself to weigh the evidence, it amounted to nothing.

The second was as follows:

"If A. J. McGill and John M. McGill had a community of interest in the losses and profits of the business conducted by A. J. McGill, after the firm of A. J. McGill & Bro. was formed, the court should find for the plaintiffs; and this fact may be arrived at from the facts and circumstances of the whole case, if they warrant such a conclusion, although the said John M. McGill may have denied it.

This declaration, we think, was unobjectionable. If the defendants had, after they became partners, a common interest in the unsettled business of the former concern or in its profits and losses, as there stated, they were between themselves partners as to that business also. Sto. Part. secs. 16-18.

The remaining ground was, that the finding of the court was contrary to the evidence.

The testimony of the appellant was direct and positive, that the note was given for the sole debt of A. J. McGill, and as direct and positive in the denial of any authority to him to give such joint note. But, on the other hand, the evidence for the plaintiffs tended to prove that he had an interest in the goods, the purchase of which was the consideration for the note, and the authority of A. J. McGill from the appellant, in its execution.

It was the province of the court sitting as a jury, to determine the weight to be given to the evidence, and there was no want of evidence to warrant its finding.

The judgment is affirmed.

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CHRISMAN VS. CARNEY.

1. VENUE: *Change of in civil cases.*

The provisions for change of venue contained in section 13, chapter 177, Gould's Digest, were repealed by the adoption of the Civil Code in 1868.

2. PLEADING: *Forms of action.*

Forms of action being abolished, the actions of trespass and case may be joined; but the requisites to constitute the injury, and the proof to sustain it, are the same as formerly.

3. FALSE IMPRISONMENT: *Malice, not necessary to be proven.*

In an action for false imprisonment it is not necessary to show malice, if the arrest was unlawful. One who participates in, or instigates or encourages an unlawful arrest, is liable, however pure his motives.

4. MALICIOUS PROSECUTION: *Malice—Probable cause.*

Both malice and want of probable cause must exist to sustain an action for malicious prosecution. Probable cause is a mixed question of law and fact, and may usually be left by the court to the jury, and the mere innocence of the party accused will not sustain the action if the circumstances be such as to induce the prosecutor to suppose the party prosecuted to be guilty.

5. AGENT: *Officer, not, of prosecutor—declarations of.*

An officer executing process is not the agent of the prosecutor, so as to make his declarations, even when part of the *res gestæ*, bind the prosecutor; nor can his declarations be used to prove his agency, or that there was a conspiracy between him and the prosecutor to abuse the process of the law.

6. CHIEF OF POLICE: *Of Cities of the first class; Power to arrest in other counties.*

Under the facts of this case (see the Op.) the court is of the opinion that the Chief of Police of the City of Little Rock may pursue a person charged with crime in said city, and arrest him in another county, within a few days.

7. EVIDENCE: *Telegrams.*

Telegrams between the parties, and from the defendant to a third party, in regard to the transactions resulting in the plaintiff's arrest, are admissible in an action for false imprisonment, as a part of the *res gestae*, for the purpose of connecting the defendant with the arrest.

8. ———: *Of probable cause.*

Where the question at issue was probable cause the prosecutor had for believing the person prosecuted guilty of the crime of false pretense, false representations made to some one else, without the design that they should reach the prosecutor and influence his conduct, are inadmissible.

APPEAL from *White* Circuit Court.

Hon. J. N. CYPERT, Circuit Judge.

Coody, Clark & Williams and *Benjamin & Barnes* for appellants.

B. D. Turner and *J. M. Moore, contra.*

EAKIN, J.:

Chrisman, a resident of Pulaski County, keeping a hotel at Little Rock, was sued and served with process in White County. The complaint contained two paragraphs.

The first was for *false imprisonment* in causing the plaintiff to be arrested without any authority of warrant, or process, or oath made before any proper officer, and without reasonable cause to believe that he had been guilty of any crime.

The second paragraph was, in effect, for malicious prosecution, charging that defendant falsely, maliciously, and without probable cause, procured a warrant from a justice of the peace of Pulaski County against said plaintiff, which was delivered to the Chief of Police of Little Rock, upon which he was arrested in White County, brought to Little Rock, and detained by defendant, at his hotel, until he gave up property to satisfy defendant's claim.

The answer denies malice or want of probable cause generally, and, as to the first count, that he caused or procured the arrest of complainant, otherwise than by giving information to the Chief of Police of the conduct of complainant.

As to the second, it denies that he caused the arrest of complainant falsely, maliciously and without reasonable or probable cause, or for the purpose of extorting from him money or

property, and proceeds to set forth the facts which afforded the grounds of the prosecution; and the circumstances under which it was made.

Upon these issues the cause was tried by a jury, which found for the complainant, and assessed his damages at $1300. There was a motion for a new trial. Bill of exceptions and appeal. The grounds of the motion will be considered so far as they seem important. The bill of exceptions shows that, by agreement, all exceptions were reserved, which, by virtue of section 4694 of Gantt's Digest, superseded the necessity of taking them upon the several rulings when made. The bill also makes proper reference to the motion for a new trial, copied in another part of the record.

Before trial, the defendant moved to transfer the cause to the county of his residence. The refusal of the court to do this is made the first ground of the motion. The motion was based on the act of November 30, 1874. (See Gould's Digest, ch. 177, sec. 13.) The practice, under this act, had been infrequent in the profession. When the Code of Civil Practice of 1868 was adopted, the Legislature seems to have intended to cover the whole subject of venue in civil cases, prescribing definitely in what counties actions might be brought, and under what circumstances the venue might be changed, omitting the provision in the act of 1840. The rule of construction applies, which, in such cases, implies an intention to repeal provisions not brought forward and repeated.

This becomes more probable from the consideration that the Code provisions having become confused by subsequent legislation, a new act was passed in 1875, which also failed to incorporate the provisions of the act of 1840. The Circuit Judge did not err in the refusal to transfer.

A brief outline of the facts may be necessary to a clear understanding of the points arising upon the trial, and presented by the other grounds of the motion.

It appears, without controversy, that complainant, W. E. Carney, with his nephew, W. E. Carney, Jr., came to Little Rock about the 1st of April, 1875, staid a short time at defendant's hotel, paid their bills, and went to a private boarding house. Afterwards complainant came back near the first of May, and representing himself to defendant as a man of property, and as having money on deposit in bank and valuable jewelry in his baggage, contracted for board for himself and nephew. That his attention was called to the notice posted in the office that boarders without baggage must pay in advance; that he asserted that he had valuable baggage in town, and directed his nephew to have it brought in, and afterwards said, in excuse for the delay, that part of his clothing was out to wash, and he was waiting to bring it all in together; that his representations and pretences were false; that, after a few days, complainant and his nephew left the hotel, and the city, without paying, and without the consent of defendant; that defendant applied to the Chief of Police, representing the circumstances and asking his aid; that, after discovering the place to which complainant had gone, the Chief of Police (Blocher) telegraphed the Sheriff of White County to arrest him and his nephew, which was done. The Sheriff afterwards, doubting his authority, released them. Defendant then made affidavit before a justice of the peace charging complainant and his nephew with having obtained *board* from him under false pretences. Before doing so, he laid the facts before the justice, who advised him that they would support a prosecution. The warrant was for obtaining *money* under false pretences. The defendant called the attention of the justice to the discrepancy, but was advised that it was all the same. This warrant, addressed "to any sheriff, constable, etc., of the State of Arkansas," as provided in section 1669 of Gantt's Digest, and otherwise in due form, was placed by the

defendant in Blocher's hands, who proceeded to Searcy, in White County, where complainant and his nephews were, arrested them, and brought them to Little Rock. They were taken as felons, and at first handcuffed, but afterwards treated leniently, and without any unnecessary severity. Arriving at Little Rock in the night, they were taken by Blocher, whether by their request or on his own motion, does not clearly appear, to defendant's hotel, where they were furnished a room by defendant's hotel clerk, and remained without any restraint until next morning. When defendant met them next morning, he spoke to them as prisoners in his charge, and refused to assent to their leaving before Blocher should come round to take them. In the altercation and discussion between them, it was proposed and agreed that complainants should make Chrisman secure for his bill and expenses, give him a lien for payment on a chest of tools, and that defendant (Chrisman), on his part, should dismiss the prosecution, if the officer having the warrant would consent. Writings were signed to that effect. Blocher was advised of it, and the warrant was never returned. Afterwards this suit was brought for damages.

The issues raised by the pleadings, to which these facts and circumstances must be applied were, on the first count, did Chrisman cause or procure complainant to be falsely imprisoned? And on the second, did Chrisman institute a malicious prosecution against complainant, without probable cause? The first was at common law an action of trespass, and the other an action on the case. The forms of action being now abolished, they may be joined under the class of injuries to the person; but the requisites to constitute the injury, and the proof necessary to be made to sustain either paragraph of the complaint, are the same as formerly.

The principles which govern these issues have long been well defined, and have been recently announced by this court,

in several well considered cases, reported in 32 Ark. (See the cases of *Lemay* v. *Williams*, p. 166; *Akin* v. *Newell*, p. 605; *Lavender* v. *Hodgens*, p. 763.)

With regard to the first issue, if the arrest was unlawful, no malice need be shown. The defendant, if he participated in it, or instigated or encouraged it, is liable for the false imprisonment, however pure his motives may have been. The arrest, however, was not necessarily unlawful because made without warrant. A peace officer or a private person may make an arrest without warrant when he "has reasonable grounds for believing that the person arrested had committed a felony." (Gantt's Digest, sections 1678 and 1679.

But where, as in the second case, the arrest has been made under a warrant in due form, the officer is entirely protected, however groundless the prosecution, and the liability of the prosecutor is upon the case for malicious prosecution, and not in trespass for false imprisonment. No imprisonment by virtue of a legal warrant in due form is false imprisonment. To have procured the warrant from malice and without probable cause is a distinct civil injury. It must be charged and shown by proof that both malice and want of probable cause existed. If there be probable cause, no degree of malice will be sufficient to sustain the action. If there be no probable cause, then malice must be shown also; and in estimating malice the absence of probable cause is only a matter of evidence to be considered, with other circumstances, in determining whether the prosecutor was prompted, in making the charge, by private motives or considerations of the public good. In other words, if there be probable cause, the law will not inquire into motives. "In general," says Mr. Chitty, "*no action whatever* can be supported for any act, however erroneous, if expressly sanctioned by the judgment or direction of one of the superior courts at

Westminster; or even by an inferior magistrate acting within the scope of his jurisdiction." (Vol. 1, p. 181.) And again (on p. 186), "no person who acts upon a regular writ can be liable to this action (trespass), however malicious his conduct, but case for the malicious motive and want of probable cause for the proceeding is the only sustainable form of action." Both elements must combine to make the cause of action complete. And to like effect Mr. Greenleaf, in his work on Evidence (Vol. 2, sec. 454), says: "The want of probable cause is a material averment, and though negative in its form and character, it must be proved by the plaintiff by some affirmative evidence." "It is independent of malicious motive, and cannot be inferred as a necessary consequence from any degree of malice which may be shown;" and this probable cause is a mixed question of law and of fact, usually so blended together that the judge may leave the whole question to a jury. (See Greenleaf on Evidence, vol. 2, sec. 454.) Nor will the mere innocence of the party accused sustain the action if the circumstances were such as to induce the prosecutor to suppose the person proceeded against to be guilty. "For," as Blackstone says, "it would be a very great discouragement to the public justice of the kingdom if prosecutors who had a tolerable ground of suspicion were liable to be sued at law whenever their indictments miscarried;" and therefore "any probable cause for preferring it is sufficient to justify it." (See Book III, p. 126–7.) And if there be such probable cause, it is no objection in law (however repulsive it may be to our sentiment of patriotism and dignity of character) that the prosecutor was impelled by the more sordid motives of recovering his property, or enforcing a civil right. The law does not undertake to compel—however society may respect—a nice sense of honor, by inflicting a pecuniary liability upon a person for what he might lawfully

and ought to do, because his motives were selfish. Society has indeed been compelled more or less to avail itself of the energies which selfish motives prompt. By the English law, as modified by statute and adopted here (although not so at common law), persons were encouraged to prosecute offenses against property by the hope of restoration. It was especially so provided in the case of larceny by statute of 21 Henry VIII., ch. II. The policy has been enlarged in later times in England, and many similar acts of more extensive scope were passed in the reigns of the Georges Second, Third, and Fourth, holding out to prosecutors the prospect of recovery of their civil rights. (See citations in IV. Black. Com. 361–2.) The policy of such laws for the protection of society is their sole, but sufficient, vindication, and we must in this view of them repress the natural impulse to hold prosecutions on probable cause to be malicious in law merely because the prosecutor was impelled by the sole motive of recovering money or property.

It yet remains, before returning to the grounds of motion for a new trial, to rule upon the power of the Chief of Police to execute the warrant in White County. A sheriff cannot execute a process outside of his own county, as held in this court in *Blevins* v. *State*, 31 Ark., 153.

The powers of the Chief of Police of Little Rock, which is a first-class city, are somewhat more extensive, as defined by the act of March 3, 1873, sec. 52. He is one of the officers to whom the warrant is directed in the legally prescribed form under sec. 1663 of Gantt's Digest. He may by himself or deputies execute all process directed to him. He shall have like powers with sheriffs in similar cases. Amongst other things, he shall have power to pursue or arrest any person fleeing from justice in any part of the State; and to receive and execute any proper authority for arrest and detention of

criminals fleeing or escaping from any other place or State. What constitutes a fleeing from justice depends very much upon particular circumstances. But under the facts as they appear in the case before us, the court is of the opinion that the Chief of Police, for a crime committed in Pulaski County, and the City of Little Rock, might well pursue and arrest the persons charged, within a few days. That the complainant had told Chrisman he meant to go to Searcy before he left, does not alter the case, as Chrisman might well have supposed he meant to make good his representations and pay his bill before leaving.

Applying these principles, we will notice such of the grounds for a new trial as may seem important.

The court, against appellant's objections, admitted certain telegrams of May the 6th, numbered from one to eight; these passed, some of them, between Chrisman and a Mr. Kellum, concerning Chrisman's debt; one from Carney to Chrisman, offering to pay a certain small amount and no more; and some from Blocher to the Sheriff, directing the arrest. At that time no warrant seems to have been sworn out.

The evidence, although it does not positively show that Chrisman directed the arrest, so connects him with the proceedings in his interest as to justify the admission of them as parts of the *res gestae* to be considered by the jury, as tending to prove that the arrest made by the Sheriff of White County was instigated by Chrisman. Although they tend to show Chrisman's agency in the arrest, taken in connection with other testimony, and that his principal motive was the collection of the claim, they have no bearing to show want of probable cause to believe the alleged crime had been committed. They were applicable to the first count alone.

It is objected, in the third ground of the motion, that the court allowed declarations made by Blocher, in the absence of

Chrisman, during the proceedings on the warrant, to go to the jury to show that Blocher was employed by Chrisman in making the arrest, and was to be paid by him therefor. This was error. A police officer in executing a warrant acts officially and on his own responsibility. He is not the agent of the prosecution so as to make his declarations, even when part of the *res gestae*, bind the prosecutor, and his declarations cannot be taken to prove his agency, or that there was a conspiracy between them to abuse the process of the law. Besides, they were historical, and no part of the actual transactions. They referred to what Chrisman had done in promising to pay him money, and were only hearsay. Besides, there was nothing to show an abuse of process, unless it were in handcuffing the complainant. That may have been an unnecessary precaution, harsh and humiliating, but we cannot say it transcended the power of the officer when done with a view to security. If Chrisman really had probable cause to believe complainant guilty of the crime, and put the warrant in Blocher's hands, he would not be rendered liable in this action by offering a reward to the officer to stimulate his exertions.

A number of questions were put by defendant to a witness, A. T. Carroll, which were excluded by the court. This is made a ground for the motion for a new trial. An examination of these questions shows that the general purport and design of them was to prove divers communications made to witness by complainant about the time of the supposed false representations to Chrisman, and that they were communicated to Chrisman. The question at issue was the probable cause Chrisman had for believing that the complainant had procured his board by false and fraudulent representations to himself. To constitute them such they should have been made to Chrisman himself directly, or through some one else with the intention and design that they should reach Chrisman and influence

his conduct. He would have had no right to place any reliance upon light and boastful representations made in general conversations. They would not be criminal if false, and to have admitted them would have given to the evidence entirely too wide a range.

The court gave for the plaintiff fifteen instructions, as asked; which is made a ground of motion for a new trial. They are too long for convenient repetition in full. Their tenor may be considered as a whole.

They correctly lay down the law of false pretense, what is necessary to constitute the crime, and the degree of probability which must have existed in the mind of defendant to justify him in making the accusation and procuring the warrant. The law as to the measure of damages is also correctly stated. But one error runs through and pervades the whole of them, and is made prominent by frequent repetition. It is impressed upon the jury that if the prosecution was instituted solely for the purpose of collecting a debt or extorting money, and was conducted for that purpose until the object was attained and then dropped, the defendant is liable, notwithstanding he may have had probable cause to believe the charge was true. This is not the law. The existence of probable cause is of itself alone a complete and entire defense to all actions for conduct which a citizen may pursue upon probable cause, whether it be to swear out a warrant or arrest without one. The interest which society has in the enforcement of the criminal laws requires this rule. It is wholly independent of any regard for the prosecution. If there be no reasonable grounds nor probable cause for his proceedings, then, and not before, the question of malice becomes important, and his whole conduct may be taken into account; and if, having instituted a prosecution with probable cause and on reasonable grounds, he should convert it into a means of extorting money or property, and

cause it to be dismissed after attaining his wicked ends, he would become himself a criminal and stand amenable to punishment for compounding a felony. But where probable cause existed when the prosecution begun, this action cannot be maintained. The instructions as drawn took from the jury the consideration of probable cause, provided they should believe the defendant had no other object in view than to collect his debt. Whilst the court holds this to be error, the occasion should not pass for saying that such prosecutions should be jealously watched. It is not well to prostitute the criminal laws of the State for the collection of debts, thereby obtaining, as unscrupulous creditors are wont to do, all the harsh coercive benefits of imprisonment for debt, superadded to the moral terror which a debtor may feel for his good name. The practice is utterly detestable in the sight of every fair-minded man and woman, and it well befits a jury, when such motives are apparent, to see well to it that the belief of the prosecutor was really upon grounds reasonable and probable, and not simulated for the purpose. But if they be found so, the law exonerates him from civil liability.

We have only to add that the refusal of instructions asked by the defendant, and the giving of those upon the court's own motion, whilst correct in the main upon other points, are all infected with the same error. They insist that the defendant cannot excuse himself for the prosecution unless it was undertaken in good faith and for the public good. This is the law only where there is want of probable cause, and where the question is one of malice; and it should have been so limited by the instructions that the jury could apply it intelligently.

If the verdict had been rendered under proper instructions and a due consideration of all the facts, it would not be so excessive as to evince passion, prejudice, or corruption on the part of the jury; and this court would not interfere on that account.

Many other questions of law arise upon the record, but it is inconvenient to notice them *seriatim*, and as they come within the bearing of the principles already herein announced, will doubtless be correctly ruled on a new trial.

For the errors above indicated, let the judgment be reversed and the cause remanded, with instructions to grant a new trial.

APPERSON & CO. VS. BURGETT ET AL.

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1. PARTIES: *Practice in equity.*

Where the court can make a final decree between the parties before it, leaving the rights of others unaffected, it may be done; but where there are outstanding equities in oth rs the future assertion of which ai ist the parties litigant would cause new equities or revive old ones, as between the parties litigating, this will never be done.

2. JUDGMENT LIEN.

The lien of a judgment is subject to all valid liens on the land at the time it is rendered, whether recorded or not.

3. LIENS: *Notice of.*

Notice of all liens and alienations attaching before judgment may be given at any time before sale of land under execution, and will bind the purchaser.

4. FRAUDULENT CONVEYANCE: *Possession by vendor.*

Whilst possession of real property retained by the vendor will not, as of personalty, raise a *prima facie* presumption of fraud, it may be a fact tending with others to show a secret trust.

5. SAME: *Execution at law.*

The practice of selling under execution at law lands fraudulently conveyed is not to be encouraged

6. PRACTICE IN EQUITY: *Vacating fraudulent conveyances.*

In an equitable proceeding to vacate a fraudulent conveyance of land upon which an execution has been levied, it is not necessary to remit the party to his execution; the court may order a sale for its satisfaction, under its own directions.

APPEAL from *Crittenden* Circuit Court in Chancery.
Hon. L. L. MACK, Circuit Judge.
Brown and *Rose*, for appellant.

Adams, contra.

EAKIN, J.:

At the June Term, 1873, of the Crittenden County Circuit Court, Apperson & Co. sued the administrators of J. W. Burgett in an action at law to recover a half interest in a body of lands in their possession, which for convenience we will designate as the Home Place.

They answered that they were in possession only as administrators, and denied the title and right of possession of plaintiffs. They also prayed that Pearl Burgett, the infant daughter and sole heir of J. W. Burgett, might be made a party, and with her filed a cross-bill against plaintiffs and John C. Burgett. The object of the cross-bill was to establish an equitable title in said lands by virtue of a purchase by the intestate from said John C., in January, 1867; alleging payment of the purchase-money, transfer of possession, and continued occupation in the intestate and his representatives ever since; and to have the title in the heir declared superior to that of plaintiffs, who claim by virtue of a deed from the Marshal of the United States Circuit Court, upon an execution against John C. Burgett, and a sale thereunder in 1872. The cause was transferred to the equity docket, and afterwards the cross-bill was amended so as to set up an actual deed from John C. to J. W. Burgett at the time of the sale, which had been lost. The plaintiffs responded to the cross-bill, denying that there had been any *bona fide* sale from John C. to J. W., as alleged, but that the same was pretended and colorable only, and made in fraud of creditors.

At the same term of the Circuit Court at which the action in ejectment had been brought, Apperson & Co. filed a separate bill in equity against John C. Burgett and the representatives and widow and heir of J. W. Burgett, in aid of their remedy against another body of lands bought by them at the

same execution sale; for which John C. Burgett, on the 4th of November, 1867, had executed a deed to J. W. Burgett, which had never been recorded until two or three days before the Marshal's sale, and which they claimed to be in fraud of creditors and without actual consideration. This body of lands we will designate as the "Council Bend" Place. Proper issues were made on these allegations, and the two causes were consolidated and heard together.

In the progress of the causes it was developed by evidence that after the alleged sales to J. W. Burgett from John C., the latter was, in 1868, duly adjudged a bankrupt on his own application. An assignee had been appointed and the property of the bankrupt conveyed to him. Apperson & Co. were the only creditors who proved their debts. Nothing, or very little, came into the hands of the assignee, who was discharged by the court, upon his own application, from all further duties, and the certificate of discharge of the bankrupt was refused. Meanwhile Apperson & Co. had been allowed to withdraw their claim from the bankruptcy proceedings. They afterwards brought suit and obtained judgment in the Circuit Court of the United States for the Eastern District of Arkansas. It was upon this judgment that the execution issued under which they had purchased in both bodies of land. They did not satisfy the debt, and as to the balance the Marshal returned *nulla bona*. An alias execution was sued and again levied on the second body of lands, the Council Bend Place, and complainants in their bill pray to be allowed to make a sale of the same under the alias, after the deed from John C. to J. W. Burgett may be declared fraudulent and set aside.

At the hearing of the cause complainants applied to the court to suspend proceedings on account of the disclosure of the bankruptcy of John C. Burgett, that they might have another assignee appointed and made a party, offering to

stipulate that it should not cause a delay beyond the next term. This the court disregarded and proceeded to a decree.

With regard to the Home Place, the court found that the sale on the first of January, 1867, of a half interest had been *bona fide* made by John C. to J. W. Burgett for a valuable consideration, which had been paid, and that said J. W. Burgett had taken and held possession of it till his death, and his administrator after him. That Apperson & Co. had notice, and acquired no title by their purchase at execution sale. Title was decreed in Pearl Burgett as heir of Isaac W. Burgett, her father, subject to debts against his estate.

With regard to the Council Bend lands the court found that the payment of the consideration for the same and their actual occupation by Isaac W. Burgett had not been satisfactorily proven, and that the conveyance from John C. Burgett was in fraud of creditors. That deed was canceled and the title to all the lands constituting that body contained in the Marshal's deed confirmed in Apperson & Co., who were also decreed to pay all the costs of the suit. Both sides appealed.

The question arises *in limine*, ought the Circuit Court, on discovery of the bankruptcy proceedings, to have dismissed both causes for want of proper parties, or to have given complainants time until the next term of the court to have made and brought in an assignee?

It is one of the chief excellencies of equity jurisprudence to do nothing futile or by halves, but to cause all persons interested in the subject-matter of the litigation to be brought in and bound by one decree, adjusting all their rights, and closing all the future litigation with regard thereto. This is not always possible, and to meet the exceptional cases it is provided by the Code that "the court *may* determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights." (Sec. 4481

Gantt's Digest.) "But when a determination of the controversy *between the parties before the court* cannot be made without the presence of other parties, the court *must* order them to be brought in." This is indeed but an affirmance of the former practice, and affords the correct criterion for determining when the court will decline to exercise any jurisdiction whatever, or may, in its discretion, proceed to a partial settlement of the matters in controversy amongst the parties actually before it. This will never be done when there are outstanding equities in others the future assertion of which against the parties litigant would cause new equities, or revive old ones as to the same matter between themselves. If so, the decree could, in its nature, be only provisional. But where it can be made final as far as it goes, the court may for convenience proceed, leaving the rights of others unaffected.

The case before us seems to come within the discretional class. The decree as to the title to the lands, subject to the claims of any future assignee, would be final between Apperson & Co. and Isaac W. Burgett's heirs and representatives; and would not be disturbed or give any new equities between themselves upon the assertion of these claims. Nevertheless, it would not have been prudent to proceed without making the assignee a party, if there had been any assignee in existence, or any proceedings in bankruptcy kept alive for the administration of John C. Burgett's effects. But such was not the case. All the effects which came to the assignee had been administered, and he had been finally discharged. The certificate of the bankrupt had been denied. Everything seemed to have been done that was intended under those proceedings. The complainants were the only creditors who had proved their debts, and their withdrawal of their claim, and their proceedings in the Federal and State courts upon the same claim, might well be taken as an election not to revive the proceedings

in bankruptcy. No one else had an interest to do so. The court did not err in proceeding at once to final decree.

In passing, it may be well to indicate that, in the exercise of this discretion, the court is not confined to the view of the interests of parties disclosed by the pleadings and put in issue. It seems the better practice, and more in accordance with the spirit of equity proceedings, that the court should take notice of any equities brought to its notice, in the course of the proceedings, which it may believe to be *bona fide*, and not interjected for the purpose of confusion and delay. It would be difficult, and this court will not attempt, to lay down any definite rule as to this point. It depends upon sound discretion under the circumstances of each case.

With regard to the home place, the onus was upon Pearl Burgett to show that an actual sale of the place, for valuable consideration, had been made by John C. Burgett to her father at the time alleged. This she did by testimony clear, certain, and unimpeached, proving not only the date but the execution of a deed which had been lost. She proved further that her father had remained from that time in undisputed possession, claiming the whole interest, until his death, and that his administrators had so remained in possession until the action at law for possession was begun. This shifted the burden upon defendant in the cross-bill, to show that the sale was fraudulent. The preponderance of proof is greatly in favor of its fairness, that the consideration was paid, and that Apperson & Co. had such notice of it, not only by the possession of Isaac W. Burgett, but actually at the Marshal's sale, as to put them upon inquiry, and subordinate their judgment lien to the equity (or in view of the last deed), the legal title of Isaac W. Burgett's heirs. There is no error in the decree as to this body of land.

With regard to the other, or Council Bend Place, the com-

plaint admits the execution of the deed from John C. Burgett to Isaac, on the 4th of November, 1867, which was recorded a few days before the Marshal's sale. This under our decision, in the absence of fraud, gave a legal title superior to the lien of a judgment obtained after the sale, and to the title of a purchaser at execution after the deed had been recorded. The whole onus of showing fraud was on complainants.

The principal evidence bearing upon this point tends to show:

That Isaac Burgett died intestate leaving a large estate and five heirs, to wit: John C., Henry E., Peter N., Isaac W., and Nancy P. Burgett, the last of whom afterwards intermarried with Grider. The estate was but little embarrassed, and administration was taken out only for the partial purpose of closing some business with his merchants. The heirs undertook amongst themselves to divide the bulk of the estate, especially the lands, of which there was a large quantity. In the course of this adjustment, Henry, Isaac W., Peter, and Nancy, on the 18th day of October, 1866, by deed conveyed to John C. their interest in the Council Bend lands, being four-fifths. The deed purports to have been made from their desire to make partition, and for the sum of $19,277, expressed to be paid. It was about the same time that the adjustment of the interests in the Home Place had been made. The Council Bend lands embraced a tract of about three or four thousand acres, composed of fractional sections and parts of sections. It was in a wild state, having only about forty acres cleared. This deed seems never to have been recorded.

On the 4th of November, 1867, John C. Burgett by deed, for the expressed consideration of $5,750 to him paid, conveyed the Council Bend lands (or what was meant to be that tract) to Isaac W. Burgett. But there is a discrepancy here which runs through the whole case, and which seems to have escaped

the notice of counsel and of the court below. The Council Bend lands lay in a compact body, in two ranges; some on the eastern side of range 6 east, and some on the western side of range 7 east. They were correctly described in the deed from the other heirs to John C. This is obvious to any one who will attempt to make a plat. But in the deed from John C. to Isaac W., of the 4th of November, the distinction of ranges is not preserved. All are stated to be in range 6 east, whereby some nine hundred acres or thereabouts are conveyed, to which probably John C. had no title, and all the lands in range 7 east are left in himself.

The mistake is patent, but would require the interference of a court of chancery, if necessary, to effectuate the intention. This deed was duly acknowledged at the time, but not recorded. John C. Burgett remained in possession, lived upon the place and cut cordwood for sale. The evidence shows that he did so under an arrangement with Isaac W. by which he was to hold as Isaac's tenant, and pay for the wood cut at a rate per cord, but fails to show satisfactorily that any payments were ever made for rent or on account of wood.

After this transaction John C. Burgett, on November 9th, 1867, executed to Henry Burgett his note for $11,564, due May 15th, 1868. This was assigned by Henry to Apperson & Co., on the 28th of November, 1867. They proved it in the bankrupt proceedings against John C. on the 11th of December, 1869; withdrew it on the 8th of March, 1870; brought suit in the Federal Court June 16th, 1871; recovered judgment April 16th, 1872; levied their execution on the lands on the 28th May, 1872; sold and purchased under execution August 7th, 1872; and, counsel says, obtained the Marshal's deed on the 20th January, 1873. The execution had been levied on the Home Place also. Before the sale the administrators of Isaac W. Burgett, on the 5th of August, 1872, had

caused the deed of the Council Bend Place from John C. to Isaac W. to be recorded; and at the sale they caused it to be announced publicly to the bidders present that all the lands included in the levy were claimed by the estate of Isaac W. The levy of the Marshal omits the east half of section 1, in range 7 east, which was in the Council Bend tract as conveyed to John C., and intended to be conveyed by him to Isaac. The proper numbers appear, however, in his certificate of purchase, dated of the day of sale.

According to the principles established in this court nearly a quarter of a century ago, and since maintained without question, the lien of the judgment was subject to all valid liens upon the lands at the time of the rendition, whether recorded or not. It bound only what the debtor then had, and was effective only to prevent future alienations or incumbrances. And it was further held, upon mature deliberation and examination of authorities, that notice of all liens or alienations attaching before the judgment might be given at any time before the sale of the lands under execution, and would bind the purchaser. (See *Rogers et al.* v. *Engles*, 16 Ark., 543.) And this notice might be actual, or by recording, or by the possession of the former grantee. (*Ib.*) The conveyance from John C. Burgett to Isaac W., of the 4th November, 1867, gave title superior to that acquired by Apperson & Co., unless the former can be held voidable for fraud.

The circumstances relied upon to establish fraud are the relationship of the parties, the secrecy of the conveyance, the continued possession of the vendor, the eve of bankruptcy, the inadequacy of the consideration, and the confusion and uncertainty of the proof as to payment.

The English rule, adopted under the lead of Twyne's case (2 Coke, 80 a), and followed in America with some modifications—that the possession of property retained in the vendor

is *prima facie* fraudulent, did not apply to the conveyances of real estate. Possession was not, as in case of personalty, a presumption of absolute ownership—or at least not so strong, and it was supposed that prudent purchasers or incumbrancers would look beyond that to the actual title. Yet possession of real estate would naturally afford some presumption of a possessory right, and in connection with other fraudulent circumstances, has been held proper for consideration. Whilst possession retained by the vendor will not, as in case of personal property, raise the *prima facie* presumption of fraud, it may oe a fact tending, with others, to show a secret trust. This is intimated in a note to Twyne's case, referring to 1 Roll Rep. 996, an authority which we have not at hand. See also on this point, *Paulding* v. *Sturgiss*, 3 Stew. 95; *Noble et al.* v. *Coleman & Gunter*, 16 Ala. 77; *Ogden Morell* v. *Scherrick*, 54 Ill. 269; and so a secret conveyance of land has been held in this State a badge of fraud. *Noble et al.* v. *Noble*, 26 Ark. 317. The fact, too, that John C. Burgett appears to have been greatly embarrassed in his circumstances, and that a few months afterwards he was adjudged a bankrupt, although, of itself, no badge of fraud, may be properly considered in estimating his intentions, in connection with other circumstances.

The consideration of $5,750 as the whole price of a large body of lands, for four-fifths of which he had a year before agreed to pay over $19,000, is, making the utmost allowance for shrinkage, grossly inadequate. If there were other considerations, they were not expressed nor shown with any satisfactory degree of clearness in the proof. The court is aware of the heavy decline of planting lands which followed the abolition of slavery and the prostration of the war, but the effects of this had been already experienced in October, 1866, and it does not account for so great a disparity in value between that

date and the 4th of November, 1867. The Supreme Court of Missouri, in the case of *Ames* v. *Gilmore et al.*, 59 Mo. 537, which was brought to set aside certain deeds as fraudulent, remarked: "It is a rule in considering such cases that while a slight inadequacy of price alone is very weak evidence, if the inadequacy is gross, it becomes a badge of fraud which may be considered by a chancellor, and becomes a controlling force when coupled with other circumstances tending to prove fraud."

Considering all the circumstances together, the condition of John C. Burgett at the time, the relationship between the parties, the inadequacy of the price and the unsatisfactory nature of the evidence of its payment, the failure of J. W. Burgett to record the deed or to take visible and notorious possession, the execution by John C. Burgett of his note for over $11,000 within four days afterward, and his petition in bankruptcy within seven months, the meager assets which were given up to the assignee, showing his utter destitution at the time, and thus raising the presumption that the deed to Isaac conveyed all his remaining property, we can not say that the Chancellor erred in decreeing the Council Bend lands subject to the claim of complainants.

The relief granted, however, went beyond the prayer of the bill, and beyond what reason and justice would dictate. Complainants very properly asked that the deed to Isaac W. Burgett of the Council Bend lands might be canceled and the lands left free for sale under their *alias* execution. This was in accordance with the views of this court heretofore expressed, that it is the better practice, in attaching fraudulent conveyances by creditors, to first get judgment and a levy upon the lands, and then apply to a court of chancery to remove impediments in the way of the sale of a clear title before the sale is made. By this course the interests of the debtor

are better protected, inasmuch as he is enabled to get credit for the full value of his lands upon a clear sale, whilst otherwise, in the face of prospective litigation regarding the fraudulent conveyance, the lands are generally bought by the creditor for a trifle, and the debtor left burdened with almost the whole of his debt. Whilst a purchaser at execution sale *may* afterwards file a bill to cancel previous fraudulent conveyances, the practice of making such sales is not to be encouraged. In this case the complainants have seemed to desire a re-sale, and it was obviously proper. There is no necessity, however, for leaving complainants to pursue their remedy by execution. The Chancery Court having jurisdiction of the subject-matter, and of all parties in interest, may complete the business, take notice of the judgment, and order a sale under its own directions, for its satisfaction, first sweeping away the cloud raised by the fraudulent conveyance and making all necessary corrections in the description of the lands.

The matter of costs was in the discretion of the Chancellor, which does not appear to have been abused.

Let so much of the decree as applies to the Home place be affirmed, designating the lands which compose it, and also let the decree be affirmed as to the costs of the court below, and let the costs of this court be adjudged against appellants, Apperson & Co.

Reverse so much of the decree as relates to the lands conveyed by John C. Burgett to Isaac W. Burgett, and known as the Council Bend lands, and as to that part let the cause be remanded, with instructions to proceed therein in accordance with the law and practice in equity and not inconsistent with this opinion, to subject said lands to sale for the satisfaction of complainant's judgment at law, and for such rulings as to future costs as to the court may seem meet.

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SCHEARFF ET AL. VS. DODGE.

1. MORTGAGE: *Lien of, discharged by payment or tender at the law day.*
Payment or tender of payment at the time mentioned in the condition of the mortgage, or payment *before* then, saves the breach of the condition, and discharges the lien and revests the legal estate in the mortgagor. In cases of tender, the debt still subsists as a personal liability against the mortgagor. But in the case of a sale by title bond, neither tender nor payment of the purchase-money divests the legal title of the vendor, nor does tender extinguish his lien on the land.
2. TENDER: *In bill for title, tender must be kept good.*
A vendee under a title bond asking a decree for title, must tender and bring the unpaid purchase-money into court before he can obtain a decree for title.

APPEAL from *Pulaski* Chancery Court.
Hon. J. R. EAKIN, Chancellor.
Duffee & Hill, for appellants.
Dodge & Johnson, *contra*.

TURNER, S. J.:

This is a suit in equity to enforce a vendor's lien on a title bond.

The complaint states that the plaintiff, R. L. Dodge, being the owner of the south half of block No. 246, west of the Quapaw line, in the City of Little Rock, did on May 1, 1868, sell the same to the defendant Charles Schearff, for the sum of $800, and thereupon executed to the said defendant a bond for title thereto, conditioned that upon the payment of the purchase-money as agreed and specified in said sale, and the building of a house upon the property as stated in the title bond, together with all future taxes thereon, then in that case the plaintiff bound himself to execute and deliver to the defendant a deed of conveyance in full of the legal title to the property.

That the defendant Schearff has paid to the plaintiff the

sum of $550, part of the purchase-money, leaving still unpaid his last note, dated May 1, 1868, for $250, with interest at ten per cent per annum from date until paid, no part of which has been paid except the sum of $25. That the defendant Augusta W. Lange purchased from her co-defendant Schearff all or part of said premises with a full knowledge that he had not paid the balance of the purchase-money. That demand has been made on the defendant Lange for the balance of the purchase-money and a deed tendered her as agreed upon and promised in the title bond, but that the defendant Schearff is nowhere to be found, and the defendant Lange has refused to pay said money. That the plaintiff has a vendor's lien upon the premises, wherefore he prays judgment against the defendants, Schearff and Lange, for the sum of $700, with costs, and in case of default of the payment thereof, that the premises may be sold, and the equity of redemption foreclosed.

With the original complaint is exhibited and made parts thereof a copy of the title bond, also of the note for the balance of the purchase-money and of the deed tendered to the defendant Lange.

The defendant answered, alleging that on the —— day of December, 1869, she purchased from her co-defendant Schearff the real estate in the complaint mentioned, and admits that the plaintiff sold the land to her co-defendant Schearff for the sum of $800, and executed to him a title bond therefor of the tenor and effect as described in the complaint; that the amount of purchase-money was divided into four payments, evidenced by the writings obligatory of the defendant Schearff, bearing interest at the rate of ten per cent per annum from May 1, 1868, until paid, all of which have been paid except the fourth and last installment for $250, which was due May 1, 1871; that on May 3, 1869, the sum of $25 was paid upon said last installment, being one year's interest; and that on May 1, 1871,

the day on which the fourth and last payment became due, the defendant, by A. W. Lange, her husband, tendered to the plaintiff the full amount thereof, with all interest due thereon, in legal-tender notes, and demanded of the plaintiff that he receive the same and deliver to her a deed for the land, as provided for by the title bond. That she kept the money deposited for a long time with John Reigler, in the city of Little Rock, with the full knowledge of the plaintiff, as a continuing tender, but that plaintiff refused to accept the same or make her a deed to the land, giving as a reason for his refusal that the defendant Schearff had sold the land before full payment, and had neglected to put up thereon a residence and other improvements. But that afterwards, on February 2, 1876, the plaintiff tendered her a deed for said land, conditioned that she would pay him the said last installment for $250, with interest from May 1, 1868, until said February 2, 1876, at the rate of ten per cent per annum, which defendant refused to do; whereupon plaintiff refused to deliver the deed.

The defendant further alleges that when she offered to pay said last installment in full, and demanded a deed for the land, it was worth $2,300; at which time she was offered said sum in cash for the land provided she would procure a deed therefor, and that in consequence of the plaintiff's refusal to make such deed she lost said trade and the $2,300 offered for the land. That the land has depreciated in value, until now it is not worth more than $1,000, and could not be sold for more than that amount even on long time. Wherefore she alleges that she has by said refusal of the plaintiff been damaged to the amount of $1,300, with interest thereon from May 1, 1871.

Defendant further alleges that all taxes were duly paid up to and including May 1, 1871, at the time of the tender, and since, including the year 1873; that she is advised that the plaintiff, by reason of his refusal to accept the tender, lost

whatever lien he might have had on the land for the payment of the purchase-money and has no equities to be enforced.

Defendant further insists that if mistaken in this, she is at least entitled to an abatement of interest on said last-mentioned installment from the time of the tender of payment until the tender of said deed, February 1, 1876, and that she is entitled to all of her damages occasioned by reason of plaintiff's refusal to make the deed on May 1, 1871. Wherefore defendant prays the court to ascertain the true amount of damages to which she is entitled, and the actual amount due on said land, and that plaintiff be required to make the defendant a warranty deed for the same.

The plaintiff filed an amended complaint making Augusta W. Lange a defendant to the suit, and the defendant filed an amended answer averring the tender of payment to have been made on May 1, 1871, instead of April 30, 1871, as averred in the original answer; and these were the only material changes in the original complaint.

The plaintiff demurred to defendant's amended answer, and for cause of demurrer to the second paragraph, wherein the defendant sets up a counter-claim or set-off, the plaintiff says:

1. That the said second paragraph does not set up facts sufficient to constitute a good cause, counter-claim, or set-off; and,

2. There is no equity set up in said paragraph.

And for cause of demurrer to so much of the first and second paragraphs as alleges that the said R. L. Dodge, by his refusal to receive the purchase-money when due and tendered, lost his vendor's lien mentioned in said bill, plaintiff says:

1. That the same does not set up facts sufficient to constitute a good cause of defense; and,

2. Because there is no equity in said defense.

And plaintiff demurs generally to the defendant's amended answer, for the want of equity.

At the September term, 1876, of the Pulaski Chancery Court, this cause, by consent, was submitted to the court on the demurrer to the first and second paragraphs of the answer; whereupon the said demurrers were sustained by the court.

And at the same term of the court (January 13, 1877), the parties appeared by their solicitors, and the defendants electing to stand on their answer so demurred to, and demurrer sustained by the court, and defendant refusing to answer further, the court adjudged and decreed that the plaintiff, R. L. Dodge, have and recover from the defendant Charles Schearff the sum of four hundred and forty-two and 42-100 dollars for his debt, with interest at the rate of ten per cent per annum, as damages, and all costs expended in the suit; and further ordered, adjudged, and decreed that the said sum as specified be declared a lien upon the following lot of land, to wit: "The south half of block No. (246) two hundred and forty-six, west of the Quapaw line in the City of Little Rock, bounded on the north by the north half of block 246, east by Izard street, on the south by Sevier street, and on the west by Chester street, situated in the City of Little Rock; and that unless said debt, damages, and costs be fully paid and discharged on or before the first day of June, 1877, that all right, title, interest, claim, and equity of redemption of the said Charles Schearff, Augusta Lange, and A. W. Lange be forever barred and foreclosed herein, and that John W. Callaway, who is hereby appointed a commissioner of this court in this cause for that purpose, shall advertise the said lot of land for sale for at least four weeks' insertion in some weekly newspaper published in the City of Little Rock, to be sold at the front entrance to the building in which this court is held, on a credit of three months, the purchaser to give bond and approved security for the purchase-money; and the said commissioner shall make report of his proceedings in writing to this court as soon as possible there-

after, and all the rights and equity of redemption of said defendants Charles Schearff, Augusta Lange, and A. W. Lange to said real estate are hereby barred and foreclosed. To which decree defendants excepted and appealed to this court.

The demurrers question the sufficiency of both the first and second paragraphs of the defendants' answer.

The demurrer to the first paragraph raises the question as to the sufficiency of the tender. Was it a good tender? and, if so, how did it affect the debt and interest? or, if not good, did it retain the plaintiff's lien or interest in the land sold? As we have seen, this suit is founded on a sale of real estate by title bond, a mode of conveyance long in use not only in this State, but it is believed in most of the States in the Union. Such a sale has been likened unto a mortgage, the *vendee* occupying the relation of *mortgagor*, and the *vendor* that of *mortgagee*. Not in form it is true, but in substance, a mortgage, with the usual incidents of a mortgage. This court has repeatedly so decided, and so have the courts of Tennessee, Alabama, Mississippi, and other States. These decisions recognize the contract of sale by title bond as having the legal effect of creating a mortgage lien upon the estate sold, for the security of the unpaid purchase-money, as effectually as if the vendor had first conveyed the whole estate by deed, and simultaneously had the same reconveyed to him by mortgage-deed. See *Smith et al.* v. *Robinson*, 13 Ark. 533; *Harris* v. *King*, 16 Ark. 126; *Moore* v. *Anders*, 14 Ark. 628; *Hall* v. *Denckla*, 28 Ark. 506; *Johnson et al.* v. *Nunnelley*, 30 Ark. 153.

But notwithstanding the resemblance by implication of such a contract of sale to a mortgage, the analogy is not in all things complete.

At common law a mortgage is regarded as a conveyance in fee, the legal title vesting in the mortgagee, while the equity of redemption remained in the mortgagor; and this construc-

tion has been thought best adapted to give to the creditor full protection in pursuing and enforcing his security, while the mortgagor is secured in his right to redeem.

This is the doctrine of the English courts, and, we think, a majority of the American States, including Arkansas, have adopted the same construction of the law. Some of the States have modified it to some extent, mostly by statute, it is believed, so that a mortgage is regarded in those States merely as a pledge, the rights and remedies under it being wholly equitable.

In the case of a sale by title bond, the vendor does not convey the legal estate to the purchaser, as in the case of a mortgage, but reserves and retains it in himself, as a security for the payment of the purchase-money, and he is only bound by the express terms of the contract to convey the legal title to the purchaser upon the payment of the purchase-money, or the doing of some other act required to be done by the terms of the contract.

In the case of a mortgage, payment, or tender of payment, at the time mentioned in the condition of the mortgage, or payment before the day named in the condition, saves the breach of the condition and discharges the mortgage lien, and invests the legal estate in the mortgagor without any reconveyance, by the simple operation of law; but the debt subsists as a personal liability in cases of *tender*, after the estate is divested, and may be recovered as such by an action at law. See 2 Jones on Mort., secs. 891, 892, 886; 34 N. J. 496.

But in the case of a sale by title bond, the payment, or tender of payment, at the time mentioned in the bond, or at any other time, does not divest the legal title of the vendor, and does not by operation of the law, or otherwise, vest any legal or other title in the purchaser (mortgagor) than that which he previously had; but if the vendor fails to make the

purchaser a legal title to the premises sold, upon payment, or tender of payment, properly made and demand therefor, he can then successfully appeal to a court of equity for relief and ask its decree for the legal title to the premises. In the meantime, the purchaser must keep his tender good, and bring the money into court before it will decree him a legal title.

In this cause it is contended by learned counsel that inasmuch as the defendant Lange, who had succeeded to the rights of her co-defendant, Schearff, tendered to the plaintiff full payment of the principal and interest of the last installment of the purchase-money on the day when due, that therefore, by analogy to the case of a common-law mortgage, the lien is discharged. Can this conclusion be true?

We have seen that by the terms of the contract of sale there is no binding obligation on the vendor to make title to the purchaser until the whole of the purchase-money is paid. If this be so, by what process can the purchaser acquire a legal title to the premises? It can only be done through the aid of a court of equity, consequent upon the payment of the purchase-money, or a good tender and refusal, and demand of title from the plaintiff, and until this is done the legal estate remains vested in the vendor. It was reserved in the vendor by the contract of sale as a security for the purchase-money, and can only be divested by the decree of a court of equity or by his voluntary conveyance.

The learned counsel for the defendants admit that if the *defendant* Lange had sought the aid of a court of equity, setting up her tender and demanding a deed, the court would have decreed her a title upon payment of the amount called for in the bond, abating the interest from the date of the tender of the money until tender of the deed by plaintiff.

True the *defendant* does not come into a court of equity asking a decree for title to the real estate sold, but the *plaintiff*

comes into equity, making the defendants parties to the suit, seeking to enforce the vendor's lien on the real estate sold, to secure the remaining balance of the purchase-money. The parties were all before the court, each claiming certain equitable rights; and the court may well take cognizance of the whole case and adjust the equities of all the parties to the suit and render such decree in the premises as the principles of equity may seem to warrant, and this without doing violence to the oft-quoted equity maxim, that "*he who goes into a court of equity asking equity, must do equity.*" Assuming that the contract of sale by title bond is to all intents and purposes a mortgage, and governed by the rules of law applicable to a common-law mortgage, was the tender, under the circumstances of this case, such a tender as would discharge the vendor's lien? We think not. Referring to the title bond exhibited with the original complaint and the answer, we find the following *proviso* embraced in the bond, and constituting a part of the contract: "Provided, however, that said Charles Schearff shall not dispose of said property, or any part thereof, until he has fully paid for it, or until he has put up a residence theron and made such other improvements as his means will allow, within three years from date."

Before the purchase-money was paid, or the tender made, the defendant Schearff sold the land to his co-defendant, Lange, nor is it pretended that the defendants, or either of them, ever put up a residence on the premises or made other improvements thereon, as required by the terms of said proviso, and therefore the plaintiff may have well refused to accept the payment tendered, because of the failure of the defendants to comply with certain provisions of the contract intended for the benefit of the plaintiff. It may have been unwise for the plaintiff to refuse the money when tendered, but we think he had a right to do so without compromising his

lien upon the real estate sold. Applying, then, the most rigid rules of law applicable to the common-law mortgage in their bearing on the effect of tender at the law day, the lien, we think, remains in full force.

If the tender of payment had been made when the last installment became due and the other provisions of the title bond had been complied with, still the vendor's lien would not be affected. The legal estate being in him, the purchaser has merely an equity of redemption in the land, and no act of his can possibly affect the vendor's title, nor can he in any way be divested of it except the purchaser fulfill his contract, and by that means become entitled to a conveyance. If then the vendor refuses to convey the legal estate to the purchaser, he can appeal to a court of equity and ask that the legal title be decreed to him according to the terms of the contract.

The effect of a tender properly made is to stop interest on the debt tendered, and to relieve the party making the tender from the burden of all costs subsequently made in any proceeding to redeem or foreclose the mortgage, but in this case it can have no such effect.

The defendant having failed to pay the last installment of the purchase-money, the plaintiff tendered the defendant Lange a deed for the land, and demanded payment of the remaining purchase-money, with the interest due thereon, which being refused, the plaintiff instituted this suit for the foreclosure of the title bond.

The view we take of the matters of defense set up in the first paragraph of the answer disposes of the counter-claim for damages set up in the second paragraph; for if there has been no payment of the last installment of the purchase-money, and no valid tender of the money, certainly the defendant Lange can have no legitimate claim for damages because of the plaintiff's failure to do a thing which, under the circum-

stances, he was not bound to do, and we do then deem it wholly profitless to indulge in speculations concerning the depreciation in the value of the real estate sold, since the alleged tender of payment.

We think the demurrers to the first and second paragraphs of the answer were rightly sustained; and as we find no error in the Chancellor's decree, it is in all things affirmed.

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Little Rock & Fort Smith Railway Company vs. Barker and Wife.

1. Damages: *Measure of, for injuries resulting in death.*

The measure of damages to a mother for the negligent killing by a railway train, of her infant child, is, under the statute, the expense necessarily incurred by her for medical attendance, nursing, and burial of the child, and reasonable compensation for the loss of the probable services of the child during its minority. For the loss of companionship and association of the child, and the grief of the mother at its death, the statute gives no compensation.

2. Practice at Law: *Instructions.*

Where there is any evidence tending to prove the issue for the plaintiff, the Circuit Court can not instruct the jury that there is no evidence on which they can find a verdict for him.

3. Same: *Motion for new trial. Practice in Supreme Court.*

Where a motion for new trial does not object that the verdict is contrary to the evidence, or is without evidence in support of it, the Supreme Court will not consider the sufficiency of the evidence further than may be necessary in considering the correctness of the instructions based upon it.

4. Same: *Instructions.*

In basing an instruction on hypothetical facts, disputed facts should not be assumed to be true, nor should facts be stated hypothetically which do not appear in evidence.

APPEAL from *Lonoke* Circuit Court.

Hon. J. W. Martin, Circuit Judge.

Clark & Williams, for appellant.

Hughes and ———, *contra*.

ENGLISH, C. J.:

This action was commenced in the Circuit Court of Pulaski County, on August 14, 1875, by Emma O. Ammon against the Little Rock & Fort Smith Railway Company.

The complaint alleges, in substance, that on April 26, 1875, while the plaintiff's son, Alpheus D. Ammon, a child five years old, without discretion, and without any knowledge or negligence of the plaintiff, was playing on or near the track of the defendant corporation, in the town of Argenta, etc., the defendant, by its agents and servants, carelessly and negligently caused one of its locomotives, with a train of cars attached thereto, to approach said child with great and unusual speed, and then and there to pass rapidly over the track of said company, and negligently and carelessly omitted while so approaching said child to give any signal, by ringing the bell or sounding the steam whistle, in time for the child to be rescued from danger, or get from the track, and also negligently and carelessly omitted to stop said locomotive and cars, although it had ample time therefor before reaching said child. That by reason of said negligence of the defendant the said locomotive struck said child, ran over and crushed both his legs, and so severely bruised and lacerated them that it was necessary to amputate both of them, and in consequence of said injury said child suffered great and indescribable bodily pain, and died from said bruising and crushing about ten hours thereafter, on said April 26, 1875, before which time said child's father had died, whereby an action accrued to plaintiff, the mother of the child, against the railway company, and by which she has been damaged in the sum of $20,000, for which she prays judgment.

By an amendment to the complaint filed May 24, 1876, the plaintiff alleged that a part of said damages accruing to her as alleged in said complaint was a large amount of money necessarily paid out by her for the attendance of a physician, and

all funeral expenses attending the child's burial, amounting to —— dollars, and a part consisted in the loss of the services, companionship, and association destined to be rendered by said child to plaintiff.

The defendant filed an answer to the complaint, and on its application the venue was changed to the Circuit Court of Lonoke County.

In the Lonoke Circuit Court, September term, 1876, it appearing that the Clerk of Pulaski Circuit Court had failed to transmit the answer of defendant to the complaint, there was a consent order that defendant have leave to supply such answer, in short, upon the record, setting up contributory negligence on the part of plaintiff and her child, and denying negligence on the part of defendant.

The plaintiff having, since the institution of the suit, intermarried with F. B. Barker, on her motion he was joined with her as plaintiff.

The cause was submitted to a jury, and, after the evidence was introduced, the court gave thirteen instructions to the jury, on motion of plaintiffs, "to the giving of which instructions," the bill of exceptions states, "especially the 3d, 6th, 9th, 10th, 11th, 12th, and 13th, the defendant objected, and the court overruled its objection."

The defendant moved seven instructions, all of which the court gave.

The jury returned a verdict in favor of plaintiffs for $4,500 damages.

The defendant moved for a new trial, on the grounds:

1. The court erred in the rule of estimating damages, and in allowing funeral expenses to be estimated, and admitting evidence of such expenses.

2. The court erred in instructing the jury as moved by plaintiffs.

3. The damages assessed by the jury are excessive.

The court overruled the motion for a new trial, and rendered final judgment for plaintiffs in accordance with the verdict. The defendant took a bill of exceptions, setting out the evidence, instructions, etc., and appealed to this court.

I. By the common law the death of a human being could not be made the subject of a civil action. *Baker* v. *Bolton et al.*, 1 Camp. 493; Sedg. on Dam. (6th Ed.), 551, 694.

By section 1 of the act of February 3, 1875 (Acts of 1874–5, p. 133), "All railroads which are now or may hereafter be built and operated in whole or in part in this State, shall be responsible for all damages to persons and property done or caused by the running of trains in this State." (See sec. 12, art. 17, Const. of 1874; also, sec. 32, art. 5.)

By section 3 of same act, "When any adult person be killed by railroad trains running in this State, the husband may sue for damages to a wife. In all other cases the legal representative shall sue. If the adult be wounded, he may sue in his own name. When the person killed or wounded be a minor, the father, if living; if not, then the mother; if neither be living, then the guardian may sue for and recover such damages as the court or jury trying the case may assess."

In this case the mother sued the appellant railway corporation for damages for the negligent killing of her infant son, and she may unquestionably maintain such action under the above statute, though she could not by the common law.

II. The first and third grounds of the motion for a new trial present the kindred questions—what is the measure of damages in this action, and, were the damages assessed by the jury excessive? And in connection with these questions, the substance of the evidence relating to the subject of damages may be stated.

Mrs. Barker testified that she was living in Argenta (on the north side of the Arkansas River, opposite Litttle Rock), on

April 26, 1875, and that her son was killed on that day. That in the morning, after breakfast, her servant asked her little son to go with her to the telegraph office. He started out of the house with the servant, and she supposed had gone with her. He was brought in in ten or fifteen minutes with both legs cut off near the knees. It was Monday morning about ten o'clock. She was then a widow, her husband being dead. The servant was trusty and careful. The telegraph office was about 300 yards from her house. Her house was about 75 yards from the railroad. An old shop in the view would have prevented her from seeing the child at the place where the accident happened. It was about 150 yards from her house to where the boy was killed. He lived, after he was hurt, until about eight o'clock at night; Dr. Skipwith attended him. He came within half an hour after the child was hurt. Other physicians were called in. They amputated the crushed leg just above the knee. The other leg was cut off entirely, before. Her circumstances were limited; had no property at the time. Kept boarders and supported her own house. The only servant she kept was her cook. Was not able to employ a nurse for the boy. Her household business required her attention until after the housework was done. She was sewing at the time the boy was brought in. Was poor. Her house was inclosed with a plank fence. The child was killed on the Little Rock & Fort Smith Railroad. She first called in Dr. Jones, and Dr. Skipwith brought in several others.

Plaintiff's counsel then asked witness as to the cost of funeral expenses, to which defendant objected, admitting that reasonable funeral expenses would be admissible. The court decided that reasonable funeral expenses were such as the jury could allow, if defendant were liable at all, and that proof of such expenses was admissible, to which ruling defendant excepted.

Witness (Mrs. Barker) then stated that the medical expenses were $210, and that the funeral expenses did not exceed $90, and consisted of burial clothes, with coffin, carrying the child to Memphis by railroad, and there burying it with her relations. She hired three carriages in Memphis, in one of which she rode with the coffin.

The court instructed the jury that the railroad expenses would be disregarded, but when the witness was asked how much it cost, she said that she herself had a free pass, but did not know what the other items of funeral expenses or transportation were; that others paid it for her, and furnished the amount, which was $90.

To all of this testimony the defendant objected, but it was permitted to go to the jury with the qualification and exception above stated, to which defendant excepted.

Witness further testified that her child's health was good, and that she had no other child. That the services of the child at the time of his death were not much, but would have been her main support, had he lived. Would have been of service to her at ten years of age. He would have been of some service from the time of his death. Her house was inclosed with plank fence, and had a gate. She could have kept the child within the inclosure, and did do it when she thought it necessary. She had intermarried with Barker since she brought the suit.

Dr. E. H. Skipwith, witness for plaintiff, testified that he was called to see the child. It had been terribly mutilated. The only hope of saving it was to amputate both legs. One was crushed from the joint above the knee down. The other was cut off just below the knee, and so mangled that it was necessary to amputate both legs above the knees. Drs. Jones and Dodge were present and assisted in the operation. Witness first saw the child about nine o'clock, A. M. Had been a

regular practicing physician for fifteen years. The child died about eight or nine o'clock, P. M., that night. Its death was caused by prostration from loss of blood from the crushed limbs. He practiced in the family nearly a year. The child was a sprightly, robust child. The services of the child from its death until twenty-one years of age were worth $10,000. The bill of witness was $200 for amputation, not including medicine. The funeral expenses, he supposed, were worth $50.

CROSS-EXAMINED FOR DEFENSE.

Q. How do you know what this child would have been worth?

A. I do not know exactly.

Q. Do you know much about it?

A. No, not much.

Q. Why do you then say that it is $10,000?

A. That is my idea under all the circumstances of this case, and that was the question I was asked.

Q. No difference about the question. I ask you now, what do you think it is worth in money?

A. I do not know exactly; perhaps you know more about it than I do.

Q. I am not swearing, you are the witness; what do you say?

No answer.

Q. Doctor, you have a step-son about twelve years old; what would you consider him worth—$10,000 from five to twenty-one?

A. Yes, I would; boys between twelve or sixteen and twenty are worth $75 or $80 per month.

Q. Is this not rather an unusual thing, and an extraordinary boy who will get it?

A. I suppose it is not ordinary.

Q. From fifteen to twenty-one is six years. Do you suppose a boy would, on an average, earn more than $720 a year from fifteen to twenty-one?

A. I think not.

Q. Would it not be an extraordinary case that he would earn that?

A. I think it would be extraordinary, but many boys are worth it, and some more.

Q. Would you not deduct from these earnings board and clothing?

A. Yes.

Q. How much?

A. I do not know exactly.

Q. Would $30 per month, or $360 per annum, be too much?

A. No, I think it would take that, at least.

Q. Doctor, taking $720 per annum as the best rates a boy can earn on an average for the last six years of his minority, as you say, it would amount to $4,370. Deduct six years' expenses at $360 per annum, making $2,160, and it leaves the net earnings $2,210 for the last six years.

A. I have not made the calculation; you say so.

Q. What do you say?

A. I do not know.

Q. Well, doctor, how much could the boy have earned between five and fourteen? Do you think it would have been $7,000 or $8,000, so as to make up your first rate of $10,000?

A. I do not know; he could work a good deal.

Q. Do you think a boy is capable of earning anything, under twelve years old?

A. It generally costs more to raise a child from five to twelve or fourteen than it can earn in that period. I have known children at five or six to earn good wages—$20 per

month—as cash-boys in stores, and as news-boys, in New Orleans.

Q. Are these not rare cases?

A. Very rare.

Q. Do you know of any at Little Rock?

A. No.

Q. Was your estimate of $10,000 based on any pecuniary calculation?

A. It was not, and I really know but little about it; in making my estimate I took into consideration that this was an only child, and considered the child as worth more on account of the relationship to its mother.

William Richardson, witness for plaintiff, testified that he did not know precisely what the child's services would have been worth. "After a child was ten or twelve years old, he would have been worth $25 or $30 per month; from seventeen or eighteen to twenty-one he would have been worth $75 or $80; from twelve to seventeen he would have been worth $60 to $70. From five to ten years old he was worth $8 or $10 per month, in excess of the expenses." The child was an intelligent, sprightly, well-grown, healthy, and perfect child of its age, had no natural infirmity, and big enough to run errands, bring chips and wood, and carry a small bucket of water.

On cross-examination, he stated that he was nineteen years old, and brother of Mrs. Barker, mother of the child. He got $35 per month when he was between twelve and fourteen. At fourteen he got $2 per day. Was now getting $1.50 per day, at nineteen years old. When he got $35 per month, his board cost him $18 per month, and about the same when he got $2 per day. He helped support himself and sister from the time he was twelve. She had a husband part of the time,

and when she was a widow she kept boarders, sewed and worked herself. His clothing cost him about $50 per year. No other expenses. His earnings were better than most boys. He would have felt satisfied had the child lived and done as well as he had.

Capt. W. C. Robinson, for defense, testified that a boy from five to twenty-one might be worth $100 per year, over and above expenses, and to a widowed mother double that sum; but he knew of no boy who was worth more than his living. He had raised one to eighteen years of age, and did not consider him worth more. He would not take an ordinary boy until twenty-one for his services; he might be worth $100 per year and board and clothing; to a mother, double that sum.

The seven instructions which the court below gave to the jury on the motion of appellant, all relate to the subject of negligence on the part of the servants of appellant, and contributory negligence on the part of the plaintiff mother, and her child. None of them relate to the subject of damages, and appellant asked no charge on that subject. So all of the instructions given by the court at the instance of appellees, except the tenth, relate to the subject of negligence.

The tenth follows:

"If the jury find for the plaintiff, they may assess damages for not only the medical attendance upon, and nursing of the deceased before death, and reasonable funeral expenses after death, but such other pecuniary damages as, under all the circumstances proven, they may consider reasonable."

In this country, under statutes similar to ours, as well as in England under Lord Campbell's Act (9 and 10 Vict., ch. 93), the ground of recovery must be something beside an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecun-

iary standard. Exemplary damages are, therefore, not to be recovered unless the statute expressly, or by implication, allows them, as in some instances (California, for example: *Meyers* v. *City of San Francisco*, 42 Cal. 217) it does. But in estimating damages, some departure from the standards applied in other cases is essential, as otherwise, in some cases, no recovery could be had at all, though the statute plainly gives the action. If a parent sues for the killing of a minor child who is yet too young to render service, it is manifest that for the time being there could be no pecuniary loss whatever; and whether the child, if living, would ever become serviceable, must be matter for speculation only. Yet, as the statute plainly gives the right of action for the benefit of the parent, without restriction as to circumstances, but manifestly assumes that there is some injury in every case, the right to recover in these cases must be deemed unquestionable. Cooley on Torts, 272.

The damages are not to be given as a *solatium*, but must be founded on pecuniary loss, actual or expected; and mere injury to feelings can not be considered. *Ib.* 473, and cases cited; Sedg. on Dam. (6th Ed.), 696 and notes.

The statute giving the mother, the father being dead, the right to sue appellant for damages sustained by her by reason of the killing of her infant child, any necessary expenses incurred by her for nursing and medical attendance before its death, and for burial expenses afterwards, were proper elements of estimate by the jury in making up the damages to be awarded to her, if they found the appellant corporation guilty of the negligence imputed to it in the complaint. *Pennsylvania R. R. Co.* v. *Barton*, 54 Pa. St. 496; *Cleveland & Pittsburg R. R. Co.* v. *Rowan*, 66 Pa. St. 399.

The value of the services of the child, lost to the mother by the death of the child, was also a legitimate element to be esti-

mated by the jury in making up their verdict upon the question of damages.

The statute prescribes no rule for estimating such damages, but the construction which has been given to similar statutes by the courts must furnish the guide. Nor does our statute limit the amount of the recovery, as the statutes of some of the States do, but juries are not warranted in finding verdicts for sums disproportionate to, or in excess of, the probable pecuniary loss of the parent, occasioned by the death of a child. Reasonable damages only, in view of all of the circumstances in evidence, should be awarded. *Pennsylvania R. R. Co.* v. *Barton, supra.*

We find no substantial error in the ruling of the court below in relation to the admission of evidence of funeral expenses, nor in giving the tenth instruction, above copied, as far as it goes.

Counsel for appellant submit that the damages allowed by the statute to the mother for the killing of her child are such only as the child would have recovered at the moment of its death, and that nothing can be awarded to her for the loss of after-service; that the loss of service in this case must be limited to the period that intervened between the time the injury was inflicted upon the child and its death, which was ten hours. If this be true, had the child been killed instantly, the mother could have recovered nothing but such expenses as she necessarily incurred in the burial of the child, and this construction of the statute would render it nugatory.

Counsel also submit that no loss of after-service is alleged in the complaint, and that therefore there could be no recovery for such loss, citing *Gilligan* v. *New York & Harlem R. R. Co.*, 1 E. D. Smith, 461.

It is true that in the original complaint there is no allegation of loss of service, or special damages by reason of expenses

incurred; but in the amendment to the complaint the plaintiff claims damages for money necessarily expended for medical attendance and in the burial of the child, and also for loss of the *services*, companionship, and association destined to be rendered by the child to the plaintiff.

For the loss of the companionship and association of the child, and for the grief of the mother on account of its death, the statutes, interpreted in the light of judicial decisions upon like statutes, afford the bereaved mother no compensation. Such loss and such grief would be difficult to measure and can not be compensated by money; and the court below, in its charge to the jury, should have so declared the law to be.

We close this branch of the case by announcing our conclusion, that when a mother sues a railway corporation under the statute for the negligent killing of her infant child, the *measure of damages* is the expense necessarily incurred by her for medical attendance, nursing, and burial of the child, and reasonable compensation for the loss of the probable services of the child during the period of its minority, difficult as it may be to estimate the value of such loss.

III. We will next endeavor to determine whether the damages awarded by the verdict in this case are excessive.

The jury fixed the damages at $4,500. The plaintiff mother testified that the medical expenses were $210. She thought proper to take the child to Memphis and there bury it with her relations, and the whole of the funeral expenses, including transportation, did not exceed $90. The court instructed the jury that railroad expenses would be disregarded, and she then stated that others paid the funeral expenses for her. Whether they were paid as a gratuity, or the persons paying them looked to her for reimbursement, she did not state. Dr. Skipwith valued the funeral expenses at $50, and it may be supposed that the jury allowed that much under the charge of the

court. Adding the medical bill and funeral expenses together, making $260, and deducting that from $4,500, the whole sum allowed by the verdict, and it leaves $4,240, as awarded for the loss of service.

The child was five years old when killed and sixteen years under majority. The verdict gave the mother (and her second husband) $265 for each year, or $22.08 for each month, or 84 cents and 6 mills for every work day during the whole period of its minority, making no deduction for boarding, clothing, education, loss of time, expense of sickness, and assuming that the child would have lived, and served its mother until it was of age.

In *City of Chicago* v. *Major*, 18 Ill., 349, the suit was by the father as administrator of a child four years old, which fell into a water-tank constructed by the city, and was drowned, and its death was alleged to have been caused by the negligence of the city. The jury rendered a verdict for $800 damages. The court held that the father could maintain the action, under an Illinois statute, as administrator of the child, and said: "The rule is that the plaintiff's damages must only be estimated for pecuniary loss suffered by the death of the deceased, without taking into account the mental anguish or bereaved affections, and the jury must make their estimate of such pecuniary damage from the facts proved, and that it was not necessary that any witness should have expressed an opinion of the amount of such pecuniary loss. In this case, as in all others, it was proper for the jury to exercise their own judgment upon the facts in proof, by connecting them with their own knowledge and experience, which they are supposed to possess in common with the generality of mankind. It is only when witnesses are supposed to possess a skill and judgment superior to the generality of mankind upon a particular subject that their opinions are allowed to go to

the jury, for the purpose of supplying the supposed want of experience and judgment of the jury. Where such aids are not attainable or are not produced, then the jury must be guided by their own best judgment, applied to the facts in proof, for the purpose of arriving at a conclusion."

The court refused to set aside the verdict on the ground that the damages assessed were excessive.

In *Louisville & Nashville Railroad Co.* v. *Connor, Adm'r'x*, 3 Heiskill (Tenn.), the mother sued, under a Tennessee statute, as administratrix of her infant child, eighteen months of age, which was run over and killed by a train of cars on defendant's road; the jury assessed the damages at $3,000 and the court below refused to grant a new trial. On appeal the judgment was affirmed, the court passing upon questions of law relating to negligence, etc., but saying nothing as to the amount of damages awarded by the jury,

In *City of Chicago* v. *Scholten*, 75 Ill., 469, the father, as administrator of his deceased son, sued the city, under a statute, for causing the death of his son, twelve years of age, through negligence in respect to the side-walks of the city, and the jury gave a verdict for $2,833.33, and the city appealed. The court below instructed the jury that if they found that the city had been negligent, etc., they had "a right to find for plaintiff and should assess the damages at such sum as will, in the judgment of the jury, compensate the plaintiff, and those in whose interest he sues, for the loss of deceased." Mr. JUSTICE SCOTT, delivering the opinion of the Supreme Court, said: "Where the next of kin are collateral kindred of the deceased and have not received pecuniary aid from him, proof of such relationship would warrant a recovery of nominal damages only; but when the deceased is a minor and leaves a father, entitled to his services, the law presumes there has been a pecuniary loss for which compensation, under the

statute, may be given. In such cases the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation. No doubt the damages could be greatly enhanced by proof of the personal characteristics of the deceased. Evidence of mental and physical capacity to be of service to his father in his business, his habits of industry and sobriety, where the deceased is old enough to have established a character, are elements to be considered in assessing the pecuniary loss. But the instruction may be liable to a just criticism because of its ambiguity as to the nature of the damages the jury were at liberty to award. It should have contained some words of limitation that would have expressly restricted the damages plaintiff might recover, to the pecuniary injury sustained. No other damages are recoverable under this statute. The court should have added the qualification indicated. In its present form, it stated the rule as to damages recoverable in such actions, too broadly, and may have made the impression damages could be awarded for bereavement and by way of solace for the affliction suffered. Such is not the law."

The judgment was reversed.

It has been held that when the suit is brought for the benefit of the mother, an award so large that the interest upon it would exceed all the probable earnings of her son, is manifestly greater than the pecuniary loss could possibly be, when it appears that the deceased was without property or other expectations. *Cooley on Torts*, 274; *Chicago R. R. Co.* v. *Bayfield*, 37 Mich., 205; *Rose* v. *Des Moines Valley R. Co.*, 39 Iowa, 254.

In this State it is allowable and customary to loan money at ten per cent conventional interest. The sum of $4,240, awarded the mother for loss of services of her son in this case,

would, if safely invested at such rate, yield the mother an annual income of $424, not only for each year of her child's minority, but for after years, when, if it had lived, it would cease to owe her service.

In *Rose* v. *Des Moines Valley R. Co.*, *supra*, the subject of the action was the killing of an unmarried man, twenty-four years of age, by occupation a harness-maker, whose expectancy of life was thirty-eight years. It was proved that he was a man of temperate and industrious habits, and that his net earning at the time of his death was $263.11, annually. The action was brought by his administrator for the benefit of his estate, and the jury awarded $10,000 damages. On appeal the Supreme Court held the damages excessive on the logic that one-half the sum awarded, at six per cent interest would produce annually, a net income greater than that earned by the deceased, and at ten per cent (the customary rate in Iowa), would produce annually nearly double the sum that he would annually earn during the expectancy of life, and the court refused to affirm the judgment unless the plaintiff would enter a remittitur for $5,000.

In this case the mother had a claim upon the earnings of her child for sixteen years. At the time of its death it was earning nothing, and would probably, if it had lived, earned her but little over and above its support for half the remaining years of its minority; and yet the jury gave her $265 for each of the sixteen years, a larger sum than the net annual earnings of the unfortunate Iowa harness-maker; and the Supreme Court of that State would allow his administrator but $5,000 upon an expectancy of manhood life of thirty-eight years, when here the jury awarded the mother $4,240 upon an expectancy of sixteen years of the minority life of her son.

In *Allen* v. *Atlanta Street Railroad Co.*, 54 Georgia, 501, it was decided that a father could not maintain an action for

damages on account of the homicide of his infant child, which was, at the time of its death, incapable of rendering him any service (the child was two years old); that there could be no recovery for loss of future services.

Such a construction of our statute would render it of no effect. If the minor is capable of service when killed, there is no loss to the father or mother for past services, for he or she has received them to the time of the killing, and if there can be no recovery for loss of probable future services, there can be no recovery at all, and the statute which gives the right of action would be worthless.

In *Cleveland & Pittsburg R. R. Co.* v. *Rowan*, 66 Penn., 395, Rowan and wife sued the company for killing a son of the wife, eighteen years old. The court below instructed the jury that if defendant was guilty of gross negligence in reckless running of the train by which the son was killed, they might award exemplary damages. The jury awarded $2,372.93. The Supreme Court held that this instruction was erroneous, that under the statute, pecuniary and not exemplary damages by way of punishment, was allowable. That the pecuniary value of the services of the son during minority was the measure of damages, which the jury must discover and determine from all the evidence, etc. The judgment was reversed for error in the instruction.

Railroad agents may be punished criminally for gross negligence, resulting in death.

In *Pennsylvania R. R. Co.* v. *Barton*, *supra*, the mother, a widow, sued for the killing of her son, thirteen or fourteen years of age, and the jury gave her $1,748, and, on error, the Supreme Court affirmed the judgment.

In slavery times, for some years before the civil war, a boy five years old would not have sold for more than $500, and the purchaser would have acquired a legal right to his services for life.

A good-looking young man would sell for $1,500 to $1,800; the price was fixed by the common judgment of experienced men, in reference to the value of the probable services of the man, over and above expenses for life. Mechanics and skilled laborers were more valuable than ordinary hands, and age, health, intelligence, habits, etc., were considered in estimating values.

Reference is made to estimates put upon the value of slave labor for illustration only. We would not say that the services of a child to a mother, prompted by duty and affection, are not more valuable than services rendered by compulsion, nor that services stimulated by fair compensation are not more valuable than involuntary services rendered for mere maintenance. Nor do we mean here to enter into a comparison of the relative value of the services of persons of different races; the true value of human labor must be estimated by considering all circumstances and conditions attending it.

In this case the mother was a widow, poor, and kept a boarding house for a living. The son, her only child, was five years old when killed. He was intelligent, healthy, and promising. If he had lived, and remained obedient to his mother until he was of age, his services would have increased in value as he advanced in years. If given no education, he would have earned for her the wages of ordinary labor only. If sent to school or apprenticed to fit him for skilled employment, expense and loss of time would have followed.

An impartial jury, of sound judgment and experience, properly instructed as to the measure of damages by the court, would consider all the facts, circumstances and contingences in fixing a reasonable value upon the probable services lost to the mother by his death.

The opinions of the witnesses in this case are of no great value. Dr. Skipwith, who was the family physician and manifestly in sympathy with the bereaved mother, at the outset

lumped the value of the child's services from five to twenty-one years at $10,000. It was drawn from him on cross-examination that his estimate was not based upon any pecuniary calculation. He could not be made to figure up the value of the services, without putting rare instances, at more than $2,210.

Wm. Richardson, the brother of the mother and uncle of the child, was only nineteen years of age, and could have had no experience in the raising of boys to the age of twenty-one years, and he had not lived long enough to make his observation of much value. He undertook to estimate the monthly value of a child's services, in excess of expenses, from five to twenty-one years of age, and run it up from $8 to $80 per month, without making any allowance for loss of time, or expense in schooling or apprenticeship to fit the boy for skilled employment, and an increase of wages over such as ordinary labor commands.

At the time he testified he was getting $1.50 per day, which was equal to $39 per month, allowing twenty-six work days to the month. He paid $18 per month for board, and $50 a year for clothing, which was a little over $4 per month. His expenses then were $22 per month, and his wages $39, leaving him a net monthly earning of $17.

The jury gave the mother of the child $22.08 for each month of the sixteen years of its minority.

Capt. Robinson's experience and observation in the raising of boys had not impressed him that it was a profitable business. A boy might be worth $100 per annum over and above his board and clothing, and to a widowed mother double that sum. If this be true, the verdict of the jury should not have been more than $3,200 for loss of service.

We are satisfied that if the facts of the case were submitted to one hundred impartial men, of sound, discriminating judg-

ment, of experience and observation in the raising of children, properly instructed in the law as to the measure of damages, ninety-nine, if not all of them, would say that the damages awarded in this case for loss of probable service were excessive, and such is our judgment.

IV. As to negligence.

Counsel for appellant submit that the killing of the child, under the circumstances disclosed by the witnesses, was an unavoidable accident; that the agents of appellant were guilty of no culpable negligence, and that upon all of the evidence introduced the court below should have instructed the jury to find for appellant, and that this court should reverse the judgment for its failure to do so.

The court below gave all of the instructions moved for appellant. It was not asked to declare, as matter of law, that there was no evidence on which the jury could find a verdict in favor of plaintiff; and, if such an instruction had been moved, the court could not have given it without encroaching upon the province of the jury, if there was any evidence tending to prove the issue on the part of the plaintiffs.

Nor did appellant, in the motion for a new trial, ask the court to set aside the verdict on the ground that there was no evidence to support it, or that it was contrary to the evidence—the ground taken in the motion being that the damages awarded by the verdict were excessive. In other words, appellant did not object, in the motion for a new trial, that plaintiffs were not entitled to any verdict upon the evidence, but that the verdict was for too large a sum; and that ground we have considered above.

We deem it unnecessary, therefore, to notice the evidence relating to the question of negligence further than it may be necessary to do so in considering such of the instructions given

for appellees as were specifically objected to by appellant, disregarding the general objection made to the thirteen instructions in mass.

The special objection was to the third, sixth, ninth, tenth, eleventh, twelfth and thirteenth. The tenth related to the measure of damages, and we have considered it above.

On the morning of April 25, 1875, at the usual time, the train, consisting of locomotive, tender, baggage car and passenger coach, about one hundred and thirty-five feet in its entire length, was starting from Argenta to Fort Smith, moving at the usual speed in starting out, and the child in question, unattended by mother or nurse, got on to the track in front of the train, when it was passing through the yard of the machine shops of appellant, and was run over by the locomotive before the train was stopped. The engineer saw the child when it got on to the track, and whether he could have stopped the train before it struck the child, by the diligent use of means within his control, or was guilty of culpable negligence in not doing so, was a question mooted before the jury on the evidence. The witnesses differ about the distance between the child and the front of the train when it got on to the track; one witness said 250 feet, another 75 yards, the engineer 40 yards, another witness 50 feet, and another 150 feet, etc. The witnesses agree that immediately upon the child getting upon the track, the steam whistle sounded down brakes, and the engine was reversed. The bell was also ringing. The child had been seen frequently playing about the premises and the skiff landing on the river, and one witness had expressed the apprehension that the "little devil" (to use his language), would some day be killed.

The third instruction given for plaintiffs is as follows:

"Contributory negligence cannot be imputed to a child of

tender years, and if the jury believe from the evidence that Alpheus D. Ammon, deceased, who is alleged to have been killed by the defendant's cars or locomotive, was only a little over five years of age, they will consider him as having been responsible only for that degree of care and diligence which would naturally and reasonably be expected of such a child of that age."

This instruction is substantially in harmony with the rule laid down by the Supreme Court of the United States in *Railroad Company* v. *Stout*, 17 Wallace, 660, and approved by Mr. Wharton, upon a review of authorities, in his work on Negligence, sec. 315.

The court, by JUSTICE HUNT, said: "It is well settled that the conduct of an infant of tender years is not to be adjudged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must have himself been free from fault; such is not the rule in regard to an infant of tender years. The care and caution of a child is according to his maturity and capacity only and this is to be determined in each case by the circumstances of that case." See also *Railroad Company* v. *Gladman*, 15 Wallace, 401.

The sixth instruction:

"Railroad companies, owing to the dangerous character of the business they engage in, are held to the greater care in the operation of their machinery and machines, especially in running through towns; and if the jury find from the evidence that the defendant's agents or servants, in running the locomotive or other machinery, failed to use such care or caution, they will find for the plaintiff; if they further find from the evidence that the son of plaintiff, Emma O., was killed by the

defendant's engine when the killing might have been prevented by the use of such diligence, if killed in town and without negligence of the motber or child being the proximate cause."

This instruction is substantially in the language of one approved by the Supreme Court of Missouri in *Brown* v. *Hannibal & St. Joseph R. R. Co.*, 50 Mo., 465, and we see no valid objection to it.

The ninth instruction:

"If the jury believe from the evidence that the plaintiff, the mother of the child was in fault, and that the child, while wrongfully on defendant's track was killed by defendant's engine or cars, but that defendant's agents were aware, or by the use of ordinary diligence, might have been aware of the fact that the child was on the track in time to avoid injuring him, by reasonable diligence, the failure to use such diligence alone must be considered the proximate cause of the injury."

We think the last clause of this instruction, construed with its context, is not subject to the objection that it assumes negligence on the part of the agents in charge of the train. Several of them swore that every exertion was used to stop the train and save the child when it got on the track, and this was a question of fact for the jury.

The rule of law expressed in the instruction is supported by authority. *Evansville & Crawfordsville R. R. Co.* v. *Hiatt*, 17 Ind., 102. *State* v, *Railroad*, 52 New Hamp., 528.

The eleventh instruction:

"If the jury believe from the evidence that the son of plaintiff, Emma O., was killed by defendant's locomotive or cars, while on defendant's track, and that defendant's employes in charge of the locomotive or cars might, by ordinary care and skill, have perceived him in time to avoid injuring him, a failure to recognize the child and stop the train before running upon and injuring him, will make defendant liable, even though

those having the child in charge may have been negligent in permitting him to go upon the railroad."

We do not see why this instruction was given. It appears from the evidence that the engineer saw the child before and at the moment he got on the track, and sounded down brakes, etc. If there had been evidence that the child was on the track before the engineer saw him, and that he might have seen him if he had been on the lookout, and stopped the train before it reached him, the instruction might have been appropriate. See *Louisville & Nashville Railroad* v. *Connor, Adm'rx*, 9 Heiskill, 19.

There was no evidence that the child was in the immediate charge of any person when it got on the track. Its mother was at home. It left the house to go with the servant to the telegraph office, but when it got into the yard it refused to go, and the servant left it there. After she had gone, it seems that it went upon the railroad premises of its own will, unaccompanied, and was playing there.

The real question before the jury was whether the train was properly manned, and whether it could have been stopped in time to save the child after it got on the track, by such prompt and diligent use of its appliances as the emergency required. All of the witnesses agree that the child had plenty of time to get from the track after the sounding of the alarm-whistle, etc., before the train reached it, but it seems to have become confused. One witness thought the train might have been stopped by the time it moved a distance equal to its length, and before it reached the child. Others disagreed with him. We express no opinion on the subject, nor do we deem it necessary to state all of the facts disclosed by the bill of exceptions which bear on the question. We only state so much of the evidence as is deemed necessary in order to pass upon the instructions complained of.

In basing an instruction on hypothetical facts, disputed facts ought not to be assumed to be true, nor should facts be stated hypothetically which do not appear in evidence. Such an instruction might mislead the jury.

The twelfth instruction:

"If the jury find from the evidence that the engineer in charge of the engine on defendant's road at Argenta, on the 26th day of April, 1875, saw or might, by the use of ordinary care and caution, have seen the plaintiff's child approaching the railroad track, and very near the same, and had reasonable ground to believe it was going upon the track, in time, by the use of ordinary care and diligence, to have stopped the train before reaching the point when the child was approaching, it was the duty of the engineer to have at least checked said train so as to have had it under control, and if he failed to do so, and the jury find that the child, by such failure, was run over and killed by the engine, the railroad company are liable in damages."

If the evidence before the jury warranted them in finding to be true the facts stated hypothetically in this instruction, the legal conclusion thereupon might have been as announced.

The thirteenth instruction:

"If the jury believe from the evidence that plaintiff had taken reasonable precaution to restrain her child and guard it against damage, reference being had to all the surrounding circumstances, including the parent's condition in life, and that the child escaped and went upon the defendant's railroad track, and was injured by the negligence of the defendant's agents, servants or employes, no negligence can be imputed to the plaintiff; and if the child exercised ordinary care for one of his years and capacity, no blame attaches to him; and if, on account of his tender years, the child was incapable of exercising any care or discretion, none could be required of him."

If the mother was blameless of contributory negligence, the fact that a child below the age of discretion got recklessly upon the railroad track, in front of the train would not excuse appellant from liability, if by the negligence of its agents in the management of the train it was run over and killed. But it would be otherwise if the killing of the child could not be avoided by diligence on the part of such agents. Wharton on Negligence, secs. 309–314; Cooley on Torts, 680–3.

Upon the whole the instructions given for appellees, to which appellant particularly objeets, with the exceptions indicated above, were well enough when considered in connection with the seven instructions given for appellant relating to negligence and contrioutory negligence, to which no objection was made by appellees.

The judgment must be reversed, and the cause remanded for a new trial.

STIRMAN VS. CRAVENS.

1. PRACTICE IN EQUITY: *Parties, when new should be made.*

Whenever it is discovered in the progress of a cause that the rights of the parties already before the court cannot be finally determined without other parties, they *must* be brought in.

2. REALTY: *House of one on land of another, is not.*

A house erected by one on land of another, with his consent, may be considered as personal property, distinct from the land. In such case the value of each may be referred to a master, and on the coming in of his report, if the parties will not agree for a purchase by one from the other, the court should order a sale of lot and house together, and divide the proceeds in proportion to their respective values found by the master.

APPEAL from *Washington* Circuit Court.

Hon. J. M. PITTMAN, Circuit Judge.

——— *Davidson*, for appellant.

J. D. Walker, ———*Gregg*, *contra*.

EAKIN, J.:

This cause is the same reported in 32 Ark., 548. After it was remanded to the Washington Circuit Court, the plaintiff below, by leave of the court, and against the objections of defendants, filed an amended complaint, and, upon their motion, the cause was transferred to the equity docket. The complaint alleged: That in 1866 James W. Stirman owned and possessed lot six (6), in block No. 16, in the town of Fayetteville, and at the same time Brooks and James E. Trott, partners in the mercantile business, found it necessary to erect a new store-house, but had no ground, nor sufficient means to purchase. They had received a large portion of their stock in trade from McKee & Co., of Fort Smith, on a credit, and expected to build out of the proceeds of the goods. Brooks declined to build unless he or his partners could procure title to a lot. They proposed to J. W. Stirman to go into business with them, and convey his lot for the purpose. This he declined; but finally, to accommodate Trott, with whom he was very intimate, and in view of a future partnership with Trott after Brooks should retire, he made the deed. Trott promised to make it all right, by and by. The deed was not witnessed nor recorded, nor intended so to be. There was no consideration, and Trott, amongst his friends, did not claim it as his property. In consideration of said privilege of building, Trott & Brooks agreed to pay for the use of the lot, and a small building formerly on it, $15 a month as long as they should use it, and to erect a house worth $800, to be accounted for by Stirman when he should afterwards become a partner, or when the lot might be returned. Afterwards Brooks & Trott built a house worth over twice as much. Afterwards Stirman advanced to Trott large sums of money, amounting in all to more than $2,700. About a year after the erection of the house Brooks sold out to Trott, who continued to occupy it until his death, in March, 1870, and his

administrator, E. J. Stirman, afterwards, until April, 1873, without payment of rent by either, and without paying said J. W. Stirman for his services as clerk in the store, which had been rendered on a contract for $75 per month.

No partnership had ever been entered into, as contemplated. James W. Stirman declined to do so on account of the embarrassed circumstances of Trott, but remained a clerk in Trott's store until Trott's death, as aforesaid.

During his life Trott urged Catherine W. Stirman to accept from said James W. (who was her son), a deed of the lot, assuring her that his own deed was not acknowledged nor recorded, and would not stand in the way of her title. It is further alleged that Trott destroyed his deed. The value of the house erected has depreciated to $700 or $800.

After the death of Trott, said James W., on March 9, 1872, conveyed the lot to his mother. The deed is exhibited, and shows that it was made for love and affection and for one dollar. The deed conveys the lot, "except the two-story frame store-house occupying the front portion of said lot, and belongs to the estate of J. E. Trott, deceased."

Afterwards, on June 18, 1872, said Catherine W. Stirman, with her husband, James H. Stirman, conveyed to plaintiffs, Cravens and Smith, a part of said lots by metes and bounds, for $1,000, Comparing the two deeds, it appears that James W. conveyed to his mother (saving the house in front) a lot fronting 30 feet on the square and running back, north, 155 feet to an alley. This is given as the description of said lot No. 6. The deed to plaintiff conveys 20 feet 9 inches off the east portion of this lot, without any reservation, leaving 9 feet 3 inches off the west side still in Mrs. C. W. Stirman.

The complainant alleges that said E. J. Stirman, as administrator of Trott, claims the right and possession of the part conveyed to complainants by said last named deed. The widow

and heir of Trott are made parties. It is alleged that the purposes of the original conveyance to Trott have been accomplished, and that the rents due from said Trott, and his representatives, to J. W. Stirman, exceeded the value of the house when it came into possession of complainants. Besides, there was due Stirman from Trott the money loaned, and clerk's hire.

The prayer is for an account of the transactions between said Trott and J. W. Stirman, and that all claims of Trott's representatives regarding the improvement be declared satisfied and extinguished; that Trott's deed be declared void; and that complainant's title be quieted; with the usual prayer for general relief.

The widow pleaded the statute of limitation and the minor put in a general denial by guardian. The administrator demurred generally and moved to strike out portions of the complaint. The demurrer was overruled, and the administrator answered.

The answer denies that Brooks & Trott were unable to procure another lot, that Trott desired a partnership with J. W. Stirman, or held out any inducements therefor. Admits the execution of the deed to Trott and asserts that it was intended to convey title in fee simple. Admits that Trott was in embarrassed circumstances and so continued until his death. Puts in issue the alleged promise to pay rent, and the agreement to reconvey. Admits the erection of the house worth $2,200 and that Stirman had loaned money and rendered services as clerk as alleged, but says all these claims have been duly probated against the estates of Trott. Denies all knowledge or belief as to the fact that Trott urged Mrs. Catharine W. Stirman to take a conveyance of the lot, or asserted that his own title was invalid; or of the destruction of the deed by Trott. Admits his possession until the common law suit

was determined and writ of possession issued; but sets up the reversal of that judgment and claims that plaintiff held possession wrongfully under said writ, after the execution had been superseded. Without further recapitulation, it may suffice to say that the answer admits all the conveyances, and puts in issue all material allegations to the effect that the original conveyance to Trott was in trust and not *bona fide* for the purpose of vesting title.

After the former decision of this court as to the effects of an acknowledged deed, the remedy of complainants was no longer clear and unembarrassed at law. The legal title was in Trott, and the remedy was in equity to show that the conveyance was made under such circumstances as to create an implied or resulting trust between the parties in favor of the grantor. It was within the discretion of the court below to permit the amended complaint to be filed, and to transfer the cause to the equity docket—and the discretion was wisely exercised. It did not make a new suit. The contest for the property was substantially the same, only changed in form to meet the new aspect of the cause resulting from the decision of this court. It would not have been in furtherance of justice to have compelled complainants to commence *denovo*; and new parties not only may, but MUST, in all cases be brought in whenever, in the progress of a cause, it is discovered that the rights of the parties already before the court cannot be finally determined without them. These views dispose of the demurrer, and the objection to the practice.

The theory of the bill was that the moneys owed by Trott to Stirman should be applied as payments upon the improvements made by Trott. If there could be proved any such understanding between the original parties, of which complainants could take advantage, it might have been proper to show it in this suit; but it is essential to an account of such

an appropriation that J. W. Stirman should be made a party. Without him all parts of the bill framed with reference to such an account, should be disregarded. The equity of the bill rests upon the allegagation of a trust in Trott, to the benefits of which complainants had succeeded, and which entitled them to the possession and enjoyment of the property as against Trott's estate, independent of any adjustment with J. W. Stirman. In no other view can the bill stand, unless Stirman be made a party. But in this view with regard to the lot, excepting the house, the bill was good against a general demurrer. The view already announced of the proper practice disposes also of the plea of the statute of limitation. It was a continuation of the same suit against the terre-tenants.

The answer puts in issue facts material to the equity of the bill. These facts, as revealed by the pleading, exhibits and deposition, are substantially as follows:

In the year 1866 Trott & Brooks were doing a mercantile business in Fayettville, upon goods furnished them by McKee & Co. of Fort Smith. They desired to build a more commodious business house, in doing which it would be necessary to use means derived from the goods furnished by McKee & Co. Brooks declined to build unless upon a lot to which they might have title, and it was further desirable that they or one of them should own the land, for the satisfaction and securing of McKee & Co. J. W. Stirman was the intimate friend of Trott, and made him a conveyance of the lot in question for the purpose—that is, principally, to induce Brooks to consent to the building and for the security of McKee & Co., but in some respects for the benefit of Trott also. No consideration passed; but it was understood that in the future transaction between Stirman and Trott the expenses of the latter in building were to be allowed. The understanding was that the house was to cost $800; but the firm, with Stirman's knowl-

edge and without his dissent, proceeded to erect a two-story frame building at a cost of about $2,200. These understandings were by parol, but the deed was absolute for the nominal consideration of $1,000. Afterwards, Stirman lent a considerable amount of money to Trott and served him for about twenty-five months as clerk at $75 per month, only five or six hundred dollars of which were repaid by credit of a store account.

It was further agreed that, meanwhile, the firm should pay Stirman rents on the lot and an old warehouse on it at the rate of $15 per month. The firm took possession, built the house and occupied it a few months, when Brooks sold out to Trott, who occupied until his death in 1870, and his administrator after him, until dispossessed by writ of possession upon the rendition of the first judgment below, which was afterwards reversed.

During Trott's lifetime, he urged Mrs. C. W. Stirman (the mother of James W.) to take a deed of conveyance of the lot in question from her son, who seems to have been considered in danger of wasting his property, assuring her that the purposes of his own deed had been accomplished; that it had never been recorded and would not stand in her way. No action was taken at the time upon these assurances. Trott was then, or soon after became, the son-in-law of Mrs. Stirman. After Trott's death in 1870, James W. Stirman probated against his estate his claim for money loaned, which was filed on the 9th day of June, 1871, and afterwards allowed for $3,028.87. Also his account for clerk's hire filed on the 2d day of September, 1871, and afterwards allowed for a balance of $899.81. Both these allowances were assigned by Stirman to his mother, Catherine W., on the 15th day of May, 1872. No settlement of rents appears ever to have been made.

Previous to this, on March 9, 1872, J. W. Stirman conveyed

the lot to his mother for love and affection and the nominal consideration of one dollar, "except the two-story frame store-house occupying the front portion of said lot, and belonging to the estate of J. E. Trott, deceased." Afterwards, on the 18th day of June, 1872, Mrs. Catharine Stirman, with her husband, conveyed a part of said lots by metes and bounds to said complainants for $1,000. Her conveyance leaves off about ten feet of the west side, running from the front back.

The Chancellor found, upon these facts, that Trott held the lot in trust for Stirman, and to secure McKee & Co., and not adversely; that he afterwards disclaimed all title, in a conversation with Catherine W. Stirman, and that in pursuance of said advice Mrs. Stirman took the conveyance to herself; whereby the representatives of Trott were estopped from setting up title, and have no legal or equitable title left, nor right of possession. Further, that the rents of the said lot and the house thereon during the time the same was occupied by Trott were worth $1,080, and that the store-house so built was not worth more, and that such rents should go to the benefit of plaintiffs, who are the legal and equitable owners of that part of the lot. Whereupon the title to the whole part of said lot sold to them by Mrs. Stirman was decreed to complainants.

This decree was certainly erroneous in this, that it overlooked the reservation of the house in favor of Trott's estate, made in the deed to Mrs. Stirman. No interest therein passed to the complainants by the deed from her to them, nor any interest in any rents that might then be due from Trott or his estate to J. W. Stirman. He had never appropriated nor claimed that there should be appropriated any rents due him from Trott, to the extinguishment of Trott's interest in the house.

Such rent did not belong to complainants. They did not take the right to them by deed from Mrs. Trott, nor any right to the house itself. Mrs. Stirman never had either to convey.

After the conveyance to Mrs. Stirman, excepting the house and declaring it to be the property of Trott's estate, it remained the property of the estate, and any claim against the estate for past rents remained in Stirman. The question as to whether the rents due Stirman extinguished Trott's right to the house, remained a question between the estate and J. W. Stirman. Mrs. Stirman never acquired the right to that account, because the house never passed to her at all, much less to her vendees, who certainly had no rights to appropriate, for the payment of a house never conveyed to them, rents due to another person. In short, complainants never had any such right to the house vested in them as would authorize a court of chancery to decree them the absolute property upon ascertaining that an incumbrance had been removed. They took the lot subject to the easement of supporting another man's house; if indeed, they acquired any title at all to the ground upon which the house stands. The decree attempts to compel a sale to them of property to which they had no claim, at a price determined by the court, and for a part consideration, the greater part of which they did not furnish nor ever owned.

Inasmuch as further proceedings must be had below, and the case is somewhat anomalous, it seems proper to indicate the views of the court with regard to the equities of the parties and the most advisable course to be pursued in adjusting them.

Although at common law the grant of a *house* carried the *land* upon which it stands (Sheppard's Touchstone, p. 90; Washburn on Real Property, book III, chap. 5, sec. 4, par. 26), and an exception of a house in a grant would be so construed, to retain it, this doctrine has been attended with many exceptions to meet the requirements of more complicated arrangements and modern usages of business. This court has held directly (in the case of *Witherspoon and Gilliam* v. *Nicholas, Sheriff*, 27 Ark., 332), "that a house erected upon the

land of another, with the owner's consent, may be considered as personal property, distinct from the land. When the house in this case was erected, there was no agreement nor presumed intention that it should ever be removed; and from the nature of the case it cannot be, without serious detriment and loss to the owner. The evidence leaves it somewhat vague and uncertain as to how the rights of the parties were to be adjusted in future. Any supposed arrangement for a future partnership was never carried out, and the property meanwhile stood thus: That Stirman owned the land, and Trott the house upon it—their interests being distinct, though indivisible. If there was any understanding that Stirman should pay for the house and take it, that was never done. Neither the money lent nor clerk's services were so applied. At the time of the conveyance to his mother, Stirman expressly recognized Trott's ownership as still existing, and neither his mother nor his vendee took any interest in it. Stirman had elected to consider his claim as personal against the estate of Trott, save as to rents; and as to them his reservation in the deed indicates that he did not intend to claim an interest in the house on that account.

After the purchase by complainants on June 18, 1872, this distinct but indivisible interest continued between Trott's estate and complainants, and it devolves upon the court to devise a scheme for final adjustment and separation of their rights in accordance with the principles and practice of courts of equity. These are very flexible, and may be moulded by the court to suit each particular case.

It would be unjust to compel either party to sell to the other at a valuation, and equally so to compel the administrator of Trott to remove the property.

An account should be taken against the estate, of the rents of the lot and warehouse at $15 per month from the date of complainant's purchase to the date of the complainant's possession

under the writ of possession, and against complainants for the value of the rents of the two-story house (independent of the lot and warehouse) from the date of their possession to the time of taking the account, unless they choose sooner to redeliver, and a balance should be struck. On the same reference the master should be directed to take proof and report the several values of the house and the land upon which it stands. Upon the coming in of the report the parties should be allowed to agree upon a purchase of the interest of Trott's estate by complainants, and a decree entered to incorporate and confirm the agreement. Otherwise the court may order a sale of the house and lot together, and divide the proceeds in proportion to their respective values found by the master. In the adjustment of the proceeds the balance for rents, on the one side or the other, may be taken into the account, and the whole cost may be in the discretion of the court. Under the circumstances it would appear equitable to burden the house and land together with all the costs before partition of the proceeds, but the court does not mean to make this imperative on the Chancellor. He will exercise his sound discretion. So much of the decree as gives the lot to complainants, irrespective of the store buildings, is correct. So much of the decree of the court below as vests in complainants the property in the lot and all buildings thereon save the two-story building erected by Trott for a store-house, and the portion of the lot it stands upon, is affirmed. In other respects the decree must be reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

MITCHELL ET AL VS. BADGETT.

1. LEASE: *When a Mortgage.*

A lease executed by lessor and lessee reserving a lien to the lessor on the crop produced on the land, is a chattel mortgage; and a written agreement, properly executed, stipulating that the amount due for rent of land should be paid before the removal of the crop, is a mortgage of the crop.

2. MORTGAGES: *Priority of Record.*

Between conflicting mortgages, the one first filed for record will have priority

APPEAL from *Pulaski* Chancery Court.

Hon. J. R. EAKIN, Chancellor.

Fletcher for appellants.

———, *contra*,

MOORE, S. J.:

This suit was brought in the Pulaski Chancery Court to the spring term, 1877, by O. K. Badgett against W. J. Mitchell and Fletcher & Barron.

The object of the suit was to obtain a decree against Mitchell for a balance of $600, claimed as due for rent of land, and against Fletcher & Barron to compel them to account for the proceeds of certain cotton the produce of the land, alleged to have been received by them from Mitchell, and on which Badgett claimed to have had a lien for his rent.

The material allegations of the bill are: That O. K. Badgett and one N. H. Badgett entered into a written contract with Mitchell on the 7th day of April, 1876, whereby they leased to him certain land for the year 1876, for which he was to pay $900, as rent, for which amount he executed his note due and payable on the 1st day of November, 1876. Mitchell joined in and signed this contract, which *inter alia*, contained these words, after referring to the note for $900: "And a lien is hereby given and retained upon the crops grown upon said land for the year 1876."

Mitchell further bound himself in the contract, not to remove or dispose of any part of the crops until the note had been paid, or the consent of the lessors obtained, except six bales of cotton which the contract expressly permitted him to remove and dispose of.

There were stipulations, also, of a minor character relating to the building of a cabin, and putting up and making rails on the land, etc.

Mitchell was also to be allowed a deduction for any overflow of a portion of the land, not to exceed three acres, at the rate of $9 per acre.

The contract was duly signed and properly acknowledged by all the parties, O. K. and N. H. Badgett and Mitchell, on the day of its execution.

It was not filed for record till the 7th day of October, 1876.

On the day of the execution of the note and contract, an endorsement was made on the note whereby it was agreed that half the amount of the same should be paid November 1st, and half, December 1st, 1876, and on the same day N. H. Badgett, by endorsement on the note assigned all his interest therein to O. K. Badgett, who consequently sued alone.

The bill charges that during the months of September, October and November, Mitchell, without the permission and against the protest of Badgett, removed and disposed of the greater portion of the crop, whereby it was lost to him, and that the sum of $600 remained due from Mitchell after allowing him all credits for improvements, overflowed lands, etc. That after diligent search all the cotton that could be traced up was eleven or more bales that had been sold and delivered by Mitchell to Fletcher & Barron, and which were received by them with a knowledge of Badgett's rights, and appropriated by them on a debt due to themselves.

Sundry interrogatories were propounded to all the defen-

dants, and the bill prays for decree against the defendants for the amount that may be ascertained to be due, and that the proceeds of the cotton in the hands of Fletcher & Barron be declared and made subject to the lien of Badgett in respect to his debt, and for general relief.

Fletcher & Barron answered, denying all knowledge or notice of Badgett's lien on the crop of Mitchell, and aver that Badgett never protested against nor forbid Mitchell selling or removing the crop, though they do not aver he knew of the sale of any of the cotton to them. They admit that they purchased fifteen bales of cotton from Mitchell, during the months as charged in the bill, which they supposed was raised on the Badgett plantation, and in response to the interrogatories they file an account of the same, showing the dates and amounts, and prices paid.

They allege that they are merchants in the City of Little Rock, and engaged largely in buying cotton; that they bought the cotton in question from Mitchell in the regular course of business, and at regular market prices; that they furnished supplies to Mitchell to make his crop, and that on the 17th day of June, 1876, he executed to them a mortgage of his corn and cotton crops to secure advances already made and to be made to him.

This mortgage was filed for record on the 24th of October, 1876, which, as will be seen, was after the contract between Badgett and Mitchell had been filed.

Mitchell also answered the bill. He admits the execution of the contract with and the note to Badgett. He denies that Badgett was ignorant of his removing and disposing of his crop, and further, he denies any intention or desire to defraud Badgett, and sets up his mortgage to Fletcher & Barron given to secure indebtedness for supplies, and avers that believing he would have enough to pay his rent and the amount

due for supplies, and being anxious to pay off Fletcher & Barron as soon as possible, he from time to time sold and delivered to them fifteen bales of cotton. That contrary to his expectation his crop fell short, and that after the sales to Fletcher & Barron, a garnishment and attachment was issued against him from the United States court on a judgment against N. H. Badgett, and the balance of his crop seized thereunder. By this proceeding his crop was much wasted. The cotton and corn which was seized, was afterwards released by the United States Marshal and turned over to O. K. Badgett, and by him credited as a payment on the rent.

It is proper to state that previous to filing the answers, a general demurrer was filed to the complaint which was overruled.

Demurrers were also filed to the answers but they seem to have been abandoned, as the case (as the transcript shows) was heard and decree rendered on the bill, answers and depositions.

The evidence is voluminous and much of it entirely foreign and irrelevant to the issues.

The following seems to be clearly established by the proof:

Mitchell, early in the year 1876, rented the land by written lease from N. H. Badgett, and whilst *his* tenant, he worked on houses, etc., to the value of $20, and in making fences to the value of $75, and he claimed that he should be allowed these amounts as a credit on his rent. O. K. Badgett, in his testimony, denies all knowledge of or responsibility for this claim for credit. O. K. Badgett purchased the land from N. H. Badgett and wife in February, 1876, and filed his deed for same for record on the 7th of that month.

On the 7th of April the contract of lease, etc., referred to in the bill was executed, and the lease first made between N. H. Badgett and Mitchell was cancelled and destroyed.

The only payments on the rent that are proven to have been made since the date of this last contract, are $65 in cash, $183.95 received from the United States Marshal, and $27 deducted on account of the overflow of three acres of the land.

There is some evidence tending to show that, after the new lease was executed, O. K. Badgett agreed verbally, to allow Mitchell $95 for work done whilst he was in possession under the first lease from N. H. Badgett. The new lease, however, having been reduced to writing, and the old one cancelled, parol evidence, in the absence of fraud, or mistake, which is not charged nor proved, could not be regarded to vary the terms of the new lease.

The evidence tends to establish clearly that Fletcher & Barron, when they gave credit to Mitchell, knew that he was a tenant on Badgett's farm. Their mortgage, which is made an exhibit to their answer, describes the land on which the crop was growing, as being part of "what is called the N. H. Badgett place, in Pulaski county, etc."

Their place of business and the residence of the Badgetts was in the city of Little Rock, and it is in proof that they were acquaintances and occasionally held conversations on business matters. They had constructive notice of O. K. Badgett's ownership of the land by the recording of his deed to the land on February 7, 1876.

On the hearing, the Chancellor decreed the defendant, Mitchell, personally liable to Badgett in the sum of $600—the credits allowed not reducing the amount of the rent note below that sum—with interest at the rate of 6 per cent from January 1, 1877, and that he be ordered to pay that sum, and that execution issue,

Also decreed that Badgett had a lien on the proceeds of cotton in the hands of Fletcher & Barron, to the extent of $429.53, with interest at 6 per cent from January 1, 1877.

This amount is arrived at by allowing them to retain the proceeds of six bales of cotton, which Mitchell was authorized to sell by the terms of the contract of lease, and charging them with the proceeds of the balance of the fifteen bales received from Mitchell, making an average of the value of all the bales from the prices as shown by the account of same filed by Fletcher & Barron.

The decree further provides that if the debt due from Mitchell be not paid nor made by execution against him, that execution issue against Fletcher & Barron for any deficiency to the extent of $429.53.

The costs were imposed primarily on Mitchell, and if not collected on execution against him, ordered that they be imposed on Fletcher & Barron, and included in any execution against them.

Defendants all appealed.

The questions presented for determination are not numerous, nor very difficult of solution.

We are first to inquire, what is the nature and force of the contract of April 7, 1876, executed by Mitchell and Badgett? for it is by virtue of that instrument only that the appellee must prevail, if at all.

It is not claimed by the bill, nor in argument, that appellee has any right to recover under the statutory lien of the landlord—by which he might have attached Mitchell's crop on his attempting to remove it—in the absence of this contract. Though he seems to have known of the crop being removed, when he could not stop it by request or protest, he chose to depend upon such lien and rights as he might have by his contract.

That this contract has none of the characteristics of a mortgage, is insisted and earnestly and ingeniously maintained by counsel for appellants.

We are referred to the case of *Barnett et al.* v. *Mason et al.*, in 7 Ark. Rep., as directly in point.

In that case the instrument by which a lien was claimed was a bill of sale of a steamboat, executed only by the vendors, and in which they used language very similar to that in the contract in this case, viz.: "they (the vendors) are to retain a lien," etc., for the unpaid purchase money. This court say in passing on the instrument, that this phrase, as used there, "is a mere suggestion of the vendors, no stipulation, and was entirely nugatory," and add that "even supposing the plaintiff had a lien on the boat, they lost it forever when they parted with its possession." There the instrument was not given by the vendee, was neither acknowledged nor recorded, and the benefit of the lien was claimed in an action of detainer, and the poesession of the boat having been parted with, the court correctly decided that in such a case they could claim nothing by their supposed lien.

The case of *Roberts et al.* v. *Jacks*, in 31 Ark. Rep., is also cited and relied on by appellants.

In that instance there is simply the statement made in a promissory note that the amount of the note was a lien, etc., and the court say: "It is certainly not a contract, no undertaking or agreement, * * * but simply the declaration of the effect of a contract made." Unquestionably, this was right. If such a statement in a promissory note could create a valid lien, where would be the necessity for ever taking a mortgage to secure a note, or the necessity or value of ever recording any instrument?

Other cases are referred to by appellants, but on close examination they are all found to rest or turn on some particular circumstance and facts, and to be totally different from the case at bar.

Here we have a formal written instrument executed by both

parties, the lessors and the lessee, and duly acknowledged at the date of its execution by all the parties to it, and afterwards duly recorded; an express lien is reserved by the one and given by the other party.

It is unquestionably a lease *to* Mitchell; is it a mortgage *from* Mitchell? In addition to the express lien given and reserved, it contains this clause: "No part of which (the crops) shall be removed or disposed of in any way by the party of the second part (Mitchell) or his agents until said note has been paid or the consent of the said party of the first part (Badgett) obtained."

Herman, in his late work on Chattel Mortgages, p. 68, says: "Leases, with conditions, are mortgages. Any condition in "a lease giving the lessor a lien upon the tenant's property as "security for the rent, is a chattel mortgage. * * * So a "written agreement, properly executed, stipulating that the "amount due for rent of land should be paid before the crops "are removed, is a mortgage of the crop."

The same doctrine is asserted in *Johnson* v. *Crofoot*, 53 Barbour (N. Y.), p. 574. It is there held that a lease providing that the lessor was to have full title, with the privilege of taking possession of the produce of the farm in payment of any balance due on rent, was a chattel mortgage, and if not recorded, was invalid as against an attaching creditor of the lessee.

The case under consideration falls distinctly within the doctrine above announced. The instrument here is not only a lease with a condition, and containing a stipulation that the crop should not be removed till the rent was paid, but it is also executed by the lessee, and duly acknowledged by him. It is to all intents and purposes a chattel mortgage.

And now, having decided the contract to be in effect a mortgage from Mitchell to Badgett, we are next to inquire, how are the other defendants, Fletcher & Barron, affected by it?

That they had a valid mortgage, also from Mitchell, is not disputed. Badgett's mortgage, whilst of course it is binding and conclusive as against Mitchell, without being recorded or even acknowledged, could only affect Fletcher & Barron, or any other third party, from the date of its being filed for record.

Both appellant and appellee were extremely negligent in regard to recording their mortgages. Appellee may have considered his as only a cumulative or additional security to his statutory lien as landlord, and not regarded it as all important until he found the crop was being removed. Having filed it, however, prior to that of Fletcher & Barron, his rights were preserved.

All the circumstances, as well as the proof, tend to show that Fletcher & Barron gave credit to Mitchell, knowing that he was the tenant of appellee. This alone was enough to advise them that, as landlord, he would have a statutory lien on the crop of Mitchell, and sufficient to put them on inquiry as to the amount he would be due to appellee, and the extent and exact nature of the lien.

Having a valid subsisting mortgage lien on the crops of Mitchell after the cotton was removed and disposed of, appellee had the right to follow and recover the property or its value from Fletcher & Barron, who received it with constructive notice of appellee's lien by the filing of the mortgage or contract for record.

They were affected with a trust upon every part of the cotton which they received after the filing of appellee's mortgage for record, except enough to make the amount of six bales, which Mitchell was authorized to dispose of.

This principle is elementary. Herman, p. 345, states the general doctrine in few words, as follows: "A mortgagee may "recover the property, or its equivalent in whosesoever hands

"it may be at the time he is entitled to it, for the purpose of "satisfying his debt."

See also *Grouler* v. *Asseler*, 22 N. Y., 225; *Duke* v. *Stickler*, 43 Ind., 494.

There is nothing in the evidence to lead to the belief that the appellee, by any act of his, ever waived his lien and rights acquired under it, or estopped himself from asserting his lien rights. The evidence nowhere shows that he was ever present, or had any actual knowledge of the sale of any of the cotton, when made to Fletcher & Barron, or that he did or suffered any other act that would amount to an estoppel.

The calculation by which the Chancellor in the court below arrived at the amounts specified in the decree seems to be correct, and warranted by the pleadings and evidence.

Finding no error in the decree of the Pulaski Chancery Court, the same is, in all things, affirmed.

Hon. J. R. Eakin, J., did not sit in this case.

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McCabe, Ex Parte.

Statutes Construed: *County Collectors are Officers.*

County Collectors are officers under "an act to provide for the approval of official bonds of county and township officers," approved March 1, 1875.

Petition for *Certiorari.*

Howard and *Redmond* for Petitioner.

Henderson, Attorney-General, *contra.*

English, C. J.:

This is an application to this court by M. D. McCabe for *certiorari.*

The petitioner states, in substance, that on September 2,

1878, he was elected Sheriff of Pulaski county, and on the 12th of October following was commissioned by the Governor as such.

That on January 4, 1879, he presented his bond as collector of taxes for said county, in duplicate, to the County Court for approval, which was approved by the court, and one copy filed with the Auditor of State, and the other in the office of the Recorder of the county to be recorded, etc.

That the Clerk of the Circuit Court and *ex-officio* Recorder, without the knowledge of petitioner, presented said bond to the Circuit Court of said county for approval, and said court, on February 8, 1879, disapproved said bond, and ordered petitioner to file a new bond as collector.

The petitioner submits that the Circuit Court acted without authority of law in the matter, and prays that the record of its proceedings be brought before this court on *certiorari*, and its order disapproving his bond, and requiring him to execute a new bond be quashed.

The transcript accompanying the petition shows, that on February 8, 1879, the matter of the approval of the bond of McCabe as collector, was taken up in the Circuit Court, it being in term, and on behalf of McCabe it was objected that the County Court had approved the bond, and that the Circuit Court had no jurisdiction of the matter, but the court overruled the objection.

Then follows this order:

"And it further appearing that said bond is in the penal sum of $350,000, and that the sureties are qualified in the aggregate sum of only $177,000, it is ordered, considered and adjudged that said bond be rejected, and that said McCabe be directed to furnish a good bond, with qualification of sureties to the full sum of $350,000, within fifteen days herefrom."

On behalf of Pulaski county, a demurrer was interposed

to the petition for *certiorari*, and the cause submitted on the demurrer.

At the time of the adoption of the present constitution, the law provided that the bond of the collector, as well as the bonds of other county officers, should be approved by the Board of Supervisors, which had taken the place of the County Court. See Gantt's Digest, secs. 5154-6.

On March 1, 1875, after the adoption of the present constitution, which restores the County Courts to our judicial system, the Legislature passed "*an act providing for the approval of official bonds of township and county officers*," which repealed all laws in conflict with the act. Acts of 1874-5, p. 192.

By the first section of this act it is provided: "That the official bonds of county and township officers shall be approved by the Circuit Court; *provided*, however, that the judge of the Circuit Court, or the judge of the County Court in vacation, subject to confirmation or rejection by the Circuit Court, may approve the bonds of such officers in vacation," etc.

This act has not been repealed, but is still in force.

The counsel for the relator submits that collectors are not embraced by the provisions of this act.

The constitution provides that the Sheriff shall be *ex-officio* collector of taxes, unless otherwise provided by law. Sec. 4, art. 7.

The relator, under existing laws, holds two offices; he holds the office of sheriff, and he holds the office of collector. They are distinct offices though held by the same person, and he is required to give bond as sheriff, and also to give bond as collector. Gantt's Digest, chap. 123, and Ib. secs. 5154-6. See *Lee County* v. *Abraham*, 31 Ark., 571. Miller's Digest, secs. 107-9, etc.

In this county, as in others, the collector is a very important county officer. He collects, not only the revenue of the county, but of the State, the city, and the district schools, and whatever motive induced the Legislature to require the bonds of county officers to be approved by the Circuit Court, applies with full force to the bond of a collector. There is no good reason why the collector should be excepted out of the provisions of the act.

It is manifest that Auditor Miller, in making up *sections 105 and 106* of his *Digest of the Revenue Laws* of the State, overlooked the act of *March 1, 1875*, but this digest has not been enacted as law, and it repeals nothing.

The demurrer to the petition is sustained, and the writ of *certiorari* refused.

HOBACK v. HOBACK ET AL.

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1. HOMESTEAD: *Right of widow to, against heirs.*

A widow is entitled to homestead as well against heirs as against creditors of her deceased husband. But she can not create a homestead on her husband's lands after his death.

2. SAME: *Right barred by decree in partition, unless claimed.*

When a widow is a party to a suit for partition among the heirs, and fails to claim her homestead right, it is barred by the decree.

APPEAL from *Benton* Circuit Court, in Chancery.
Hon. J. M. PITTMAN, Circuit Judge.
——— *Gregg*, for appellant.

ENGLISH, C. J.:

This was a complaint in equity for partition of lands, filed in the Circuit Court of Benton county, September 1, 1876, by William Hoback and Isaac N. Hoback, against John Hoback, Mary E. Hawkins and her husband John Hawkins, Margaret

E. Hoback, Wesley D. Hoback, Nancy A. Hoback, and Mary Hoback.

The allegations of the complaint are in substance as follows:

That Robert V. Hoback died intestate, on the — day of ———, 1864, leaving him surviving said Mary Hoback, his widow, who is yet living, and the plaintiffs, and the other defendants named above, his children; and that after his death said Mary E. intermarried with said John Hawkins.

That said Robert V. Hoback died seized and possessed of the following real estate, situate in the county of Benton: West half of northeast quarter, east half of northwest quarter, north half of southwest quarter, northwest quarter of southeast quarter, and the southwest quarter of northwest quarter of section 20, township 19 north, range 31 west, containing 320 acres.

That defendant, Mary Hoback, widow of said Robert V., is residing on said lands, and entitled to dower therein, dower having never been assigned her.

That the estate of said Robert V. is not indebted to any one in any amount, and said lands belong to plaintiffs and defendants equally, subject only to the dower interest of said widow.

That said real estate is not susceptible of partition in kind amongst and between said parties, without great loss and injury to each.

That defendants are residents of Benton county, and said Wesley D. and Nancy A. are minors, and reside with their mother, the said Mary.

Prayer that dower be assigned said widow, and that commissioners be appointed for that purpose, and that the remainder be sold at such time and on such terms as the court might think fit, and that the part assigned the widow as dower be sold subject to her life estate, and the proceeds divided, etc.

No process appears to have been issued to any of the defendants.

The first term of the court, after the filing of the complaint, commenced October 2, 1876.

On the 4th of October, defendant, Mary Hoback, filed an answer to the complaint in substance as follows:

Admits that she is the widow of Robert V. Hoback, who departed this life on November 21, 1864, seized and possessed of the lands described in the complaint.

That she is still a widow, having never married since the death of her said husband. That she now resides, and has for many years last past, resided upon and been in the occupancy of said real estate. That since the death of her said husband she has extended the farm and made valuable improvements thereon, and paid out about $370.82 taxes for the same.

That on the 16th day of September, 1876, she selected out of said real estate the east half of the northwest quarter and the southwest quarter of the northwest quarter, and the northeast quarter of the southwest quarter of section 20, etc., upon which she resides, and upon which is the residence of her said husband, containing 160 acres, as her homestead, and filed her claim of the same in the office of the Clerk of the Circuit Court of said county, which was by said Clerk duly entered of record in said office on the day and year last aforesaid.

That she owns no real estate in her own right. That two of the said heirs-at-law of Robert V. Hoback are still minors, living with and in her charge and custody as their mother.

She prays that her said homestead of 160 acres, as above described, be not subjected to the partition and sale as prayed for by complainants; but that the same be decreed her homestead, and reserved from partition or sale under execution or other process of law.

The plaintiffs, on the 11th of October, demurred to so much of the answer of Mary Hoback as relates to her claim of 160

acres of the real estate mentioned in the complaint as a homestead, and assigned the following cause of demurrer:

"Because that portion of her answer which relates to right of homestead in the lands of her deceased husband does not state sufficient facts to entitle her to the right of homestead in said real estate against plaintiffs and the other defendants as heirs-at-law of said Robert V. Hoback, deceased."

The court sustained the demurrer, and on the same day (October 11, 1876), rendered the following decree:

"The defendant, Mary Hoback, declining to make further answer, but electing to rest on the answer already filed, this cause came on to be heard upon the complaint of the plaintiffs, answer of defendant, Mary Hoback, the proof adduced, and agreement of parties, whereupon the court doth find that Robert V. Hoback departed this life intestate, in the year 1864, leaving the defendant, Mary Hoback, his widow, and the plaintiffs and defendants herein named, his children and heirs-at-law, him surviving. That said Robert V. died seized and possessed, in fee simple, of the following described real estate, to wit: (Here the lands set out in the complaint are described). That said land is occupied by said widow, and that two of the defendants, who are minors, reside with her. That said estate is not indebted to any one. That said widow is entitled to dower in said real estate. And it is further agreed by and between the adult plaintiffs and defendants herein, that in consideration of said Mary waiving all claim for taxes paid on said lands and improvements erected, that they waive any claim to the personal property of which said Robert V. died seized and possessed, to the said Mary Hoback.

"It is therefore ordered, adjudged and decreed by the court, that dower in said estate be assigned to said widow, Mary Hoback, consisting of one-third part thereof in value, including the mansion house, and that the remainder of said real estate

be partitioned between said plaintiffs and defendants, giving to each of the seven (naming them) one-seventh part; and John W. Floyd, Guss Henderson and N. W. Holland are hereby appointed commissioners to make such partition, and to assign dower to said widow, and that they report their action herein at the next term of the court. To which finding and ruling of the court, that defendant, Mary Hoback, was not entitled to hold 160 acres of said land as a homestead, she excepted, and prayed an appeal to the Supreme Court, which is granted."

On what particular ground the court below sustained a demurrer to so much of appellant's answer as set up a homestead right in the land, does not appear in the record, and appellees are not represented here.

Nor do we see why the court below rendered a decree affecting the rights of the two minor defendants without causing them to be served with process, and represented by guardian, etc.

I. At the time of the death of appellant's husband (November 21, 1864) the statute then in force provided that: "Every free white citizen of this State, male or female, being a householder, or the head of a family, shall be entitled to a homestead, exempt from sale or execution (except as hereafter mentioned) not exceeding one hundred and sixty acres of land, or one town or city lot, being the residence of such householder or head of a family, with the appurtenances and improvements thereunto belonging.

"The preceeding section shall be deemed and construed to exempt such homestead, in the manner aforesaid, during the time it shall be occupied by the widow, or child or children of any deceased person who was, when living, entitled to the benefits of this act." Gould's Digest, chap. 68, secs. 29-30.

This provision for the benefit of the widow and minor children of the owner of the homestead, was carried, with some

modifications, into the constitution of 1868 (Art. 12, secs. 4-5), and the constitution of 1874, Art, 9, secs. 5.

If the court below sustained the demurrer to the answer of appellant on the ground that the widow can take and hold the homestead of her deceased husband as against creditors only, and that when there are no creditors, as in this case, the heirs are entitled to put her upon her dower right, and have the homestead land partitioned, it was an error. *Trotter et al* v. *Trotter et al*, 31 Ark., 145.

But the widow cannot create a homestead right in the land of the husband after his death. He must have impressed the homestead character upon the land during his life, and she must succeed him in that right. *Johnson* v. *Turner, adm'r.*, 29 Ark., 280.

To impress the homestead character upon the land, under the above statute, and transmit the homestead right to the widow, the husband must have been a free white citizen inhabitant or resident, (*McKenzie* v. *Murphy*, 24 Ark., 155) of the State, a householder or head of a family, and his residence, home, must have been upon the land at the time of his death. *Tumlinson* v. *Swinney*, 22 Ark., 400; *Williams* v. *Dorris, et al.*, 31 Ark., 468.

There was no statute at the time of the death of appellant's husband requiring the claimant of a homestead to schedule the land claimed as a homestead to protect it from sale or execution. He could obtain protection by application to the court from which the process issued. *Grubbs* v. *Ellyson*, 23 Ark., 287; *Wassell* v. *Tunnah*, 25 Ark., 101.

In this case the adult heirs sought to disregard the homstead claim of appellant and have the lands partitioned, and she had the right to interpose her homestead claim as a defense; and had she failed to do so, her claim would have been barred by the decree. *Wright et al* v. *Dunning*, 46 Ill., 272.

In the absence of any showing to the contrary, the presumption is, that appellant's husband was a free white man, that being the general character of the land-owning population of the State at the time of his death.

It is not specifically alleged in the answer of appellant, as it should have heen, that appellant's husband was a citizen of the State, and that his residence was upon the land which she claimed as his homestead at the time of his death, though these facts are inferable from the scope of the answer.

The court, instead of sustaining a demurrer to so much of her answer as set up a homestead claim upon the land, should have directed her solicitor to make its allegations more specific as to the facts indicated above. *Bushey et al* v. *Reynolds et al*, 31 Ark., 658; *Ball et al* v. *Fulton County*, Ib. 379.

II. It was error in the court to decree partition of the land, etc., without causing the two minor defendants to be brought in by service of process, and represented by guardian. Gantt's Digest, sec. 4493.

The decree must be reversed and the cause remanded with instructions to the court below to permit appellant to amend her answer so as to make its allegations more specific as to her husband's residence in the State and upon the land claimed by her as his wife at the time of his death, and to cause the two minor defendants to be brought in by process, and represented by guardian, and for such further proceedings as may be had in the cause according to law, and not inconsistent with this opinion.

ROGERS v. COOPER.

ATTACHMENTS: *Landlord's affidavit amendable.*

A defective affidavit of a landlord, in attachment for rent, is amendable.

APPEAL from *White* Circuit Court.

Hon. J. N. CYPERT, Circuit Judge.

W. R. Coody, for appellant.

J. W. House and *B. D. Turner*, *contra*.

ENGLISH, C. J.:

On November 15, 1875, Thomas J. Rogers filed before a Justice of the Peace of Gray township, White county, the following note, executed to him by W. H. Cooper:

"$235.50. SEARCY, ARK., January 23, 1875.

On or before the 15th day of October next, I promise to pay Thomas J. Rogers, or order, two hundred and thirty-five and 50-100 dollars, for rent for the Thomas Rogers place, on Little Red river, for the year 1875.

W. H. COOPER."

Rogers also made the following affidavit before the Justice:

"The plaintiff, Thomas J. Rogers, states that the claim in this action against the defendant, W. H. Cooper, is for money due upon a promissory note executed by the defendant to the plaintiff for the rent of his farm on Little Red river, for the year 1875, and for corn furnished the defendant by the plaintiff, and a judgment against the defendant before a Justice of the Peace, and that it is a just claim, and that he ought, as he believes, to recover thereon $235.50, and that said debt is justly due and remains wholly *unpaid*, and that unless attachment issues there is reason to believe, and he does believe, that said debt will be lost or greatly delayed."

Rogers also filed the following bond: "We undertake that the plaintiff, Thomas J. Rogers, shall pay to the defendant, W. H. Cooper, all damages, not to exceed five hundred dollars, which the said defendant may sustain by reason of this attachment, if the order therefor is wrongfully obtained." Signed by Thomas J. Rogers and R. J. Rogers.

Whereupon the Justice issued a writ of attachment, directed to any Constable, etc., commanding him "to attach and safely keep all the crop of corn, cotton and other produce raised by the defendant, W. H. Cooper, on the farm of plaintiff, Thomas J. Rogers, situate on Little Red river, in township seven, etc., in the year 1875, or so much thereof as will satisfy the claim of plaintiff, etc., for $235.50, and $20 for costs, etc., and to summon the defendant," etc.

The writ was made returnable before the Justice on November 27, 1875.

The officer to whom the writ was delivered returned upon it that he had executed the attachment by attaching three bales of lint cotton, marked, etc., as the property of W. H. Cooper. That said cotton was found in the hands of J. W. Arnold, who executed bond and retained possession thereof, etc.

On the return day the cause was continued to December 20, 1875, on which day Arnold interpleaded for the cotton, and a demurrer was sustained to his interplea. The defendant, Cooper, moved to dissolve the attachment for want of a sufficient affidavit; whereupon the Justice permitted the plaintiff to amend the affidavit by inserting after the word "*unpaid*" the following: "*and defendant had removed a part of the property from the premises without paying said rent.*"

Cooper then filed an answer, in substance, as follows:

He denies that he is indebted to plaintiff in the sum of $235.50, and that the same is wholly unpaid. Admits that on

January 23, 1875, he executed a promissory note to plaintiff for that sum, for the rent of his farm on Little Red river, and for corn furnished defendant, and a judgment in a Justice's court in favor of Deener & Bro. against defendant, which plaintiff had purchased of them. That the sum of $150 embraced in said note was for the rent of said place, $37.50 for corn furnished defendant by the plaintiff, and the balance was for said judgment. But that under the contract for rent of the farm plaintiff agreed to pay defendant for all work he might do for him, and for all improvements done by him on the place, which should come out of the rent. That, pursuant to said contract, defendant had done work for plaintiff on said place to the value of $151.25, for which an itemized account was filed, and which defendant claimed as an offset, etc. He admits that he removed a part of the crop from said place without the consent of the plaintiff, but he states that he had a perfect right to do so, as he had more than paid him for said rent.

On the filing of this answer, by agreement of parties and order of the Justice, defendant's set-off was referred to arbitrators, the award to be returned on February 3, 1876.

The arbitrators returned their award, allowing defendant $92.72 for labor and improvements, to be deducted from the rent note in suit, which sum was credited on the note.

Plaintiff then demurred to defendant's answer, and the Justice sustained the demurrer, and defendant failing to answer further, judgment was rendered against him and Arnold and R. S. Pitts, his surety in the bond for the attached cotton, for $145, plaintiff's debt for rent, and upon failure of Arnold and Pitts to deliver the attached cotton in satisfaction of the judgment, execution to be issued against them.

Cooper appealed to the Circuit Court.

In the Circuit Court the defendant filed a motion to quash and dismiss the attachment in the cause on the following grounds:

1. Because no affidavit was filed before the writ issued, as the law requires.

2. The affidavit shows that the indebtedness sued for was for corn furnished defendant by plaintiff, for a judgment against him, etc., and for rent, a character of indebtendess for which a specific attachment could not issue.

3. The writ does not correspond with the affidavit.

4. No bond was filed as required by law.

5. The court has no jurisdiction in this case.

The motion was argued, and submitted and sustained by the court, but before judgment was entered, "plaintiff moved the court to be allowed to amend his said affidavit and the grounds of attachment therein named," which motion the court overruled, and rendered judgment discharging the attachment.

A personal judgment was then rendered against defendant for $145, as balance due upon the note sued on, and for costs.

Plaintiff excepted to the ruling of the court sustaining defendant's motion to dismiss and discharge the attachment, and in overruling plaintiff's motion to amend the affidavit for attachment, and obtained the allowance of an appeal by the Clerk of this court.

I. By statute a landlord has a lien upon the crop grown upon the demised premises in any one year for rent that accrues for that year, and the lien continues for six months after the rent becomes due. Gantt's Dig., sec. 4098.

A landlord who has a lien on the crop for rent may bring suit before a Justice of the Peace, or in the Circuit Court, as the case may be, and have a writ of attachment for the recovery of the same, whether the rent be due or not, in the following cases. *Ib.*, 4101.

First—When the tenant is about to remove the crop from the premises without paying the rent.

Second—When he has removed it, or any portion thereof, without the consent of the landlord.

Before such writ of attachment can issue, the landlord, his agent or attorney, must make and file an affidavit of one of the above facts, that the amount claimed, which must be therein stated, is or will be due for rent, etc., stating the time when the same became or will be due, and that he has a lien on such crop for such rent, etc. *Ib.*, 4102.

In this case the note sued on was due when the suit was commenced, and on its face the whole sum promised to be paid purported to be for the rent of the plaintiff's farm for the year 1875.

But the plaintiff, in his affidavit for an attachment, stated that the note was executed for the rent of his farm for the year 1875, and for corn furnished the defendant, and for a judgment against him, but the affidavit does not state how much of the note was for rent.

The plaintiff had no lien on the defendant's crop, under the above statute, for the price of the corn nor the amount of the judgment. So much of the note only as was for rent was a lien upon the crop, and the affidavit should have stated the amount.

Nor did the original affidavit state either of the grounds for attachment prescribed by the statute. It did not state that defendant was "*about to remove the crop from the premises without paying the rent,*" or that he had removed the crop, *or a portion thereof from the premises, without the consent of the plaintiff.*

When the defendant moved to dissolve the attachment before the justice for want of a sufficient affidavit, the plaintiff was permitted to amend the affidavit by inserting a clause as above stated, which did not help it much.

The affidavit, as amended, reads thus: "That said debt '($235.50 the full amount of the note)' is justly due and remains wholly unpaid, and defendant had removed a part of the *property* from the premises without paying said rent," etc.

If the justice wrote this amendment, he could not have had the statute before him. It was an attempt, perhaps, to cover the *second* ground for attachment prescribed by the statute. The amendment states "*that the defendant had removed a part of the property from the premises without paying said note,*" when it should have stated that the defendant had removed a portion of the *crop* from the premises *without the consent of the plaintiff*.

No attempt was made to amend the affidavit before the justice by stating what portion of the note was for rent.

With the affidavit thus defective, the cause went into the Circuit Court on appeal from the judgment of the justice. Should the Circuit Court have permitted the plaintiff to amend the affidavit?

The statute giving landlords the right to attach for rent, cited above, was enacted December 28, 1860, and contains no provision for amending an affidavit upon which such attachment is issued.

But the general statute of attachments passed afterwards contains this proviso:

"The affidavit or ground of attachment may be amended so as to embrace any grounds of attachment that may exist up to and until the final judgment upon the same. If the amendment embrace grounds existing at the time of the commencement of said proceeding, and is sustained upon such grounds, the lien created by the suing out or levying of the original attachment shall be good," etc. Gantt's Digest, chap. 11, sec. 394.

And section 459, same chapter, provides that: "The pro-

visions of this chapter may be applied, so far as shall be proper, to regulate the proceedings in cases of attachments against specific property."

And by section 4617: "Whenever any proceeding taken by a party fails to conform in any respect to the requirement of the law, the court may permit an amendment of such proceedings, so as to make it conformable thereto."

There can be no good reason why attaching creditors generally should be permitted to amend their faulty affidavits in furtherance of the substantial administration of justice, and the same privilege be denied to landlords attaching their delinquent tenants.

It is objected by counsel for appellee that the record fails to show what amendment the appellant proposed to make to his affidavit. To this it may be replied, that it is manifest that the court denied to him the privilege of amending his affidavit at all.

The amendments that should have been made to make the affidavit conform to the statute are apparent, as above shown.

Moreover, the requisite amendments might have been made upon facts appearing of record. The defendant admitted in his answer before the justice that $150 of the sum named in the note sued on was for rent. He also admitted that he had removed part of the crop from the demised premises without the consent of the plaintiff. He adds, however, that he had a perfect right to do so, as he had more than paid him for the rent in labor and improvements on the farm; but this, by the award of the arbitrators, proved not to be true.

The court below erred in refusing to permit the appellant to amend the affidavit, and in discharging the attachment so far as its discharge was based upon defects in the affidavit.

II. As to the bond for attachment.

The statute also requires the plaintiff landlord, before an

attachment is issued, "to file with the justice or clerk, as the case may be, a bond to the defendant, with sufficient security, in double the amount of the claim as sworn to, conditioned *that he will prove his debt or demand and his lien in a trial at law*, or that he will pay such damages as shall be adjudged against him. Gantt's Digest, sec. 4102.

At the time this statute was passed it required a seal to make a *bond*, and though private seals have since then been abolished, lawyers will call such instruments *bonds*, as they are almost compelled to say "ejectment," "replevin," etc., regardless of the fact that the code makers have abrogated the common law classification of actions. It is difficult for innovators to stop the use of long used legal terms, founded on a classification as natural as *that* in any department of abstract or physical science.

The bond in this case is signed by the plaintiff and a surety, it is made to the defendant, and is in double the amount of the plaintiff's claim as sworn to, but it is not conditioned as prescribed by the statute, and is therefore not a good statute bond (*Edwards et al.* v. *Cooper*, 28 Ark., 469,) though the plaintiff and his surety may be liable upon it as a common law obligation.

No objection was made to the bond before the justice of the peace, but if the court below had permitted the plaintiff to amend his affidavit, it might have required him to file a statute bond in good form for the protection of the defendant. True, the plaintiff did not offer to file another bond, but the offer if made, would have been useless, as the court would not permit him to amend his affidavit, and the *rem* feature of his case had to fall under this ruling.

The appellant does not complain, on this appeal, of the judgment in *personam* rendered in his favor.

So much of the judgment as discharges the attachment must

be reversed, and the case remanded with instructions to the court below to permit appellant to amend his affidavit in the matters indicated, and that he be required to file a bond, conditioned as required by the statute, and for such other proceedings in the case as may be had in accordance with law.

JACKMAN V. ANDERSON.

ATTACHMENT: *Judgment on Discharge of.*

Upon the discharge of an attachment the defendant should have judgment for the return of the attached property.

APPEAL from *Chicot* Circuit Court.
Hon. J. F. SORRELLS, Circuit Judge.
Reynolds for appellant.
Rice & Bishop, contra.

ENGLISH, C. J.:

On January 4, 1876, Wm. P. Jackman sued John Anderson in the Circuit Court of Chicot county, on an open account for rent of land, a mule, supplies, etc., amounting to $319.93, and obtained an attachment upon an affidavit that defendant was about to sell, convey or otherwise dispose of his property with the fraudulent intent to cheat, hinder or delay his creditors, and to deprive the plaintiff of his lien for rent. The writ was general against the goods and chattels, lands and tenements of defendant.

The sheriff returned upon the writ that he levied upon what he supposed to be eight or ten bales of lint cotton in the gin house of Carlton & Jackman.

At the return term the defendant filed a sworn denial of the truth of the plaintiff's affidavit. The issue was submitted to a jury at the January term, 1877, who, upon the evidence

adduced by the parties, returned a verdict in favor of the defendant, and assessed his damages at $20; then follows this entry:

"It is therefore considered, ordered and adjudged that the sheriff return the property attached, or the proceeds thereof, to the defendant herein, and that the defendant go hence without day, and that he recover from the plaintiff, and John Neal and C. H. Carlton, sureties on the attachment bond, the sum of $20 besides his costs in this suit in this behalf expended; to which order of the court in requiring the sheriff to return the property attached, or the proceeds thereof, to defendant, the plaintiff excepted, and prayed an appeal to the Supreme Court, which is granted."

The only question presented on this appeal is whether the court erred in ordering the sheriff to restore the property seized under the attachment to defendant, on the verdict of the jury that the attachment was wrongfully sued out, and upon the judgment of the court thereon discharging the attachment.

It necessarily follows that the property must be restored to the defendant upon such discharge of the attachment. *Delano et al.* v. *Kennedy*, 5 Ark., 459. The process in *rem* under which the property is seized into the custody of the sheriff being in effect abated or quashed by the judgment of the court discharging the attachment, the sheriff has no longer any legal authority to hold the property. Gantt's Digest, sec. 459; Acts of 1875, p. 7.

It seems from the above entry that the court on dissolving the attachment discharged the defendant personally from the action, but such we presume could not have been the intention of the court as the defendant had put in an answer to the merits of the action which remained to be tried when the appeal was taken.

Affirmed.

PORTIS V. MERRILL.

CONTRACTS: *Written, can not be varied by parol.*

Where a note promises to pay interest at five per cent per month after maturity, the interest can not be avoided by a plea in equity that it was an agreed penalty to stimulate prompt payment at maturity.

APPEAL from *Jefferson* Circuit Court.
Hon. JOHN A. WILLIAMS, Circuit Judge.
Carlton & McCain, for appellant.
——— *Compton*, for appellee.

ENGLISH, C. J.:

Joseph Merrill sued James M. Portis, in the Circuit Court of Jefferson county, on the following note:

"$475.79. On or before the 28th day of November next, value received, I promise to pay to the order of J. Merrill four hundred and seventy-five 79-100 dollars, with five per cent interest per month from due until paid. Witness my hand and seal, this 28th day of June, 1874.

J. M. PORTIS.

The defendant filed the following answer to the complaint:

"Comes the defendant and files this, his equitable answer to the complaint herein, and says: That he admits that he executed the note as set out in the complaint, but he says that said note was executed under the circumstances and for the consideration following—that is to say: On the 28th day of June, 1874, the plaintiff held against the defendant a certain promissory note given by defendant to one James S. Evans, dated the — day of ———, 187–, for the sum of $500, bearing 10 per cent interest per annum, and which interest was afterwards increased to 2 1-2 per cent per month, which note had been indorsed by said Evans to the plaintiff herein, before said

28th day of June, 1874, and on which note was due, at the date last aforesaid, the sum of $422.93, as accumulated interest, and by way of payment of such accumulated interest, and in order to compound the same, the plaintiff agreed with the defendant to accept the defendant's note for such accumulated interest, payable at the end of five months, to wit: on the 28th day of November, 1874, with the understanding and agreement that interest at the rate of 2 1-2 per cent. per month should be calculated on said sum of $422.93, accumulated interest as aforesaid, and that the said interest, so calculated, should be inserted in said note as principal, and in pursuance of such agreement, interest at the rate of 2 1-2 per cent. per month was calculated on said sum of $422.93 from the said 28th day of June, the date of said note, until said 28th day of November, 1874, the date of the maturity of said note, such interest, so calculated, amounting to the sum of $52.86; and the defendant thereupon, for the consideration aforesaid, and for no other or different consideration, executed to plaintiff the note in suit, and as a penalty to secure the payment of said sum of $422.93, and the said sum of $52.86 interest, so included in said note as aforesaid, it was stipulated in said note that the said note should bear interest, after maturity, at the rate of five per cent. per month. This defendant is willing to pay, and here tenders to pay the said sum of $475.79, with six per cent. interest thereon from the maturity of said note, and all costs of this suit; and defendant makes this equitable answer a counterclaim against the plaintiff, and asks to be relieved from the payment of said penalty stipulated in said note at five per cent. interest per month, as unconscionable and contrary to equity, and for other relief."

The court sustained a demurrer to the answer, and defendant saying nothing further in bar of plaintiff's demand, judgment was rendered against him for $475.79 debt, and $285.75

damages, being interest on the note from maturity to date of judgment (December 18, 1876), and the judgment was made to bear six per cent. interest.

Defendant appealed.

The answer of appellant to the complaint is not in the nature of a plea of want of or failure of consideration of the note sued on, for it shows neither. Nor can it be sustained as a plea of usury, for at the date of the note the Constitution of 1868 was in force, which allowed the parties to contract for any rate of interest they pleased, and the plea of usury was not allowed.

The note, on its face, is plainly a contract for interest at five per cent. per month from its maturity, and the appellant could not set up a cotemporaneous verbal agreement that it was to be a penalty, and thereby vary the plain terms of the written contract.

It was a hard bargain, and the creditor may have been over-exacting, but appellant must abide by the face of his written contract, as we held in *Miller* v. *Kempner*, 32 Ark., 573. We can not make new contracts for parties, or alter their plain meaning by construction.

If it be said that the five per cent. interest, after maturity, stipulated for in the face of the note, must be treated as a penalty intended to stimulate the maker to pay the note promptly at maturity, how could it have any such effect if the law be that he can only be required to pay the legal rate of interest after maturity as damages for breach of the contract? On the contrary, if the maker is legally obliged to pay the rate of interest stipulated for in the face of the contract, he would be stimulated to pay the note at maturity, and stop the running of such interest.

A sane man has no claim upon a court of law or equity to relieve him from a hard bargain, when it is voluntarily entered into, and no fraud is practiced upon him. We have heretofore

examined this subject fully, and we are not disposed to retrace our steps or reverse our conclusions.

Affirmed.

DISSENTING OPINION.

EAKIN, J.:

This is a case of direct application, by cross-bill, to a court of equity for relief against a penalty. The note in suit was given for accumulated interest on a debt at the rate of 2 1-2 per cent. a month, calculated up to the maturity, and included in the sum total, and with interest upon the whole, after maturity, at the rate of five per cent. per month. There was no law, at that time, forbidding such a contract, and a court of law would have no option but to enforce it, nor should a court of equity refuse to do so at the suit of the creditor, unless the equitable defense should be properly made, and in apt time. Under the Constitution of 1868, parties might lawfully agree upon any amount or rate per cent. of interest, unless so exorbitant or oppressive as to give rise to the presumption of oppression, or undue influence, or fraud. Equity then interposes upon grounds independent of statute or constitutional provisions as to the permissible rate per cent. in fair transactions. It is, moreover, the settled policy of courts of equity to relieve against penalties invoked upon themselves by parties to a contract; and further, to discourage, and except in peculiar cases, refuse to enforce executory contracts for compounding interest in future. These principles are all based on the broad ground of duty on the part of the chancery courts to protect needy persons from such improvident contracts as should not be exacted of them by others whose situation naturally gives them an undue influence.

Within a few years all usury laws in England have been repealed, and the state of the law in this respect is now, there,

as it was here under our Constitution of 1868. The courts of chancery here have nevertheless held that they were not prevented from setting aside extravagant and improvident bargains with regard to interest (see cases cited in 2d edition of Bispham's Eq. Ju., sec. 222); nor has the right to contract for interest any bearing on the question of penalties.

What is a penalty, and what a contract for the use or forbearance of money, depends upon intention, to be deduced from the terms of the contract and the circumstances of the case. In this case the cross-complaint alleges that the agreement to pay five per cent. per month on the whole accumulated interest at 2 1-2 per cent. a month was, in truth, a penalty, and so intended. Indeed it would seem so in the light of the present Constitution, which has since fixed ten per cent. per annum as the highest permissible rate. It certainly was, in any view, a contract *in futuro* for compounding interest.

I think, in all cases, agreements for increased interest after maturity, or for exorbitant interest then to commence, especially when there is no reciprocal obligation on the part of the creditor to allow the debtor the use of the money at the increased rate for a definite time, are penalties in their very nature and essence, at least *prima facie*. They bear indubitable marks of intention to secure prompt payment to avoid worse consequences. The debtor never calculates upon really paying them. He is too apt to be sanguine with regard to his resources and the chances of business, hopes to pay at maturity, and often is not in the mental condition to make cool calculations. He improvidently puts himself into a situation where disappointment as to his means is attended with the most shocking annoyances. This is more apt to occur where there is no legal restriction upon conventional interest, and courts of equity, in such cases, should rather increase their vigilance than renounce their powers.

I think, in this case, the offer to pay the full amount of the note, with legal interest after maturity, was quite enough, and relief should have been granted. I think these views may be reconciled with the decisions in *Badgett* v. *Jordan*, 32 Ark., 154, and *Miller* v. *Kempner*, *Ib.*, 573. The first was strictly a case at law, in which it was contended that a judgment for the excessive interest was erroneous. Courts of law have, of course, no power to administer equitable relief. The last was a case in equity by Kempner to foreclose a mortgage given to secure a note made to bear interest at the rate of ten per cent. per annum until maturity, and two per cent. per month afterwards till paid. After due service a decree was rendered upon default to appear and answer. Afterwards he moved to set the decree aside, which was refused. This court sustains the action of the court below upon the ground that the motion was addressed to the sound discretion of the court, and there was nothing to show that the court abused its discretion.

With these views I cannot assent to the opinion of the majority.

SHINN v. TUCKER.

STATUTE LIMITATIONS: *Time, how computed.*

In computing time to ascertain whether an action is barred by limitations, the day on which the right of action accrued must be included, and the day of issuing the summons excluded.

APPEAL from *Pope* Circuit Court.

Hon. W. W. MANSFIELD, Circuit Judge.

W. C. Ford and *Clark & Williams*, for appellant.

Granger & Coblentz, *contra*.

EAKIN, J.:

On November 27, 1875, Shinn sued Tucker before a justice

of the peace upon three notes under seal, all bearing date January 1, 1861. They are all expressed to be for value received, and contain a promise to pay the respective sums of each, generally, without specifying any time. In effect they are notes payable on demand. Each note has a credit endorsed: one March 28, 1864, one January 15, 1869, and the other December 1, 1870.

The defendant pleaded payment, and the statute of limitations. Judgment was rendered in his favor, and plaintiff appealed to the Circuit Court. There the defendant was allowed to put in an amended plea without verification. The amended answer repeated the pleas of payment and limitation, to which plaintiff replied, as to each of the notes, a promise within ten years. There was no proof of payment adduced upon trial. The plaintiff showed that the several endorsements of credit had been made before the statute bar had attached. As to whether the particular sums, credited upon each note, had been paid by the defendant for the purpose of being so applied, or had been so applied by his consent, the proof was conflicting, and this court would not disturb the verdict of the jury, so far as it implies that these payments did not form new points from which the statute would commence running. The jury found for defendant, upon which followed judgment, motion for new trial, bill of exceptions and appeal.

The material question presented by the record is, was the action brought within the period allowed by the statute of limitations, leaving the credits out of view. Upon this point the instructions of the court, viewed as a whole, were to the effect: That the right of action of plaintiff accrued on January 1, 1861, and would be barred at the end of ten years, unless there had been such part payment as would make a new point from which the statute would run; but that the statute

did not run between May 6, 1861 and April 2, 1866, which intervening time was not to be computed, and that the jury, in computing the time of ten years, must include the day of the date of the writings, and exclude the day on which the summons issued.

The writings were payable immediately, and payment might have been demanded at once. They were not entitled to grace. There was no error in telling the jury that the day of their execution must be included in the estimate, accompanied with the direction that the day of the issue of the summons must be excluded. There has formerly been much labored discussion in the English and American courts, and much conflict of opinion as to the true method of computing time from one act or event to another. We are happily spared from entering into it by our statute, which furnishes the following plain and concise rule for all cases. Sec. 5698 of Gantt's Digest provides that "when a certain number of days are required to intervene between two acts, the day of *one only* of the acts may be counted," and the rule applies equally when a certain number of years is mentioned, as years may be resolved into a certain number of days, and uniformity of principle must be preserved. Applying that rule here, it was proper to advise the jury to include the day of the first act or event, the execution of the writing, and to exclude the day of the last event, to-wit: The issuance of the summons, and if they should find that the suit was not in ten years, to find for defendant.

And the same rule must be applied to the time to be excluded from the computation on account of the war, to-wit: From the act of secession on May 6, 1861, to the proclamation of the president on April 2, 1866, declaring the war, as to Arkansas, closed, making a period of four years, ten

months and twenty-seven days, allowing for the thirty-one days in March.

This period, for the suspension of the statute, was definitely fixed by this court in the case of *Hall* v. *Denckla*, 28 Ark., 506. In that case no close calculation of time to a day was necessary, and the court inadvertently use this expression: "We find that the statute of limitations ceased to run *between* May 6, 1861 and April 2, 1866, by reason of the civil war."

This formula of expression was adopted by the Circuit Judge in the instruction, and literally construed by the jury may have induced them to exclude both days in the estimate of the time to be left out of the calculation, making a period of only four years, ten months and twenty-five days, when, by the statute, one or the other of the days should be included. The word "from" would have been more proper than the word "between."

With regard to all sealed instruments as these were, against which the statute had commenced running on May 6, 1861, and which were not already barred at the time of the adoption of the Constitution of 1874, the *actual* time of limitation was fourteen years, ten months and twenty-seven days. Including January 1, 1861, this period would expire at midnight on November, 27, 1875, but as this calculation is made exclusive of the day allowed for the issuance of the summons (inasmuch as the day when the writings were made is included) the summons would have been in time on the 28th. It was certainly within time on the 27th, in any view of the case.

Obviously, the jury were mistaken in their calculations. They could not have brought in a verdict for the defendant upon the proof, upon any other ground than the bar of the statute, which, as we have seen, had not attached.

Other errors were assigned, which it is not important to notice.

For the error in the verdict which was not only contrary to evidence, but ths instructions of the court, the judgment must be reversed and the cause remanded with directions for a new trial.

MYRICK v. JACKS.

33 425
70 192

33 425
85 106

1. INFANTS: *Jurisdiction of courts over person and property of.*

The general jurisdiction over the persons and property of minors belongs to the Chancery Court. Courts of probate have, by statute, limited powers over the estates of minors in the hands of administrators and guardians, but the statute is the limit of their powers, and their orders not authorized by the statute, are void.

They have no authority to direct an investment of a minor's funds in land.

2. FRAUD: *Jurisdiction in equity.*

Wherever there is fraud, equity has jurisdiction, exclusive or concurrent, with law.

——— *How proved.*

At law fraud must be shown and proved. In equity it suffices to show facts and circumstances from which it may be presumed.

3. ——— *Not necessary to place party in statu quo.*

When courts cannot place parties wholly in *statu quo*, they are not thereby precluded from relieving against fraud. They may do so as nearly as possible, and make compensation.

APPEAL from *Phillips* Circuit Court, in Chancery.

Hon. J. N. CYPERT, Circuit Judge.

B. C. Brown, for appellant.

——— *Rose, contra.*

EAKIN, J.:

Complainant's bill seeks to hold defendant, Jacks, responsible for moneys or securities received from her guardian during her minority.

The bill charges that her mother died in 1853, leaving her sole heiress to two valuable city lots in Louisville, Kentucky.

That in 1865 she was induced by her father to apply to the Phillips county Probate Court to have him appointed her guardian, which was done. That a few days afterwards her father, as guardian, applied to said court for authority to exchange said property for certain city lots in Helena, in this State, owned by Jacks, representing to the court that he had made a contract with Jacks for such exchange in 1861, at which time the properties in Louisville and Helena were estimated to be of about equal value, about $9,000 each; that it had been agreed at the time between her father and Jacks, that her father was to continue to pay taxes on and receive the rents of the Helena property, and to allow Jacks therefor, on settlement, rent at the rate of seven per cent. on its valuation; that meanwhile the property in Louisville had been sold by order of the Probate Court, there, and had brought a sum over its estimated value in 1861, and that the rents on the Helena property, by that time, had so augmented as that, added to the original estimate of value, it would nearly reach the sum for which the property in Louisville had sold, to-wit, the sum of $12,101.25, leaving a small balance in the guardian's hands for attorney's fees, about which there is no complaint.

Upon this application the Probate Court of Phillips county directed the former contract to be consummated, and that Jacks should convey to her father certain portions of the Helena property, estimated at 40 per cent. of the same on account of his interest in the Louisville property, as the husband of her mother, under the laws of Kentucky, and the balance to herself, and that her father, as her guardian, should convey the Louisville proper to Jacks. In accordance with which order Jacks conveyed, as directed, and receipted to her father for the proceeds of the Louisville property, which was in notes, to the amount of $11,649.69.

Complainant alleges that Jacks perpetrated a fraud upon her in this, that he grossly misrepresented the value of the Helena property, which, at the time of the contract with her father, in 1861, was only worth $3,000, and at the time of the conveyance to her, not more than $3,500. That there was collusion upon his part with her father, by which the court was misled in making the order; that the large amount of interest charged was an after-thought to bring up the value of the Helena property so as to absorb the sale value of that in Louisville, and that her interests were sacrificed. She afterwards married during her minority, and was induced by her father to reconvey to Jacks two of the lots, in order, as she was advised, to facilitate a land trade in which her husband was interested, but she did not understand the transaction. She knew nothing about the condition of her affairs whilst she was a minor. Her father died without making any settlement, and she had only discovered the facts of the case and become aware of the fraud a short time before her bill was brought in 1875. She had the utmost confidence in her father, and relied upon him implicitly, but he never revealed to her the condition of her affairs, further than to tell her that the lots in Helena were hers. Her guardian died wholly insolvent, and the sureties on his bond have either lost all their property or been discharged by the bankrupt law.

She prays that the order of the Probate Court be set aside, and that Jacks be decreed to repay the money he has thus received over and above the value of the lots conveyed to her through her guardian; and, to that end, that an account be taken of such value. She agrees to retain them or to reconvey, and prays general relief.

Such, in short, are the material allegations upon which the equity of the bill rests.

To this bill Jacks demurred, assigning nine causes. They

are each argumentative, however, going to show want of equity, and, taken together, amount to a general demurrer under the 5th clause of sec. 4564, Gantt's Dig. It was sustained by the court, and the bill dismissed. Complainant appealed.

The general jurisdiction over the persons and property of minors belongs to the Chancery Courts. It is a very high trust, involving the most delicate and important interests of a helpless class, which is peculiarly the subject of the jealous and watchful care of chancery, and which is peculiarly liable to injury from the greed of crafty men and the carelessness of relations. Courts of probate have, by the statute, been entrusted with some limited powers over the estates of minors in the hands of administrators and guardians, and within the scope of those statutory powers they are certainly entitled to all presumptions accorded to superior courts of record. But they had no such jurisdiction by common law, and beyond the limits given they have none now. When they proceed to do a thing which, by proper proceedings and upon a proper case made, they are authorized to do, it will be presumed they have acted correctly; or if the proceedings have been irregular or the conditions of jurisdiction not strictly fulfilled, it is error to be corrected on appeal or *certiorari*. But if they undertake to make an order not authorized under any circumstances, although they may have jurisdiction over the same property for other purposes, it is void.

Every day's experience convinces us of the propriety of observing this rule and reserving for the more deliberate and intelligent action of the Chancery Courts all interference with the property of minors beyond the strict limits of the powers expressly conferred upon the Probate Courts by the Legislature. It devolves upon the law-making powers to determine how far they may be safely trusted with such powers; but a high public

policy requires it of the superior courts to see that they do not transcend them.

It is scarcely credible that a court of chancery would have made such an order as is complained of in this case upon so slender a showing.

The objection is not that the Probate Court attempted to exercise jurisdiction over real property in another State. This is the language of the order. It seems to contemplate an exchange and mutual conveyances. But it is evident that the court meant only to authorize the investments in Phillips county lands of the minor's money, the proceeds of the Louisville sales which had then already been made. The fatal objection is that the Probate Court had no authority, under any statute, to direct such an investment. The order of the court was a nullity.

If the means by which Jacks got possession of this fund were fraudulent, equity will follow it into his hands, and acting *in personan*, decree a repayment. The jurisdiction of equity over fraud is all-embracing. None of its protean shapes can be allowed to elude the searching investigations of a Chancellor. No human ingenuity can devise a plan for the protection of fraud. Positive acts of the Legislature cannot be used as covers for its perpetration. This jurisdiction is not confined to cases where a trust can be declared upon some specific thing, traced into defendant's hands, and there remaining. A constructive trust is only *one* of the means used in the correction of fraud, and not the limit of the court's machinery. It will correct fraud wherever found by the most available means applicable to the case, and this it *may* do even where the remedy is plain, simple, and adequate at law, although in such cases the jurisdiction is seldom invoked. Whenever there is fraud there is equity jurisdiction, exclusive or concurrent. In this case the remedy at law is not adequate. The bond is old and

almost, if not quite, worthless, but the remedy would be cumulative, if good.

Fraud must be shown and proven at law. In equity it suffices to show facts and circumstances from which it may be presumed. In this case it is alleged, with a pardonable delicacy of language, concerning complainant's father, that Jacks contriving to defraud her of a valuable estate in Kentucky fraudulently misrepresented the value of his Helena property; that it was not worth more than a third of the estimated value of the Kentucky property, and afterwards, when the Kentucky property was sold and found to bring about three thousand dollars more than either had been represented to be worth, the expedient was adopted of an old pretended written contract, made by her father without any authority, by which he had agreed to pay seven per cent. on this estimated value in consideration of rents which it is doubtful whether he ever received, and which complainant alleges she believes he never did. The old written contract, upon which this attempt to equalize the consideration was based, was not produced before the Probate Court, or not exhibited with the petition, at least; notwithstanding the court was asked, upon that, to order away to Jacks about $5,000 of the minor's fund, and, notwithstanding the strangeness of the provision, nor is the want of it accounted for in any way. Still, upon the suggestion of it, from all that appears, the court charged the infant this enormous amount over the value of the property, already triply estimated, and compelled her, or attempted to do so, to give Jacks the benefit of her Louisville fund, amounting to more than $12,000, From these facts as they appear in the bill, if unanswered, the court might well presume fraud and compel restoration.

It is no objection that complainant cannot put Jacks entirely in *statu quo* on recision. The change in the condition of the property was brought about by persuasion to accomplish a

transaction in which Jacks was a party, and before the fraud was discovered, and by the action of complainant in a matter she did not understand.

When courts can not place parties wholly in *statu quo*, they are not thereby precluded from granting relief against fraud. They may proceed to do so as nearly as possible, and make compensation. It would disclose a very gross inadequacy in our system of remedial justice if, in this case, taking the bill as true, Jacks could continue to enjoy the fruits of a transaction by which, with full notice of her rights, he had acquired almost the whole estate of an infant for a consideration so grossly inadequate. He should answer the bill, and may, by leave of the court below, under sec. 4571, Gantt's Dig., bring in all parties necessary to his protection with regard to the subject-matter of the litigation. The bill seems to concede the right of the father, under the laws of Kentucky, to forty per cent. of the proceeds of the Louisville sales. The subject-matter of the suit, in this view, is sixty per cent. of the fund which Jacks received from the guardian. It is not meant here to decide upon this point, nor is it necessary.

We think the Chancellor erred in sustaining the demurrer and dismissing the bill.

Let the decree be reversed and the cause be remanded, with instructions to the court below to overrule the demurrer, and for such proceedings as may be consistent with equity and this opinion.

WENTWORTH ET AL. V. CLARK ET AL.

MARRIED WOMAN: *Her deed void.*

The deed of a married woman not acknowledged according to the statute is absolutely void and a nullity, and incapable of confirmation. (The deed in this case was executed before the adoption of the Constitution of 1874.—Rep.)

APPEAL from *Marion* Circuit Court, in Chancery.
Hon. J. W. PITTMAN, Circuit Judge.
Gregg for appellant.

EAKIN, J.:

Plaintiff (then Eliza G. Tucker) brought an action at law against Clark and others, to recover certain town lots in Buffalo, Marion county, showing her title by descent. The complaint was filed in July, 1876.

Defendant made no defense at law, but filed a cross-complaint in equity, whereupon the cause was transferred to the equity docket. Some errors of practice in allowing this are complained of, not material to notice.

The cross-bill, admitting that the title had been in plaintiff, as alleged, sets up a purchase of the lots by defendant from plaintiff and her, then, husband on May 2, 1870, for the sum of $395, paid to plaintiff; that she and her husband thereupon executed and delivered to him a deed of conveyance; that he entered into possession, under the purchase, with plaintiff's assent—has continued to hold, and with like knowledge and consent has made valuable and lasting improvements worth $2,000. The deed under which defendant claimed was offered as an exhibit, and asked to be taken as a part of the answer.

Pending the suit plaintiff intermarried with Wentworth who was made a party. They excepted to the deed exhibited

because it did not show that it had been executed and acknowledged by plaintiff as required by law, and asked that it might be suppressed.

The defendant filed an amended cross-complaint, setting up the same conveyance by Tucker and plaintiff, then a married woman, by which she intended to convey the property. That Tucker died about the 20th of March, 1872; that plaintiff intermarried with Wentworth about the 15th of July, 1876; that during the intermediate time, while plaintiff was sole, defendant continued in possession, making valuable improvements to the additional amount of $75, all with the knowledge and consent of plaintiff, and that whilst sole she demanded of defendant $50 as part and parcel of the purchase money for "real estate under said original contract," and did many other acts recognizing said contract.

A demurrer was filed to the amended cross complaint, and also exceptions to the deed of conveyance set up and relied upon therein.

Both were overruled and plaintiff answered the cross-bill. She denies the execution of the deed by herself and her former husband, or any attempt on her part to execute the same, and that defendant ever paid the consideration. She admits that during her first coverture, and after defendant's possession, he put on improvements to the value of five or seven hundred dollars. Admits that he remained in possession during her widowhood, but denies that it is, or was, with her consent, or that he has made valuable improvements since her first husband's death. She admits that she may have signed the paper, but denies that she did so intelligently; denies that the $50 she demanded was for purchase money, but was due her on other accounts; and denies, finally, that during her widowhood she acquiesced in defendant's possession of the property, but says that she had long been a resident of Ala-

bama, where she remained until her first husband's death, when she came to Arkansas to look after her property, and commenced proceedings against defendant in a reasonable time.

The deed exhibited in the cross complaint and relied upon by defendant, was signed by Tucker and his wife (plaintiff), and acknowledged before a Justice of the Peace in Alabama. The form of his certificate expresses only, that she "of her own free will signed and sealed the relinquishment of dower in the foregoing deed, for the purpose therein contained and set forth."

The evidence, taken most strongly for defendant on all conflicting points, showed that Mrs. Tucker—coming to Arkansas after her first husband's death—began making enquiries concerning her property; that she lived a short time near the lots in question, then held by defendant, and at one time demanded of him money as part of the purchase price, which he refused to pay; that she acknowledged her signature to the bond was genuine, after she had claimed title to the lots, and made no objection to some slight repairs the defendant was making, amounting to about $75.

The Chancellor deemed the lots to be the property of defendant Clark, and confirmed his title; from which plaintiff appealed.

The exceptions taken to the deed set up and relied upon in the cross-bill and made an exhibit thereto, was in accordance with the new practice in land suits, prescribed by the act of March 5th, 1875.

In the year 1870 a married woman could not convey any interest in real property in any other mode than that prescribed by statute, nor, except in the case of separate property, make any contract whatever with regard thereto, either express or

implied, which would in any way affect her title or give equities against it.

The statute has been always construed with the utmost rigor, and those who deal with married women have been held, at their peril, to see to it that every requisite of the statute is observed. The power of conveyance is in derogation of the common law, and, construed with all rigor, too often leads to the spoliation of a class, subject to all manner of subtile and indefinable influences upon the part of husbands, which are none the less irresistible because they may often elude the scrutiny of the courts.

Her deed, if not in accordance with the statute, is not, like an infant's, voidable. It is absolutely void and a nullity. *McDaniel* v. *Grace et als.*, 15 Ark., 465; *Elliot et als.* v. *Pearce*, 20 Ark., 508; *Stidham and wife* v. *Matthews et als.*, 29 Ark., 650; *Wood and wife* v. *Terry et al.*, 30 Ark., 385.

In this last case it was also held that no estoppel can attach from her conduct, nor can she be bound by any executory contract not duly acknowledged.

The deed was, in this case, aeknowledged before a Justice of the Peace in another State. There was no law authorizing that. The deed could not be used in evidence to show title, or an executory contract; nor could it derive any validity from subsequent confirmation, in any manner, which would not, of itself, without the deed, give an equity to defendant. The exceptions to it should have been sustained.

After the death of complainant's first husband, there is nothing to show such new contract and part performance as would entitle defendant to a deed.

The trifling repairs, amounting to $75, taking his own estimate, made upon property he was already occupying and holding adversely, would not be sufficient part performance to create such an equity. But it is not necessary to consider that.

He did not take possession and improve under or by virtue of, or in pursuance of, any such new and independent parol contract.

The decree should have been for plaintiff, upon her complaint at law, and possession should have been awarded her with costs, and the cross bill in equity should have been dismissed.

Let the decree be reversed, and a judgment be entered here for the possession of the property and all costs, in favor of plaintiff Eliza G. Wentworth and her husband.

City of Little Rock v. Barton et al.

33 436
58 611

1. Brokers: *Who are. Power of Municipal Corporations to tax.*

A dealer in real estate for others is a broker, and the City of Little Rock has the power to require such to pay license for following the occupation within her limits.

2. *Property of citizens held subject to police power.*

Every citizen holds his property subject to a proper exercise of police power either by the Legislature directly or through public corporations to which the Legislature may delegate it.

APPEAL from *Pulaski* Chancery Court.

Hon. J. R. Eakin, Chancellor.

Dodge & Johnson for appellant.

Rose, contra.

Turner, S. J.:

The plaintiffs on behalf of themselves and others interested, state that they reside in the city of Little Rock and severally carry on the business of Real Estate Agents in said city: that their business is to buy and sell lands for others; to rent out real property, and to collect the rents on the same, and pay taxes, and does not extend beyond these objects.

That on the 6th day of January, 1876, the defendant by resolution defining the term "*broker*" declared that every person or firm who buys or sells scrip, bonds or exchange, pays taxes at a discount or profit, shall be considered a *broker*, and shall pay one hundred dollars per annum, in currency, in advance, and that any person violating its provisions shall be fined in each and every instance twenty-five dollars, as will appear by reference to the resolution exhibited with and made part of the complaint.

That on the 26th day of December, 1876, the defendant passed an ordinance for the better regulation of licenses in the city of Little Rock for the year 1877, which provides, among other things, that it shall be unlawful for any person to exercise or pursue any of the following avocations without first having obtained a license therefor, from the proper city authorities, and having paid for the same in gold, silver or United States currency; each money broker, land broker, tax broker, exchange broker or other brokers or bankers, one hundred and twenty-five dollars per year, in advance; providing also penalties for carrying on either of said pursuits, as appears by a copy thereof exhibited with the complaint. The plaintiffs say they buy and sell lands and pay taxes for others for a commission or compensation, but they say they are not brokers in the legal sense of the word, and that the said tax, as attempted to be imposed on them, is wholly illegal; and yet, they say, that the defendant, by her agents and officers, is endeavoring to make them pay said illegal tax by arrest and imprisonment, which they say is without any legal sanction whatever, and that plaintiffs believe that the defendant will proceed to enforce the payment of said taxes if not restrained from doing so by this court. Wherefore plaintiffs pray that the said defendant and her agents and officers may

be enjoined and perpetually restrained from levying and collecting the said tax.

On the 11th January, 1877, the defendant filed a demurrer to the complaint, which demurrer was overruled. Whereupon the court granted a temporary injunction and restraining order in conformity to the prayer of the complaint.

On the 26th day of June, 1877, the defendant filed her response to the complaint, admitting the passage by the city council of the city of Little Rock, of the ordinances and resolutions exhibited with the complaint, but alleging that under section 12 of an act of incorporation, passed and approved March 9th, 1875, she has full power and authority to pass such an ordinance, and that the same is now in full force in pursuance of said authority.

Defendant denies that the sole business of the plaintiffs is to buy and sell lands for others, to rent out real estate and to collect the rents, and to pay taxes for others; and defendant charges the truth to be, that they are, each and every one of them, in addition to, and in connection with the said real estate business, either money brokers, scrip brokers, tax brokers, exchange brokers or bankers, under the provision of section 16 of said city ordinance above referred to, and that all of said parties buy and sell scrip, both city, State and county, as brokers, having offices for such purposes, and that they pay taxes on lands at discount as land brokers, so advertised to the public; that they sell lands on commission at certain fixed rates as land brokers, and that they so hold themselves out to the public.

Wherefore, defendant says that she ought not to be enjoined from enforcing the collection of said license tax by said ordinance provided for. Because, she says: the said parties are engaged in a privileged kind of business, which the defendant has, by the general and special laws of Arkansas, the right,

power and authority vested in her to tax and license, and that the same is a fixed and important source of her yearly revenues, by which she is enabled to take care of the property and the rights of the inhabitants thereof; therefore prays that the temporary injunction heretofore issued may be dissolved, etc.; and plaintiff demurs to the complaint for the following reasons:

1st. That this court has no jurisdiction of the subject matter of the complaint.

2d. That the same does not set up facts sufficient to authorize the granting of the relief; and

3d. Because there is no equity in the complaint.

The depositions of a number of witnesses were taken and read on the hearing of the cause.

John Ingram, one of the plaintiffs, stated, that he was a real estate agent, carrying on business in the city of Little Rock at this time; has been engaged in that business since March, 1875; that his principal business was furnishing abstracts of title, looking up homestead lands, and keeps lands on sale; has sold some town property, but not within the last two years. Has not been engaged in selling personal property for others. Has not been engaged in selling bonds, notes or other commercial securities. Has not been engaged in any brokerage business. Has real properly on sale. When parties apply for certain class of lands, witness takes the description and supplies them with it if he can find a piece to suit, charges a regular fee, but not a commission. It is part of his business to negotiate sales of lands for private individuals, in which he charges in accordance with the services rendered.

David Reeve, one of the plaintiffs, stated that he was doing business in the city of Little Rock, principally paying taxes for others, and also deals in scrip, rents property, collects rents, and offers to sell lands for others, but has sold none during the past year. Has been in the business about four years.

The scrip that he buys and sells is on his own account, or on account of his firm. He is of the firm of Reeve & McCabe. They have attempted to negotiate the sale of real estate in a few instances, for other parties, but have not made a single sale. They pay taxes to a considerable extent for others, pay the taxes at a discount from the face of the tax receipt. Think that 203 loans for other parties, based upon collateral security, have been arranged in their office, but that they make no charge for this. It is no part of their business to negotiate loans.

The advertisement of their business, published in the Little Rock Gazette, is as follows:

"Real Estate and Tax-paying Agency. D. Reeve, M. D. "McCabe. Reeve & McCabe, Real Estate and Tax-paying "agency, 106 West Markham street, Little Rock, Ark. Buy "and sell scrip and bonds of all kinds; pay taxes and licenses "of all kinds at the lowest possible rates; also, rent, lease or "sell property on the most reasonable terms."

The sign, at their door, is marked Real Estate Agents and Brokers. D. REEVE.

S. N. Marshall, one of the plaintiffs, stated that his business is principally insurance, also does something in real estate and paying taxes. In real estate he proposes to buy and sell on commission. Doesn't buy or sell for others any scrip or bond, or other securities; pays taxes at a discount from the face of the receipt. Has been engaged in this business five or six years; has never negotiated a loan, nor attempted to do so for others. In one or two cases where he was personally interested to make collections, he found out where the money could be loaned and it was done, and he made his collection out of it; where these loans were made he received no commission.

J. H. Haney, one of the plaintiffs, stated that his business was that of real estate agent. That includes principally paying taxes, collecting rents and selling lands, and business in the

land office in Little Rock. Buys scrips for the purpose of paying taxes. Pays taxes for others and charges a commission therefor. Does not hold himself out as a broker.

J. H. Barton, one of the plaintiffs, stated that his business was that of real estate agent. Buys and sells real estate in Little Rock and throughout the State. When he sees an opportunity to buy real estate cheap he purchases to sell again. Pays taxes for others, which is part of his real estate business. Has been carrying on the business about eight years in the same manner. In buying and selling real estate he does not buy for others. Has in his possession lists of lands for others which he endeavors to sell. Charges a commission for selling real estate. Agrees to pay taxes at a fixed sum less than the face of the receipt, the discount being controlled by the value of the scrips at the time. Purchases the scrips himself for the purpose of paying such taxes.

And this was all the evidence in the cause.

The demurrer to the complaint was overruled by the court and on the final hearing of the cause the injunction was made perpetual, and the defendant appealed to this court.

The jurisdiction of the court of chancery in this cause, we think, is unquestionable. For although there may have been a remedy at law, and we think there was, the Legislature, by the Act of 1873 to amend the Code of Practice in civil cases, in express terms, confers the jurisdiction in question.

Section 296 of that Act declares: "That the Judge of the Circuit Court for any county, may grant *injunctions* and *restraining* orders in all cases of illegal or unauthorized taxes and assessments by county, city, or other local tribunals, boards or officers.

And this provision of the Act of 1873, is strongly fortified by Art. 16, Sec. 13 of the Constitution of 1874 which provides, "That any citizen of any county, city or town may institute

suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exaction whatever."

In order to carry out and make effective sec. 12 of the Act of 1875, the City Council of the City of Little Rock, on the 26th of December 1876, passed an ordinance for the better regulation of *licenses* in the City of Little Rock, which, among other things, ordained that it shall be unlawful for any person to exercise or pursue any of the following avocations or business, to-wit: money broker, land broker, scrip broker, exchange broker or banker, without first having obtained a license therefor from the proper city authorities and having paid for the same in gold, silver or United States currency $125 per year in advance; and further provided that any person exercising any of the privileges for which a license is required without first obtaining the same, shall be fined in any sum from two to twenty-five dollars for the first offense and double that amount for subsequent offenses.

See ordinance sec. 16 and 34.

These avocations and pursuits are not within the scope of State taxation for State purposes, for in such cases the taxes must be uniform and according to the value of the property taxed, but they are subjects of police regulation, and if licensed at all, it is done in the exercise of the police power, which is deemed necessary and proper for the government and well-being of all municipal corporations, and in such cases, these avocations and pursuits are *licensed* and not *taxed* as property.

What are called police powers relate mostly to the government of municipal corporations

Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storage of

dangerous articles, to establish and control markets and the like.

And it may here be observed that every citizen holds his property subject to the proper exercise of this power either by the State Legislature directly, or by public corporations to which the Legislature may delegate it; and although laws and regulations of this character may disturb the enjoyment of individual rights, they are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate the use and enjoyment of it by the owner. The citizen owns his property absolutely it is true; it cannot be taken from him for any private use whatever without his consent, nor for any public use without compensation, but he owns it subject to this restriction; that it must be so used as not to injure others, and that the soverign authority may by police regulations so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally. Sec. 1, Dil. Mun. Corp., sec, 93, and marginal references.

The matters enumerated in section 12 of the Act of 1875, including those enumerated in section 16 of the ordinance of 26th December, 1876, are the proper subjects of police regulation, and as such, may be licensed under the authority of the municipal government.

The authority of the Legislature to regulate the exercise of privileges or the following pursuits and occupations does not fall properly within its taxing powers, but within its police powers. Pursuits that are detrimental 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 keeping

of ferries, draymen, hackmen, and even persons who furnish meat and bread to communities. Cooley on Con. Lim., 200.

The power of the corporation of Little Rock to license *brokers* and to require the payment of a fixed sum for the privilege of carrying on the business of broker, we think, is clearly granted by section 12 of the Act of March 9th, 1875, and the authority for this grant may be found in section 23, article 11, of the Constitution of 1874, which provides that "The State's ancient right of eminent domain and of taxation is herein fully and expressly conceded, and the General Assembly may delegate the taxing power with the necessary restrictions to the State's subordinate political and municipal corporations to the extent of providing for their existence, maintenance and well being."

The plaintiffs stated that they resided in the city of Little Rock and severally carry on the business of real estate agents in said city. That their business is to buy and sell lands for others, to rent out real property and to collect the rents and to pay taxes for others, and that their business does not extend beyond these objects.

The depositions read at the hearing fully sustain the allegations of the complaint, enlarging it is true, somewhat, the operations of the plaintiffs and being more precise in description, and in one instance, that of Reeve & McCabe, it is shown that the sign of "*Real Estate Agents and Brokers*" appears at the door of their office

What then and who is a broker in the legal acceptation of the term?

Lord Ch. Baron Comyns, of the Court of Exchequer, in his Digest of the laws of England, defines brokers to be "persons employed among merchants to make contracts between them and fix the exchange for payment of wares sold or bought." See 5 *Comyns' Dig.* 78.

Burrill, in his law dictionary published about thirty years ago, describes a broker as "one who makes a bargain for another and receives a commission for so doing." *Tindall, C. J., Bing.* 702, 706. An agent employed among merchants and *others* to make contracts between them in matters of trade, commerce or navigation, for a commission commonly called *brokerage. Russell on factors* 3, 4. *See also Story on Agency.* A broker is not in general authorized to act or contract in his own name, nor is he entrusted with the possession of what he is employed to sell, or empowered to obtain possession of what he is employed to purchase; but he acts merely as a middleman or negotiator between the parties and in those respects he is distinguished from a factor. 2 *B.* and *Ald.* 137, 143. *Russell on Fact.* 4. 2 *Kent Com.* 622.

"The earliest definitions of this term (*broker*) confine the employment of brokers to dealings *between merchant and merchant.* Thus by the Statute 1 Sec. 1 Ch. 21, brokers are described to be persons employed by "*Merchants* English and *Merchants* strangers in contriving, making and concluding bargains and contracts between them, concerning their wares and merchandizes and moneys to be taken up by exchange between such merchants and merchants tradesmen." *Russell on Fact.*

These definitions, however appropriate at a period when merchandize and exchange brokers appear to have constituted the only classes of this description of agents, have been very properly regarded by modern writers as too limited to include the various classes of brokers recognized at the present day; although in a late case in England the Court of Exchequer seemed disposed to abide by the ancient interpretation of the term." *Sec.* 16, *Meeson & Wellsby* 174, *See Burrill's Law Dict.* 229.

Bouvier says, that brokers are those who are engaged for

others in the negotiation of contracts relative to *property* with the custody of which they have no concern. *Paley's Agency*, 13.

A broker is for some purposes treated as the agent of both parties; but in the first place he is deemed the agent only of the person by whom he is originally employed, and does not become the agent of the other until the bargain or contract has been definitely settled as to the terms between the principals." *Payley's Ag. Lloyd ed.* 171 *note p.* 13 *Met.* (*Mass.*) 463.

Bill and Note Brokers negotiate the purchase and sale of bills of exchange and promissory notes.

Exchange Brokers negotiate bills of exchange drawn on foreign countries or on other places in this country.

Insurance Brokers procure insurance and negotiate between insurers and insured.

Merchandise Brokers negotiate the sale of merchandise without having possession or control of it as factors have. This is the original broker as defined by the earlier law writers; now mentioned simply as a *class* of brokers.

Pawn Brokers lend money in small sums on the security of personal property.

Real Estate Brokers. Those who negotiate the sale or purchase of real property. They are a numerous class, and in addition to the above duty, sometimes procure loans on mortgage security, collect rents, and attend to the letting and leasing of houses and lands.

Ship Brokers negotiate the purchase and sale of ships and the business of freighting vessels. Like other brokers they receive a commission from the seller only.

Stock Brokers. These are employed to buy and sell shares of stocks in incorporate companies and the indebtedness of governments. Bouvier's Law Dict., 224.

Webster defines a broker as:

1. One who transacts business for another; an agent.

2. An agent employed to effect bargains and contracts as a middle man, or negotiate between other persons for a compensation commonly called *brokerage*. He takes no possession as broker of the subject-matter of the negotiation. He generally contracts in the names of those who employ him, and not in his own.

Broker, simply so called, one who sells or appraises household furniture destrained for rent.

Bill Broker, ono who buys and sells notes and bills of exchange.

Exchange Broker, one who buys and sells uncurrent money and deals in exchanges relating to money.

Insurance Broker, one who is agent in procuring insurance on vessels or against fire.

Merchandise Broker, one who buys and sells goods; one who advances money at interest upon goods taken in pledge.

Real Estate Broker, one who buys and sells lands and obtains loans, etc., upon mortgage.

Ship Broker, one who deals in buying and selling ships, procuring freight, etc.

Stock Broker, one who deals in stock of moneyed corporations and other securities. Cites McCullock, Wharton, Simmons, New Am. Cyclo. See Webster's Dict. Eng. Lang. p. 167.

We may thus see that the ancient definition of *broker* has been enlarged and extended greatly beyond its original limits.

Instead now of being confined, as in the time of Chief Baron Comyn, to "persons employed among merchants to make contracts between them and to fix the exchange for payment of wares sold or bought," it is extended to almost every branch of business, and this as a necessity growing out of the increas-

ing exigencies of commercial business. In its modern and enlarged signification it embraces the buying and selling, and dealing in real as well as personal estate, and may as well, we think, include real estate agents as persons employed among merchants to make contracts between them and to fix the exchange for payment of wares sold or bought.

Looking at the distinctive character of a broker as a middleman and agent for the sale of property and the transaction of business for others, we fail to see any reason in principle why the dealer in real estate for others may not as legitimately be called a broker as a person employed to make bargains and contracts in matters of trade, commerce or navigation.

So we find that real estate brokers "or persons who sell real estate for others," are often called simply "brokers."

In the case of *Pierce* v. *Thomas and others*, 4 E. D. Smith's N. Y. R., the plaintiff, a broker, sought to recover commissions from the defendants for the sale of certain real estate, without showing an employment to sell, or such an adoption of his acts or acceptance of his services by the owner as is equivalent to an original employment. The court, by WOODRUFF, J., said: "To entitle a *broker* to recover commissions for effecting a sale of real estate it is indispensible that he should show that he was employed by the owner (or on his behalf) to make the sale. A ratification of his act, where original employment is wanting, may, in some circumstances, be equivalent to an original retainer, but only when there is a plain intent to ratify.

In the case of *McGavock* v. *Wodlief*, 20 How. U. S. Sup. Ct., 221, the court, in deciding that a *broker* who negotiates the sale of an estate is not entitled to his commission until he finds a purchaser in a situation and ready and willing to complete the purchase on the terms agreed upon between the broker and the vendor, uses the following language: "The

broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on before he is entitled to the commission. In this case the event speaks of the person employed to negotiate the sale for another simply as a "*broker*."

In the case of *Farnsworth* v. *Hemmer*, 1 Allen (Mass.) 494, which was a suit by a real estate broker to recover commissions for his services in negotiating an *exchange of land* between the defendant and one Cooper. Here also the real estate broker is simply styled a "*broker*."

In the the case of *Glentworth* v. *Luther*, 21 Barb. 145, which was an action by the plaintiff to recover his commission as a broker for negotiating the sale of a *house and lot* in the City of New York, Cowles, J., said: There can be no doubt as to the extent of the duties to be performed by one who as *broker* is employed to sell real estate. In the nature of things he can do nothing more than find a party who will be acceptable to the owner and enter into a contract of purchase with him; unless the owner makes him more than a *broker* merely, by giving him a power of attorney to convey the property and then the employee would cease to be merely a broker, and become the attorney. The *broker* employed to sell real estate is in this case called simply a *broker*. See, also to the same effect, Doty vs. Miller, 43 Barber, 529. Middleton vs. Findla, 25 Cal. 76. Morgan vs. Mason, 4 E. D. Smith 638. Clapp vs. Hughes, 1 Phil. (Pa.) 382.

So we see that the term *broker* has long been indifferently applied to those who buy and sell real estate for others, and those middlemen who negotiate and make contracts between merchants in the interest of commerce, trade and navigation.

At the time of the passage of the act of March 9th, 1875, and long previously, the modern and enlarged meaning of the word *broker*, had been accepted and recognized by the courts,

as a part of the law of the land, including in this extended interpretation of the meaning of the word broker, not only what are called real estate agents or brokers, but every other dedescription of broker, except perhaps *pawnbrokers*, who are strictly not brokers at all, not falling within any of the definitions of the term broker.

We are of the opinion that under the power conferred upon the corporation of Little Rock by Sec. 12 of the Act of 1875, it was competent for the corporation to license the plaintiffs as brokers and to require of them to pay respectively the sum mentioned in Sec. 16 of the ordinance of the City Council for the privilege of pursuing their business as brokers.

Having arrived at this conclusion we are of opinion that there is error in the decree of the Chancellor and we do therefore reverse said decree and remand the cause, with instructions to the Chancellor to dissolve the injunction and restraining order herein, and dismiss the complaint.

Hon. J. R. Eakin, J., did not sit in this cause.

FRY, COLLECTOR v. REYNOLDS.

1 COUNTY WARRANTS: *Order for re-issue and cancellation—Mandamus against Collector.*

An order of the County Court calling in County Warrants for re-issue, which gives less than three months from its date to the time appointed for presenting the warrants, is invalid—and a scrip holder is not obliged to appeal from it or quash it by *certiorari*, but may compel the County Collector by *mandamus* from the Circuit Court, to receive his scrip for County taxes.

2. MANDAMUS: *Parties in.*

It is not the practice to make any person a defendant to a petition for mandamus but the officer whose conduct is complained of.

APPEAL from *Chicot* Circuit Court

Hon T. F. SORRELLS, Circuit Judge.
Valentine for appellant.
Reynolds for appellee.

ENGLISH, C. J.:

On the 21st day of July, 1875, the County Court of Chicot county made the following order:

"In the matter of calling in the outstanding indebtedness of Chicot county, Arkansas:

"Whereas, it is deemed expedient by the County Court of Chicot county to call in the outstanding warrants of said county, in order to cancel, re-issue and classify the same: It is therefore hereby ordered that all the warrants and outstanding scrip of Chicot county, of all kinds, character and description whatsoever, issued prior to the 30th day of October, 1874, be and the same are hereby ordered to be called in for the purpose aforesaid: and it is further ordered that the holders of all outstanding warrants and other scrip of Chicot county issued prior to the said 30th day of October, 1874, shall present the same to the County Court of Chicot county, in the town of Lake Village, Ark., *on Monday the 4th day of October*, 1875, for the cancellation, re-issuance and classification of the same, and that the sheriff of Chicot county shall give notice, and make due publication of this order as by law he is required to do. And it is further ordered that all persons who shall hold any warrant of said county and neglect or refuse to present the same as required by this order, shall thereafter be forever debarred from deriving any benefit from their claims."

On the 26th of July, 1875, the sheriff made publication as directed by the order.

Daniel H. Reynolds, who was the holder of six county warrants, issued prior to the 30th of October, 1874, which had

been presented to the County Treasurer for payment, and endorsed not paid for want of funds, and which had not been presented to the County Court for cancellation, re-issuance, etc., under the above order, being a property holder and taxpayer of the county, tendered said warrants on the 20th April, 1877, to Reuben M. Fry, collector of the county, in payment of his county tax, and the collector refused to receive them on the ground that they were barred by the above order of the County Court, but admitting the warrants to be otherwise genuine and valid.

On notice to the collector, Reynolds presented to the Circuit Court of Chicot county, at its July term 1877, a petition alleging the above facts, and praying that Fry, as such collector, be compelled, by mandamus, to receive said warrants (which were made exhibits) in payment of the county taxes, etc., charged against his property, etc.

The Hon. F. Downs, Judge of the County Court, filed a motion to make the county a party to the application for mandamus, stating as grounds therefor, that by an order of the County Court said warrants were declared to be barred and null and void, and the collector directed not to receive them in payment of any taxes, and the County Treasurer directed not to redeem them—"That said county believes that it has a good and valid defense to said warrants, and that said cause cannot be fully determined except by making said county a party, and permitting it to make a defense."

The court overruled the motion to make the county a party.

Fry, the collector, demurred to the petition for mandamus, on the ground that it did not show that the petioner was without other adequate relief in the premises.

The court overruled the demurrer, and ordered a mandamus as prayed in the petition, and Fry appealed to this court.

The Statute empowering the County Court to make an order

to call in outstanding warrants, etc., prescribes that the time fixed by the order for the presentation of such warrants, shall be at least three months from the date of such order. *Gantt's Dig. Sec. 614.*

The order made an exhibit to the petition, and copied, was entered by the County Court on the 21st of July, 1875, and the holders of outstanding warrants were required to present them to the County Court for cancellation, etc., on the 4th day of October following, which was less than three months from the date of the order.

The court had power under the statute to make such an order, and the warrants of appellee were not barred by his failure to present them at the time fixed by the order.

The order being invalid as to the warrants of appellee, he was not obliged to appeal from it, or apply to the Circuit Court to have it quashed on *certiorari.* His warrants not being barred by his failure to present them at the time fixed by the order, or their validity in any way legally affected thereby, he had the right to tender them to appellant, as Collector, in payment of his county taxes, and on his refusal to receive them, he could be compelled to do so by mandamus. *Woodruff* v. *Trapnall*, 12 Ark. 640; *Parsel* v. *Barnes & Bro.* 25 Ib. 261; *Graham* v. *Parham* 32 Ib. 677; *Lindsey* v. *Rottaken*, Ib. 623; *Loftin, collector*, v. *Watson*, Ib. 415; *McCracken* v. *Moody*, M. S.

It is not the practice to make any person a defendant to a petition for mandamus but the officer whose conduct is complained of. *Dig. Ch. 89.*

The county was not a necessary party, nor does the motion of the County Judge state any good reason for permitting it to become a party.

If the County Court made an order directing the collector not to receive appellee's warrants, and directing the Treasurer

not to redeem them because of the failure of appellee to present them at the time fixed by the order above copied, as indicated in the motion, such order was invalid.

The general statement in the motion that the "*county believed* it had a good and valid defense to said warrants," without stating what the defense was, amounted to nothing. If there was any defense other than that the warrants were barred by the failure of appellee to present them under the invalid order above, it should have been presented by the collector in answer to the petition. It was his duty to interpose such defense, if there was any. But he rested upon his demurrer, and the judgment of the court below must be affirmed.

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TURNER v. VAUGHAN.

1. DECREE: *Final at Expiration of term.*

After the expiration of the term at which a decree is rendered, the Court rendering it cannot set it aside or modify it except in the manner and for the causes specified in Sec. 359, 3602 and 4692 Gantt's Dig., or by bill of review under the Chancery practice.

2. HOMESTEAD: *Not lost by fraudulent conveyance if claimed in the suit to set aside the conveyance.*

It seems from the current of adjudications that a conveyance of land set aside for fraud at the suit of creditors, does not stop the grantor from claiming a homestead in the premises conveyed, but he must assert his claim in that suit or he will be afterward barred.

3. CHANCERY PRACTICE. *Decree vacating fraudulent conveyance.*

When a debtor purchases land and has it conveyed to another to avoid his debts, a decree in behalf of creditors vacating the conveyance, should direct a sale of the land by a commissioner of the court. and not remit them to their execution at law.

APPEAL from *White* Circuit Court in Chancery.

Hon. J. N. CYPERT, Circuit Judge.

J. M. Moore for appellant.

Coody, contra.

ENGLISH, C. J.:

This was a bill to enjoin a Commissioner in Chancery from selling lands, claimed as a homestead, under a decree rendered upon a creditor's bill condemning the lands to be sold by the commissioner.

The material facts disclosed in the transcript of the record before us are as follows:

On the 25th of May, 1871, E. D. L. Atkins, being indebted to Blakely D. Turner, drew a draft in his favor upon John W. Vaughan, who was indebted to Atkins, for $364.27, payable 1st November 1871, which was accepted by Vaughan.

On the 3d of February, 1873, Turner recovered judgment against Vaughan before a Justice of the Peace of White County for $347, being for amount due upon the draft after allowing credits, etc.

On the 18th of February, 1873, Turner caused a *fi. fa* to to be issued upon the judgment; Vaughan scheduled his personal property, and the constable returned upon the execution *nulla bona* etc.

Turner then filed a transcript of the judgment, execution and return, in the office of the clerk of the Circuit Court of White County, and on the 10th March, 1873, caused an execution to be issued thereon, which was returned by the sheriff, no property found, and wholly unsatisfied.

On the 17th of November, 1873, Turner filed a creditor's bill on the Chancery side of the Circuit Court of White county against Vaughan and his wife Amanda, alleging in detail the facts above stated, and further averring, in substance:—

That on the 24th of August, 1871, Vaughan purchased of A. K. Lewis and wife the N. E. 1-4 sec. 14, and the S. W. 1-4 of the N. W. 1-4 of sec. 13, T. 10 N. R. 8 W.; and on the 10th of January, 1873, he purchased of Hugh B. Chandler and wife the S. W. 1-4 of the N. E. 1-4 of sec. 34, same

township and range, situate in White county. That he purchased the said lands with his own means, but to avoid the payment of said debt and other debts owed by him, he fraudulently caused them to be conveyed by the vendors to his wife, Amanda. That at the time of the purchase of said lands, said Amanda had no separate means or estate with which to purchase or pay for them, and that Vaughan purposely caused them to be conveyed by the vendors to his wife to cheat, defraud, hinder or delay his creditors, and particularly Turner, in the collection of their debts against him.

Prayer that said deeds (which were made exhibits) be declared fraudulent, and said lands held to be the property of Vaughan, and decreed to be sold and the proceeds applied to payment of said judgment, etc.

Vaughan and wife answered the bill, admitting to be true its allegations relating to Turner's debt, judgment, executions, etc.

Vaughan admitted that he purchased the lands of Lewis with his own means as alleged in the bill, and had the deed made to his wife, but denied that he caused the deed to be made to her to avoid the payment of his debts or to defraud his creditors, and averred that he caused the deed to be made to her in good faith, and with a view to secure a home for his family and that it was so agreed and understood at the time.

He also admitted that he purchased of Chandler the other tract described in the bill, and paid for the same with his own means, and caused the deed to be made in the name of his wife, but denied that it was with fraudulent intent or purpose to hinder or delay his creditors.

The cause was heard on the pleadings and evidence at the January term, 1876, and the court found that Vaughan purchased the lands described in the bill with his own means, and caused the deeds to be made to his wife to cheat, defraud,

hinder and delay Turner in the collection of his debt, and decreed that unless Turner's judgment, interests, costs, etc., should be paid by the 1st of March following, the land should be sold to satisfy the same, and appointed the clerk of the court a commissioner to sell the lands under the decree.

On the 21st of June, 1876, Vaughan filed the bill in this suit, in the same court against Turner and A. P. Sanders, the commissioner appointed to sell the lands under the above decree.

The bill alleges that complainant accepted the draft drawn by Atkins upon him in favor of Turner on the 25th of May, 1871, that Turner obtained judgment against him on the draft 3d February, 1873, before a Justice of the Peace, that execution was issued and returned *nulla bona*; a transcript filed in the office of the clerk of the Circuit Court, and execution issued thereon 10th March, 1873, and returned unsatisfied without levy.

That prior to the acceptance of the draft, complainant bought of A. K. Lewis, and paid for the N. E. 1-4 of sec. 14, and the S. W. 1-4 of the N. W. of section 13, T. 10 N. R. 8 W., 200 acres, which at the instance of complainant was, on the 27th of August, 1871, conveyed to his wife Amanda, by deed duly acknowledged and recorded. That he purchased the lands for a home for himself, his wife and children, and to that end he had the deed made in the name of his wife. That since the purchase, in 1871, he and his family had resided, and still resided upon the lands, etc. That the same was his homestead, and he being a resident of the State, and the head of a family, claimed that he was entitled to 160 acres of said lands upon which were his residence and improvements as his homestead, to-wit: The S. W. 1-4 of the N. W. 1-4 of sec. 13, and the S. 1-2 of the N. E. 1-4 and the N. W. 1-4 of the N. E. 1-4 of sec. 14, T. 10, N. R. 8 W., free from sale under

execution or other process, or the lien of any judgment or decree of any court, the same not exceeding in value the sum of $2,500.

Complainant then gives the history of Turner's suit against him and wife, and the decree therein as we have stated above, and makes a transcript of the decree an exhibit.

Then alleges that having failed to pay the debt, etc., at the time fixed in the decree, the commissioner had advertised the lands claimed by him as a homestead, with the other land condemned by the decree, to be sold on the 24th of June, 1876.

That he had applied to said commissioner, claiming the above described lands as his homestead, and asking that the sale be suspended and superseded, which he refused. That if the sale should be allowed, it would be a cloud upon his title, etc.

Prayer for restraining order as to the lands claimed as a homestead, that said decree be reviewed and modified, and that upon the final hearing, the injunction be made perpetual.

On the presentation of the bill a temporary injunction was granted.

Turner answered the bill at the July term, 1876.

He admits the allegations of the bill relating to his judgment against Vaughan, and the suit of himself against Vaughan and wife, and the decree therein rendered, and makes a transcript of the pleading in that suit an exhibit to his answer. And avers that in that suit neither Vaughan nor his wife claimed or pretended to claim any homestead right in said lands, but rested their defense entirely upon other grounds, added a demurrer to the bill, and prayed that the temporary injunction be dissolved.

The cause was submitted on the pleadings and exhibits, and the court announced that it would dissolve the injunction and dismiss the bill; whereupon complainant's solicitor moved the

court to suspend decree until he could consider what further steps he would take in the cause, which was granted.

On the same day of the term, the complainant filed a supplement to his bill, reciting the previous steps in the cause, and alleging that after the announcement by the court, he had filed in the office of the clerk of the Circuit Court a schedule of the lands claimed by him as a homestead, etc., which was exhibited, and asked the clerk for a supersedeas, which was refused.

Turner moved to strike out the supplement, which the court refused, and he entered a demurrer thereto, which with the whole case was submitted, and the court overruled the demurrer, and rendered a decree enjoining the commissioner from selling the lands under the original decree, claimed and scheduled by complainant as a homestead, so long as he should continue to use and occupy them as such.

From this decree Turner appealed to this court.

I. The decree condemning the whole of the lands to be sold by a commissioner to satisfy Turner's judgment, was rendered by the court below on Turner's bill against Vaughan and wife, at the January term, 1876. The decree appealed from, enjoining the commissioner from selling the lands claimed by Vaughan as a homestead, was rendered upon this bill at the July term following. After the expiration of a term at which a decree is rendered, the court rendering the decree has no power to set it aside or modify it, except upon application under the statute, and for some cause therein specified, (*Gantt's Dig. Secs.* 359, 3602, 4692) or by bill of review under the Chancery practice. *Jacks* v. *Adair*, *M. S.*

The bill now before us does not make a case for setting aside or modifying the decree condemning the lands to be sold under either practice. *Ib.*

II. Counsel for appellant submits that if appellee had set

up his homestead claim in answer to appellant's bill it would have been unavailing. That no exemption can be allowed out of property which has been conveyed with intent to hinder, delay or defraud creditors. That the transfer is valid against the debtor, and in attempting to place his property beyond the reach of his creditors, he places his exemptions beyond his own reach.

In re Graham, 2 Bissell 449. Graham sold personal property to Hanton, to defraud his creditors, and was afterwards adjudged a bankrupt and the sale set aside, and he claimed the property as exempt, under a statute of Wisconsin. The court said: "They had no doubt conspired together to place the possession and apparent title in Horton, to defraud Graham's creditors, and were in the execution of that scheme when they were arrested by the proceedings of this court. And if the bankrupt has by his fraudulent acts deprived himself of the benefit of the exemption laws, it is a just retribution upon him. A debtor not unfrequently cheats himself in trying to cheat his creditors, and his bankruptcy furnishes a striking example of such case. In his anxiety to place his property beyond the reach of his creditors, he places his exemptions beyond his own reach."

It seems, however, from the current of adjudications, that a conveyance of lands set aside for fraud, at the suit of creditors, does not stop the grantor from claiming a homestead in the premises thus conveyed. Such a conveyance does not constitute an abandonment of the homestead such as opens it to creditors. *Thompson on Homestead, sec. 408, etc.*, and cases cited.

If, therefore, appellee had, in his answer to appellant's bill, not only denied, as he did, that he procured the lands to be conveyed to his wife to defraud his creditors, but, as a further defense, shown that he had impressed the homestead character

upon a part of the lands, and asked the court if it found the canveyance fraudulent and set it aside, to decree to him the benefit of the homestead exemption provided for by the Constitution, the court should have so decreed.

III. But having neglected to make such defense, and the court having, by its decree, condemned the whole of the lands to be sold by a commissioner in satisfaction of appellant's judgment, had appellee the right, after the decree, to schedule a part of the lands as a homestead, under the statute providing for the scheduling of exempted property, and then upon his bill for that purpose, procure a decree enjoining the commissioner from selling that part of the lands claimed by him as a homestead?

In *Norris et al* v. *Kidd*, 28 Ark., 486, the homestead claimant permitted the lands to be sold under an execution issued upon a judgment recovered against him, without scheduling the property, as required by the statute (Gantt's Dig. sec. 263 etc.,) and afterwards the homestead claim was set up as a defense to an action of ejectment brought by the purchaser, and it was held to be too late.

In *Frits* v. *Frits*, 32 Ark., 327, the homestead was mortgaged, and to a bill to foreclose the mortgage, the answer set up the homestead claim (under the constitution of 1868) as a defense, and it was held that the defense could be successfully interposed by answer without scheduling the homestead under the statute.

It has been held that where a mortgage has been made on homestead land, and a bill brought to foreclose, the mortgagor must plead the homestead exemption in defense, and if he neglects to do so, or pleads it, and the defense is overruled, and there is no appeal from the decree, he is barred from afterwards asserting the homestead claim against one who purchases under the decree of foreclosure. *Larson* v. *Reynolds et al.* 13

Iowa, 57; *Haynes et al* v. *Meek*, 14 Ib., 320; *Lee et seq* v. *Kingsbury*, 13 Texas, 68: *Tadlock* v. *Eccles*, 20 Ib., 783.

In *Haynes et al* v. *Meek*, *sup.*, the court said: If the homestead right ever existed, it was lost to the claimant by his failing to set it up in the foreclosure proceeding, in other words, he has had his day in court upon this alleged homestead right.

In Illinois the husband cannot alone release the homestead right, but he must be joined by the wife, hence it has been held that a foreclosure against the husband does not bar the wife, and she may interpose the homestead claim after decree. But if a writ is brought against her after she has become discourt involving the homestead right, and she neglects to plead the homestead right, she is precluded by the decree. *Wright et al* v. *Dunning*, 46 Ill., 274. *Thompson on Homesteads*, sec, 715–721.

By our laws the homestead right of the wife does not attach until the death of the husband—she succeeds him in the homestead right, if he has it at his death. He may bar any homestead claim by her, by a conveyance in which she does not join, though he cannot thus bar her right to dower which attaches at the marriage. *Johnson et al* v. *Turner*, *ad.*, 29 Ark., 281.

So "Where a judgment creditor brings a bill in equity to set aside a conveyance of certain realty of the debtor, as having been made in fraud of his rights, if the debtor would set up a right of homestead in the premises, he must do it in that suit. If a decree has been entered divesting him of all right and interest in the premises, and directing them to be sold, and they have been so sold, and the purchaser brings ejectment, the debtor cannot, in this action, set up a right of homestead in the premises, he must do it in that suit. The decree in equity cannot be thus collaterally questioned. So, if the bill is taken for confessed, a final decree entered, and the premises sold thereunder, and the defendant refuses possession, claiming

to hold under the homestead law, he cannot assert this right in opposition to the granting of a writ of assistance." *Thompson on Homesteads*, sec. 726.

Miller v. *Sherry*, 2 Wallace, 237, was a creditor's bill, like Turner's, and the property claimed as a homestead was sold under the decree, the debtor having failed to plead the homestead right, in the suit to set aside a fraudulent conveyance. The court, by JUSTICE SWAYNE, said: "In regard to the homestead right, claimed by plaintiff in error, there is no difficulty. The decree under which the sale was made divested the defendant of all right and interest in the premises. It cannot be collaterally questioned. Until reversed it is conclusive upon the parties," etc.

In this case the lands claimed as a homestead had not been sold when the bill for injunction was brought, but the object of the bill was to prevent the sale by the commissioner under the decree condemning them to be sold.

The lands were as effectually condemned to be sold by the decree as mortgaged premises are upon a decree of foreclosure.

The court did not merely set aside the fraudulent conveyances which appellee procured to be made to his wife, and remit appellant to his remedy by execution upon his judgment at law, (which was in effect the character of the decree, or order of sale in *Sears et al* v. *Hanks et al.*, 14 Ohio St. R., 298, relied on by counsel for appellee) but it directed the sale under its own decree, and could not upon the facts of the case, have done otherwise.

The title to the lands was never in appellee, Vaughan. He purchased the lands, and procured the vendors to convey them by deeds to his wife. The title to the lands was in her when Turner filed his creditor's bill against husband and wife, and when the decree in that suit was rendered. Had the decree merely set aside the deeds made to her as fraudulent, and re-

mitted Turner to his execution on his judgment against the husband, a sale under the execution would not have carried title to the purchaser; hence it was necessary to condemn the lands to be sold under the decree, in order to carry the wife's legal title to the purchaser.

The Constitution of 1868, which was in force when the debt, upon which Turner's judgment was obtained, was contracted, provides that the homestead shall be exempted from sale on execution, or any other final process from any court. *Art. XII, sec. 3; Constitution of 1874, Art. IX, sec. 9.* Yet it was held in *Norris et al* v. *Kidd, sup.*, that the homestead claim was lost if the property was not scheduled before sale under execution. So we think it is lost where there is a bill in *rem* to condemn the homestead land to be sold to satisfy a debt, and the claim is not interposed before decree, and the decree becomes final, and passes from under the control of the court rendering it, as in this case.

If it be said that it is a hardship for a man to lose his homestead exemption because he failed to assert it at some particular time, or in some special mode, or in some particular proceedings; it may be replied, that such is the law in relation to any defense which a man has an opportunity to make, and fails to interpose it. If sued on a paid, or barred demand, and he fails to plead payment or limitation, he is precluded by the judgment, in the absence of fraud, etc. *Conway* v. *Ellis*, 17 Ark., 365.

The decree of the court below must be reversed, and a decree entered here dismissing appellee's bill for injunction.

JOWERS V. PHELPS, AD.

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1. POSSESSION: *Notice of title.*
Actual possession of land is notice to all the world, of the possessor's title.

2. ESTOPPEL IN PAIS.
A party who by his acts, declarations, or admissions, or by failing to act or speak when he should, either designedly or with willful disregard of the interest of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, is estopped to assert his right afterward, to the injury of the party so mislead.

APPEAL from *White* Circuit Court.
Hon. SAM. W. WILLIAMS, Special Judge.
B. D. Turner for appellant.
Coody, contra.

EAKIN, J.:

Appellant Jno. J. Jowers filed his bill in equity against his son, Geo. A. Jowers, for specific performance of a sale of lands; alleging purchase, payment of the price, continued possession under the purchase, and valuable improvements. Upon this branch of the cause the proof was clear, and specific performance was properly decreed as against Geo. A. Jowers. Phelps was also made a defendant, against whom it was charged, that, whilst complainant was so in possession, without any deed of record, he had taken a mortgage upon the land from Geo. A. Jowers, in whom the legal title remained. The prayer against him was that the mortgage might be set aside, and the property relieved.

Phelps answered, denying any notice of complainant's equitable claim at the time he took the mortgage, stating that complainant was present when it was executed by Geo. A. Jowers and set up no claim that the lands appeared on the assessessment rolls in the county in the name of Geo. A. Jowers who also appeared from the records of the Recrder's

office to be the legal owner. He makes his answer a cross-bill against complainant and his co-defendant Geo. A. Jowers, stating that the lands had been levied upon at the suit of one James A. Huff as the property of said Geo. A., and advertised to be sold upon the 7th day of April, 1873. That said Geo. A., applied to him for a loan of money to pay off the execution, offering a mortgage on the lands. He lent the money and took the mortgage, to secure a note given therefor in the sum of $300, which mortgage was duly recorded. He on his part prays foreclosure. The occupancy of J. J. Jowers at the time of the mortgage is admitted. Complainant J. J. Jowers answered the cross bill, reiterating the grounds of his equitable claim, relying on his possession at the time the mortgage was executed, and denying that it was made with his knowledge or consent, although he does not expressly deny that he was present.

The Chancellor, on this branch, found that J. J. Jowers "knew of the mortgage being contemplated, prior to its execution, but failed and neglected to assert his claim to the land and notify the said Phelps of his title;" and as against J. J. Jowers decreed a foreclosure in favor of Phelps for debt, interest and costs. From this portion of the decree J. J. Jowers appealed.

This court has repeatedly held that actual possession of land, with visible indications of occupancy, is notice to all the world of some right or equity claimed by the occupant, so as to put all others who deal concerning it upon inquiry; and that a mortgage taken under such circumstances from the legal owner, should be subordinated to the rights of the occupant, whatever they may actually be, and whether shown by record or not. The question now raised is whether the complainant has been estopped by his conduct from claiming the benefit

of that protection which equity extends to the *bona fide* occupant.

The evidence on this part is, substantially: that the occupancy of the land by J. J. Jowers, and his claim of ownership was matter of notoriety in the neighborhood. He had been over two years in possession, and when the mortgage was made had a tenant upon it. Geo. A., had refused to make him a deed in pursuance of the parol purchase. It seems to have been discovered that the legal title remained in Geo. A., and the execution in question was levied upon it as his property, to satisfy a judgment of about $150. Upon the day appointed for the sale, J. J. Jowers, Geo. A. Jowers and Phelps were all at Searcy, the county seat. J. J Jowers had made an arrangement with a neighbor to buy in the land and get a sheriff's deed to fortify his title, inasmuch as his son refused to convey. He heard that his son intended to mortgage the land to Phelps to raise money to pay the execution, and advised him not to do so. His son disregarded his advice, executed the mortgage, paid the debt, and thus defeated the purposes of his father, who was waiting for the sale. J. J. Jowers was advised of his son's intentions before the mortgage was made, and was informed soon aftrrwards that they had been carried out, but he was not present when the mortgage was executed, nor did he say or do anything to mislead Phelps, the mortgagee. He seems simply to have declined any active interference, and Phelps on his part seems to have relied upon the fact that J. J. Jowers had no legal title; and upon his own judgment, that the mortgage was good. There is no proof that Phelps and J. J. Jowers had any conversation on the subject from which the assent or concurrence of the latter, in the mortgage, could be reasonably inferred. In fact, the mortgagee defeated the objects which

J. J. Jowers had in view, and which were legitimate. Phelps resided about four miles from the land.

Estoppels in *pais*, depend upon facts, which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed, afterwards, to come in and assert his right, to the detriment of the person so mislead. That would be a fraud. But it is difficult to define special acts or conduct which in all cases would amount to an estoppel. Generally it is said that if the owner of property, *with a full knowledge of the facts, stands by*, and *permits it to be sold to an innocent purchaser*, without asserting his claim, he will be estopped. Although this will not embrace all species of estoppel in *pais*, which may be as diverse as are the nature of human transactions, it is, so far as it goes, about as safe and correct a rule as can be formulated. The leading idea is that a person shall not do, or omit to do, anything regarding his rights, which if taken advantage of by him, would work a fraud upon another; but, in this as in all other cases involving fraud, the exact limits and boundaries of fraudulent conduct, are left undefined, to be applied by the Chancellor to the facts before him.

There are no cases that seem to require the equitable owner of property to be active in seeking one about to take the legal title, for the purpose of advising him against it. He must see to it, at his peril, that by some mode which courts of equity recognize as sufficient, notice of his equity be given to all the world; or that such particular notice be brought home to the

purchaser as should put him upon it until inquiries be made, upon which there would devolve upon him the further duty of full, frank and explicit explanation. Men are not required to be clamorous in asserting their rights; nor to be active in seeking others about to deal concerning them, in order to prevent anticipated mischief. To *stand by* and see a sale to *an innocent purchaser* would be, however, a breach of moral duty, unless the owner meant to abide by it.

Upon a view of all the facts in this case the court is of opinion, that the complainant J. J. Jowers might well rest upon the notice of his equity, given to all the world by his notorious possession, and that hearing of the intended mortgage he was not obliged to seek Phelps and warn him against taking it. The time and opportunity of forbidding the sale, and asserting his rights never occurred, inasmuch as the land was not offered. He did not desire the mortgage to be made, had no inducement to mislead Phelps, and seems never to have intended by any act of his to encourage Phelps to take the mortgage. He had no influence in the matter over his son George A. and as to Phelps, he acted on his own judgment, under the advice and information of others.

So much of the Chancellor's decree as confirms the title in the land in complainant J. J. Jowers as against George A. Jowers, by way of specific performance, with costs, must be affirmed. So much of it as declares the land subject to the mortgage of Phelps, and orders a foreclosure, with costs, against said J. J. Jowers, will be reversed; and a decree will be entered here dismissing the cross-bill, and quieting the title of complainant J. J. Jowers against all claim of Phelps under or by virtue of the mortgage. The costs of this court, and so much of the costs of the court below as resulted from the cross-bill, will be adjudged against the defendant Phelps.

WILLIAMSON ET AL V. MCCRARY AD.

NON-CLAIM: *Statute of did not run during the war.*

The statute of non-claim has all the attributes and characteristics of a statute of limitations and did not run during the war.

APPEAL from *Sevier* Circuit Court.

Hon. L. J. JOYNER, Circuit Judge.

Compton, for appellant.

Gallagher & Newton and *Rose*, *contra*.

EAKIN, J.:

It appears from the record in this case, which incorporated an agreed statement of facts, used in the court below upon trial, that on the 5th day of January, 1861, Benj. E. Williamson with others, executed a note under seal, whereby he bound himself, on or before the first day of April next thereafter, to pay George and M. E. Williamson, guardians, etc., $6,961.23. He died on the 21st day of February, 1863, and on the 3d day of April, 1863, the Probate Court of Sevier county granted letters of administration upon his estate to J. D. Bellah and Eliza Williamson. The payees of the note were at the time of its execution, and have since continued to be, residents of the State of North Carolina, which was in and a component part of the Confederate States during the war. During the year 1863, and on to the close of the war, the Mississippi river was blockaded by the United States forces; but citizens of the Confederate States did actually pass and repass frequently.

On the 7th day of June, 1866, the defendant, McCrary, was by said Probate Court duly appointed administrator *de bonis non* of said estate; and on the 5th day of July, 1867, this claim, duly verified, was presented to him for payment, and by him disallowed. It had never been presented earlier to either

administrator. Upon application to the Probate Court it was allowed, and McCrary appealed to the Circuit Court.

The principal defence, and the only one necessary to notice, was the statutory bar of non-claim. At the February term, 1877, the cause was submitted to the court, sitting as a jury, which found that the claim was barred by the statute, and disallowed the same, with costs; declaring the law to be, that the statute of non-claim is not a statute of limitation, and was not suspended by the war. The court, further. refused to declare that the residence of the claimant in North Carolina, and the blockade of the Mississippi, affected the operation of the statute between citizens of that State and of this. The claimant appealed.

Soon after the close of the civil war it was held by this court in the case of *Hawkins* v. *Filkins*, (24 Ark., 286) that the government of the State had continued to exist *de jure* during the war, until changed by the convention of 1864; and that all its acts up to that period, not in conflict with the constitution and laws of the United States, had been valid and binding. It was further held in the case of *Bennett*, *ad. etc.*, v. *Worthington*, (Ib. 487) that as between citizens of the Confederate States the statute of limitations had not been suspended by the war, although in the county of the defendant the courts had been practically closed.

In the Federal courts, however, it was held, repeatedly, that as between citizens of different belligerent powers the statutes of limitation were suspended. This, upon principles of international law, independent of any exceptions in the respective statutes of either State. It is not an exception created by the courts. It is the consequence of an imperative mandate of the law of nations; by which, during the war, all commercial intercourse and correspondence between enemies is interdicted. *Brown* v. *Hicks*, 15 Wallace, 182. The matter, however, did

not rest wholly upon general principles of international law. By Act of 11th June, 1864, Congress provided that when any defendant could not be served with process, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of legal proceedings, the time of such interruption should not be estimated in the time limited by law for the commencement of the action; and it was declared in *Ross* v. *Jones*, 22 Wallace, 22, without reference to citizenship, to be the established rule of the Federal courts "that the statute of limitation was suspended in the rebellious States during the existence of the late rebellion."

Afterwards, upon the adoption of the Constitution of 1868, and a change of the members of this court, different views prevailed as to the effect of the attempted secession. It was considered that no legal government existed in this State at all after the act of secession; and that all acts of *soi disant* Legislature or courts sitting here were void. That in fact no courts were in existence. And in this view this court adopted in their full scope the principle declared by the Federal Courts, holding that as "*flagrante bello*," there were neither courts nor government here, the statutes of limitation became suspended also, even as betwen citizens, from the 6th of May 1861, to the 2d of Apri,l 1866. The legitimacy of this conclusion it is bootless now to discuss. From that time it became a rule of property affecting the dealings of citizens, with regard to a large amount of choses in action then outstanding, and not barred. *Hall* v. *Denckla*, 28 Ark., 506.

Another change occurred in our government. This court was reorganized under the Constitution of 1874, and the former views announced in *Hawkins* v. *Filkins* came again in vogue. It might have followed from the principles announced in *Bennett, admr.* v. *Worthington* (*supra*), that the statutes of limitations between citizens had continued to run during the

war, (except as controlled by action of the State Legislature previous to the Constitution of 1864). The question arose in the case of *Mayo & Jones* v. *Cartwright et als.*, 30 Ark., 407. The court, without approving the grounds upon which the doctrine of *Hall* v. *Denckla* was based, considered that the conclusion as to the running of the statute had been so long acquiesced in that it would be a matter of questionable propriety to disturb it. Upon the doctrine of *stare decisis* it declined to do so, but declined also to make any extension of its application. It held that it would not be used as a defense by a trustee for sale, who had neglected to take possession and sell before the title of the occupant of the land had ripened by adverse possession of seven years. The court considered that as no suit or action in court on the part of the trustee was necessary, but he might have proceeded *in pais*, he was not entitled to claim a suspension of the statute against suit in equity, by the occupant who had been more than seven years in possession.

The question now presented is, whether the statute of nonclaim is to stand upon the same rule with regard to suspension as the general statute limiting the time for actions.

Gantt's Digest, chap. 4, sec. 99, provides that "all demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of the letters, shall be forever barred." This is in express terms a statute of limitations, applicable alone to claims against estates, prescribing the time in which they must be brought to the notice of the personal representative by exhibition. The *mode* of exhibition may be by revivor of a pending action (sec. 100) or the beginning of a new action against the representative (sec. 101), or by delivery of a copy of the instrument or account upon which the claim is founded. These limitations supersede and take the place of the general statute of limitations, but that is only the change from one system of limitations

regulating suits *inter vivos*, to another governing proceedings against estates.

The first two modes of exhibition are by proceedings in court, and are without question *actions*, as distinct from proceedings *in pais*.

The last has no efficacy in itself, except as a foundation and preliminary step to proceedings in the Probate Court, either to obtain the judgment of the court upon the validity of the claim, or (if that is not controverted), to obtain an order for its payment, for the administrator or executor is not authorized to pay the account upon his own allowance. He may do so, but it is at his peril. He should report his action to the court and await its order. If the claim be disallowed, he need do nothing more, and it devolves upon the claimant to follow the presentation with notice of application to the Probate Court, when the matter becomes a suit between parties as effectually as if presented in the Circuit Court by either of the other prescribed modes.

The presentation then must be considered as incidental and preliminary to a judicial proceeding, to establish the claim or direct its payment if not litigated. It is an Act *in pais*, but done only as a pre-requisite to a suit—not as an act by which alone the object may be effected. It partakes of the nature of the judicial proceeding in the Probate Court, to which it is incident. It differs essentially from a sale under a power, which may be entirely accomplished without the aid or intervention of any court whatever.

We think the statute of non-claim has all the attributes and characteristics of a statute of limitations, and that the statute did not run from the 6th day of May, 1861, as held in *Hall* v. *Denckla*, and in other cases since.

The court below erred in declaring the law otherwise.

Let the judgment be reversed and the cause remanded, with instructions to allow and class the claim; and for other proceedings in accordance with law, and consistent with this opinion.

GATES ET AL V. BENNETT.

33 475
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1. PARTNERS: *Power of one to mortgage partnership property.*

One partner may make a valid mortgage upon the partnership crop to secure a partnership debt, but cannot mortgage the individual property of his co-partner without his consent, or acquiescence under such circumstances as to create an estoppel.

2. EVIDENCE: *Entries on docket of Justice of Peace.*

The docket entries of a Justice of the Peace are *quasi* records, and when certified, receivable in evidence.

3. SAME: *Judgments of Justices of the Peace as*

When a Justice has jurisdiction of the subject matter and parties, his judgment [until reversed] is as conclusive as that of a court of record and may be pleaded, and proved by exemplification of his docket entries.

4. ATTACHMENT: *None for specific property.*

Attachment is no remedy for the recovery of specific property.

5. REPLEVIN: *Who may have for trust property.*

A trustee may maintain replevin for possession of the trust property, but the beneficiaries in the trust cannot.

6. EVIDENCE: *In aid of record.*

Where in an action of replevin the defendant pleads former recovery of the same property, from the plaintiff, and in the judgment exhibited by him the description of the property varies from that in plaintiff's complaint, he may prove it to be the same by parol evidence.

7. ——— : *Filing papers may be proved by parol; but judgment not varied by.*

The filing of a complaint and affidavit in a replevin suit, and that a writ was issued, bond executed and return upon the writ, and that they were all in regular form and had been lost or destroyed, may be proved by parol; but it is not competent to prove that a different judgment was rendered from the one offered in evidence, or that it was entered by mistake in a wrong name.

8. JUDGMENT: *Correction of Etc.*

A judgment of a Justice may be corrected by his successor in office, by a *nunc pro tunc* order, upon proper application.

APPEAL from *Prairie* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Clark & Williams for appellants.
Gatewood & Hughes, contra.

ENGLISH, C. J.:

On the 12th of March, 1875, John Bennett brought an action of replevin before Justice Booth, of Wattensas township, Prairie county, against David Gates for the following property:

One dark brown mare, five years old.
One sorrel mare filley, two years old.
One red and white pied cow, five years old, and her calf.
One dun cow, six years old, and her calf.
One red cow, four years old.
One white heifer with specks on her neck, etc.

Upon affidavit and bond, a writ of replevin was issued, the constable seized the property sued for, and upon the execution of a cross-bond by defendant, he was permitted to retain possession of it.

On application of defendant the venue was changed to Red River township, and the suit then progressed before Justice Stephenson.

To a formal complaint filed by plaintiff, the defendant filed the following answer:

"The defendant, David Gates, says that he does not unlawfully detain the property sued for as described in plaintiff's complaint and affidavit as by plaintiff alleged therein, and for an answer states:

First: That one Joseph Bennett and the plaintiff in this action (John Bennett) were partners in raising a crop in the year 1874, and that on or about the — day of —— 1874, said Joseph Bennett executed a mortgage or deed of trust to de-

fendant to secure to Gates, Bro. & Co., certain indebtedness of himself and said John Bennett, and by said mortgage or trust deed conveyed to defendant as trustee a part of the property in question, to-wit: one black mare, one sorrel colt, two red cows, one dun cow, and one pied cow, as well as other property not sued for in this action, including the crop of cotton and corn raised by said Joseph and John Bennett, in the year 1874; and that plaintiff in this action was well aware of the execution of said mortgage, and at no time made any objection to David Gates, trustee, or to Gates, Bro. & Co., until their debt matured. That on and after the maturity of said mortgage, or trust deed, plaintiff in this action (John Bennett) by verbal contract and agreement, agreed to deliver without delay to the defendant, the property conveyed by said mortgage now in controversy in this action, or so much thereof as would be sufficient to pay all the indebtedness of himself and his brother, Joseph Bennett, then due the said Gates, Bro. & Co., provided said defendant or Gates, Bro. & Co., let him, the said John Bennett, have and keep the balance of said crop of cotton included in said conveyance. Being willing and desirous to accommodate their customers, the said Gates, Bro. & Co., consented thereto, and defendant avers that plaintiff (John Bennett) did keep and appropriate said crop under said agreement, and afterwards refused to deliver said property notwithstanding his said agreement to do so.

Second: That on the 21st day of November, 1874, in an action by Gates, Bro. & Co., before John Aiken, a justice of the peace within and for Prairie county, Arkansas, against the said Joseph Bennett and the plaintiff in this action (John Bennett) a judgment was duly rendered, given and made in favor of said Gates, Bro. & Co., and against said plaintiff for the property in controversy in this action; and that said plaintiff, John Bennett, appealed from the decision

of said Sustice to the Circuit Court of Prairie county, in the name of Joseph and John Bennett; and that on the 5th day of March, 1875, said appeal was, by said court, dismissed; and that the property (a part thereof) sued for in this action was thereafter, by the constable of Upper Surrounded Hill township, in said county of Prairie, turned over to this defendant by the order of the Justice before whom said case was tried and judgment rendered, and that by virtue of the premises he now holds the same as trustee for the benefit of Gates, Bro. & Co., and not otherwise."

Isaac Gates and Ferdinand Gates, partners under the firm name of Gates, Bro. & Co., applied to be made defendants, on the grounds that they were the real parties in interest, and had immediate possession of the property in controversy, and that the possession of defendant David Gates was only constructive.

The justice permitted them to be made defendants, they adopted the above answer filed by defendant David Gates, the cause was tried before the justice, judgment in favor of plaintiff for the property described in his complaint, and defendants appealed to the Circuit Court.

In the Circuit Court the plaintiff demurred to the answer filed by defendant David Gates, before the justice, and adopted by Gates, Bro. & Co., as their answer on being made defendants.

The demurrer to the *first* paragraph of the answer was upon the following grounds, in substance:

1. Defendants seek to claim the property in controversy by virtue of a mortgage from Joseph Bennett, but do not show that at the time of the execution of the mortgage the property belonged to him, or that he had any authority to mortgage the property to plaintiff.

2. The description of the property in the answer is not

responsive to the description of property claimed by plaintiff; and the knowledge of plaintiff that Joseph Bennett had executed a mortgage covering his property does not preclude him from asserting title thereto.

3. Defendants set up a parol agreement with plaintiff to deliver the property in controversy, which if true gives defendants no title thereto, and which parol agreement is at variance with the written mortgage under which they claim and they cannot sustain title under both.

The demurrer to the *second* paragraph of the answer was upon the grounds:

1. That it sets up a pretended judgment before John Aikin, a justice of the peace, rendered on the 21st November, 1874, against plaintiff and Joseph Bennett in favor of Gates Bro. & Co. without showing that the justice had jurisdiction in the premises.

2. That it shows simply a dismissal of the appeal of plaintiff in the Circuit Court, and no trial on the merits.

3. The property being turned over by the constable to David Gates, confers upon him no right to it.

4. David Gates shows no right in himself to hold the property.

The court sustained the demurrer to the *first* paragraph of the answer, and overruled the demurrer to the *second* paragraph.

The cause was submitted to a jury on the second paragraph of the answer, and verdict in favor of plaintiff for the property described in his complaint, the value of which was found to be $190, and for $22.50 for its detention.

Defendants moved for a new trial on the grounds:

1. The court erred in sustaining the demurrer to the first paragraph of defendants' answer.

2. In excluding testimony offered by defendants, and in

directing the jury to render a verdict in favor of plaintiff for want of evidence on the part of defendants to sustain the issue.

3. The verdict is for plaintiff, when it should, by law, have been for defendants.

The court overruled the motion for a new trial, and defendants took a bill of exceptions setting out the evidence and points reserved at the trial; judgment was rendered for plaintiff, on the verdict, and defendants appealed to this court.

I. We are first to consider whether the court below erred in sustaining the demurrer to the *first* paragraph of the answer of appellants to the complaint of appellee, (which question is presented upon the record, and need not have been made ground of the motion for a new trial).

The substance of the paragraph, or plea, is that appellee, John Bennett, and his brother Joseph, were partners in making a crop in the year 1874, and that Joseph, with the knowledge of appellee, executed a mortgage or trust deed, to David Gates, as trustee, upon part of the property in controversy in this suit, and upon the crop of cotton and corn raised by him and appellee in that year, to secure a debt which they owed to Gates Bro. & Co. And that after the maturity of the debt, appellee agreed to deliver to the trustee the property in controversy, or so much thereof as would satisfy the debt, provided that Gates Bro. & Co. would let him keep the cotton included in the mortgage, to which they consented, and he did keep and appropriate the cotton, etc.

Joseph Bennett could make a valid mortgage upon the partnership crop produced by himself and appellee to secure a debt due from them to Gates Bro. & Co. *Herman on Chattel Mortgages, p.* 298. He could not mortgage the individual property of appellee to secure a firm debt, without his consent, or acquiescence under such circumstances as to make it operate as an estoppel (*Jowers* v. *Phelps, M. S.*) But if the mortgagees

released, to him, as alleged, cotton bound by the mortgage, this was a good and valid consideration for his alleged agreement to surrender such of the property in controversy in this suit as was covered by the mortgage.

In the facts alleged in the first paragraph of the answer be true, appellee could not recover of the trustee, such of the property in controversy as he had so agreed to surrender for a valuable consideration.

The identity of the property would be a matter to be settled by evidence upon a trial.

The court erred in sustaining the demurrer to the first paragraph of the answer.

II. It appears by the bill of exceptions that on the trial, defendants, to secure the opening and conclusion, admitted the value of the property in controversy to be $190, and damages for its detention to be $22.50, and that the plaintiff had the right to recover unless they could establish the truth of the *second* paragraph of their answer (the first paragraph having been demurred out), and therenpon assuming the *onus probandi*, they introduced John Aiken as a witness, who testified that he was a Justice of the Peace of Upper Surrounded Hill township, Prairie county, during the year 1874, and for some years before and after that date. That he was now out of office, but still retained possession of his docket; that the paper shown him was a true copy of his docket entries in the case therein named.

Defendants then offered to read in evidence the following transcript:

IN JUSTICES COURT OF UPPER SURROUNDED HILL TOWNSHIP.

Isaac Gates & Bros.,		Plaintiffs.
vs.	}	Affidavit.
Joe Bennett and John Bennett.		Defendants.

On this 17th day of November, 1874, comes David Gates, trustee for Gates Bros., and filed before me his complaint in

writing under oath, stating that the stock and property claimed in this action by Gates Bro's., is as follows: by mortgage executed by defendandants to Gates Bro's., six acres of cotton and four acres and a half of corn in cultivation on the Hipper farm, seven acres of corn planted on their own place, one black mare with blaze face, 4 years old, about 14 hands high; one black horse with star in forehead, 10 years old, about 15 hands high; one sorrel colt with white stripe in its face; two red cows marked crop and underbit in each ear; one dun cow, crop and split in the right ear and swallow fork and underbit in the left ear; one pied cow marked the same as the dun cow; two yearlings marked swallow fork and underbit in each ear; which sale and conveyance, however, is upon this trust, that is to say, whereas the said Joseph Bennett is indebted to the mercantile firm of Gates Bro.'s for supplies furnished him and John Bennett, brother and partner, by a deed of trust and one promissory note bearing even dates together, and unless said property is taken in hand by their creditors there is reason to fear that the debt will be lost or greatly delayed.

DAVID GATES, FOR GATES BRO'S.

"On this 21st day of November, 1874, comes John Bennett in open court, and admits service as a party to this suit.

On this 21st day of November, 1874, comes the plaintiff, by David Gates, trustee, and also comes the defendant, John Bennett, and announced themselves ready for trial; after swearing and examining the witnesses, an argument was had by Major A. Boyd; after hearing the evidence and law, the court adjudged that plaintiffs have and recover of the defendant a judgment for all of the stock now in controversy, and all costs in and about this suit expended—whereupon David Gates prayed a delivery of said property; the said order is issued directed to the constable of said township, this 21st day of November, 1874.

JOHN AIKEN, J. P.

"An appeal was then prayed by defendant to the Circuit Court, which was granted.

JOHN AIKEN, J. P.

To which is attached a sworn certificate of John Aiken, Justice of Peace, that the above is a full complete and perfect transcript of the entries made in his docket in the case of Isaac Gates & Bro's. against Joseph Bennett and John Bennett, including the judgment and grant of appeal.

The plaintiff admitted that the paper offered in evidence was a correct transcript of the docket entries of Justice Aiken, but objected to its introduction on the ground that it did not show that any process was ever issued—no affidavit or bond was ever filed either for replevin or attachment, and that the Justice had no jurisdiction of the subject matter, and no right to enter judgment, and that the judgment was not in favor of the parties set out in the answer.

(a.) The court sustained the objections to the transcript being read, upon the grounds that the only right of recovery Gates, Bro. & Co., had in the action as shown from the transcript, was by attachment, and that there appeared to have been no affidavit, no sufficient complaint or cause of action filed, nor any bond given as required by law. To which ruling defendant excepted, etc.

Defendants then obtained leave to amend the second paragraph of their answer by showing that the proceedings and judgment therein referred to, was in fact a writ in replevin in favor of David Gates, as trustee in favor of Gates, Bro's. & Co.; and thereupon offered to prove by J. S. Thomas, Esq., an attorney of the court, that on the 17th of November, 1874, he filed with John Aiken, the justice of the peace above mentioned, a complaint and affidavit for an action of replevin in the name of David Gates, as trustee of Gates, Bro's. & Co. That said suit was based upon a deed of trust and note (pro-

duced by the witness and offered in evidence, and copied in the bill of exceptions.)

That upon said complaint a regular writ of replevin was issued, and delivered to the constable of Upper Surrounded Hill township, etc., and a bond as required in actions of replevin, executed and delivered to the officer; and that all things in the proceedings in said suit conformed to the requirements of chap. 115 of Gantt's Digest. That the affidavit contained all the requirements of sec. 5035 of said Digest; that the bond was conditioned as prescribed by law and conformed to sec. 5038, etc, of the Digest, and that the writ of replevin issued upon the complaint and affidavit was in regular form, etc.

Defendants also offered said deed of trust in evidence, and offered to prove by John Aikin that the entries in the transcript offered above were made in the suit which was brought by J. S. Thomas, Esq., for David Gates as trustee as aforesaid, and that said suit was prosecuted to final judgment, and that the complaint, affidavit, writ, return thereon and bond were all lost.

(b.) The court excluded the whole of the evidence so offered, on the ground that the action of replevin could only have been brought in the name of David Gates, and the transcript offered in evidence did not show any such suit, but was entitled in the caption Gates Bro. & Co., vs. Joe Bennett and John Bennett.

Defendants offered to prove by Aikin that the judgment rendered in said cause was in favor of David Gates as such trustee of Gates Bros. & Co. mentioned in the deed of trust.

(c.) But the court refused to allow such testimony to be given upon the ground that a justice of the peace could not prove by parol what judgment he rendered, different from the one entered on his docket in the proceedings, and the justice being out of office and not having delivered his docket to another justice, did not change the rule.

Counsel for defendants submitted that Aikin being out of office and his docket not having been delivered to another justice, there could be no amendment of the judgment by *nunc pro tunc* order, but the court adhered to its ruling.

Defendants then offered to prove by Aikin this fact, that the entry in his docket was a mistake in the caption or title of the cause, which should have been David Gates, trustee, etc., v. Joe Bennett and John Bennett, and then to prove all of the other facts offered in evidence as above.

(d.) But the court overruled the motion.

Defendants then offered to prove by the clerk of the court, and by its records, that the suit of Gates Bros. & Co. v. Joe Bennett and John Bennett was brought into the court on the appeal of John Bennett from Justice Aikin's court, and that no papers except the above transcript, and an appeal bond were filed, and that the appeal was dismissed for want of an affidavit for appeal.

(e.) But the court excluded the evidence on the grounds that it was irrelevant and incompetent.

No other evidence being offered by defendants, the jury rendered a verdict for plaintiff, as above shown.

(a.) The court of a justice of the peace is not strictly a court of record (*Faulkner et al* v. *State, use, etc.*, 9 Ark., 19), yet a justice is required to keep a docket, and enter judgments, etc., rendered by him, and such entries are *quasi* records, and, when certified, receivable in evidence, etc., *Gantt's Digest, secs.* 3723, 2447.

Where a justice has jurisdiction of the subject matter and the parties, his judgment (until reversed on appeal) is as conclusive between the parties as the judgment of a court of record; and the judgment may be pleaded as such, and proven by an exemplification of his docket entries, etc. *Arkansas Justice, secs.* 377-8-9. *Vaden et al* v. *Ellis*, 18 Ark., 357.

The second paragraph of the answer of appellants to the complaint of appellee was, in effect, a plea of former recovery, though it does not conclude with a verification, but this was matter of form and not of substance. *State, use of Gibson* v. *Sadler et al,* 6 Ark. 236. *Pierson* v. *Wallace,* 7 Ib. 291.

On its face, the transcript offered in evidence shows a judgment in favor of Gates Bros., the plaintiffs, against Joe Bennett and John Bennett, defendants therein, for the "*stock*" (manifestly meaning the animals described) in controversy in the suit, no judgment being given for the corn or cotton. It appears also that there was a sworn complaint in writing filed, and that John Bennett (the plaintiff in this suit) appeared before the justice, and admitted service as a party, and announced himself ready for trial.

It appears, therefore, that the justice had jurisdiction of the plaintiffs in that suit, the animals which were subjects of controversy (Constitution sec. 40, art. 7,) and the defendant John Bennet, who is the plaintiff in this suit, and against whom the judgment of the justice is pleaded as a former recovery.

Gates Bros & Co., could not have recovered the animals in controversy by attachment before a justice of the peace. Property may be seized upon a writ of attachment, and condemned to be sold to satisfy a judgment recovered in the action, but it is no remedy for the recovery of specific property.

Looking at the deed of trust recited in the transcript of the justice, and offered in evidence after appellants obtained leave to amend the second paragraph of their answer, we find it was executed 6th of May, 1875, by Joseph Bennett, to David Gates, as trustee to secure a supply note executed by Bennett to Gates Bros. & Co. for $100, payable 1st October following.

The deed conveys the animals, etc., to the trustee, and on default of payment of the debt at maturity, empowers him to

take possession of the property, and sell it, and apply the proceeds in satisfaction of the debt secured by the deed.

On default of payment of the debt at maturity, the legal title to the property being in the trustee, he had the right to bring replevin for possession of it. *Anderson ad. et al* v. *Mills exr.*, 28 Ark., 184. Or he might have brought a bill to foreclose. *Sullivan* v. *Hadley et al* 16 Ark., 143.

So Gates Bros. & Co., had two remedies. They had the right to sue at law on the note secured by the trust deed, or to bring a bill in equity to foreclose, making the trustee, who held the legal title to the property, a party.

But they had no right by virtue of the deed of trust to bring replevin for possession of the property conveyed to the trustee by the deed. By the terms of the deed he was selected by the parties as a trustee to hold the legal title to the property until default of payment, and then to take possession of it, and sell it for the payment of the debt secured by the deed.

But when appellants offered in evidence the transcript of the judgment of the justice of the peace, pleaded as a former recovery, under the second paragraph of the answer, before it was amended, the deed of trust was not before the court. Nothing was before it but the transcript offered in evidence.

The transcript, however, shows upon its face that the Gates Bros., the plaintiffs in that suit, claimed the property by virtue of a deed of trust executed by the defendants in the suit, to David Gates as trustee, to secure a debt to the plaintiffs; and it may be supposed, and doubtless is the fact, that the deed of trust recited in the transcript is the same that was offered in evidence on the trial in this cause. That being so, if the plaintiffs in that suit showed upon the trial of the case no other title to the property sued for than the deed of trust, it was an error in the justice to render a judgment in their favor for the property. But such error did not make the judgment

void; it was valid until reversed for the error on appeal. *Alston exparte*, 17 Ark., 580. *Hill* v. *State*, Ib. 440.

The judgment of no court, whether of general or limited jurisdiction, rendered when the court has jurisdiction of the parties and subject matter of the suit, can be treated as void, when brought in question in a collateral proceeding, on the ground that the plaintiff recovered on a bad title. The rendering of a judgment on a defective title, or on no legal title to the thing in action, is but an error in the court which must be corrected by a superior court on appeal or writ of error. *Boothe* v. *Estes*, 16 Ark., 110.

The suit was not upon the deed of trust as the foundation or subject matter of the action, but for property covered by the deed, and the deed could only be used as evidence of title on the trial, hence this case does not fall within that class of cases in which this court has held that the instrument filed with the justice as the cause of action must show a right of action in the plaintiff, etc. *Ib. Latham* v. *Jones*, 6 Ark., 371, *Levy* v. *Sherman*, *Ib.* 182.

The animals sued for in this action are not described in the complaint as they are in the judgment pleaded as a former recovery, but if the court had admitted the transcript in evidence, parol evidence would have been admissible to prove the identity of the animals. *1 Greenleaf Ev.*, *Sec. 532*. *Smith* v. *Talbot*, *ad.*, 11 Ark., 669.

(b.c.d.) After appellants were permitted to amend the second paragraph of their answer, so as to aver that the judgment pleaded as a former recovery was in fact rendered in favor of David Gates as trustee, in an action of replevin brought by him for the property in controversy, the transcript of the judgment offered in evidence did not correspond with the judgment as so pleaded, and was properly excluded by the court for variance.

It was competent for appellants to prove, by parol evidence, that a complaint, and affidavit were filed in the replevin suit, a writ issued, bond executed, and the return upon the writ, and that they were all in regular form, and had been lost or destroyed. *Davis* v. *Pitt*, 1 Ark., 359. *Mason, ad.*, v. *Bull*, 26 Ark., 167. But it was not competent for appellants to prove by the attorney who brought the replevin suit, or by the justice who rendered the judgment, or by any witness, that the justice in fact rendered any other or different judgment than that shown to have been rendered by the transcript offered in evidence. Or that the justice by mistake, entered the judgment in the names and in favor of Gates Bros., when it should have been entered in favor of David Gates, as trustee, etc. *Butler* v. *Owen*, 7 Ark., 373. *Barkman* v. *Hopkins*, 6 Ib. 157. *State Bank* v. *Minikin*, 12 Ib. 719. *Kimball* v. *Merrick*, 20 Ib. 12, *and cases cited.*

If the justice in fact made a mistake in entering the judgment—if he entered it in the names, and in favor of Gates Bros., when it should have been entered in favor of David Gates, as trustee, etc., the parties relying on the judgment as a former recovery, should have taken the proper steps to have the judgment entry amended, and pleaded the judgment as amended, and offered in evidence a transcript of the amended judgment.

It was the duty of John Aiken, when he went out of office, to deliver his docket, and all the books and papers belonging to his office, to his sucessor in office—and he might be compelled by proper proceeding to do so, and the power of amendment would be in his successor, on proper application, notice to parties interested, and proof of the error. *Gantt's Digest, sec. 3711. King et al* v. *State Bank*, 9 Ark., 187. *Mitchell* v. *Conley*, 15 Ark., 419.

(1.) Had the transcript been admitted in evidence, as an ap-

peal had been taken from the judgment of the justice to the Circuit Court, it was competent for appellants in this suit to prove that the appeal from the judgment pleaded as a former recovery had been dismissed, thereby leaving the judgment of the justice in force.

The judgment of the court below must be reversed, and the cause remanded with instructions to the court below to overrule the demurrer to the first paragraph of the answer, and for trial *de novo* upon the whole answer.

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SUMMERS AND WIFE ET AL V. HOWARD.

In June, 1867, a curator of the estate of infants, by order of the Probate Court, sold certain town lots belonging to them, and received and paid over to them the purchase money. The purchaser took possession and made valuable improvements upon the lots with knowledge of the infants who asserted no claim to them until the bringing of the suit. Held

1st. That the Probate Court could not authorize a curator to sell a minor's estate, and the sale was void.

2d. That it would be unjust for the plaintiffs to recover the lots and the rents and profits without returning to the purchaser the money received from him and making compensation for the improvements made and taxes paid by him; but for such improvements as were made during their disability they can not be required to make compensation beyond the value of the rents and profits of the premises.

3d. That the rents and profits should be estimated at the rental value of the lots without the improvements made by the purchaser.

4th. That the improvements should be estimated at their value at the time of the recovery.

5th. That the plaintiffs should be charged with only such of the taxes paid by the purchaser as would be chargeable upon the lots without the improvements.

APPEAL from *Phillips* Circuit Court, in Chancery.

Hon. J. N. CYPERT, Circuit Judge.

Tappan & Horner, for appellant.

J. C. Palmer, contra.

HARRISON, J.:

James Summers and Joanna Summers, his wife, and Austin N. Yerby and James H. Yerby, on the 26th day of February, 1862, brought their action of ejectment against William J. Howard, for three lots in the city of Helena, on which were a dwelling house and other improvements

The defendant made his answer a counter-claim, and on his motion the cause was transferred to the equity side of the court.

Admitting that the lots had been the property of the plaintiffs, Joanna Summers, Austin N. Yerby and James H. Yerby, who inherited them from their father, Henry Yerby, the defendant, alleged that they were, on the 8th day of June, 1867, under an order of the court of probate, made at the January term, 1867, offered at public sale, by Lycurgus Cage, who was the curator of the real estate of said Joanna and James H. Yerby, then minors, and were bid off and purchased by him the defendant, at the price of $1,400, and which was their fair and full value. That according to the terms of the sale, one half was required to be paid in cash, and the remainder in twelve months, but that Cage being willing to discount the deferred payment, $77.50, he paid him in cash and in full of the purchase money, $1,333.50, and Cage, the same day, conveyed the lots to him by deed.

That Cage made to the court of probate a report of the sale, and the sale was confirmed by the court, but that, through the negligence and misprission of the clerk, the order confirming the sale was not entered upon the record. That Cage paid over the money he paid him for the lots, after paying the expenses of the sale and certain charges against them to the plaintiffs, Joanna, James H. and Austin N. Yerby, in accordance with the direction and order of the court. And that, immediately after his purchase, he entered into possession of the

lots, and was then and had ever since been in possession of them.

He further averred, that since he had been in possession of the lots, he had made valuable and lasting improvements on them, and with the knowledge, at the time, of the plaintiffs, who stood by and asserted no claim or title to the property; and that the said Austin N. Yerby was of age when the order for the sale was made and joined with Cage in the petition for the same, and the said James H. Yerby became of age, and the said Joanna Yerby intermarried with the said James Summers, soon after the sale of the lots to the defendant. And he prayed that the sale be confirmed, and his title quieted, and for general relief.

The plaintiffs filed a reply: They admitted, as alleged in the answer, the sale of the lots by Cage under the order of the court of probate; the purchase of them by the defendant, and the conveyance of the same to him by Cage. They admitted the payment of the price, the said sum of $1,333.50, to Cage, and the payment of the same over to the said Joanna, James H. and Austin N. Yerby, less the said expenses of sale and charges—that Austin N. Yerby was of age when the order for the sale was obtained; that James H. Yerby became of age on the 21st of August, 1868, and Joanna intermarried with James Summers in February, 1868; that the defendant went into possession immediately after his purchase, and that he had made valuable and lasting improvements on the lots.

But they denied that the lots were sold for their fair and full value; that Austin N. Yerby joined in the petition for the sale; that the sale had been confirmed, or that Cage ever made a report to the court, and denied that they had, at the time, knowledge of the improvements the defendant was making.

Upon the hearing the court held the sale void, and decreed possession of the lots to the plaintiffs. It directed an account

between the parties to be taken by a master, as to the rents and profits; the money that came into the hands of plaintiffs which (it found to be $1,100), and interest thereon, the value of the improvements, and the taxes paid by the defendant, which was done, and a balance was found to be due from the plaintiffs to the defendant of $1,680.74.

The sum so found, the plaintiffs were decreed to pay the defendant, and the same was declared a lien on the property.

Both plaintiffs and defendant appealed.

The master's account contained three statements as to the value of the improvements. Their original cost; their value at the time the account was taken; and what they might then be made for.

The decree does not state the facts found or upon which it is made, but it would seem from the sum decreed the defendant as the balance due him upon the account, that the value at the time of auditing the account was taken by the court as the measure of compensation for the improvements.

With some corrections made by the court, the account, so far as we are able to understand it, stood thus:

Value of improvements	$2,137.58
Money paid in the purchase $1,100, and interest to June 8th, 1877, date of decree	1,760.00
Taxes	859.89
Total	$4,757.47
Rents and profits	2,940.00
Balance in favor of defendant	$1,817.47

The discrepancy between the balance above shown and the sum decreed the defendant is very probably owing to an error in calculation.

It was not alleged, nor does it in any manner appear, that Austin N. Yerby, who seems to have received a full share of

the money, sold or contracted to sell his interest in the lots to the defendant.

That the sale by Cage of the interest of the other two owners was void, though it had been confirmed, of which there was no evidence, admits of no question.

The whole law in respect to curators, as it existed when the order of sale was made, and the sale took place, is contained in the following sections of chapter 81 of Gould's Digest:

"Sec. 32. If any minor own real estate, and have no guardian, the court of probate may appoint a curator to take charge of such estate, whose powers shall cease on the appointment of a guardian.

Sec. 33. The court shall have power to make such rules and regulations in relation to the curator of the estate of any minor as may be deemed just and proper.

Sec. 34. In such cases the rent of the real estate of any such minor shall be paid by the curator into the court, and the same shall be appropriated for the benefit of the minor."

The Legislature, it is thus seen, had made no provision for the sale of a minor's real estate by a curator, and his power over it extended no farther than to its preservation and management; and the court of probate could confer upon him no authority to sell it. . . . .

It would be, however, manifestly unjust for plaintiffs to recover the lots, and, as a necessary consequence, the rents and profits, without paying back to the defendant the money received from him and making compensation to him for the improvements made upon them.

They deny, it is true, that they had any knowledge of the fact, when he was putting the improvements upon the lots, but they knew of the sale; they had the money, and they must be presumed to have known that he was in possession of them; and by failing to repudiate the transaction and to assert

their title, when they might have done so, were guilty of gross *laches*, and should not be allowed to appropriate to themselves, without satisfaction or indemnification, the improvements of the defendants, which by their silence they permitted to be made. *Morris* v. *Terrill*, 2 Rand., 6; *Barlow* v. *Bell*, 1 A. K. Marsh. 246; *Ewing's heirs* v. *Handley's, exr's*. 4 Litt. 171: *Janes* v. *Boisguard*, 39 Miss., 796; *Douglass* v. *Bennett*, 51 Miss., 680.

A considerable part of the improvements, however, were made, as the proof shows, before the marriage of Mr. Summers, or James H. Yerby became of age; for such they cannot be required to make compensation beyond their shares of the rents and profits, for not then being *sui juris* no laches can be imputed to them.

But for those made after her marriage, Mrs. Summers, or more properly her husband, who has become entitled to her interest in the rents and profits, must make compensation.

It was therefore important, but which was not done, that the value of the improvements made after the marriage of Mrs. Summers, and of those made after James H. Yerby became of age, should have been ascertained.

The defendant was charged in the master's account, and also in the decree, with rents and profits as enhanced by the improvements. This was also an error. A party who is, under the circumstances of the case, entitled to compensation for improvements, is only chargeable with such rents and profits as the property would have yielded without the improvements; for if charged with such as arise exclusively from the improvements which he has made, he would pay for the use of that which was his own. *Neale* v. *Hagthrof*, 3 Bland's, Ch,, 591; *Hawkins* v. *Beal*, 4 Dana, 4; *Taylor* v. *Bate*, Ib. 198; *Richardson* v. *McKinson*, Litt. Sel. Ca., 321; *Williamson* v. *Williamson*, 3 S. and M., 749.

The rents and profits should therefore have been estimated according to the state or condition of the lots before the improvements were put upon them.

And by a parity of reasoning the plaintiffs should not have been charged, as seems to have been the case, with the whole amount of taxes paid by the defendant, but with such part only as would have been paid upon the lots without the improvements.

The plaintiffs were adjudged to account to the defendant for only $1,100 of the money paid by him—the sum which Cage paid over to them, but the evidence discloses the fact that Cage paid taxes on the lots, and also redeemed them from a tax sale. These expenditures were as clearly for their benefit, as the money they directly received, and there can be no reason why they should not account to him for the money so expended.

The court committed no error, if, as we suppose, in determining the compensation for the improvements, it estimated them at the value when the account was taken.

"Such allowance," says Chaucellor Bland, in *Neale* v. *Hagthrof*, cited above, are made upon the ground that the improvements do in fact pass into the hands of the plaintiff as a new acquisition; and they can only be a new acquisition to him to the extent of their value at the time he recovers or obtains possession of them; and therefore their value at that time is to be allowed; and nothing more." *Southall* v. *McKean*, 1 Wash., (Va.,) 336; *Green* v. *Biddle*, 8 Wheat, 77.

The decree is reversed and the cause remanded to the court below, with instructions that an account be taken between the parties as above indicated, and a decree rendered in conformity with this opinion.

EAGLE ET AL V. BEARD ET AL.

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1. PRACTICE IN CHANCERY: *Parties, defect of, not raised by general demurrer.*

A general demurrer to a complaint does not raise the question of defect of parties. Nevertheless when a determination of the controversy between the parties before the court, can not be had without the presence of other parties, the court must order them to be brought in.

If a bill has equities, it should not be dismissed for defect of parties, until refusal of the plaintiff to bring them in upon a proper order of the court to that end; and such order should be made by the court of its own motion, if the bill present equitable grounds of relief against all the defendants when brought in. The proper practice in such cases when defect of parties is developed by the bill, and a special demurrer is interposed on that ground, is to sustain the demurrer and dismiss the bill, unless the plaintiff asks leave to amend by bringing in the other parties. But when the demurrer is general the court should look alone to the equities of the bill, and if the bill should stand *with* proper parties, it should overrule the demurrer, and order such parties to be brought in as are necessary to a full settlement of the matters in contest between the parties already before the court.

2. COUNTIES: *What they are.*

Counties are not in any respect business corporations for private purposes, nor are they organized exclusively for the common benefit of the citizens and property holders within their limits. They are of a purely political character, constituting the machinery and essential agencies by which the free governments derived from, and modeled upon the representative and popular features of the English Constitution are upheld, and through which, for the most part, their powers are exercised.

3. SAME: *Their rights and liabilities when divided.*

When a county is divided the old county will, without statutory provision retain the property and remain liable for the debts of the county and the severed part or new county will be released. But it is competent for the Legislature to apportion the property and the burden between the old and the new counties as it may deem proper, and compel taxation for the purpose.

4. SAME: *How created—Legislative power over.*

Counties, cities, and towns, are municipal corporations created by the Legislature, and derive all their powers from it, unless otherwise provided by the State Constitution.

The Legislature has the authority to amend the charter of said corporation enlarge or diminish its powers; extend or limit its boundaries: divide the same into two or more; consolidate two or more into one; and even abolish it altogether at its own will and discretion and according to its own views of public convenience, and without the consent of those comprising the body politic.

APPEAL from *Lonoke* Circuit Court in Chancery.
Hon. J. W. MARTIN, Circuit Judge.
—— *Hallum*, for appellants.

EAKIN, J.:

On the 16th of April, 1873, the General Assembly created the new county of Lonoke, out of portions of the counties of Pulaski and Prairie. Sec. 18 of the Act made it "the duty of "the Board of Supervisors of the counties of Pulaski, Prairie "and Lonoke, to appoint, each, a suitable person whose duty "it should be to adjust on an equitable basis, and designate "the amount of the indebtedness of the counties of Pulaski "and Prairie, which shall be assumed by the county of "Lonoke."

In order to form the new county 428 square miles of territory were detached from the county of Pulaski, and 252 square miles from the county of Prairie.

The new county was organized under the Act, and during the year, each of the connties named, appointed a commissioner to adjust the amount of the indebtedness of Pulaski and Prairie counties, to be assumed by Lonoke. They met on the 11th of March, 1874, and reported the sum of $40,000, as the debt of Lonoke county, to the county of Pulaski. This report was spread upon the records of the former county.

Afterwards, on the 7th of December, 1875, the General Assembly passed another Act to define the boundaries of Pulaski and other counties, by which an area of 45 square miles was, in one place, detached from Lonoke and transferred to Pulaski; and in another place a like area was transferred from Pulaski to Lonoke. Parts of Pulaski were also transferred to other counties and portions of their territory added to Pulaski. By sec. 4 of the Act it was provided that the Pulaski County Court should make a *pro rata* division of the debt of the county ac-

cording to the assessed value of the property, real and personal, within the several portions of her territory thus cut off and attached to the other counties, and enter it upon the records of the court, and cause a transcript to be transmitted to the clerks of the several other counties, to be laid before their respective courts. It was made the duty of the judges to cause these transcripts to be spread upon the records of their respective courts; and it was provided that the same should, thereafter, stand and become a valid indebtedness, due the said county of Pulaski from each of the other counties. Similar provisions were made for the other counties with regard to their trerritory, which had been added to Pulaski, to be used as a set off. Under this section, in September, 1876, the county of Pulaski transmitted to the Lonoke county clerk, a claim for the sum of $26,-327.65, which was never spread upon the records of the Lonoke County Court. Thus, if valid, the whole debt of the county of Lonoke to Pulaski, on account of her territory transferred, amounted to the sum of $66,327.65.

A similar obligation had accrued from the county of Lonoke to the county of Prairie, on account of her territory originally taken in 1873, amounting to $1,750. This obligation, although at first rejected by the county of Lonoke, was afterwards fully paid up by the scrip of the latter county.

At the October term, 1876, the County Court of Lonoke submitted to the County Court of Pulaski a proposition to pay $30,000 in discharge, and compromise, of all supposed indebtedness, growing out of the two Acts of the General Assembly. This the County Court of Pulaski accepted in a modified form, and the County Court of Lonoke authorized defendant, E. L. Beard, as County Judge, to execute the bonds of that county to the county of Pulaski, to the aggregate amount of $30.000, bearing 7 per cent. per annum interest from the 10th of October, 1876, running ten years to maturity, and at the same

time levied a tax of 5 mills on the dollar, on *all* the property of the county to pay the outstanding indebtedness. In the order for this levy the bonds for $30,000 were not alluded to in any manner. At the time this bill was filed, (January 26, 1877), the sheriff of Lonoke was about proceeding to collect this tax, and the County Judge was preparing, and about to issue said bonds.

The bill was filed by citizens and tax payers of Lonoke county, in behalf of all other citizens and tax payers of the whole county. It sets up the foregoing facts and submits that the two Acts of the General Assembly were unconstitutional, in so far as they impose a burden upon the body of the whole county; being specially in conflict with the provision that "private property shall not be taken for public use, without just compensation," and also the fundamental law restraining the Legislature from taking the property of A. and giving it to B.

The prayer is that the County Court, and County Judge of Lonoke, be restrained from issuing said bonds; and that they and their successors in office be enjoined from paying any portion of said supposed indebtedness, or collecting any tax for that purpose, and for general relief. Only the Judge and County Court of Lonoke are made parties defendant.

The defendant, (probably the County Judge), interposed a demurrer in short upon the record. The record shows that "the court being of opinion that the Act of the General Assembly" of April 16th, 1873, "is constitutional and valid, and that the debt imposed by said Act on the county of Lonoke in favor of the county of Pulaski is a lawful and valid debt, complainant's bill is therefore dismissed." From which decision and action complainant appealed.

There is an obvious defect of parties to this bill, inasmuch as Pulaski county claims the bonds to be issued, and should have day in court. The demurrer being general, did not raise

this question. It is made a special ground of demurrer by the 4th clause of section 4564, but it is specially provided by section 4565, Gantt's Digest, that the demurrer shall distinctly specify the grounds of objection to the complaint, or otherwise it shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action. Nevertheless it is provided by section 4481, that when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in.

If the bill had equities, it should not have been dismissed on this account before refusal of the complainants to bring in other parties after a proper order of the court to that end, and such an order should have been made by the court of its own motion, if the bill would have presented equitable grounds of relief against all defendants when properly brought in. The proper practice, in such cases, where defect of parties is developed by the bill itself and a special demurrer is interposed on that ground, is to sustain the demurrer and dismiss the bill, unless complainants ask leave to amend by bringing in other parties. But when the demurrer is general, the court should look alone to the equities of the bill, and if it finds that the bill should stand *with* proper parties, it should overrule the demurrer, and order such parties to be brought in as are indispensible to a full settlement of the matters in interest between the parties already before the court. We must therefore consider the action of the court in sustaining the demurrer at this stage of the pleadings, in all respects as if the county of Pulaski had been a party.

Counties are not, in any respect, business corporations for private purposes; nor are they organized exclusively for the common benefit of citizens and property holders within their respective limits. They are of a purely political character,

constituting the machinery, and essential agencies by which the free governments derived from and modeled upon the representative and popular features of the English constitution, are upheld, and through which, for the most part, their powers are exercised. The idea of a government by means of counties, comes down from the remotest period of Anglo Saxon history. It was imported to the American colonies with the common law, and entered, naturally and of course, into the frame of all their colonial governments; from whence it passed, by easy transition and necessary consequence, into the governments of the States. Our constitutions do not expressly provide for the organization of the territory into counties. This division is taken for granted. The idea of counties underlies all American constitutions. They presuppose both the existence and necessity of counties, and starting from that foundation, proceed to base thereon frames of government, in which the counties act all efficient parts. The political power is composed of representatives from counties. Through them justice is administered, the revenue collected, and the local police rendered effective. Neither the courts of justice, nor the Executive of the State, can perform any important function, except in the tribunals, or through the offices of the counties.

Having this character, so intimately connected with the public interests, so foreign to any considerations of private convenience in opposition to the common good, it logically follows that the power of the Legislature, to mould and direct these political subdivisions to effect their objects, and cause them to subserve their highest purposes, must be very great. They are the vitals of the State. Their annihilation as a system would be the destruction of the State. Their inefficiency, her paralysis. The health of the body politic requires that the Legislature should have a power over them analagous to that

of the individual over his own limbs and vitals. It is germain to the subject to allude to the correlative duty of the political power, not only of the States, but of the Federal government, composed of all the States, to see to it, that the counties suffer no detriment from the encroachment of any power which may tend to crush their existence, or paralyse their efficiency. Such attacks, making imperceptible advances, and gathering strength from precedents, endanger the foundations of the American system of constitutional government.

Returning to the matter of power, it has been long held with regard to the towns in the New England States, which, there, are political agencies as our counties are here, and with regard to counties also, that upon their division, the old county or town will, without statutory provision, retain the property, and remain liable for the debts. But it is competent for the legislature to *apportion* the property and the burden between the old and new towns or counties, as it may deem proper, and compel taxation for the purpose. See the cases collected in note 2 on p. 176 of Mr. Cooley's Work on Taxation. In some of these cases property originally inuring to the use of a portion of the citizens of a town, has been applied to the benefit of all others brought into the same town with them ; and in others, burdens have been imposed on new additions which did not appertain to them before. The power to create new towns or counties, and change the boundaries of old ones, is indispensable to wholesome government, in the ever-varying changes of condition attending our progress in civilization ; and that power could not be exercised with sufficient freedom if the Legislature could not, in doing so, apportion benefits and burdens amongst those presumed to be benefited by the change.

This is not, in any true sense, taking the property of A. for the benefit of B. It is simply imposing a tax upon the

property of A. and B. together for the direct benefit of the particular political subdivision of the State, and for the general benefit of the whole State in so arranging these political subdivisions, that justice may be administered, the local police provided for, the revenue collected, and political representation secured in the most efficient manner, without injustice to creditors. It is, indeed, like all taxation, taking private property for public uses, but the compensation is presumed in the benefits of the new organization in promoting the welfare and convenience of all the citizens, regardless of locality.

The principles which govern, in such cases, have been recently so thoroughly and clearly discussed in the case of *Laramie Co.* v. *Albany Co.*, 2 *Otto*, 307, and authorities so fully quoted, that nothing is left to be added.

"Counties, cities and towns," says Mr. Justice Clifford, in that case, "are municipal corporations, created by the authority of the Legislature; and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides." * * * "The Legislature has authority to amend the charter of such a corporation, enlarge or diminish its powers; extend or limit its boundaries; divide the same into two or more; consolidate two or more into one; and overrule its action whenever it is deemed unwise, impolitic or unjust; and even abolish the municipality altogether, in the legislative discretion," citing *Cooley on Court*, 2 Ed., 192, and this may be done "at the mere will of the Legislature, according to its own views of public convenience, and without any necessity for the consent of those comprising the body politic."

He quotes with approbation from the opinion of PARSONS, C. J., in the early case of *Windham* v. *Portland*, 4 Mass., 589, as follows: "If a part of its territory and inhabitants are separated from it by annexation to another, or by the erec-

tion of a new corporation, the former corporation still retains all its property, powers, rights and privileges; and *remains subject to all its obligations and duties; unless some new provision should be made by the act authorizing the separation.*"

"Institutions of this kind," proceeds Mr. Justice Clifford, "whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretention to sustain their privileges, or their existence, upon anything like a contract between them and the Legislature of the State; because there is not, and cannot be, any reciprocity of stipulation; and their objects and duties are utterly incompatible with everything of the nature of a compact. Instead of that, the constant practice is, to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, *as understood by those who control the action of the Legislature.* Opposition is sometimes manifested, but it is everywhere acknowledged that the Legislature possesses the power to divide counties and towns at their pleasure; and to apportion the common property *and the common burdens* in such manner as to them may seem reasonable and equitable."

Quoting from THOMPSON, C. J., in the case of *Burns* v. *Clarion Co.*, 62 Penn., St. 425, he says that these divisions had their origin in the necessities and convenience of the people, but this does not withdraw them from the supervision and control of the State in matters of domestic government. "Proof of that is found in the fact that the Legislature often exercises the power to exempt property liable to taxation; and in many other instances imposes taxes on what was before exempt, or increases the antecedent burdens in that behalf."

Real or seeming hardships may arise in every exercise of such power. They are unavoidable in all cases where the municipalities own property, or are burdened with debts.

The solution of the difficulties belongs to the legislative discretion, in the exercise of which, individual hardship must of necessity yield to the public good.

These views as to the nature of counties, and the powers of the Legislature over them, were early adopted and have been followed by this court, notably, in the case of *Pulaski Co.* v. *Irvin*, 4 Ark., 489, and *English* v. *Oliver*, 28 Ark., 317. In the latter case the power of the Legislature was upheld, to compel every county in the State to receive for its taxes for county purposes the scrip of the State, which at that time was much depreciated. This, in solvent counties, owing no debts, was in effect and ultimate consequence, an imposition of an additional tax upon the property of the county to supply the depreciation, and an exercise of authority which would never have been pretended in the case of private corporations or individuals. It must rest alone upon the ground that counties are merely political organizations, parts of the State government, and wholly subject to legislative control. See also, *Loftin, sheriff*, v. *Watson*, 32 Ark., 422, and *Cole* v. *White Co.*, Ib. 51. In the last case Mr. Justice Harrison distinctly announces the main body of principles declared in Laramie v. Albany (counties) *supra*, with numerous citations of authority.

It results that the Legislature had the power to create the county of Lonoke out of portions of the respective territories of Pulaski and Prairie, and to apportion the burdens of their respective debts, compelling Lonoke to assume a part, and providing the mode of ascertaining it, even against the will of the inhabitants of the new county, if any objection had been made. These were the conditions imposed upon the people of the new county, under which they were to enjoy the privilege of having a county for their better convenience, with right to tax for its support, and for general police purposes, territory formerly belonging to other counties.

Had the Legislature, as it might have done, stopped with the creation of Lonoke, making no provision for the debts of Pulaski and Prairie, the portions from those counties would not have remained liable for the old debts. The burden of those debts did not constitute a lien upon these fractions, which might be followed by creditors into the new counties, and their payment enforced by the taxing power. They would have been released, and would now, if it should be held that the section of the act imposing a portion of the old Pulaski debt upon the whole of Lonoke, was unconstitutional. It would leave no provision for taxing these fractions separately, and *the whole* of the debt would be thrown upon the old county, without its old resources. The Legislature thought it more equitable to distribute the burden over the whole county of Lonoke, and this court does not question its power, nor will its discretion either in the original act or the subsequent one, changing the boundaries, and imposing upon Lonoke an additional burden. Comity towards a co-ordinate department of the government forbids the discussion of matters of discretion, when the power is conceded. The Chancellor did not err in holding the act for the creation of Lonoke county constitutional in all its parts.

This first debt was imposed upon Lonoke before, and existed at the time of the adoption of the Constitution of 1874. She had a right to levy a tax of 5 mills on the dollar to pay that class of indebtedness. The levy is a general one, without reference to any particular debt, and there was no equity to enjoin it.

In the case of *Worthen, County Clerk*, v. *Badgett et als*, 32 Ark., 496. This court held the Act of March 6th, 1875, authorizing the issuance of bonds by counties to be unconstitutional. When the compromise for the issuance of $30,000 in bonds was made between the two counties in 1876, there

was no law enabling Lonoke county to carry out the terms. No county had any power to issue interest-bearing bonds for such purposes. The issuance of them would unnecessarily endanger the rights of the tax payers of Lonoke county and lead at least to multiplicity of suits. The prayer to enjoin the issuance of these bonds should have been entertained, and the demurrer overruled. For this error the decree must be reversed and the cause remanded with directions to the Chancellor to overrule the demurrer, and to order the county of Pulaski to be made a party, and brought in, before any answer shall be required, or in case complainants may decline to do so, to dismiss the bill for want of proper parties.

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DODSON ET AL V. MAYOR AND TOWN COUNCIL, FORT SMITH.

1. COUNTY COURTS: *Successors to Board of Supervisors.*

By the Constitution of 1874 County Courts were made successors and mere continuations of the former Boards of Supervisors of the counties.

2. SAME: *Appeals from to Circuit Courts.*

An appeal lies to the Circuit Court from the judgment of the County Court granting or refusing an application to annex territory to a municipal corporation, and the Circuit Court should, on such appeal, retain jurisdiction of the subject matter for final judgment, and try the case *de novo;* but where the County Court has fairly understood the law, considered the facts and exercised its discretion upon a view of the fitness and propriety of the proposed matter as affecting the interest and convenience of the public, its action then should have not the technical, but much of the persuasive force of a political question finally determined.

3. MUNICIPAL CORPORATIONS: *Annexation of Territory to. Construction of Statute.*

By force of the Statute of 1875, the annexation of contiguous territory to a town, follows the vote of the town and the proper formal steps to be taken in the County Court, unless there be a remonstrance filed against it and sustained.

The vote of the town makes a *prima facie* case for annexation; the onus for showing sufficient cause against it is upon the remonstrants.

APPEAL from *Sebastian* Circuit Court.
Hon. J. H. ROGERS, Circuit Judge.
Newton, and *Duval & Cravens*, for appellants.
Clendenning, *contra*.

EAKIN, J.:

On the 10th of October, 1877, the town of Fort Smith, by its attorney, presented to the Sebastian County Court a petition for annexation to itself, of certain contiguous territory, described as follows: "The N. W. 1-4 of section 16, and all "of section 17 lying in the State of Arkansas; and all of sec-"tion 8 lying in the State of Arkansas, not included in the "present limits of Fort Smith, except that part of section 8 "known as DuVal's new addition, and that portion known as "DuVal's field; all in T. 8 N. of R. 32 west, situated in "Sebastian county." The petition showed that the matter had been duly submitted to the qualified electors of the town as prescribed by law; and that, at an election held on the 31st day of August, 1877, a majority of the votes had been cast for said annexation. A map, or plat, of the territory proposed for annexation, accompanied the petition; which was duly set for hearing on the 14th day of January, 1878.

On that day a remonstrance against the said annexation, was filed, with the signatures of 106 persons, describing themselves as inhabitants and real estate owners within said contiguous territory. They declare their opposition to annexation, and state that they had not been consulted in the matter, and that they believe it would be unjust.

Next day the County Court, upon hearing the petition, remonstrance, evidence and argument of counsel, held: That as it appeared that the remonstrants constituted a majority of the freeholders and property owners, residing on said territory sought to be annexed, the petition ought not to be granted. It

was therefore rejected, and the town appealed to the Circuit Court. The matter was there heard *de novo*, after a refusal to dismiss for want of jurisdiction.

The evidence adduced on trial showed that a part of the N. W. 1-4 of said section 16 had been laid off into blocks and lots. That is to say: There were in said section 683 1-2 lots, of which 513 1-2 had been sold; that there were 16 1-2 blocks entirely unsold and unnamed; that part of these blocks were in the woods, and other parts consisted of low, swampy lands; that the remonstrance was signed by a majority of the occupants and owners of the lots on this quarter section; that on said 17th section, embraced in the map, there was one field of about forty acres, and another of ten acres; that the Birnie estate owned about 13 1-2 acres; that a part of said section was laid of in lots, ranging from a half acre to two acres, making a total of 80 acres in the State; that the largest portion of said section, to-wit, 300 acres, constituted what is known as the Government reserve, containing the old fort, national cemetery, and other buildings belonging to the United States, and occupied in part by the Federal District Court and its officers. A majority of the occupants and owners on this section also signed the remonstrance. The territory sought to be annexed lies all in the same county with and contiguous to the town of Fort Smith. This was all the evidence.

Upon the hearing the court held that there had been a full compliance with all that the statute required, in order to authorize the annexation; and that it was right and proper that the petition therefor should be granted. It was accordingly ordered that the remonstrance be dismissed, the prayer to the petition be granted, and that the said territory included therein be deemed and taken to be included in, and constitute a part of said town. The County Court was further directed to take proper legal steps for such annexation, in conformity

with the judgment. The remonstrants excepted and moved for a new trial on the grounds that the Circuit Court had no jurisdiction of the matter; that the rejection of the petition by the County Court was final and conclusive; and that the finding and judgment of the court was contrary to law and evidence; The motion was overruled, and thereupon the remonstrants appealed and gave bond for supersedeas.

By the Constitution of 1874, (*schedule, sec.* 23,) the County Courts were made successors and mere continuations of the former Boards of Supervisors of the counties, and were given exclusive original jurisdiction in all matters necessary to the internal improvement and local concerns of their respective counties (*Art. VII, sec.* 28). All laws then in force, not in conflict with the new Constitution, were continued until amended or repealed (*schedule, sec.* 1). By the laws then in force, (*Gantt's Digest, secs.* 706 *and* 1191) appeals lay in all cases, by persons aggrieved, to the Circuit Courts from the final judgments or orders of the Boards of Supervisors. This applies now to the County Courts, and it is plain that the Circuit Court properly entertained jurisdiction of this appeal, and it was further the duty of the Circuit Court to retain jurisdiction of the subject matter for final judgment, in the same manner and to the same extent as though original jurisdiction had been conferred on said Circuit Court by law. (*Gantt's Digest, sec.* 1195.)

The only remaining question is, did the court err upon the law and the evidence. This leads us to a particular notice of the general Act of March 9th, 1875, providing for the incorporation, organization and government of municipal corporations.

Sections 35, 36 and 37, provide for the creation of new corporations to meet the wishes of the inhabitants of localities, not already incorporated. They are required to file a petition

to the County Court, signed by not less than twenty of said inhabitants, with a description and map of the territory, name of the town, and the persons authorized to act for the petitioners in court. A time must then be fixed for hearing said petition, not less than thirty days, of which notice must be given in a mode prescribed by the Act. The hearing must be public, and *any person interested* may appear and contest the granting of the prayer, and affidavits may be used on both sides. If the County Court shall be satisfied, upon hearing the case, that twenty voters reside in the limits described, and have signed the petition, and that the requisites of the law have, in other respects, been complied with; "and it shall, "moreover, *be deemed right and proper in the judgment and* "*discretion of the court*, that said petition shall be granted," then they shall make an order that the town may be organized, etc.

Sec. 84, under which these proceedings were had, was framed to meet the case of a corporation already formed, desiring to annex contiguous territory. It provides that the matter shall be first submitted by the town council to the "*qualified electors*," which can only mean electors of the town. If a majority desire it, the corporation shall present a petition for that purpose to the County Court, whereupon "the like proceeding shall be had on said petition as is prescribed in the 35th, 36th and 37th sections of this Act, so far as the same may be applicable." The Act then proceeds, "and if within "thirty days after a transcript shall be delivered as provided, "no notice of a complaint against such annexation shall be "given, at the end of said thirty days (and in case of any such "complaint, after the end of thirty days after the dismission "of said complaint) the territory shall in law be deemed, and "be taken to be included in, and shall be a part of said cor-"poration," etc. It will thus be seen that the annexation is

to take place, unless a complaint be filed; or if a complaint filed should be dismissed. In the former case, the annexation is effected by operation of the statute, regardless of the action of the court; in the latter the action of the court is presumed to arise on and be directed to the complaint. Inasmuch as the proceedings must, as nearly as possible, *mutatis mutandis*, conform to those prescribed by the 35th, 36th and 37th sections, it follows that the court in dismissing, or refusing to dismiss, any complaint against annexation, should consider and determine whether under the circumstances it be right and proper in the judgment and discretion of the court, that the petition for annexation should be granted.

All these are obviously proceedings of a political nature, having for their object the promotion of the prosperity of the inhabitants of thickly settled localities and their better government. The counties, as political organizations, have an interest in the matter, as well as the State herself. It concerns them, as such, on the one hand that the citizens should have all the aids afforded by local organizations, to increase the numbers of the inhabitants, promote their comfort, facilitate their business and apppreciate the value of real estate, all of which go to the augmentation of the county revenues; and, on the other hand, that no portions of her citizens may, under pretence of the necessity of municipal organizations, withdraw themselves from the general police powers of the counties, with regard to roads, bridges and other matters conceded to these corporations within their limits.

The very nature of the subject matter, as well as the anomalous character of the proceedings, distinguish cases like this from ordinary suits between parties, or claims against counties, in which courts have no discretion, but are subject to rules of law regulating rights. The provisions for organizing towns, etc., are rather ancillary to the governments of the State, and

counties, than acts for conferring or protecting private rights. No particular inhabitants have a vested right to come into, or remain in any town organization, or being in to go out; nor has any town a vested right to compel others to come in. This whole matter, with the power of taxing them, is under the sovereign control of the legislative body, subject only to constitutional restrictions. It might have made the creation and enlargement of towns depend upon other formalities than the assent of the County Courts, or might organize them directly, perhaps, but where it has made the assent and judgment of the County Courts necessary, it must be presumed that it was for a wise purpose, and the policy of the act should not, without strong reason, be overlooked or thwarted.

Whilst the court is of opinion that an appeal lay in the case, yet we think it should be distinguished from ordinary suits, or judicial proceedings. The appeal is useful to correct any improper action of the County Court, such as an abuse of discretion, or irregularity of its proceedings, or mistake of law resulting in prejudice to public or private rights. It is evident that the act for hearing all appeals *de novo*, although broad enough to cover cases like this, was not framed with a view to them, but to ordinary suits in the Probate Courts, or claims aginst counties, in the County Courts. It is very doubtful whether the Legislature meant to so interfere with the discretion of the County Court in a political matter, as to put it under the entire control of the Circuit Court, without any showing of abuse or mistake. This should always be a grave matter of consideration, and the Circuit Court, in cases like this, should hesitate to interfere with the judgment and discretion of the County Courts, when fairly exercised, without any fraud or manifest mistake as to the law of the case, upon the facts presented. That is to say: where the County Court has fairly understood the law, considered the facts, and exercised

its discretion upon a view of the fitness and propriety of the proposed matter, as affecting the interests and convenience of the public, its action then should have, not the technical, but much of the persuasive force of a political question finally determined.

This would have been the positive duty of the Circuit Courts, under the old practice, on appeals from the Probate and County Courts, and no trial *de novo* would have been proper unless it had been first ascertained that there had been material error of law or fact.

But the language of Sec. 1195 of the Digest is so direct and comprehensive that we cannot avoid the conclusion that in this case it was not only the duty of the Circuit Judge to hear the matter *de novo*, but in doing so, to exercise the same discretion which the County Court might have done originally. There is no middle ground which, as a matter of law, can be securely taken, which would impose it upon the Circuit Court as a matter of positive duty, to regard the view taken of the matter by the County Judge, any further than as the same may be persuasive.

Having this jurisdiction of the cause, and being clothed with this discretion, did the Circuit Judge err in dismissing the complaint or remonstrance? By force of the statute the annexation follows the vote of the city, and the proper formal steps prescribed to be taken in the County Court, unless there be a complaint filed against it and sustained. The vote of the town makes a *prima facie* case as to the propriety of the annexation. The onus of showing cause against it sufficient to satisfy the judgment of the County Judge, was upon the remonstrants. The only reason they alleged was that it was against their will, and that they had not been consulted.

This was not a valid reason. The power of the Legislature to include, or cause to be included, in such municipal corpora-

tions, any portion of territory, with its inhabitants, and to subject them to taxation for municipal purposes is too well settled for further discussion. The whole matter has been gone over in the case of *Eagle et al* v. *Beard, etc.*, decided at the present term of this court, and this may be done wholly irrespective of the will or consent of the persons incorporated. It is not taking property without compensation, but subjecting it to public burdens for the compensation presumed to result from the benefits of the corporation.

We do not know what affidavits, or other evidence, were presented to the County Court. The petition, as appears from the record, was refused, and the remonstrance sustained, expressly, and only, because it appeared that the remonstrants constituted a majority of the freeholders and property owners residing in said territory sought to be annexed. It does not appear what the judgment of the court would have been upon the facts, or that the court meant to exercise any discretion based upon views of State or county policy. Its decision rested upon a view of the law, obviously erroneous, and which precluded any exercise of discretion. It was never called into action, and the matter passed to the Circuit Court, to be heard as an original cause.

Evidently, the evidence presented to the Circuit Court, with the accompanying map, makes a weak case for the annexation of the outside territory, if the onus of showing the necessity of it had been upon the town. But it is not inconsistent with the evidence to suppose that it was a matter of propriety and public convenience. It is sufficient here to refer to the sentiment of the evidence in the former part of the opinion.

The remonstrants should have shown that the thing proposed ought not to have been done, by facts and circumstances from which the court could judge of its injustice The proof is all very vague and indefinite. What would be the return and

extent of the burdens imposed upon the proposed territory? What would prevent them from receiving the full benefits of incorporation in as full a degree as other portions of the city? How many inhabitants were there? How many houses and how distributed? These and many other important considerations, are left, in a large degree, to inference and conjecture. That a large portion was open ground, about fifty acres, is a very important fact; and raises a serious doubt as to the propriety of the incorporation, as proposed. Yet it is not conclusive, without further explanation; showing that it was of such a nature or so situated, as not to be really proper for city objects—or that the real object of incorporating it was to acquire the right of taxation without compensatory municipal advantages.

Looking at the whole matter, and considering that the onus was on the remonstrants, we cannot say that the Circuit Judge abused his discretion. The proceedings have been in accordance with law, and if the territory has been improvidently added to the town of Fort Smith, the remedy is in the Legislature alone.

Judgment affirmed.

DODD v. STATE OF ARKANSAS.

1. CRIMINAL LAW: *Indictment: Burglary and Larceny may be joined in same.* 33 517 59 328
If one feloniously enter a house in the night time with intent to steal, he is guilty of burglary though he does not accomplish the theft. If he completes the theft he is guilty of a further offense, and may, by statute, be indicted and punished for both burglary and larceny; and he may be charged with the two offenses separately, or jointly in different counts in the same indictment.

APPEAL from *Pulaski* Circuit Court.

Hon. J. W. MARTIN, Circuit Judge.
Lea and W. A. Compton, for appellants.
Henderson, Attorney-General, *contra*.

ENGLISH, C. J.:

The indictment in this case contains two counts, the first count charging F. C. Dodd with burglary, and the second count charging him with larceny.

The substance of the first count is as follows:

"The grand jury of Pulaski county, etc., accuse F. C. Dodd of the crime of burglary, committed as follows, viz.: The said F. C. Dodd, on the 17th day of December, 1877, in the county, etc., aforesaid, and at the hour of eight o'clock of the night of said day, the stable of David Lowe, there situate, then there feloniously and burglariously did break and enter with intent the goods and chattels of said David Lowe in said stable then and there being, then and there feloniously and burglariously to steal, take and carry away; said goods and chattels being of the value of $200; against the peace," etc.

The second count accused the defendant of the further crime of larceny, committed as follows:

"The said F. C. Dodd, on the 17th day of December, 1877, at etc., two geldings of the value of $100 each, the property of David Lowe, being found as mentioned in the first count herein, did then there feloniously and burglariously steal, take and carry away, against the peace," etc.

The defendant was tried on the plea of not guilty, and the jury found him guilty as charged in the first count of the indictment, and fixed his punishment at three years imprisonment in the penitentiary; and they also found him guilty upon the second count, and fixed his punishment at five years in the penitentiary.

He moved for a new trial, which the court refused, and sen-

tenced him in accordance with the verdict. He took a bill of exceptions, setting out the evidence, the instructions of the court, the questions of law reserved, and prayed an appeal, which was allowed by one of the judges of this court.

If a man feloniously enter a house, in the night time, with intent to steal, he is guilty of burglary, though he may not accomplish the theft. If he completes the theft, he is guilty of a further offense, and may, by statute, be indicted and punished for both burglary and larceny; and he may be charged with the two offenses separately, or jointly in different counts of the same indictment, as in this case. *Gantt's Digest*, secs. 1349, 1351.

The evidence on the trial that appellant broke and entered the stable of David Lowe in the night time, and took the two horses, is not direct, but circumstantial.

Lowe resided on Capital Hill, Little Rock, Between sun down and dark, on the 17th day of December, 1877, he locked his two carriage horses in his stable, and left home. On his return, about 9 o'clock at night, he found the stable door had been broken open, and the horses were gone. The appellant, who seems to have been a stranger to the witnesses, was seen not far from the stable on that day. Witness, *Maxwell*, lived about ten miles from Little Rock, on the road to Benton. About 11 o'clock of the night on which Lowe found his stable door broken, and his horses gone, a man riding one horse and leading another, passed Maxwell's house, and made inquiry about movers, saying he was trying to overtake them. The moon was shining, and witness could see the color of the horses but did not know the man. On the next day Lowe started in pursuit. He found that one of his horses had been swapped to witness *Henderson*, who resided near Benton, and about twenty-two miles from Little Rock. Henderson went on with him to Hot Springs, where they found appellant in possession

of the horse that Henderson had swapped to him, and Lowe's other horse, and he was arrested.

Upon these facts, we cannot say that there was no evidence to warrant the jury in finding that appellant broke and entered the stable of Lowe in the night time, and stole his horses.

The appellant asked the court to give four instructions to the jury, all of which the court gave except the second, which is as follows:

"The naked possession of stolen property unaccompanied by other circumstances tending to show that the defendant committed the offense charged, is a mere circumstance from which a presumption of guilt may arise, and is easily rebutted by any circumstances tending to prove a contrary conclusion."

The court instead of giving this instruction in the language in which it was asked, said to the jury in a general charge:

"Upon the question of possession of stolen property, the court charges the jury that the possession of property recently stolen, if unexplained, raises a presumption against the defendant that he is the guilty party. That this presumption is stronger or weaker according to the circumstances of each particular case, and that the jury in determining the force of it must take into consideration all the circumstanees surrounding the case, the kind of property, the length of time intervening between the taking and the possession charged to be guilty. They are to say whether under all the circumstances of this case they are satisfied beyond a reasonable doubt of the defendants guilt," etc.

This, upon the facts proven, is not a case of naked possession of stolen property unaccompanied by other circumstances tending to show guilt, as assumed in the instruction asked for appellant. The charge of the court was more appropriate upon the evidence, and fair to the accused. *3 Greenleaf, Ev.*, sec. 31-2-3.

The appellant did not attempt to account for his possession of the recently stolen horses.

He failed to prove that he had any local habitation, was engaged in any business, or had any means of purchasing or trading for a pair of carriage horses. He was at Capital Hill on the day preceding the night the horses were missing, and a few days after he was followed to Hot Springs, where he was found in possession of one of the horses, and it was proven that he had traded the other to Henderson on his way out.

The horses were locked in the stable between sun down and dark. The door was found broken, and the horses gone at 9 o'clock at night. Two hours after, at 11 o'clock, he passed Maxwell's house ten miles out, with the horses, for no doubt, from the facts in evidence, it was he that passed there at that hour.

It is not probable that the stable door was broken open, and the horses taken out in the day light. At that season of the year (17th of December) it was night by six o'clock. If he had taken the horses from the stable before night, it is probable that he would have been farther away, on his flight, than Maxwell's house, which was only ten miles off, by 11 o'clock at night

But it was the province of the jury, not ours, to weigh all of the facts and circumstauces in evidence. They found him guilty on both counts of the indictment, and we cannot say, as matter of law, that there was no evidence to warrant the verdict.

Affirmed.

GEISREITER ET AL V. SEVIER.

1. RES JUDICATA: *Plea to merits.*

A plea to an action on a note, that the plaintiff is not the legal holder of the note, is not a plea to the merits, and a judgment of the court sustaining such plea is not an extinguishment of the debt, nor a bar to a recovery upon the note by the rightful holder.

2. BANKRUPTCY: *Orders of Register not to be collaterally assailed.*

The validity of an order made by the Register in Bankruptcy, except such as the bankrupt court only has power to make, cannot be collaterally questioned in the absence of any showing that it was disapproved by the court.

3. SAME:

An order made after the discharge of an assignee in bankruptcy, authorizing him to sell subsequently acquired assets of the bankrupt, is equivalent to opening the discharge, or reappointing him as assignee.

4. ASSIGNMENTS OF NOTE: *Consideration of, not to be questioned by maker.*

The maker of a note when sued by an assignee, cannot question the consideration for the assignment.

5. BANKRUPTCY: *When title of assignee to bankrupt's estate vests.*

The assignment by the Register to the assignee, of the bankrupt's estate, relates to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all the estate of the bankrupt, both legal and equitable, vests in the assignee.

6. STATUTE LIMITATIONS: *When stayed by fraud.*

There must be fraud by the debtor, not by the creditor, to prevent the running of the Statute of Limitations.

7. SAME: *When assignee in bankruptcy barred.*

By the bankrupt act, neither the assignee in bankruptcy, nor his assignee, can maintain any suit to collect a debt due the bankrupt, after two years from the time the right of action on the debt accrued to the assignee in bankruptcy.

APPEAL from *Jefferson* Circuit Court, in Chancery.

Hon. J. B. WILLIAMS, Circuit Judge.

M. L. Bell, for appellant.

Dodge & Johnson, contra.

ENGLISH, C. J.:

The bill in this case was filed in the Circuit Court of Jefferson county, on the 28th of August, 1871, by Ambrose H.

Sevier against Sebastian Geisreiter, James P. McGaughey, A. L. Breysacher and B. F. Fall.

The bill alleges, in substance, that on the 3d of September, 1867, William Warren Johnson, being the owner in fee of block No. 12, in James' addition to the city of Pine Bluff, bargained and sold, and by deed of that date intended to convey to defendant Geisreiter, said block for $1,200, of which $600 was paid in cash, and the note of Geisreiter taken for $600, payable twelve months after date, and secured by an express lien reserved upon the block in the face of the deed.

That after said deed was executed, acknowledged and recorded, said Wm. Warren Johnson discovered that by a mere mistake and clerical error therein he had conveyed to Geisreiter, block No. 14, in James' addition to Pine Bluff, which he did not own, instead of said block No. 12, which he did own, did in fact sell, and intended to convey to Geisreiter.

That to correct said mistake, Johnson, on the 18th day of June, 1868, executed to Geisreiter a second deed, reciting the first deed, the mistake therein, its registration, etc., and conveying said block by proper description, which deed was duly acknowledged and recorded. Certified copies of both deeds, with the certificates of acknowledgment and registration, are made exhibits.

That afterwards, Wm. Warren Johnson was adjudged a bankrupt, on his own petition; and James P. Clayton was appointed his assignee in bankruptcy, who, as such, on the 7th of August, 1871, sold and assigned to plaintiff (Sevier) the note for $600, executed by Geisreiter to Johnson for balance of purchase money of said block, together with the equitable right and lien of the assignee in bankruptcy upon the property.

The note and assignment are exhibited. That defendants McGaughey, Breysacher and Fall had purchased a part, or the whole, of said block No. 12, and were residing threon, holding

some interest therein unknown to plaintiff, and that they purchased with full knowledge that Geisreiter had not paid said note to Johnson or his assignee in bankruptcy.

Prayer for decree against defendant, Geisreiter, for the amount of the note, etc., and that the block be condemned to be sold by a commission to satisfy the decree, etc.

McGaughey answered the bill. He admits that Wm. Warren Johnson sold to Geisreiter said block No. 12, and took his note for purchase money as alleged in the bill. That Johnson became a bankrupt some time in the year 1868, but fraudulently omitted to schedule said note for $600, and assigned it to Benj. S. Johnson, who brought suit upon it on the law side of the Circuit Court of Jefferson county, against Geisreiter, to the Spring term, 1869, and that such proceedings were had in the suit, that on trial of an issue joined in the cause, 19th of May, 1869, judgment was rendered against the plaintiff therein and in favor of Geisreiter, which was a satisfaction and extinction of said note as a lien on said block.

He alleges that on the 6th of October, 1869, he purchased lots 3 and 4 of said block No. 12, of Marcus L. Bell, for $1,000, which at the time of the purchase was the full value of the lots, and that said judgment being of record, he supposed of course the lien was extinguished, and avers that he was an innocent purchaser for a valuable consideration, without notice of any lien on the property, and claims the protection of the court of equity.

That at the May term, 1871, of said court, Benjamin S. Johnson withdrew said note from the files of the court, leaving a copy, erased the assignment thereon to himself, and by fraudulent combination procured James P. Clayton, who had formerly been assignee in bankruptcy of William Warren Johnson, but who had filed his accounts, and been discharged on the 18th of February, 1869, to make an assign-

ment of said note, on the 7th of August, 1871, to complainant, Sevier. That this assignment was illegal, fraudulent and without consideration. That Clayton made no public sale of the note, and gave no notice of sale, but assigned it to complainant, without consideration, to enable him to sue upon and collect it for the benefit of Benjamin S. Johnson, or the bankrupt, William Warren Johnson. So he charges that complainant has no legal or equitable title to the note, and ought not to recover upon it as against respondent, who claims to be an innocent purchaser.

That Clayton did not institute suit on the note within two years from the time his right of action accrued thereon, which was on his appointment as assignee, nor could he by assignment vest in complainant any right to sue on the note.

He asks that Benjamin S. Johnson and James P. Clayton be made parties to the suit, and that his answer be taken as a cross-bill against them, and that they be required to answer the same; and prays to be discharged with costs.

GEISREITER answered the bill. He adopts the answer of his co-defendant, McGaughey, so far as it relates to and admits the sale of the property to him, and the execution of the note by himself, and admits that the two deeds made exhibits to the bill are copies of the original. He further adopts the answer of McGaughey so far as it charges the fraud of William Warren Johnson in the suppression of said note in his bankrupt schedule; and the statement of the suit of Benjamin S. Johnson against respondent on the note, and the judgment in his favor therein, which he pleads as a bar to this suit.

Charges that the taking of the note from the records of the court, and the striking out of the assignment thereon, was illegal, and done for the purpose of perfecting and carrying out the original fraud of William Warren Johnson, and the procuring

of Clayton, the pretended assignee of said Johnson, more than two years after his final settlement and discharge, to make said pretended assignment and sale of said note to complainant, without notice of public sale, and without consideration, and that said sale and assignment was void, etc.

Also adopts so much of the answer of McGaughey as pleads the limitation of two years allowed the assignee in bankruptcy to sue on the note, etc.

Demurs to the whole bill for want of equity.

Asks that Benjamin S. Johnson and James P. Clayton be made defendants to the suit, and prays to be discharged, etc.

Complainants filed a replication to the answers of McGaughey and Geisreiter. Denies any fraudulent combination on his part as charged in the answer.

Alleges the truth to be that said William Warren Johnson having been legally adjudged a bankrupt, as stated, and the note herein sued on having been adjudged by the Supreme Court of the State to constitute a portion of the assets of said bankrupt, (*see Johnson* v. *Geisreiter*, 26 Ark., 44), the same was surrendered to the duly and legally appointed assignee of said bankrupt, and was by said assignee sold under the order of the bankrupt court, and complainant became the purchaser thereof as stated in the bill, which facts would appear from a transcript of the records of the bankrupt court made an exhibit.

That McGaughey was not an innocent purchaser as alleged, etc. That said note was described in the deed from William Warren Johnson to Geisreiter, etc., and also set out and described as an encumbrance upon said block No. 12 in a deed executed by Geisreiter to M. L. Bell and H. King White on the 5th of March, 1869, as the same appeared of record in the recorders office, etc., and that said incumbrance was further recognized and set out in an interchange deed executed between

said Bell and White on the 8th of April, 1869, and recorded, etc., certified copies of both of which deeds are made exhibits.

That Bell and White purchased said block No. 12 of Geisreiter for $700, and for the further consideration of a covenant on their part to hold him harmless against said note, which covenant was fixed by the deed from Geisreiter to them as a special lien on the block. That McGaughey and Fall purchased of Bell and White, and had not paid the full purchase money, but well knowing of said incumbrance withheld a portion of the purchase money for the special purpose of protecting themselves against it, etc.

That Bell and White were the real parties setting up the above defences in this suit, and if there was any fraud in the matter it was on their part, etc.

The cause was heard at the May term, 1877, upon the pleadings, exhibits and the depositions of James P. Clayton; and defendants Breysacher and Fall having failed to answer a decree *pro confesso* was entered against them. The court held that Benjamin S. Johnson and James P. Clayton were not necessary parties, and rendered a decree against Geisreiter for the amount of the principal and interest of the note in suit, and condemned the whole of block No. 12, to be sold by a commissioner to satisfy the decree, unless the debt should be paid by Geisreiter on or before a day fixed in the decree, etc.

Geisreiter and McGaughey appealed to this court.

1. It appears that in the suit of Benjamin S. Johnson against Geisreiter, on the note in controversy in this case, Geisreiter pleaded that William Warren Johnson was the owner of the note at the time he filed his petition in bankruptcy, that he did not include the note in his schedule, and assigned it to Benjamin S. Johnson after the filing of the petition. That therefore the assignment was null and void, and that Johnson did not thereby acquire the legal title to the note. That to this

plea Johnson demurred, the court overruled the demurrer, he rested, and judgment was rendered discharging Geisreiter from the action with costs. On appeal by Johnson to this court, the judgment was affirmed (at the December term, 1870) the court holding that the bankrupt could not make a valid assignment of the note after filing his petition in bankrnptcy. *Johnson* v. *Geisreiter*, 26 Ark., 74.

This is the judgment which appellant McGaughey, in his answer to the bill, pleaded as an extinguishment of the note in controversy, and which appellant Geisreiter, in his answer, pleaded as a bar to recovery by appellee, Sevier, in this suit.

The defense made by Geisreiter to the action brought by Benj. S. Johnson on the note, was not a plea to the merits, it was merely a plea that the legal title to the note was not in the plaintiff in the action, and the judgment of the court sustaining the plea, was not an extinguishment of the debt, nor a bar to a subsequent recovery upon this note by any person rightfully holding it. *Cannon et al* v. *State*, 17 Ark., 365, *Moss* v. *Ashbrook et al*, 12 Ark., 375.

II. It appears that at the May term, 1871, of the Circuit Court of Jefferson county (20th May) Benj. S. Johnson obtained leave of the court to withdraw the note in controversy from the files of the court, on filing a copy thereof.

It appears from a transcript of the records of the District Court of the United States for the Eastern District of Arkansas, in the matter of Wm. Warren Johnson, bankrupt, exhibited with the pleadings in this cause, that on the 18th day of February, 1869, the accounts of James P. Clayton, as assignee of Wm. Warren Johnson, which, with a petition for discharge, had been previously filed, were examined and approved by Albert W. Bishop, Register in Bankruptcy, and Clayton discharged.

It also appears that on the 27th of July, 1871, James P.

Clayton filed a petition in the bankrupt court, addressed to the District Judge, stating, in substance, that he, on the —— day of —— 1868, by order of the court in bankruptcy, was appointed assignee of the estate of Wm. Warren Johnson, bankrupt, pursuant to the 13th section of the Act of Congress to establish a uniform system of bankruptcy, etc. That among the estate of said bankrupt, which had come into his possession, was a note for $600, dated Sept. 3d, 1867, given by Sebastian Geisreiter, and made payable to Wm. Warren Johnson, or order. That this note or claim had come into his possession within the last few days, and after the sale of the other assets of the estate of said bankrupt. That this note was all that remained of the assets of said bankrupt's estate in his hands; and praying the court to order the same to be sold at private sale, and the proceeds thereof to be paid over to the Register in Bankruptcy for the benefit of the creditors of the estate of said bankrupt according to law.

Upon this petition the following order was made by the Register in Bankruptcy.

"On reading and filing the petition of James P. Clayton, assignee of the estate of the above named bankrupt, it is ordered that said assignee be, and he is hereby authorized, to sell all the interest of said bankrupt in a certain promissory note for six hundred dollars ($600) dated Sept. 3d, 1867, given by one Sebastian Geisreiter, and made payable to the said Wm. W. Johnson or order, at private sale."

On the 7th of August, 1871, Clayton, as such assignee, reported that he had sold the note mentioned in the order of sale for $15, and filed a sworn account for settlement, (charging $10 for his services), and record petition for discharge.

On the 19th of August, 1871, his account was approved by the register, and he was again discharged.

On the note in controversy, as made an exhibit to the bill, is this endorsement:

"I hereby assign this note, together with all equitable right and lien held by me, as assignee upon said property sold by said Wm. W. Johnson, value received, without recourse on me, to A. H. Sevier.

JAS. P. CLAYTON, Assignee."

Clayton in his deposition stated that when he sold the note he was of the opinion that it could not be made available to the creditors of the bankrupt, who were numerous, and that an attempt to litigate for the collection of the note would be expensive, and probably unsuccessful. That he had no interest in this suit, etc.

He shows that Benj. S. Johnson was active in procuring his reappointment as assignee, and in obtaining the order to sell the note, etc.

Upon the above facts it is insisted for appellants that the title to the note is not in Sevier, and that he had no right to sue thereon; that the register had no power to make an order directing Clayton to sell the note after his discharge as assignee, no authority to order him to make a private sale of the note, and if he had, Clayton sold the note for a price grossly inadequate, and the sale was therefore invalid.

Orders of the register are made under the supervision and control of the District Court, which is always open for bankrupt purposes, and any order made by the register, except such as the court only has power to make, must be regarded as valid, when collaterally questioned, as in this case, in the absence of any showing that it was disapproved by the court. *Rev. Stats, U. S. Bankruptcy, Ch.* 1. *Rule V. Bump*, 9 *Ed.* 858.

We take it that the order of the register authorizing Clayton, as assignee, to sell the note, made after his first discharge,

was equivalent to opening the order discharging him, or to his reappointment as assignee.

When assetts come to the hands of an assignee, or are ascertained to exist, after his discharge, we can see no good reason why the order discharging him might not be opened, or he be reappointed by the court, or register under its supervision, and such, we believe, is the practice.

The order to sell the note at private sale was doubtless made under sec. 28 of the *Bankrupt Act*, *Rev. Stat. U. S.*, *sec.* 5064. *Bump* (*9 Ed.*) *p.* 130.

Whether the note was sold by the assignee for little or much did not concern Geisreiter, the maker of the note. He was a debtor, not a creditor of the bankrupt. The creditors might have applied to the bankrupt court to have the sale set aside on the ground that the note was sold for a grossly inadequate price. *Bump* (9 *Ed.*) *p.* 168. The maker of the note, when sued upon it by an assignee, cannot question the consideration given by the assignee to the assignor for the transfer of the note. *Booker* v. *Robbins & Page* 26 Ark., 660.

Perhaps if Geisreiter (though not a creditor of the bankrupt) had gone into the bankrupt court, and shown that Clayton, as assignee, under an order of the register, had made a private sale of his note to Sevier for $15, that the note was for $600, secured by a lien upon a block of ground in Pine Bluff, and that he was willing to pay the amount of money due upon the note into court for the benefit of the creditors of the bankrupt, the court would have accepted the money, and on proper process to Sevier required him to bring the note into court, set aside the sale, caused his $15 to be refunded to him, and the note to be surrendered to Geisreiter, and the balance of proceeds distributed to the creditors of the bankrupt.

But neither Geisreiter, nor any creditor of the bankrupt, appears to have made any objection before the bankrupt court to

the order of sale, or the sale and assignment of the note to Sevier. We must therefore regard him as holding the legal title to the note for the purposes of this suit.

III. We are next to enquire whether this suit was barred by the limitation of two years prescribed by the bankrupt act.

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed. *Rev. Stat. U. S.*, sec. 5037, p. 982.

There was a similar section in the bankrupt act of 1871, and the courts held that the limitation applied to suits by the assignee to collect the debts and assets of the estate as well as to suits relating to specific property. *Mitchell* v. *Great Work M. & M., Co.*, 2 Story, 660. *Prichard* v. *Chandler*, 2 Curtis, 448. *Paulding* v. *Lee et al*, 20 Ala., 753. *Harris* v. *Collins, et al*, 13 Ala., 388. *Comegys* v. *McCord*, 11 Ala., 932. *Archer* v. *Duval's, ad.*, 1 Florida, 219. *Pike* v. *Lowell*, 32 Maine, 245.

And the weight of judicial opinion (though there are some decisions to the contrary) favors the same ruling under the limitation section of the late bankrupt act above quoted. *Bailey* v. *Glover*, 21 Wallace, 342. *Payson* v. *Coffin*, 4 Dillon, 386. *Walker* v. *Towuer*, Ib., 165. *Miltenberger et al* v. *Phillips*, 2 Wood, 115. *Norton, assignee* v. *D. La Villebeauve*, 1 Ib., 163.

The object of the present suit was two-fold; *first*, to obtain a personal decree against Geisreiter, a debtor of the bankrupt,

and *second* to enforce a vendor's lien against a block of land in which appellant, McGaughey, claims an adverse interest.

In the deed from William Warren Johnson to Geisreiter of 3d September, 1867, an express lien was retained to secure the note for $600 given for balance of purchase money, and the deed was not to become absolute until the note was paid. There was a clerical mistake in the deed in describing the block, but this error was corrected by the deed of 18th of June, 1868, and construing the deeds together, Johnson, the vendor, had a lien on the block, like a mortgage, to secure the payment of the note recited in both deeds for balance of purchase money.

When a debtor has been adjudged a bankrupt, an assignee appointed and qualified, and assignment executed by the register, the assignment relates back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all the property of the bankrupt, both personal and real, legal and equitable, vests in the assignee. *Bump*, p. 107.

It follows that the legal title to the note in question, with the equitable right to enforce the lien upon block No. 12, which was a security for and an incident to the debt, was in Clayton, as assignee of Johnson, from the time of the assignment (which related back to the commencement of the proceedings in bankruptcy) down to the date of his first discharge as assignee, though the note was not included in the schedule of the bankrupt, and was not in the possession of the assignee during that period. The law vested in him the title to the note; hence this court held in *Johnson* v. *Geisreiter*, *sup.*, that Johnson (Ben S.) had no title to the note, and could not maintain an action upon it under an assignment made to him by the bankrupt after he filed his petition in bankruptcy.

The note matured on the 3d of September, 1868, when the right of action upon it accrued to Clayton as assignee, for we

take it that he could not sue at law upon the note, or bring a bill to foreclose the lien until the debt was due. The statute of limitation commenced running against him when his cause of action accrued, though he was not in possession of the note by reason of the fact that the bankrupt had not included the note in his schedule, but assigned and delivered it to Benjamin S. Johnson. It may have been a fraud, or a mistake, in the bankrupt to omit to schedule, and surrender the note to the assignee, but whether one or the other, it was not the fault of Geisreiter, the debtor. No fraud or concealment is imputed to him. There must be fraud in the debtor, and not the creditor or his representative, to prevent the running of the statute of limitations. *Prichard* v. *Chandler*, 2 Curtis, 488. *Bailey* v. *Glover, et al*, 21 Wallace, 342.

The statute was running against Clayton, as assignee, from the maturity of the note, to the time of his first discharge, which was on the 18th of February, 1869, a period of about five months and a half; but having commenced to run against him when he had the right to sue, it continued to run notwithstanding his discharge, and when he was reappointed, or his discharge opened, however it may be viewed, on the 27th of July, 1871, the two years limitation presented by the statute had expired, and his cause of action was barred. *Brown as ad* v. *Merrick & Fenno*, 16 Ark., 612.

This case differs from *McCustian* v. *Ramey, M. S.*, in which we held that when a right of action accrues to an estate when there is no administrator—no one to bring suit—the statute of limitations does not commence to run until an administrator is appointed.

At the time, therefore, that Clayton sold and assigned the note to Sevier, he had no cause of action at law upon the note, and no right to bring a bill in equity to foreclose the lien. His

legal and equitable causes of action were barred in the courts, both Federal and State.

Can an assignee in bankruptcy assign a note barred in his hands by the Federal Statute, and thereby enable his assignee to sue the debtor and put him upon the general statute of limitations of the State?

In *Paulding* v. *Lee et al*, 20 Ala., 754, the suit was upon a claim purchased by the complainant of the assignee of a bankrupt firm, and two of the judges held (the others expressing no opinion) that the claim being barred as against a suit by the assignee, by the limitation section of the bankrupt act of 1871, the suit of the complainant was barred by the same statute.

So in *Pike* v. *Lowell*, 32 Maine, 245, an assignee in bankruptcy sold to Bolkcom a non-assignable chose in action belonging to the estate of the bankrupt, and Bolkcom not having the legal, but only an equitable title to the claim, sued the debtor in the name of the assignee of the bankrupt from whom he had purchased the claim. The court held that the suit was barred by the limitation clause of the bankrupt act of 1871. There the assignee of the bankrupt was but the nominal plaintiff, the purchaser of the claim being the virtual plaintiff.

In *Judson* v. *Lathrop*, 6 La. An., 587, it was held that the prescription of two years, in the bankrupt act of 1871, related to actions by and against assignees, and not to those for the recovery of debts disposed of as bankrupt assets. It does not appear, however, in this case, that the claim was barred in the hands of the assignee before he sold it.

At the time Clayton sold and assigned the note to Sevier, having no cause of action upon the debt, it being barred by limitation in his hands, he could not transfer to Sevier a larger right than himself posesssed. *Nemo plus juris ad alienum transferre potest quam ipse habet. Broom's Legal Maximes, p. 357.*

We are of the opinion that the suit of appellee was barred, and the decree of the court must be reversed, and a decree entered here dismissing the bill.

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JAMES ET AL V. BELDING ET AL.

LANDLORD AND TENANT:

A tenant cannot dispute his landlord's title.

Hot Springs—Jurisdiction of State Courts.

The jurisdiction of the State Circuit Court to try and determine the right of possession to lands or lots within the Hot Springs reservation, is not taken away by the Act of Congress of March 3, 1877, providing for determining the rights of occupants to purchase the parcels or lots they have made improvments on.

APPEAL from *Garland* Circuit Court.
Hon. J. M. SMITH, Circuit Judge.

HARRISON, J.:

This was an action by George Belding and Amanda Belding against Henry James and Amanda J. Hill for recovery of the possession of a store-house in the town of Hot Springs, which was commenced on the 3d day of November, 1877.

The complaint alleged that the plaintiffs are the owners of the store-house, which is situated on a lot occupied by them in the Hot Springs reservation, and on which is their residence; that on the 6th day of November, 1876, they leased the same to the defendants for the term of seventeen months, from the 1st day of said month, at the rent of $13.50 per month, payable in advance; that it was, however, expressly provided in the lease, that if default for fifteen days was made in the payment of the rent or any part of it, the lease should become void, and the possession upon the demand of the plaintiffs be surrendered to them; that one month's rent was due, and the

defendants had been, not only in default in the payment of the rent, fifteen days, but they denied the plaintiff's title, and refused to pay them rent; and that the plaintiffs after such default for fifteen days, demanded from them the possession of the premises, yet that they refused to surrender the same, but withheld it from them to their damage—two hundred dollars.

The defendants denied that the plaintiffs are the owners of the store-house or entitled to its possession, the title of the ground being they said, in the United States; and that the store-house was built prior to the 24th day of April, 1876, by the defendant James; that he had sold it to the defendant Hill, who was then and had been ever since his purchase in the occupancy of it, and that said Hill had filed before the commissioners appointed under the Act of March 3d, 1877, in relation to the said Hot Springs reservation, his claim to purchase the parcel of ground upon which it stands.

They did not deny the alleged lease to them or any other of the allegations of the complaint.

The cause was, at the June term, 1878, submitted to the court, sitting as a jury, which found in favor of the plaintiffs, and it assessed their damages at $108.

The defendants moved for a new trial, upon the ground that the finding of the court was contrary to law and evidence. Their motion was overruled, and they excepted and appealed.

The proof was that George Belding had been in the occupancy and possession of the lot upon which the store-house stands, about twenty years, that he employed and paid James to build the store-house, and after it was built the plaintiffs rented it to him, and James paid rent to them until they leased it to him and Hill on the 6th day of November, 1876, and that that they paid the rent up to the first day of October, 1877.

There is no rule of law better settled, than that a tenant can-

not dispute his landlords title; and a reference to this rule would seem to be sufficient for the decision of this case.

But, it is insisted by the appellants, and that is the only contention in the case, that as Congress has by the Act of March 3d, 1877, made provision for determining the rights of occupants to purchase the parcels or tracts they have made improvements on, the Circuit Court now has no jurisdiction of any matter relating to lands in the reservations.

To this proposition we can not yield our assent.

It is not as to the right of possession but the right to purchase, the commissioners are to enquire and determine, and there is not, necessarily, any inconsistency or repugnancy between such rights, for whilst one person may have the right to purchase the tract or parcel, he has improved, another may under him or as his tenant, be entitled to possession.

The fifth section of the Act is as follows:

"Sec. 5. That it shall be the duty of said commissioners to show by metes and bounds on the map herein provided for, the parcels or tracts of lands claimed by reason of improvements made thereon or occupied by each and every such claimant and occupant on said reservation, to hear any and all proof offered by such claimants and occupants and the United States in respect to said lands and in respect to the improvements thereon, and to finally determine the right of each claimant or occupant to purchase the same, or any portion thereof, at the appraised value, which shall be fixed by said commissioners. *Provided, however*, That such claimants shall file their claims under the provisions of this Act, before said commissioners within six calender months after the first sitting of the said board of commissioners, or their claims shall be forever barred, and no claim shall be considered, which has accrued since the twenty-fourth day of April, eighteen hundred and seventy-six."

In the case of *Earle's, admx.* v. *Hale, admr.*, 31 Ark., 470,

which was a suit for the use and occupation of a tavern in the reservation, the court say: "As between these parties, it is a matter of no importance whether the United States was or not the legal owner of the property. The United States might perhaps in strictness, treat Hale as a trespasser, but as an actual settler upon public lands his occupancy has not only been tolerated, but actually encouraged by several Acts of Congress. The improvements upon the public lands have been recognized and held as the property of the occupant by Acts of State Legislature and by many decisions of this court. They are held to be the property of the occupant or party making the improvements of value, and the subject of transfer and sale."

No conflict between the jurisdiction of the court, and the duties and powers of the commissioners can possibly arise, and the reason and necessity for the jurisdiction are as apparent now as before the passage of the act.

The judgment is affirmed.

SHACKELFORD V. STATE OF ARKANSAS.

CRIMINAL PRACTICE: *Evidence of testimony of witness at former trial, when admissable.*

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Evidence of the testimony of a witness before the examining court, is admissable on the trial of the same offense before the Circuit Court, where the witness has forfeited his recognisance and cannot be found. And this though the substance of the witness' testimony was reduced to writing by the examining court.

The statute does not now require that the evidence of witnesses before an examining court shall be reduced to writing and signed by them. It only requires that the names and places of residence of the witnesses and the substance of what was proved, be stated in the minutes of the examinations. The object of making such statement is not that it shall be used as evidence.

APPEAL from *Lee* Circuit Court.

Hon. JOHN M. HEWETT, Special Judge.

HARRISON, J.:

The appellant, Frank Shackelford, was indicted with George Shackelford, Perry Carlton and Jim Bradford, in the Lee Circuit Court, for grand larceny.

He was separately tried, and was convicted and sentenced to the penitentiary for one year.

It was proven upon the trial, that the store of V. C. Bigham, at Moro, in Lee county, was broken into in the night time, and goods and articles of merchandise of the value of one or two hundred dollars stolen; that upon searching the houses of the appellant and the other defendants, several pairs of shoes, of the goods charged in the indictment to have been stolen, were found in the house in which he lived, and other articles of the stolen goods, in each of the other defendant's houses, and a hat upon the appellant's head; and after proving that one Marshall Williams, who had been sworn and examined as a witness by the State, upon the trial of the appellant before the examining court, whom the appellant had the opportunity and privilege of cross-examining and the substance of whose evidence was taken down under the direction of the magistrate, but which he had not signed, was not in attendance upon the court, it being shown that he had, the term before, forfeited his recognizance, and the cause been continued for the want of his evidence; that he had disappeared, and his whereabouts was unknown in the community in which he had usually resided, and that the sheriff, after diligent search and inquiry, had not been able to find him and serve an attachment issued for him as a defaulting witness in the case, the State was permitted, against the objection of the appellant, to prove by J. H. Spivey, the justice of the peace before whom the examination was had, that said Marshall Williams swore and testified: that sometime in October, 1877, he met in the night the defendant, Frank Shackelford, and George Shackel-

ford, Perry Carlton and Jim Bradford, near the village of Moro, in Lee county, and he was persuaded by them to go with them to break open the store of V. C. Bigham, and steal goods out of it. That they went to the store about midnight, and prized up the floor in the back end of the store, and some of them went in and opened the front window, through which they handed out the goods to those on the outside. That Frank Shackelford was there, and engaged in the breaking into the store and in stealing the goods, and that after they had gotten the goods, they went to George Shackelford's and divided them.

It is insisted for the appellant, that it was error, and such for which the judgment should be reversed and a new trial ordered, to admit evidence of the testimony of Williams before the examining court.

The exact question before us has never been adjudicated or decided by this court; but in the case of *Pope* v. *The State*, 22 Ark., 370, it was, after a very careful examination of the authorities held, that the evidence of a deceased witness on a former trial of a criminal cause may be proved on a second or other subsequent trial.

And it was decided in *Hurley* v. *The State*, 29 Ark., 17, that the deposition of a witness before the committing magistrate or examining court, taken in the defendant's presence, and when he had an opportunity of cross-examining the witness, may, if he be out of the jurisdiction of the court, be read upon the trial as evidence for the State.

In the latter case the court say: "It is a provision of the Constitution of the United States, and of the Constitutions of the States generally, that in criminal prosecutions the accused 'shall be confronted with the witnesses against him,' or as expressed in our bill of rights of 1836, 'to meet the witnesses face to face.' It is remarkable that a similar provision is not

to be found in the Constitution of 1868, which was in force when this cause was tried below. But the admission of Burns (the absent witness) "was no violation of this old land mark of the criminal law."

Many cases may be cited in support of the doctrine here declared.

The statute does not now require that the evidence of witnesses before an examining court shall be reduced to writing and signed by them. Nothing more is required, than that the magistrate shall state in the minutes of the examination the name and place of residence of each witness, and make a general statement of the substance of what was proved, and file the same with the proceedings. *Gantt's Digest, sec.* 1707.

That the object of making such statement is not that it shall be used as evidence is obvious; and it can make no difference as to the admissability of the proof of the evidence before the examining court, that the substance of it was taken down, as in this case, or the statement fuller than required by the statute, for it would not be superior to oral proof. Mr. Wharton in his work on evidence, speaking to this point, says: "Nor is such oral evidence excluded by the fact that the original testimony was reduced to writing. The admission of such evidence is based on the fact that the party against whom the evidence is offered, having had the power to cross-examine on the former trial and the parties and issue being the same, the second suit is virtually a continuance of the first." 1 *Whar. on Ev. sec.* 177. And in the same section he says: "What a deceased witness swore to at the preliminary hearing before the committing magisrate is evidence at the trial in chief; what a deceased witness swore to on a criminal trial is evidence on a second trial for the same offence, or an offence substantially the same."

For the admission of such secondary evidence, it is not

essential to prove that the witness is out of the State or beyond the jurisdiction of the court, as was the case in *Hurley* v. *The State*. It is enough to prove that his attendance cannot be had. The author we have just quoted, says: "Proof of mere disappearance of the original witness, is not by itself enough to admit such testimony, if by due diligence the witness's attendance could have been secured; though it is sufficient to show that the original witness is absent and a non-resident in the State when the trial is held, being out of the jurisdiction of the court. It has ever been held enough, if the witness, though technically within the jurisdiction, cannot without extraordinary inconvenience be brought to the trial." 1 *Whar. on Ev. sec.* 178.

There was no error in the admission of the evidence, and the verdict of the jury was fully sustained by the proof.

The judgment is affirmed.

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CHAMBLEE v. STOKES.

PLEADING: *Exhibits, when part of complaint.*

In an action by a mortgagee for the recovery of personal property, claiming to be the owner by virtue of the mortgage, the mortgage is not the foundation of the action, and though filed with the complaint, is no part of it but is simply evidence for the plaintiff to be used at the trial.

APPEAL from *Arkansas* Circuit Court.
Hon. JOHN A. WILLIAMS, Circuit Judge.

HARRISON, J.:

This was an action of replevin for a horse, commenced before a justice of the peace.

The cause of action was stated in the complaint, as follows: "The plaintiff, J. W. Chamblee, states that he is the owner

by virtue of a certain deed of trust or chattel mortgage executed by James L. Bigham to plaintiff on the 22d day of March, 1875, and entitled to the possession of one sorrel horse, about six years old, and known by the name of Poodle; that the said horse is worth ninety dollars; that the defendant, T. J. Stokes, has possession of said horse without right, and has unlawfully detained him from the plaintiff for one month."

And the prayer was for the recovery of the possession of the horse and the sum of twenty-five dollars damages for his detention.

The mortgage mentioned in the complaint was filed with the justice.

The plaintiff recovered judgment before the justice and the defendant appealed to the Circuit Court.

In the Circuit Court the defendant filed a demurrer to the complaint, upon the grounds:

1. That the complaint and the exhibit with the same, did not show a sufficient cause of action. 2. That the mortgage, which it averred was the foundation of the action, was informal, vague, uncertain and insufficient. 3. That the mortgage did not state or show in which county the property was; and 4. That the mortgage was usurious and void.

The court sustained the demurrer, and judgment was rendered for the defendant.

The plaintiff appealed to this court.

The mortgage was not, as the demurrer assumes, the foundation of the action, and it was, though filed with it, no part of the complaint. It was simply evidence for the plaintiff, to be used at the trial. *Newm. Plead. and Prac.*, 251, 619; *Vanghn* v. *Mills*, 18 B. Mon., 634; *Dodd* v. *King*, 1 Met., (Ky.) 430.

The facts stated in the complaint, without any reference to

the mortgage, show a cause of action, and the demurrer should have been overruled.

The judgment is reversed and the cause remanded to be proceeded in according to law.

BRODIE ET AL V. WATKINS AND WIFE.

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1. DAMAGES: *Measure of in breach of contract—Attorney and client.*

Where there is a special agreement for labor, services, or the delivery of goods at a stipulated value, and the party bound to the services or delivery is ready and willing to perform his part, but is wrongfully prevented by the other, the measure of damages is the profit which would have accrued to the party willing to perform, if the contract had been fully executed on both sides. And in cases of special contracts for legal services which are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, he may claim the whole compensation agreed on, subject to such abatement as would, in the natural course of things, have been incurred by him if the services had been continued.

On motion to settle amount of Attorneys' fees,

EAKIN, J.:

The property in this case sold for the sum of $10,000, which sum, in the adjustment of other attorneys' fees, has been taken without objection, as the amount recovered.

B. D. Turner, Esq., an attorney-at-law, on the 1st of June, 1877, filed an application in this court for a lien upon the fund for services rendered the appellees; stating that they had agreed to pay him ten per cent upon the amount collected; that, under the agreement, he instituted the suit, and rendered material services in the prosecution.

Objections are made by Greer & Baucum, assignees of the claim upon which the decree was rendered. They allege that Turner did not prosecute the suit to judgment, whereby they

were compelled to employ other attorneys, who have also filed liens for services; that the claim is exorbitant and unjust; and was not filed in the time prescribed by law,

The lien had been filed also in the court below, and no point is made by counsel as to time.

The testimony taken regarding this lien shows: That Turner was employed by Watkins to prosecute the suit under a special agreement to give him ten per cent on the amount collected. Turner drew the bill and commenced the suit in 1872; attended the Pine Bluff court in November; filed an amendment to the bill, which, he states, was rendered necessary by disclosures in the answer; made arrangements for taking depositions, and was engaged in the prosecution of the suit until early in October, 1873. Meanwhile litigation had grown up between Watkins and Turner regarding other matters; and about the last named date, Watkins peremptorily discharged Turner as his attorney; demanded of him the papers, and employed other attorneys. Turner expressed himself ready and willing to continue the case and fulfil his part of the contract, and from all that appears, has continued so since. Watkins says that he suspected Turner was not prosecuting the suit with diligence, but that he would not have discharged him but for the personal litigation which had arisen between them.

The duty of an attorney or solicitor, towards his client, and his obligation to regard the confidence reposed in him, should be wholly independent of, and above any personal affection or dislike; and these cannot be supposed to affect his conduct. An attorney, with the highest appreciation of the honor and dignity of his profession, should rather, in case of a personal quarrel, be stimulated thereby to more zealous efforts in his client's behalf, and a more punctilious discharge of duty.

Where no want of fidelity is shown, a suspicion of it savors of insult; and a discharge of an attorney on account of feel-

ings engendered by matters outside of his employment, is an injury to, or at least an imputation upon his professional honor, more grievous to a sensitive man than the loss of the particular business. Certainly it is desirable that the client should have for his adviser, one with whom he has pleasant personal relations. If Watkins had courteously represented this to Turner, upon the breach between them, and proposed a dissolution of their relation on that account, with an offer to settle fairly for services rendered, no difficulty would probably have arisen. He chose to dismiss him, and employ other attorneys. It would not have been delicate, after that, in Turner, to have interfered with the business in the hands of the other attorneys, and he was absolved from any further duties in that regard. He had, nevertheless, a right to stand upon the contract.

Where there has been a special agreement for labor, service, or the delivery of goods, at a stipulated value, and the party bound to the services or the delivery, is ready and willing to perform his part, but is wrongfully prevented by the other, the measure of damages is the profit which would have enured to the party willing to perform, if the contract had been fully executed on both sides. It is not necessarily or commonly the gross sum agreed to be paid. In many cases the damages are easily estimable. For instance, in the class of cases where successive deliveries of produce, or commodities, are to be made to a certain amount, within a fixed time, at a stipulated price, and the vendee refuses to receive them. There, the complainant can only recover the difference between the market price and the agreed price of the articles rejected, for that would have been the limit of his profit. And so when contracts have been made for the whole time of a person in any employment, and the services have been rejected. There the employee is held to make a fair and reasonable use of the time which belonged to the employer, and can only recover the

difference between what he received or might have received, and the price agreed. These propositions are sustained by the whole current of authorities in all the States, and commend themselves at once to the highest sense of justice and right. The criterion extends to all kinds of executory contracts, and the conflict of authorities arises upon the difficulty of its application to cases where the services are not easily partible.

Legal services are of this last named character. They cannot be apportioned either by time, or the amount of physical labor expended in drawing papers, attending courts, and oral arguments. It is the attorney's judgment, his learning, his responsibility and advice, which is relied upon, and which gives the peculiar value to legal services. Perhaps the most difficult and valuable services of the attorney may be rendered in considering his client's case, and giving him confidential information. before any visible act is done. These are general considerations, to show that the professional services of an attorney cannot justly be apportioned by the plain and obvious mode indicated above for cases of other classes.

A review of all the authorities, cited on both sides, leads the mind to the conclusion that in cases of special contracts for legal services, which are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, the latter may claim the whole compensation, subject to such abatement as would, in the natural course of things, have been incurred if the services had been continued. The value of the legal services proper, will not be apportioned; but whilst, upon the one hand, the attorney will not be put upon the *quantum mervit*, he ought not to recover more than he would have made if he had gone on with the case. His *time*, however, does not belong wholly to his client, and no deduction can, in ordinary cases, be justly made on the presumption that it was wholly occupied in other professional business. Such a case might

perhaps be made out, but it would be exceptional, and stand upon its own circumstances.

The attorneys who conducted the cause after Turner's discharge, are of high standing and known ability. They assumed the duties, under circumstances consistent with the highest sense of professional etiquette, and brought it to a suceessful termination. Whilst it may be supposed that Turner would have done as well, it cannot be presumed he would have done better, and we may take the case as a guide in estimating his pecuniary loss in some approximate manner.

After the discharge of Turner, the case was pending in the Jefferson Circuit Court during four terms. It would have been necessary for the attorney to attend that court at an expense of $25 or $30 a term. He would have been under the necessity of attending at this place at least twice at something about the same expense. Doubtless other incidental expenses would have been necessary, which he could not have charged to his client. An accurate account of these probable expenditures would be impossible, and the court, in the exercise of a fair discretion, upon the evidence presented, is of the opinion that a deduction of $200 would be proper.

Allow the lien for $800, and let it be paid out of the fund in the master's hands.

AMERICAN LAND COMPANY v. GRADY ET AL.

1. VENDOR AND VENDEE: *Special contract between, as to settlement of adverse claim—Measure of recovery under, etc.*

An understanding between the agent of a vendor of lands and the vendee, that the latter should take such steps as he should deem prudent to settle the claim of an adverse occupant, or sue him if necessary, and that in either case the vendee was to be allowed upon his debt for the land such sums as he might expend, authorized the vendee to employ an attorney and pay him a reasonable fee and to execute such bond as might be necessary in the prosecution of the suit, and if the sureties in such bond have damages to pay in consequence of the failure of such suit, they have the right to be subrogated to the rights of their principal, the vendee, against the vendor for recovery of such damages and interest.

2. SPECIFIC PERFORMANCE: *Assignee of title bond may have—Damages in*

The assignee of a title bond succeeds to all the rights of his assignor under it, and may sue in equity for specific performance and recover damages when performance is impossible. The measure of damages in such case, will be the amount paid upon the purchase, whether to the vendor or to others with his assent or directions, with the understanding express or implied, that it would be taken and credited as part of the consideration.

3. SAME: *Attorneys Fee—Pleading.*

Where there is a general prayer for damages in such cases, the attorney's fee paid by the vendor in a suit to recover the land from an adverse occupant, may be allowed though not specifica ly prayed for.

4. ATTACHMENTS: *In Equity.*

The Civil Code authorizes proceedings by attachment, in suits in equity.

APPEAL from *St. Francis* Circuit Court, in Equity.
Hon. J. N. CYPERT, Circuit Judge.

EAKIN, J.:

On the 28th of February, 1872, Charles Butler, as trustee for the American Land Company, held a legal title to the land in controversy. The defendant, Wiley Smith, agreed to purchase the land from the company, and upon that day said Butler for himself and as trustee, together with Erastus Corning and Joseph S. Fay, other trustees of the company, executed through W. A. Goodman, their attorney in fact, a title

bond to said Smith, reciting the sale for the sum of $1,219,80-100, of which $100 was paid in cash, and for the balance Smith executed two notes, one for $571.30, payable December 1st, 1872, and the other for $548.50, payable December 1st, 1873, with interest from date on each at six per cent. per annum. The bond was conditioned in the usual form, for a conveyance on payment, with warranty of title.

At the time of the purchase the land was in the possession of defendant, Robert Anderson, holding adversely to both parties, under an independent legal title. Smith afterwards brought suit against Anderson for the possession in the St. Francis Circuit Court. The complainants, Grady and Kuthley, became security in a bond with Smith in that suit, whereby the land was taken from Anderson and given to Smith. The suit was finally decided in Anderson's favor, and judgment rendered against the obligors in the bond for the sum of $750 and costs. Afterwards Smith, by writing, assigned the title bond to Grady and Kuthley and directed the deed to be made to them in accordance with its provisions.

This bill was filed by said Grady and Kuthley against the company, the trustees, Smith and Anderson, alleging: That complainants had joined in the bond given in the possessory action for the accommodation of said company; that the proceedings were instituted by the advice, concurrence and consent of the Land Company, the trustees and said Charles Butler; that complainants became bound in said bond on the faith and credit of the obligors in the title bond; that they were forced to satisfy the judgment and had done so; that by the assignment of the title bond they had obtained all the rights of Smith against the obligors; that they have the right to be indemnified againt the judgment for damages, and to have the amount allowed them out of the purchase money due on the land, if the contract for sale can be consummated, or if not,

to have a return of the money. They say they have offered to pay said company, through said Goodman, said balance, if they would allow said sum so recovered as damages out of the purchase money, and make title in accordance with the title bond, which was refused, and complainants now offer to do so.

It was further alleged that said Walter Goodman was properly authorized to act in the premises.

Complainants pray, as to Anderson, that his title be declared void; and, as to the company and trustees, and said Butler, in his own right, that they be decreed to perform the stipulations of the title bond, allowing in payment of the purchase money said sum recovered against complainants as damages: Or, if the contract cannot be performed, that complainants may have a decree against them for that sum, together with said sum of $100, paid by Smith on the purchase and "*all proper damages*" for the non-performance of the contract, and for general relief. They state further that they are residents of St. Francis county, in this State, and append to their complaint an affidavit that the Land Company, and said trustees are non residents of the State, that they are bound to complainants in the sum of $1,500, which complainants believe they ought to recover. Wherefore an attachment was issued and levied on other lands of the company.

Corning, one of the trustees, was dead when the suit commenced, and during its progress Butler and Fay resigned. Other trustees, Greenough and Carden, were substituted. The Land Company and the trustees appeared and answered. They admit the agency of Goodman and that he transacted the whole of the business on the part of the vendors. They say that Smith at the time of the purchase informed Goodman that Anderson claimed the land by some sort of tax title, but deny that Goodman knew he was in possession. They deny that Smith instituted the proceedings at law by and with their advice

and consent, or that of their said agent. They allege that Smith himself undertook to settle the question as to the pretended tax title. The agent agreed in that case, to allow Smith as a credit on the purchase "any reasonable cost that he might properly incur in settling the matter," and "if necessary, that Smith should institute proper suit," but they deny that Smith had any authority to employ counsel, or to institute a suit that could by no possibility, be sustained. They deny that they knew of the employment of counsel by Smith until after the suit was in progress; or that they requested any one to go on a bond for the purpose of the suit; or that complainants became so bound on the faith and credit of respondents, or for their accommodation. They deny any tender of the purchase money, but admit the proposition to pay them if they would allow the said sum of $750, and now proffer to make to them full payment of the purchase money.

They make their answer also a cross-complaint againt Anderson, and join in the prayer of the bill to have his title set aside.

The answer of Smith supports the bill. With regard to defendant Anderson and his title, it suffices to say, that in various ways by motions to strike out, and by demurrers to the bill and cross bill, he continually resisted being made a party to the proceedings at all. All of which being overruled he saved exceptions, and answered, setting up legal title paramount to that of the company. His answer was sustained, and he was dismissed upon hearing, with costs against the company. He joins in the appeal, and his attorney complains here of the errors of the court in compelling him to abide the litigation, and not dismissing him at first upon his motions and demurrers. His counsel has certainly very respectable authority for maintaining that as he was not a party to the contract sought to be enforced, nor claiming by privity from either of the par-

ties, he ought not to be harrassed in the contest between them growing out of the contract; that it gave neither any equities against him, and that he had a right to await an action at law from any one better entitled. But if we were to concede that, it is somewhat perplexing to discover any mode of aiding him here. He has gone out with his title confirmed, and with provisions for recovery of his costs, and as to him we can only affirm. His trouble has been the accidental result of his position, and unless he can make out a case of malicious prosecution, he is remediless, not only here but elsewhere. If the design of Anderson had been to settle the law upon the points raised, he should have stood upon his demurrer.

With regard to the other parties, the court upon final hearing held that complainants ought not to be required to take the title of the land company; that the bond should be rescinded; that complainants were entitled to the purchase money paid, and to be reimbursed in the amount expended by them on the account of, and as securities for, the company and Smith. A reference was made to the clerk for an account of those amounts, with interest at six per cent on the amounts expended on account of the law suit from the date of the period when complainants offered to perform their part of the contract. The clerk found due the sum of $1,134.28, for which a decree was rendered against the company, and the trustees, Canada and Greenough. The attachment upon other lands, sued out at the beginning of the suit, was sustained, and they were ordered to be sold for the satisfaction of the decree. In arriving at the amount, the master in his account included the sum of $100 paid by Smith in the action at law, as an attorney's fee to Aldridge, and interest on the whole amount from 17th October, 1874, the time of the offer of complainants to perform, to date of decree. All the defendants, save Smith, appealed.

The evidence in this cause leads the mind to the conclusion

that there was an understanding between Goodman, acting on behalf of the company, and the trustees, and Smith; that the latter should take such steps as he might deem prudent, to settle the claim of Anderson; or in case that could not otherwise be done, to bring suit; and that, in either case, Smith was to be allowed, upon his debt for the land, such sums as he might expend. It would result that he might employ an attorney for the purpose and pay him a reasonable fee, and execute such bond as might be necessary. There is nothing to show that he acted in bad faith, although there appears to have been a mistake in judgment in bringing an action of forcible entry and detainer. It appears, moreover, that Goodman knew of the proceedings at the time of their commencement, and during their progress; and, at least, made no objection. Grady and Kuthley signed the bond at the request of Smith and his attorney, Aldridge, with the understanding that the writ was prosecuted by the advice and directions of the land company, which was joined in the writ.

If there had never been any assignment of the title bond to the complainants, they would have had the right in equity, after paying the judgment for damages, to be subrogated to the rights of their principal, Smith, against the company for indemnity, to the extent of the amount paid with interest. Before suit they had paid the judgment in part, and arranged to pay the balance, which they afterwards paid in full.

If, without any judgment against them, and damages paid, they stood merely as assignees of the bond for Smith, they would succeed to all his rights under it. They might sue in equity for specific performance, and pray for damages in case specific performance should be found impossible. The measure of damages, in such case, would be the amount of money which Smith had paid upon the purchase, whether paid to the company itself or to other persons by the assent or direction

of the company, with the understanding, express or implied, that it should be taken as part of the consideration, and so credited. Such sums would be all in effect paid as part of the consideration, and would be considered as damages.

Both these rights combined in complainants. They were entitled to indemnity for the judgment paid by them, and to other damages on failure to perform the contract, which Smith might have claimed if he had brought the suit. Smith is in the suit and assents to this. All the matters grow out of the transactions resulting from the title-bond and the agreement concerning the suit, and the whole relief was properly sought in one bill.

There was no specific prayer for the $100 paid Aldridge, nor was the master specifically directed to take an account of it. But there was a prayer for *damages*, and the account of the master might properly include it as part of the consideration. No proof was returned with the master's report. The reference, the report and the decree appear all to have been made on the same day, and are recited in the same decree. Some of the items of the report concerning costs, were easily ascertainable upon the spot. Some facts are wanting to show periods affecting calculations of interest, aud there are other minor irregularities. It was hasty practice, and somewhat careless. But the parties were all in court, and no one filed exceptions, or asked time to do so. Enough appears from the evidence used on hearing to show that the sum total was within the limits of what complainants might well claim, and we presume the Chancellor thought, as he might well, that substantial justice would be done by the decree.

As for the attachment, our code provisions are broad enough to authorize such a proceeding in an equitable suit. It is the prevailing practice in Kentucky and other States having laws similar to ours. It has been adopted and used here by mem-

bers of the bar, and has heretofore passed *sub silentio* under the notice of the court. Although it does not belong to the traditionary system of equity practice, as adopted here under our territorial government and transmitted to the State, it commends itself to the court as proper under the statutory provisions embracing all civil actions.

Affirm the decree.

WILSON v. STATE OF ARKANSAS.

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1. CRIMINAL PLEADING: *Indictment, when should negative exceptions in a statute.* When there is an exception in the enacting clause of a statute, it must be negatived in the indictment, but when a statute contains *provisos* and exceptions in distinct clauses it is not necessary to state that the defendant does not come within the exceptions, or to negative the *proviso* it contains.

2. EVIDENCE: *Declarations of prisoner. Res gestæ.* The statements of a defendant of his intended use of a pistol at the time he borrowed it of the witness, and a like statement when he exhibited it to another witness, were admissible in evidence as part of the *res gestæ.*

3. CRIMINAL LAW: *Carrying weapons: Constitutional right to bear arms.* The Legislature may to some extent regulate the mode and occasion of wearing war arms, but to prohibit the citizen from wearing or carrying a war arm except upon his own premises or when on a journey, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.

APPEAL from *Arkansas* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.

ENGLISH, C. J.:

Chancy Wilson was indicted in the Circuit Court of Arkansas county, at March term, 1878, as follows:

"The grand jury, etc., etc., accuse Chancy Wilson of the crime of carrying side arms, committed as follows, to-wit: The said Chancy Wilson in the county aforesaid, on or about

the 14th day of February, 1878, did then and there unlawfully carry a pistol as a weapon, contrary to the statute in such case made and provided, and against the peace and dignity of the State," etc.

The defendant demurred to the indictment, the court overruled the demurrer, he was tried and convicted, a new trial was refused him, and he took a bill of exceptions and appealed.

I. It is submitted for appellant that the indictment is bad, because it does not negative the exceptions contained in the *proviso* of the act under which it was preferred. *Acts of* 1874–5, *p.* 155.

When there is an exception in the enacting clause of a statute it must be negatived; but when a statute contains *provisos* and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the *proviso* it contains. *Britton* v. *State*, 10 Ark., 301; *Matthews* v. *State*, Ib. 485; *Shaver* v. *State*, Ib. 259; *Bone* v. *State*, 18 Ib. 113; 1 *Wharton Cr. L.* (6 *Ed.*) *p.* 378.

The enacting clause of the statute makes it a misdemeanor, punishable by fine, for any person to wear or carry as a weapon, any pistol, dirk, butcher or bowie knife, sword or spear in a cane, brass or metal knucks, or razor. In a *proviso*, exceptions are made in favor of persons on their own premises, or travelling through the country on a journey with baggage, officers of the law engaged in the discharge of official duties, or persons summoned by an officer to assist in the execution of process, or a private person anthorized to execute process.

It is sufficient for the indictment to charge the offense prohibited by the enacting clause of the statute, and if the accused is within any of the exceptions mentioned in the *proviso*, it is matter of defense.

It follows that the court below did not err in overruling the demurrer to the indictment.

II. It was proven on the trial that appellant borrowed of witness, Bowers, a large army size six shooter, a revolving pistol, 44 caliber, eight inches in the barrel, such as is commonly used in warfare, stating at the time he borrowed it, that he was going over to Pearman's to shoot wild hogs. On the next day he went to Pearman's, stated to him the purpose of his visit, and while conversing with him, before going into dinner, pulled the pistol out of his boot, cocked it a few times to see if it would revolve, and then put it around under his coat, and went in to dinner.

The court excluded from the jury the statement made by the appellant to Bowers, when he borrowed the pistol from him, as to the use he intended to make of it, and a like statement made by appellant at Pearman's where he took the pistol from his boot in his presence, etc. These declarations were admissible as part of the *res gestæ*. *Pitman* v. *State*, 22 Ark., 357.

III. The appellant, among other instructions, asked the court to charge the jury that if they believed from the evidence, that the pistol carried by him was an army size pistol, such as are commonly used in warfare, they should acquit; which was refused by the court.

In *Fife* v. *State*, 31 Ark., 455, on review of authorities, we held that the Legislature might constitutionally prohibit the carrying of such pistols and other arms easily concealed about the person, as are used in quarrels, brawls and fights between maddened individuals, but that the Constitution guaranteed to the citizens the right to keep and bear arms for defense, etc.

And it was indicated in the opinion that the Legislature might, in the exercise of the police power of the State, regulate the mode of wearing war arms, and no doubt the occasions of wearing such arms may be to some extent regulated.

Thus it has been made an offense to wear a pistol, etc., concealed (*Gantt's Dig.*, *sec.* 1517) and this may well apply to the character of the pistol used as a war arm.

So hunting with a gun with intent to kill game, or shooting for amusement, on the Sabbath, are made offenses. *Gantt's Dig.*, *sec.* 162.

No doubt in time of peace, persons might be prohibited from wearing war arms to places of public worship, or elections, etc. *Andrews* v. *State*, 3 *Heiskel*, 182.

But to prohibit the citizen from wearing or carrying a war arm, except upon his own premises or when on a journey traveling through the country with baggage, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms.

If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.

The judgment is reversed and the cause remanded for a new trial.

HOLLAND V. THE STATE.

CRIMINAL LAW: *Carrying weapons.*

The carrying of army sized pistols, such as are commonly used in the military and naval service of the United States, is not prohibited by the laws of Arkansas.

APPEAL from *Yell* Circuit Court.

Hon. W. W. MANSFIELD, Circuit Judge.

ENGLISH, C. J.:

James Holland was indicted in the Circuit Court of Yell county, for carrying a pistol as a weapon.

On the trial but one witness was examined. He stated, in substance, that the first time he ever saw defendant, was on the 1st of October, 1875, in Yell county. He had two large sized six shooting pistols, one of them a Remmington, navy size and loaded, and the other a Colt's army pistol. The pistols were such as are commonly used in the United States military and naval service. Defendant was carrying them in his saddle-bags, and stated he was from Texas. Witness did not know whether he was on a journey or not.

Upon this evidence, the defendant asked the court to charge the jury that if they found from the evidence that the pistols, proven to have been carried, were army sized pistols, and were such as are commonly used in the United States military and naval service, they must acquit defendant.

The court refused this instruction, defendant was convicted, a new trial refused him, he took a bill of exceptions and appealed.

The court erred in refusing to instruct the jury as moved by appellant. *Fife* v. *State*, 31 Ark., 455: *Wilson* v. *State*, M. S.

Reversed, and remanded for new trial.

Clary et al v. State of Arkansas.

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1. Criminal Law: *Robbery—Value immaterial.*

To constitute robbery the taking must be either directly from the person or in the presence of the party robbed, and must be by force, or a previous putting in fear. It is the previous violence or intimidation that distinguishes robbery from larceny. It is immaterial of what value the thing taken is.

2. Indictment for Robbery.

In an indictment for robbery it is sufficient to allege that the taking was done by violence, without alleging intimidation.

3. ——————

A Code indictment is the substance of the common law indictment, and must be direct and certain as regards the party charged, the offense, the county, and particular circumstances of the offense charged, where they are necessary to constitute a complete offense.

4. INDICTMENT: *Robbery—Larceny.*

There can be no conviction for larceny under a bad indictment for robbery.

APPEAL from *Pulaski* Circuit Court.
Hon. W. F. HILL, Circuit Judge.

ENGLISH, C. J.:

James Clary, George Hall and Charles Hall were indicted in the Circuit Court of Pulaski county for burglary and robbery. On the first count, which charged them with breaking and entering a railroad car in the night time with intent to commit a felony, they were acquitted. They were found guilty on the second count, and the jury fixed their punishment severally at imprisonment in the penitentiary for seven years and six months. They filed a motion in arrest of judgment, which the court overruled.

On motion of the prosecuting attorney, and upon a showing made to the court (not disclosed by the record) the court reduced the punishment to five years imprisonment and sentenced them accordingly. They prayed an appeal, which was allowed by one of the judges of the court.

The second count of the indictment upon which appellants were convicted is literally as follows:

"The grand jury aforesaid, in the name and by the authority of the State of Arkansas, accuse said James Clary, Charles Hall and George Hall of the further crime of robbery committed as follows: The said James Clary, Charles Hall and George Hall, on the 4th day of November, 1878, in the county of Pulaski, and State aforesaid, feloniously and wilfully did make an assault upon one James Fisher, in bodily fear and

danger of his life then and there feloniously and wilfully and one pair of boots worth six dollars, one pair of shoes worth four dollars, a lot of painting tools to-wit: ten worth three dollars each, one valise worth six dollars, one hat worth four dollars, one pistol worth ten dollars, all the property of said James Fisher, then and there feloniously, wilfully and violently did seize, take and carry away with intent from the person of the said James Fisher, the said property from the said James Fisher to rob and steal, against the peace and dignity of the State of Arkansas."

The grounds of the motion in arrest were, that the facts alleged in this count did not constitute a public offense, etc., and that the allegations in the count did not constitute the offense attempted to be charged.

It is submitted by the Attorney-General, that though the count may not be good under the common law definition of robbery, it charges every material fact necessary to constitute robbery under our statute.

Robbery, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear. The taking must be either directly from his person or in his presence to make it robbery. It is immaterial of what value the thing taken is. A penny as well as a pound thus forcibly extorted makes it robbery. The taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing, for, according to the maxim of the civil law, *qui vi rapuit, fur improbior esse videtur.* This previous violence or putting in fear is the criterion that distinguishes robbery from larceny; for if one privately steals six-pence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent, etc. Not that it is in deed necessary, though usual,

to lay in the indictment that the robbery was committed by *putting in fear*; it is sufficient if laid to be done by violence. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent. Thus, if a man be knocked down without previous warning and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. *4 Blackstone's Com., 243-4.*

Robbery, says Mr. Archbold, is defined to be a felonious taking of money or goods from the person of another, or in his presence, against his will, by violence or putting him in fear. And this violence or putting him in fear must precede or accompany the stealing. (*In note.*) The words of the definition of robbery are in the alternative, "violence or putting in fear," and it appears that if the property be taken by either of these means, against the will of the party, such taking will be sufficient to constitute robbery. The principle, indeed, of robbery is violence, but it has been often holden, that actual violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as constructive violence. *3 Arch, Cr., Prac. and Plead. 417, 418, 6 Ed.*

By Statute:—"Robbery is the felonious and violent taking of any goods, money, or other valuable thing from the person of another by force or intimidation; the manner of the force, or the mode of intimidation, is not material, further than it may show the intent of the offender." *Gantt's Digest,* sec. 1329.

The statute substitutes the word "*intimidation*" for the words "*putting in fear*" used in the common law definition of rob-

bery, but the definitions are substantially the same, the statute making no material change.

The Attorney-General further submits that though the count in question may be bad under the common law form of indictment for robbery, yet it may be good under the criminal code.

The following is a common law precedent:

"*Surry* (*to-wit*).: The jurors for our lord the King, upon their oath present, that A. O. late of etc. or etc., with force and arms, at etc., then and there in and upon one A. J., in the peace of God and of our said lord, the King, then and there being, feloniously did make an assault, and him the said A. J. in bodily fear and danger of his life then and there feloniously did put, and one gold watch, of the value of eighteen pounds of the goods and chattels of him the said A. J., from the person and against the will of the said A. J., then and there feloniously and violently did steal, take and carry away, against the peace of our said lord, the King, his crown and dignity." *3 Chitty*, Cr. L., 577, 806. *3 Arch, Cr. Prac. and Plead.*, (6 Ed.) 117.

Under the code the indictment may be substantially in the following form, after stating the court and parties in the caption: "The grand jury of Pulaski county in the name and by the authority of the State of Arkansas, accuse George Smith of the crime of (here insert the name of the offense) committed as follows, viz.: The said George Smith, on the —— day of ——, in the county aforesaid (here insert the acts constituting the offense) against the peace and dignity of the State of Arkansas."

It must be direct and certain as regards the party charged, the offense, the county, and the particular circumstances of the offense charged, where they are necessary to constitute a complete offense, etc., etc. *Gantt's Digest*, secs. 1775 to 1779.

A code indictment is the substance of the modern common law indictment. *Barton* v. *The State*, 29 Ark., 69.

Doubtless the count in question was drafted hastily and in the press of court business. Its allegations as to the offense charged are confused and uncertain, and it falls below the standard of good common law or code pleading.

No doubt the intelligent prosecuting attorney who hurriedly drafted the count, could now deliberately make it a good charge for robbery, by adding some words, transposing parts of sentences and striking out parts of others, but he could not, neither can we, so alter an indictment after it is returned into court by the grand jury.

It is further submitted by the Attorney-General that if the count be bad for robbery it may be good for larceny.

Mr. Chitty says, if in the trial, it should appear that any of the circumstances of robbery are wanting, but the taking is proved, the defendant may be acquitted of the aggravated offense and found guilty of simple larceny. *3 Chitty*, Cr. L. 806.

But that ought to be on a good count for robbery.

Perhaps on a trial for robbery, if the State fail to prove that the goods were taken from the person of the party charged to have been injured by putting him in fear, or by intimidation, or by violence, and proves that the goods were taken from his person, or presence, furtively, the accused might be convicted of larceny. But in this case the appellants were indicted, tried, convicted and sentenced for robbery, on a count which we cannot approve as valid for any offense without degrading the standard of good criminal pleading, and setting a precedent to encourage unwarrantable looseness.

The judgment must be reversed, and the cause remanded with instructions to the court below to hold appellants to answer a new indictment, but not for the burglary of which they were acquitted in this case.

WARE v. STATE OF ARKANSAS.

LARCENY: *Value must be proved.*

Without proof of value of stolen property, there can be no conviction for larceny.

APPEAL from *Mississippi* Circuit Court.
Hon. L. L. MACK, Circuit Judge.
Henderson, Attorney-General.

ENGLISH, C. J.:

John Ware and Solomon Bass, Jr., were jointly indicted in the Circuit Court of Mississippi county, for stealing a hog, alleged to be of the value of $10, and the property of James Perry. Ware was separately tried, and the jury found him guilty, as charged in the indictment, and fixed his punishment at imprisonment for one year in the penitentiary. He moved for a new trial, on the ground that the verdict was not sustained by the evidence; the court overruled the motion, and he took a bill of exceptions, which purports to set out all of the evidence introduced on the trial. He was sentenced in accordance with the verdict, and prayed an appeal, which was allowed by one of the judges of this court.

Perry lost thirty or forty of his hogs which ranged back of Friend's field, a neighbor of his. Friend found a hog freshly killed, at the back of his field, and Bass, with a gun, and Ware standing by it. The hog was in Perry's mark, and fat; but no witness swore that it was of any value; at least the bill of exceptions fails to show that there was any evidence of the value of the hog.

Without evidence that the value of the hog exceeded $2, the accused could not be punished by imprisonment in the penitentiary. *Acts of 1874-5, p.* 112.

The judgment is reversed, and the case remanded for a new trial.

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GARIBALDI V. CARROLL.

1. PRACTICE AT LAW: *Bill of exceptions: Mandamus against Judge.*

The refusal of a Circuit Judge to sign a bill of exceptions tendered to him, is not the subject of an exception in a subsequent bill of exceptions. A judge should allow and sign a bill of exceptions if true; if not, he should correct and then sign it. If the party is not then satisfied, the statute points out his remedy.

A Circuit Judge may in a proper case be compelled by mandamus to sign a bill of exceptions.

2. BILL OF EXCEPTIONS: *When to be allowed and signed: Statute construed,*

Section 4694, Gantt's Digest, does not mean that when time is given for filing a bill of exceptions it will extend to the last day of the next term if not specially limited.

3. LOST JUDGMENT: *Remedy to restore.*

At common law the plaintiff has a right of action on a judgment as soon as it is recovered. The remedy provided by *sec.* 3774 *Gantt's Digest,* to revive or restore a lost judgment, is but cumulative. The plaintiff may at the same time prosecute an action on the judgment and a *scire facias* to revive it, and have judgment in both.

APPEAL from *Pulaski* Circuit Court.

Hon. J. W. MARTIN, Judge.

Bishop for appellant.

Alex. D. Jones, contra.

HARRISON, J.:

This was an action by John Carroll against James Garibaldi on a judgment recovered by the former against the latter, before a justice of the peace, on the 5th day of February, 1870, for the sum of $184.50. The complaint alleged the record of said judgment to be lost.

This action was commenced on the 16th day of March, 1876.

The defendant answered the complaint. He admitted the recovery of the judgment before the justice of the peace, but averred that an appeal was taken from it to the Circuit Court,

and that the cause was, in the Circuit Court, dismissed; and denied the loss of the record of the judgment.

The cause was, at the October term, 1876, submitted to the court, without a jury, which found as facts, that no appeal had been taken from the judgment and the same remained in force, and that the record of the judgment was lost; and thereupon rendered judgment for the plaintiff for the sum of $184.50 debt, and the further sum of $76 damages, sustained by the detention of the debt.

The defendant appealed.

After the filing of the transcript in this court, an agreement in writing between the parties was filed, that the transcript of a bill of exceptions therewith filed, allowed and signed by the Circuit Judge on the 17th day of December, 1877, should be taken and considered as a part of the record in the cause, as if the same had been made part thereof by *certiorari*.

From this bill of exceptions it appears, that the defendant at the April term, 1877, presented to the judge a bill of exceptions as to certain rulings of the court at the previous term, or that at which the judgment was rendered, and setting out therein a motion for a new trial that was overruled, which the judge refused to sign. That at the next or October term, 1877, the record on motion of the defendant was so amended as to show that when the exceptions were taken, time, but not until any particular day, was given him to prepare his bill of exceptions; and that after the amendments were made, the defendant again presented the same bill of exceptions, which the judge again refused to sign, and to this refusal the defendant excepted and tendered the bill of exceptions referred to in the agreement, and in which is set out the bill of exceptions tendered and rejected.

The Circuit Judge should have declined to allow and sign the

bill of exceptions to his refusal to sign the other. It was not the subject of an exception.

There can no more be an exception to the refusal to sign a bill of exceptions than there can be a demurrer to a demurrer. It is the duty of the judge to allow and sign the bill of exceptions presented to him, if true; if not, to correct it and then sign it. If the party excepting is not satisfied with the correction, the statute provides, upon his procuring the signatures of two bystanders attesting the truth of his exceptions as by him prepared, the same shall be filed as part of the record; and that the truth of the exceptions may be controverted and maintained by affidavits, not exceeding five in number, on each side, filed with the clerk. *Gantt's Digest secs.* 4697, 4698. And we do not doubt that a judge might, in a proper case, be compelled by mandamus to sign a bill of exceptions.

"The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exceptions to writing, but not beyond the succeeding term." *Ib. sec.* 4694. It is not implied by this language, that the time when given, if not specially limited, will extend to the last day of the next term. *Washington and N. O. Tel. Co.* v. *Hobson & Son*, 15 *Gratton* 135.

A judgment becomes final and passes beyond the control of the court, upon the expiration of the term at which it is rendered, unless suspended by the order of the court; and it cannot be conceived, with any reason, that giving time to a party for the mere purpose of reducing an exception to writing can have the effect, if no day is named, of suspending the judgment until the end of the next term, and that an exception might then be reserved to the refusal of the judge to sign the bill of exceptions as an act done in the cause.

It is more reasonable to suppose that the time, like the power of the court over its judgment, expires with the term.

But it is contended that the court had no jurisdiction of the subject of the action.

The judgment sued on being for more than one hundred dollars, exclusive of interest, the sum in controversy is clearly within the jurisdiction of the Circuit Court.

At common law a party has a right of action upon his judgment as soon as it is recovered, although having the right to take out execution, his action seems unnecessary. *Freeman on Judgments*, *sec.* 432.

The plaintiff may at the same time prosecute an action upon the judgment and a *scire facias* to revive it, and a judgment in his favor in the latter proceeding, does not affect the former, *Ib.* *Carter* v. *Coleman*, 12 *Ind.*, 274.

The remedy provided by *section* 3774 *of Gantt's Digest*, when the record of a judgment of the justice's court has been lost or destroyed, that such court may on motion of the judgment creditor, after five day's notice, render a new judgment for what may remain due, is but a cumulative or additional remedy, *Sedgw. Con. and Stat. L.* 100 (*n.*) Two remedies may co-exist.

The judgment is affirmed.

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CAVANESS v. ROSS.

PAYMENT: *Of part, when will discharge the whole.*

In cases of contract for the payment of a liquidated sum of money, the payment of a less sum will not be a good satisfaction unless it was paid and accepted before the time when it was to have been paid, or at a different place from that appointed for the payment.

APPEAL from *Lincoln* Circuit Court.

Hon. T. F. SORRELLS, Judge, on exchange of circuits.

Carlton & McCain, for appellant.

Cunningham, contra.

HARRISON, J.:

This was an action by Johnathan H. Cavaness against William H. Ross upon two promissory notes for $1000 each, made by the defendant and one Harvey Jaggers, bearing date the 16th day of November, 1871, and payable to H. S. Odom, with ten per cent interest from date, respectively, on the 25th day of December, 1872, and 1873, and indorsed to the plaintiff by said Odom, on the 23d day of February, 1876.

The complainant shows a payment on the note first due, of $100—on the 23d day of February, 1873.

The defendant pleaded in answer as a defense to the action: That Odom, on the 4th day of February, 1876, brought suit in the Lincoln Circuit Court against him on the notes, and that the case was afterwards compromised by his paying him $350, in full satisfaction and discharge of his liability on the notes, which Odom so received, and dismissed the suit; and that he was not indebted to the plaintiff.

The cause was tried by a jury and a verdict returned for the defendant. The plaintiff moved for a new trial; his motion was overruled, and he appealed.

H. M. Rattenee, a witness for the defendant, testified: that

he was the agent of Odom, who lived in Texas, and as such agent instituted the suit by him against the defendant, on the notes; that he was instructed by Odom to accept $1400 as satisfaction and discharge of the notes. Ross was, he said, as between himself and Jaggers, to pay one fourth of the debt, and he agreed to pay one fourth of the $1400, and Jaggers the remainder, That Ross paid $350—the one fourth, and the witness delivered to him a deed, to him from Odom, for his part of the land for which the notes were given—and as was agreed between him and Ross, he dismissed the suit. This was in the month of February, 1876. He sent the money to Odom. Jaggers failed to pay his part of the $1400, and he as Odom's agent sold the notes to the plaintiff for $1050—telling him at the time that Ross had paid his part of them.

The witness thought when Ross paid the $350 he was released from further liability on the notes; but said that Odom had never said anything to him about releasing him; nor did he say anything about his having released him either to Odom, when he sent him the money, or to the plaintiff when he sold him the notes.

The defendant himself testified—that he purchased one fourth of the lands for which the notes were given. That Odom, in 1876, brought suits on the notes against him and Jaggers. That Rattenee, the agent, offered to compromise the case for $1400—saying to him that his part of that sum would be $350, and Jaggers's the remainder; and that he accepted the compromise offered, and paid him the $350, and the suits were dismissed, and a deed from Odom to him for his part of the land was delivered to him by Rattenee He understood at the time, he said, from what Rattenee told him, that he was released from further liability on the notes.

The plaintiff in behalf of himself, testified, that he purchased the notes from Odom, through his agent, Rattenee, and paid

for them $1050; and that nothing, at the time, was said about a release of the defendant.

The only grounds of the motion for a new trial, which need be noticed are: that the court improperly instructed the jury for the defendant, and that the verdict was not supported by the evidence.

The instruction complained of was as follows:

"If the jury believe from the evidence, that Odom brought suit on the note against the defendant, and that Rattenee, as his agent, compromised and dismissed it in consideration of $350, paid by the defendant; and that Odom ratified the action of Rattenee, they shall find for the defendant."

There was no evidence of a ratification by Odom of Rattenee's action, but if such fact had been proven, the instruction, as we shall presently show, should not have been given,

In cases of contract for the payment of a liquidated sum of money, the payment of a less sum will not be a good satisfaction, unless it was either paid and accepted before the time when it was to have been paid, or at a different place from that appointed for the payment. *2 Greenl. Ev., sec. 28.*

Chitty says: "The payment of *part* of a liquidated and ascertained sum is, in law, no satisfaction of the whole; although it may, in certain circumstances, be evidence of a gift of the remainder. And a plea which alleged the payment by the defendant, and receipt by the plaintiff, of a smaller sum in satisfaction of a larger, would be bad even after verdict." *Chit. on Con. 645.*

And Story says: "A parol agreement by a creditor to accept part payment of a debt in money, in satisfaction for the whole debt, will not be binding upon him, for want of consideration, although he actually receive such part payment, and give a receipt for the whole debt." 2 *Sto. Con. 978, b. Fitch* v. *Sutton*, 5 East, 230; *Cumber* v. *Ware*, 1 Str. 426;

Geiser v. *Kuthner*, 4 Gill & J., 305; *Blanchard* v. *Noyes*, 3 N. H., 518; *Bailey* v. *Day*, 26 Maine, 88; *Wheeler* v. *Wheeler*, 11 Ver., 60; *Warren* v. *Skinner*, 20 Conn., 559.

In *Fitch* v. *Sutton*, where it was held that the acceptance of £17 10s. could not be a satisfaction for a debt of £50, Lord Ellenborough said: There must be some consideration for the relinquishment of the residue; something collateral, to show the possibility of benefit to the party relinquishing his further claim, otherwise the relinquishment is *nudum pactum*."

It is thus seen, that the answer, if proven to be true, which however, it was not—for the evidence shows that Jaggers was to have paid the remainder of the $1400, but had not done so—set up no defense to the action except as to the partial payment of the $350. There was no averment in the complaint, or any attempt to prove, that any dispute or controversy existed as to the sum due on the notes, when the agreement for the payment of the $1400 was made. And if that sum had been paid, and the notes given up, it might justly have been inferred or presumed that Odom had made them a gift of the residue.

The judgment is reversed, and the cause remanded, for further proceedings according to law, and not inconsistent with this opinion.

WEST AND WIFE ET AL V. WADDILL ET AL.

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1. PROBATE COURTS: *Jurisdiction, Judgment of, conclusive.*

The jurisdiction of the Probate Courts since the adoption of the Constitution of 1874, is precisely what it was before the transfer of probate jurisdiction to the Circuit Courts by act of 1873; and their judgments are conclusive until corrected by appeal or other proper proceeding of a supervising court.

2. SAME: *Chancery jurisdiction over judgments of.*

There is an inherent power in equity to set aside the orders and judgments of Pro-

bate Courts, as of all other courts, for fraud; or, if such a state of facts and circumstances is presented as shows an irreparable injury impending, against which a Probate Court can grant no relief, courts of equity may interpose, but not for mere errors however gross.

3. ADMINISTRATOR: *Discharge of, by Probate Courts.*

The discharge of an administrator by the Probate Court, is only for so much of the funds belonging to the estate as is found *by his settlement* to be in his hands. He will still be liable for funds received and not accounted for by him.

4. SAME: *What not fraudulent purchase by.*

An administrator is not precluded from dealing with the purchaser of property purchased at his sale, where there is no understanding express or implied at the time of the sale that he shall share in the purchase.

5. SAME: *Attorney of, not allowed to buy at his sale.*

An attorney of an administrator who prepares and files the petition and obtains an order for sale of property of the deceased, is not allowed to purchase at the sale.

6. FRAUDULENT PURCHASER: *Rents and profits, repairs, etc., where no actual fraud.*

Where a purchase of land is set aside as fraudulent for being against public policy, but in which the purchaser has been guilty of no actual or intentional fraud, he should be charged with only such rents and profits as he has received, or should by prudent management, have received; and should be credited with the purchase money paid by him, and taxes and all other reasonable expenditures, including improvements: and if these exceed the rents and profits, he will be entitled to the excess with a lien upon the property for its payment.

APPEAL from *Jackson* Circuit Court in Chancery.
Hon. WILLIAM BYERS, Circuit Judge.
Gause, Butler, Minor, Clark & Williams for appellants.
Doswell, Coody, Rose, contra.

EAKIN, J.:

The bill in this case was filed by the two minor children and sole heirs of James L. Robinson, deceased, against Waddill, the administrator of the estate, and divers persons who had become purchasers of the lands of the estate, at a sale ordered by the Probate Court for the payment of debts.

Pending the suit one of the complainants, Alice, was married; and both became of full age. The husband, West, was made a party, and, by order of the court, the other complainant, Jno. M. Robinson, prosecuted the suit *suo jure*.

The object of the bill was to attack and correct the settlements of the administrator as fraudulent, and to set aside the sales, on the grounds that the order therefor was procured by fraud, based upon the fraudulent settlements. As touching the purchasers, it is charged, that one of them, Hyer, bought in trust for the administrator, and that two of them, Doswell and Jones, were employed by the administrator as attorneys to procure the order of sale, and became purchasers under the order.

The bill further discloses: that a portion of the lands, the the S. W. 1-4 of sec. 24, in T. 11, N. of R. 2 W., was highly improved, and was the residence of the deceased at the time of his death, in the fall of 1865. Before the application for sale, the widow had, for a while, held the home and farming lands under her quarantine; afterwards dower was assigned to her of the N. 1-2 of this quarter section. When the lands were sold under order of the court, her dower was excepted, and the remainder sold only. The complainants were then minors. The widow intermarried with Lax, and died before suit, in 1870, when this portion was taken possession of by Doswell and Jones under their purchase and whilst complainants were minors.

The circumstances charged in the bill as indicative of fraud, are substantially as follows: That intestate died possessed of a large personal estate worth $3,700, consisting largely of horses, cattle, hogs, wagons, farming stock, etc., and of which about $2,000 worth was never inventoried, appraised nor accounted for; that of the articles inventoried, some amount-

ing in value to $33.33 1-3 were not included in the sale bill nor accounted for.

That a debt due Malloy contracted in 1860 was allowed March 11th, 1867, and classed in the fourth class. That letters were granted on the 2d of January, 1866, and the debt was barred. That an account in favor of Dill had been allowed and classed, which was also barred. That a number of other accounts were allowed which had never been presented; and taxes were charged for which no receipts were filed. By these means the amount of debts was swelled so as to make an apparent necessity for the sale of the lands. That the administrator had failed to charge himself with large amounts of rents which he either received or should have received, and had failed to charge himself with interest of a considerable amount due to the estate. That he had credited himself, in some instances, with more than he had actually paid out, and charged excessive commissions. The result of all the allegations is, that if the personal estate had been honestly accounted for, and the liabilities truly shown, there would have been ample personalty to pay the debts, and the sale would not have been necessary.

The second paragraph of the bill, more particularly directed against the purchasers, to set aside the sales, charges that the appraisement of the lands had not been duly made before the sale; that it was made by neighbors of Waddill, at his suggestion, who were not on the land, and not duly sworn. That it was made at a time when the State militia was ravaging the country, when citizens were in a state of alarm and confusion, and there were no buyers; and that, in consequence, lands worth $10,000 were appraised at only $1,175. That Doswell and Jones acted in collusion with Waddill, as his attorneys, in procuring the order of sale, and conducting the business in court, and purchased the lands bought in by them for the joint

benefit of themselves and Waddill, and that Hyer bought for the use of Waddill, and afterwards sold his purchase to Anderson, for Waddill's benefit, who received the consideration. That the lands altogether brought only a little over $900, being over two-thirds of the appraised value. That Doswell and Jones took possession of the homestead tract after the death of the widow, notwithstanding the minority of the children, and that all the lands so bought by them have been all the time under the control and management of Waddill for the joint benefit of himself and the purchasers.

They pray that the accounts of the administrator may be restated; that the sales may be set aside and the deeds cancelled; that title may be decreed in the heirs; that an account be taken between them and Hyer, and also Doswell and Jones; that they be respectively charged with rents and profits, and credited with improvements and money paid out for the benefit of the estate, and that personal decrees be rendered against them accordingly.

There is also the general prayer for relief.

These, in substance, are the material charges, although made in detail at considerable length.

The bill is in two paragraphs, the first seeking to set aside and correct the settlements of the administrator, and the second, to cancel the sales of the land and hold the purchasers liable for rents.

Doswell & Jones, in their answers to the original and amended bills, deny specifically all the material charges in the first paragraph, made to show fraud in the settlements of the administrator, and contend that the settlements were made honestly and in good faith. With regard to the second, they admit that they were the attorneys of the administrator, Waddill, in procuring the order of sale from the Probate Court, and that they purchased at the sale, but deny

that they purchased for the benefit of the administrator, or for the use of any other than themselves. They deny all collusion with the administrator in procuring the order by fraud, if any was practiced, but say they founded the petition on the matters disclosed by the records of the court, and upon information given them by Waddill. They contend that the proceedings were in good faith throughout, and in accordance with law, and that they were *bona fide* purchasers for valuable consideration. Moreover they say;

That a part of the lands so purchased by them, to-wit: the southwest quarter of sec 24 (which includes the homestead and widow's dower) was duly assessed on the resident's list, for the taxes of 1867, and the warrant placed in the collector's hands; that he made due demand of the taxes from the administrator Waddill, and from Lax, which demand was refused; that there was no personal property of the estate upon which to levy; that on the 22d day of April, 1868, being a day of the April term, the court ordered the collector to proceed to sell residents' lands for non-payment of taxes; that demand was again made for the taxes, penalties, and costs, and again refused; that the lands were levied upon on the 8th of May following; and, due notice having been given, they were sold on the 8th of June, being the second Monday; that they were bought by one Wishow, to whom a collector's deed was executed; that by possessory action begun 19th of October, 1869, Wishow recovered the lands from the possession of Lax (the wife being dead) and sold to Doswell, and conveyed, on the 1st day of April, 1870; and that the complainants, before bringing this suit, did not file in the clerk's office an affidavit of the tender of the full amount of taxes, penalty, and costs with 100 per cent. thereon, as required by law. This defense of a tax title was set up in the answer to the original complaint, and not noticed in the amended bill filed afterwards. No

relief as to this title is sought upon either side. It is set up it seems, as matter of defense to that prayer of the bill, which seeks that the title to the lands be decreed to be in the complainants as heirs.

The defendant Hyer claims to be an innocent purchaser, and denies that Waddill has or had any interest in his purchase.

The cause was heard upon the pleadings, exhibits and evidence, and the court rendered a decree for the defendants, referring in the decree to sec. 128 of Gantt's Digest, and finding that the allegations of fraud had not been sustained by the evidence. As to other matters of complaint the court found that complainants had a complete remedy at law. The bill was dismissed for want of equity but without prejudice. Complainants appealed.

By the laws, as they existed when the accounts of the administrator were acted upon, and the order made for the sale of the land, the Courts of Probate had original, exclusive jurisdiction over those subject matters, as they still have, under the constitutional provisions of 1874. In other words, the peculiar jurisdiction of Probate Courts in the matter of the administration of estates, is now as it has ever been, since the system was established, and the decisions with regard thereto, made previous to the adoption of the constitution of 1874, apply now, save as to such proceedings as were had in the Circuit Courts, during a short period when courts of probate were abolished. Their judgments are conclusive unless corrected upon appeal, or by some proper proceeding of a supervising court. But over the judgments and orders of these courts, as of all other courts, there is an inherent power in equity, to set them aside for fraud. In the absence of fraud Chancery will not interpose for mere errors, however gross. These must be corrected on appeal. But when fraud is shown, or such a state of facts or circumstances presented as shows an irreparable injury

impending, against which a Probate Court is powerless to grant relief, the courts of equity may interpose. (*See Ringgold* v. *Stone*, 20 Ark., 526; *Stone* v. *Stilwell*, 23 Ark., 444; *Hoag et als* v. *Sparks*, 27 Ark., 594.) In all such cases the fraud, or the peculiar circumstances must be clearly shown, to the satisfaction of the court.

The case of *Ringgold* v. *Stone*, (supra) was one in which the administrator had taken possession of a large number of notes and choses in action, and made settlements running through a number of years, without charging himself with any interest collected upon the debts, or showing what interest they bore. This was held to be satisfactory proof of fraudulent intent, and the settlement was set aside. There, the misconduct was gross, and such as no honest administrator could be supposed capable of, through mere mistake or carelessness without fraudulent intent.

It does not follow that every case of omission to charge himself with interest, however small, will be proof conclusive of fraud against an administrator. It will depend upon the circumstances of the particular case.

On inspection of the accounts of Waddill it appears that the choses in action were very small in comparison with the personal property and the lands, and mostly worthless. The dates, amounts and times due, are given in the inventory. There were only four of them for the sums respectively of $90.00, $78.50, $34.00, and $190.00. He charges himself with all these on his first settlement, filed at the January term 1868, showing by a separate cash statement that he had collected the note for $190 without interest. The inventory shows that the note was due in 1861, and, in strict law, some interest must have accrued. The other notes were all credited as worthless, on the second settlement. Taking cognizance of the fact that the intervening period from 1861 to 1868 embraced the time

of the civil war, it can scarcely be imputed as fraud that the administrator failed to collect, or charge himself with interest on the only note that was paid—although it was error in the Probate Court not to have required some showing of the exact state of the facts. The proper practice would have been to charge the administrator with interest on this note from due until the time of settlement, unless he had shown an earlier collection; and then if he had shown that it could not be collected, or was remitted under circumstances which the court could approve, to give him credit. But the failure to do so is not proof of fraud.

There are other errors and irregularities, relied on as *indicia* of fraud in the settlement. Some small articles of no great value, included in the inventory and appraisement, are not accounted for. But it is sufficiently shown that they were not sold for want of bidders. The administrator was allowed a trifling excess of credit for the widow's dower in the personal property. Some of the debts are alleged to have been barred by the statutes of limitation, but that is not apparent, allowing for the time during which the statute ceased to run. Some credits were allowed for payments without vouchers, and some debts reported not duly verified, whilst some of the vouchers fail by trifling amounts to show the full sum allowed in settlement. But of all these it may be said, that they do not involve amounts sufficient to present inducements to deliberate fraud, and that all come within the jurisdiction of the Probate Court, for its consideration. To pass them was error, which would not have stood the test of an appeal. The administrator should certainly have been ruled to a stricter showing. But as he was not, every presumption must be made in favor of the court, in a proceeding like this, requiring fraud to be shown affirmatively.

It is a graver charge, that the administrator did not show

greater rents for a very valuable real estate. Up to the time of the last settlement for the years 1866-67, and '68, he seems only to have collected and charged himself with $100, when all the proof shows that he should have received a great deal more, even excluding the lands assigned to the widow as dower. There seems to have been gross inefficiency or mismanagement, to say the least. The explanation given is that up to the time of the last settlement he had not actually collected more, which appears to be true, although it is clear that he should have done so, and it further appears that after the last settlements he did collect $245 on old rents, which he did not report as outstanding assets, and which he has not accounted for since. The failure to account for what he had not then received cannot, of itself, be considered as fraudulent. There is no evidence that the administrator has been discharged, although the settlement in its caption professes to be a final one. He is still subject to the Probate Court until actually discharged by its order, and may still be held to an account for sums which have come into his hands, and have not been duly accounted for. Even, if final, his discharge would only be for so much of the fund belonging to the estate, as was found *by the settlement* to be in his hands.

Whilst therefore this court cannot approve the settlements of the administrator, or seem to sanction the loose and irregular proceedings, we cannot say that the Chancellor erred in finding no such fraud in them as to justify him in the exercise of the power of setting them aside. All errors might have been corrected on appeal.

One of the charges in the amended bill is to the effect that the intestate had at the time of his death several thousand dollars worth of horses, mules, cattle, wagons, etc., of which the administrator takes no account. The proof on this point shows that he had controlled a large amount of such property, and

had it in his possession jointly with Waddill, or mixed together, being partly the property of each, up to nearly the time of his death. They were refugees together in Texas several years before the death of intestate, in the fall of 1865, had worked a plantation together, and been engaged in making salt. They returned together with all their property to Jackson county, and some sort of division had been informally made. What remained of the property of intestate is not shown, and there is no clear and satisfactory proof that any considerable amount of the intestates property came into the administrator's hands, not shown by the inventory.

The second paragraph of the bill seeks to cancel the sales made under the order of the Probate Court, on the ground that Doswell & Jones who purchased a portion of the lands, were the attorneys of the administrator and acted in collusion with him; and that Hyer, another purchaser, bought for the use and benefit of the administrator. Hyer has since sold to an innocent purchaser who is not made a party, and against whom no relief can be had. The proceeds of the sale can be traced, partly into the hands of Waddill, but the proof fails to show clearly that, at the time Hyer purchased, Waddill had any interest, present or perspective in the sale; and the fact that a part of the purchase money was afterwards transferred to him by Hyer, may be consistent with honesty and good faith. An administrator is not precluded from ordinary business transactions with his fellow-citizens, concerning property, or its proceeds, bought at a sale which he has conducted, provided there was no express or implied understanding at the time of the purchase, that the administrator should share the benefit. Such dealings may be evidence to raise the suspicion of fraud; and, taken in connection with other circumstances, may establish it; but they are not conclusive, nor, standing alone, sufficient.

A large portion of the lands, including the home place, subject to the widow's dower, was bought by Doswell & Jones. The sales were regularly made, and no fraud is charged in the conduct of the sale itself. The appraisement was very low, but seems to have been made without collusion or undue influence. It is alleged that the proceedings for the sales were instituted and the sales made, at a time when lands were very low, and there were few or none willing to purchase, on account of the disturbed condition of the country, and the presence of the State militia. These were matters of which the Probate Court might judge, and must be classed among the unfortunate accidents of the times. Property is ever fluctuating, and the proceedings of the courts cannot be arrested to await revivals in prices. Cases and circumstances may arise, which would justify the courts in exercising a discretion to postpone proceedings, but it is difficult to imagine mere conditions of depression which would make it imperative on them to do so; or make it fraudulent in persons holding fiduciary relations to proceed in the regular discharge of their duties as prescribed by the law. The administrator follows the due course of law, and cannot be held responsible for the depression of the market.

Doswell & Jones were purchasers at the sale in good faith. There is no indication that they were influenced by any improper motives, or sought any advantages over other bidders, or had any fraudulent intent. The proof shows that they bought for themselves alone, and that the administrator had no interest in their purchase. Notwithstanding this, the question arises, whether they stood in such position with regard to the property and the administrator as, upon grounds of public policy, to be competent to purchase.

They were not the attorneys of the administrators at the time of the first settlement, nor until the application for a sale

of the lands was made to the Probate Court. They were then retained and procured the order of sale. They probably made the report in his behalf and procured the order of confirmation. They do not appear to have taken any part in the appraisement, or other preliminary matters *in pais*. One of them attended the sale and bought in fair competition with other bidders. It is not pretended that any fraudulent means were used to discourage attendance upon the sale or to suppress competition. In short, there is no proof of actual fraud, nor is there any reason to suspect that they intended anything unfair. If their purchase fails it must be on the sole ground of public policy, irrespective of any intention.

It has long been the established doctrine of equity that trustees cannot deal with trust property for their own benefit in any manner. It is plain that the admisistrator could not himself have purchased. The doctrine has been extended to all persons entrusted with the management and direction of sales, in such manner as to impose upon them the duty of taking care that the property may be sold to the best advantage for all concerned. They cannot purchase at all, however fair their intentions. As purchasers their interests would conflict with their duties, and the courts of equity, regarding the weakness of ordinary men, takes from them all temptations by rendering them incapable of purchasing at all.

This court has, very recently, applied this doctrine to the case of an attorney. After a careful examination of numerous authorities it was held to be a well settled principle that no one can be permitted to purchase an interest, when he has a duty to perform that is inconsistent with the character of a purchaser; quoting the remark of Lord Thurlow in *Hall* v. *Hallett*, 1 *Cox*, 134, that "no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure."

(See *Wright, Exr.* v. *Walker et al.*, 30 Ark., 44, and authorities cited.)

The application of the principle to this case is clear. It was the duty of the administrator to sell the lands to the best advantage. It was the duty of his attorneys to advise and aid him to that end. They were paid by the estate. Their interest as purchasers would have prompted many men in that position, to use means to depress the price. Although there is not the slightest ground to suspect that they did so, or wished to do so,yet the policy must be preserved, of forbidding persons in that position from purchasing at all. They should have been held as trustees of the estate.

As such, the purchase by Doswell of the outstanding claim of Wilson under a tax title, must inure to the benefit of the estate, subject to all proper charges in the hands of the trustee for amounts paid out, etc.

In imposing these involuntary trusts upon purchasers, not guilty of actual or intentional fraud, it has not been the custom of courts of equity, nor would it be just, to charge them in any penal manner as to rents or profits, or to deprive them of improvements, or any reasonable expenditures. They are hard cases, made necessary by policy. In this case an account must be taken under the direction of the Chancellor, of the rents and profits actually received by Doswell & Jones after they came into possession of the lands purchased at the sale, or which would have been the net result of a reasonably prudent and careful management of the property, allowing credits for the original purchase money, taxes, the amount paid Wilson for tax title, and all other reasonable expenditures including improvements. If the balance, when struck, may be in favor of Doswell & Jones, they will be entitled to a lien for the same upon the lands, if against them it should be paid to the administrator to be administered in due course under the

further directions of the Probate Court. The title to the lands subject to any lien of the said purchasers for the balance, should be divested from them, and re-vested in the complainants as heirs of the intestate, where they will be still subject to sale, by order of the Probate Court, for payment of debts, if upon further accounting it may be found necessary. Proceedings to that end should in that case commence *de novo*, so that there may be a new appraisement to meet changes in value. The sale to Hyer should be sustained.

So much of the decree as dismisses the bill as against Hyer, and as against the administrator for the purpose of declaring his settlements fraudulent is confirmed. The accounts have not been finally settled in the Probate Court, and that tribunal retains the power of compelling future settlements and charging the administrator with all amounts not heretofore passed upon. It may proceed with the administration in due course.

The relief herein indicated should have been granted against defendants Doswell & Jones. For the error in dismissing the bill as to them, the decree must be reversed, and remanded for further proceedings, in accordance with equity and this opinion.

The attorney for the appellants, on a day of this term subsequent to the delivery of the opinion, and the entry of the order remanding the cause, requested the court to modify said opinion, with a view to closing all matters before the Chancellor. He calls attention to an exhibit to the amended complaint purporting to be a copy from the records of the Probate Court, of the final order confirming the last settlement, as follows:

"September Term, 1869, (23d)
"Estate of James L. Robinson, dec'd.

"This day was presented the account current of James R

"Waddill, as administrator of the estate of James L. Robinson, "deceased, filed herein at the last April term of this court; "and no exception having been filed thereto, and the court "being sufficiently advised, it is considered that said adminis- "trator has paid off, according to law, to each of said credi- "tors their respective *pro rata* claims in obedience to the "former order of this court; and that said account is just and "correct, and that the same be in all things affirmed as prayed "for, and that said administrator be discharged and go hence; "and that all further administration on said estate cease, and "that said account current be recorded in the book of settle- "ment."

It appears, however, from the same exhibits, that at a subsequent day of the same term of the Probate Court, further proceedings in the same cause were had, and an account placed in the fourth class not included amongst those in the list of *pro rata* division. Although the bill charges that the settlement was prepared and filed "for final settlement and discharge of said Waddill as administrator thereof," and that it was thereafter re-examined and confirmed, it does not set forth the actual order discharging the administrator from all further proceedings with regard to the estate. The exhibits referred to are not certified copies; and no point being made upon this discharge, the case was treated in the opinion as if the administrator were still amenable to the orders of the Probate Court. In deference to the motion of appellant's attorney, and to settle a practice which has fallen into confusion, this supplemental opinion is filed.

The proceedings in the Probate Courts are not formal, and are not to be construed with a rigid regard to technical rules. It is sufficient, if it can be understood from their records what was meant, and the thing meant be within their powers. It may be fairly implied from the subsequent proceedings after

the attempt to discharge the administrator and cause the administration to cease, that the court was satisfied the order had been prematurely made, and meant to set it aside. This construction is necessary to sustain its action, which would in other respects be illegal in two respects. One in entirely renouncing its jurisdiction over an estate, and the other in proceeding with an estate after discharging the administrator and ordering the administration to cease. It was all done at the same term, whilst the matter was in control of the court; and this construction of the effect of the subsequent proceedings seems most consonant with reason, and that indulgence to the proceedings of the Probate Courts which their organization requires, being generally under the control of plain business men, who are not required by the Constitution to be learned in the law.

A discharge of an administrator applies only to matters appearing in his settlements, and does not otherwise relieve him or his sureties of liability for moneys or property received and not reported, nor the effects coming into his hands after his settlement was filed. For these he must be called afterwards to account, and the Probate Court is the original and appropriate forum for this purpose, unless there be some peculiar grounds for chancery jurisdiction; so the statute provides with regard to shares going to heirs or legatees; and the reason applies *a fortiori* to creditors whose debts have been allowed and classed. (*Gantt's Dig.*, sec. 165.) If an administrator should desire to withdraw and be relieved from further duties with regard to the estate; or if, for cause, he should be removed, there are proceedings appropriate to that end, which should be resorted to, and an administrator *de bonis non* appointed. *Ib.*, *secs.* 40–45.

In the final settlement filed April 23, 1869, the administrator prays that upon payment of their *pro rata* interests to the

creditors, as indicated in the statement of the debts, "he may be discharged," etc. This the court should have understood to apply to the matters in the settlement. The court had no grounds to release the administrator from all further duties, and no right to renounce its jurisdiction over the administration and order it to cease. The order is effective to discharge the administrator from liability upon all matters passed upon in his settlement, and no further. By the subsequent proceedings it is evident that the court so understood it. However that may be, it is the opinion of this court that such is the legal effect of the proceedings, and that the administrator may be held for further settlements in the Probate Court.

The opinion needs no modification as to its directions. The principles which should govern the Chancellor in further proceedings, have been recently gone over, and this court has endeavored to make them clear in the case of *Reinhardt* v. *Gartrell*, decided at the present term.

There appear to be unpaid creditors, and rents seem to have been paid to the administrator not included in his settlement. The lands, upon cancellation of the sale to Doswell & Jones, become assets in the hands of the administrator for the payment of the debts, although the legal title has descended to the heirs.

Proceedings under the statute are necessary to sell them, unless sufficient assets to pay the debts be found in the hands of the administrator.

These and such further proceedings as may be necessary to a complete settlement of all the business of the estate, belong to the original exclusive jurisdiction of the Probate Courts.

The settlement with Doswell and Jones will be conducted under the orders of the Chancery Court.

ABBOTT v. ROWAN.

33 593
59 634
33 593
74 351

PLEADING: *Exhibits—Effect of*

The Civil Code [sec. 4599, *Gannt's Dig.*] requires a pleader to make a bond, bill, note, or other writing which is evidence of indebtedness *and the foundation of the action*, "a part of the complaint," by filing it; and on demurrer it may be considered as part of the record. When the action is not *founded upon* the instrument as evidence of indebtedness, but the instrument is merely relied upon, it must still be filed [sec. 4,600] but the plaintiff has no right by reference, to make it *part of the pleading*, and it cannot be noticed on demurrer further than to explain allegations—not to supply or contradict them.

SAME: *Reply.*

A reply filed when none is authorized by the code should be stricken from the files.

BANKRUPTCY: *Damages for breach of covenant, provable in*

Damages for breach of coverants are provable against the estate of a bankrupt.

VENDOR AND VENDEE: *Covenant of warranty. etc., when broken.*

Where a grantor conveys by deed with covenant of seizin, land which belongs to the government or to a stranger in possession, the covenant is broken as soon as made, and the grantee may sue at once for damages for the breach. But upon a covenant of warranty, where any thing passes to the vendee, no action can arise until eviction or its equivalent.

As to a vendee's rights under a covenant of warranty where no title passes, nor possession taken of land held adversely, *quere.*

APPEAL from *Arkansas* Circuit Court.

Hon. J. A. WILLIAMS, Circuit Judge.

Pindalls for appellant.

Gibson & Pinnell, contra.

EAKIN, J.:

Rowan sued Abbott at law, for breach of covenants in two deeds, conveying certain lands to the former, with the usual covenants of seizin, freedom from incumbrances, and warranty of title.

The complaint freely indulges in all the latitude given by the code. It does not set forth the covenants either in the same

words, or substantially, but simply alleges the purchase, and that the lands were conveyed to him "by deed of warranty" and makes the deeds part of the complaint. The consideration is set forth, and the breach alleged is this, that the lands were at the time, the property of the United States, being unimproved, and in the actual possession of neither party; that they were afterwards taken up by valid homestead entries of other parties under the laws of Congress. There were other charges of false and fraudulent representations as to title, inducing the purchase. The complainant claimed his purchase money with interest.

Defendant moved the court to compel complainant to make the complaint more definite and certain, because:

1st. It did not show whether plaintiff relied on the covenants or the false representations:

2d. It did not show disseizin of complainant, as to when, by whom, and in what manner it was done, whether by judgment of a legal court, or by compromise or collusion, and

3d It did not show with sufficient certainty, facts and circumstances to give cause of action.

Whereupon, as the record shows, the complainant declared in open court that he elected to "stand on the covenant of warranty in said deed," and dismiss all claim on the false representations and deceit. This was taken down by the clerk and thereupon the defendant's motion to make the complaint more certain and definite was dismissed.

Complainant then filed an amended complaint expressive of his intention; and without setting out the covenants says, that "he relies entirely upon the warranty in the deeds *made part of the original complaint* and that he does not intend for this suit to be in the nature of an action on the case, but in the nature of covenant, and only asks that he may have judgment

against defendant for the amount of money he paid" and interest.

Being thus advised, by reference to the old familiar forms of action, of what the plaintiff meant, and being directed to sources of further information, to-wit: the deeds filed, the defendant might have ascertained, as he doubtless did, that in the deeds, which are alike, he had used the statutory words of covenant "grant, bargain, sell and convey," and had specially covenanted that he was lawfully seized of the lands in fee simple; that they were free of incumbrances, and that he had bound himself to warrant and defend the title against the lawful claims of all persons whatsoever. There might have been some uncertainty in his mind perhaps as to *which* of the warranties the plaintiff relied upon, but he answered and thereby waived all further objections.

These proceedings are strongly suggestive of the primitive days, when all altercations before the court, between suitors and defendants, were *ore tenus*, and taken down in the third person by the clerk. They made an issue, however, with tolerable precision, deriving their certainty chiefly from the reference to the old common forms of action—now abolished. The Civil Code (see Sec. 4599 *Gantt's Digest*) requires a pleader to make a bond, bill, note, or other writing which is evidence of indebtedness, and the foundation of the action "a part of the complaint" by filing it. In such cases, upon demurrer, the court may consider the paper filed as part of the record. It has been considered loose practice, however, to plead in this way, and upon the motion to make more definite, the court should have ruled the plaintiff to set forth in the body of the complaint, in a clear succinct manner, everything necessary to make his cause of action complete. The failure to do so was not error, however, and, if it were, it is cured by the answer. It is in the power, and is the duty of the courts,

to educe from the code and settle by practice, new forms of pleading in accordance with its genuine spirit. But this falls within their discretion.

An important distinction is to be noted in passing. (Ib., 4600.) When the action is not *founded upon* the instrument, as evidence of indebtedness, but when the instrument is merely relied upon, it must still be filed; but the plaintiff has no right, by reference, to make it a *part of the pleading*, and it cannot be noticed on demurrer any further than to explain allegations—not to supply them, nor should it be noticed, on demurrer, to contradict them even, since, in such cases, the instruments are essentially *evidence* and no part of the pleading. In the first class of cases the filing and making them a part of the pleading, places them in the position they would have had at common law if heard to be read in response to a prayer of oyer. In the latter class they are simply required to be filed for information to the court and suitors in advance.

In this case the written covenants are the foundation of the action to recover money, and might, at common law, have been the subject of oyer. The allegation is that plaintiff purchased by warranty deed. The court could understand that there were some covenants in the deed to warrant and defend the title, and the deeds themselves, made part of the pleadings, might supply more definite information. Orderly pleading, and the dispatch of business will, in general, however, be promoted by requiring the complainant, upon motion for rule, to insert in the body of his complaint, as at common law, all that is necessary to show his cause of action, and not drive a defendant to search voluminous documents or obtain explanations of record, before he can be well advised of what he must answer. Thus only by wise and prudent co-operation on the part of the Circuit Courts with the spirit and purpose of the new procedure, can the experiment be fairly tried of remodel-

ing the formal modes of arriving at issues of law and fact, and crystalizing into the practice new forms embracing only matters of substance, and better adapted to modern convenience, but insisting upon that much. This effort is due from the judiciary to the legislative department, and if, after all, it may be found best to return to the old forms of action, divested of excrescences and absurdities, the Legislature may be trusted to perform the work. Until that is done, this court will not interfere with the discretion of the Circuit Courts within the latitude which the Code allows, especially where the defendant has answered and gone to trial on the merits.

The answer admits the execution of the deeds, but denies that the consideration was paid in full, or that the lands then belonged to the United States. By way of further defense, defendant says that he was duly declared a bankrupt on the 13th day of October, 1868, and discharged on the 23d of July, 1869.

It appears that the deeds were executed respectively on the 31st of August, 1861, and 7th of March, 1863.

The plaintiff filed a reply, which not being authorized by the Code, should have been stricken from the files.

The cause was submitted to the court, sitting as a jury, which found for the plaintiff, and rendered judgment for the sum of $1,474.36. There was a motion for a new trial overruled: bill of exceptions, and appeal granted.

The evidence showed that at the time of the execution of the deeds, the title to the property was in the United States, and that neither party had ever taken or attempted to take possession. At the time of the suit a part had been entered by a third party under the laws of the United States, as a homestead, and was in his possession. Pending the suit the balance had been entered and occupied by still another party.

The covenants for seizin and against incumbrances, (if the

latter was broken at all) were broken at the time of the conveyance, and damages might have been proven in bankruptcy. The remedy on them was clearly barred.

With regard to the covenant to warrant and defend the title, it was personal between covenantor and covenantee. It might have run with the land if any land, or interest in land or seizin of land, had passed by the deed upon which it could attach. There being none, no lawful possession could have been taken, and as held by this court in *Hendricks* v. *Kezee et als.*, there was nothing to defend; and there could be really no eviction. Where anything passes to the vendee, there must be eviction or its equivalent, before an action can arise on a covenant of warranty. Where no title passes, nor possession is taken of lands held by a stranger, there have been two lines of decisions totally at variance and antagonistic to each other, with regard to the rights of a covenantee under a covenant of warranty.

In some it is held that as there never was possession, nor could not be without trespass (which the law would neither require nor sanction), there could never be eviction, or its equivalent, and that no cause of action could arise on the warranty at all; but that a purchaser must protect himself by taking covenants of seizin and right to convey, and against incumbrances, or be helpless, except perhaps, by action for money paid without consideration.

In other cases it has been held that the scope of a warranty of title is more extensive than a mere obligation to defend against eviction, or make compensation in damages. That it implies that there is such a title existing as the deed pretends to convey, so far, at least, as to absolve the covenantee from the necessity of first entering and then yielding to title paramount, which latter course would be equivalent to eviction, and that an action would lie at once. The matter is very ably

discussed, and the authorities upon both sides collected in a recent case before the Commission of Appeals of New York (65 N. Y. Rep., 499, *Shuttuck* v. *Lamb.*) In this case a dissenting opinion was delivered by Commissioner Dwight in support of the first view above mentioned. It was an action upon covenants for quiet enjoyment, and to warrant and defend the title, which covenants are essentially the same. (*See Raule on Covenants for Title*, *p.* 215, and cases in note.) The court held that if the covenantee is kept out by superior title, it is equivalent to an eviction, and gives effect to the covenant.

These two lines lead to different poles, totally at variance. In the first view there is no cause of action at all upon the covenants. In the second a cause of action arose at once, without any eviction, and in the latter case the time of discovery of the paramount title is not important.

In the case of lands held by the United States, it may be remarked that the reason of the general rule requiring eviction before suit on warranty does not apply. Ordinarily, if one be not evicted by title paramount, his possession will ripen into a title, and until eviction, *non constat* that he will lose it. But in the case of government lands, there can never be such adverse possession as will give title. Which ever line of decisions may be the better founded, either will apply more strongly to the case of lands held by the United States than to that of lands held by title paramount in the hands of a third party.

Without further discussion of a point which does not require a decision in this case, it suffices to say that in either view of the effect of the warranty, this action could not be maintained upon that.

If the former line of decisions be correct, there never was any cause of action on the warranty. If the latter be better founded, the cause of action arose at the time of the execution

of the deeds, and like the covenant for seizin, is barred. The same reasoning applies to the statutory covenants embraced in the words "grant, bargain and sell."

It is unnecessary to notice divers other grounds of error alleged to have been committed. They all depend upon the principles above discussed, and stand or fall accordingly.

The court, for the reasons above indicated, erred in finding for the complainant, and rendering judgment in his favor.

Reverse the judgment, and remand the cause for a new trial, and other proceedings consistent with law and this opinion.

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JOHNSON V. GODDEN, ADMR., ET AL.

GAMING ACT: *Burden of proof under*

One who pleads the gaming act in defense against a note and mortgage fair on their face, must prove the defense by clear and strong proof.

DEED: *Acknowledgment—What necessary in*

An acknowledgment by a grantor that he executed the deed, or mortgage, *for the purposes therein expressed* is not sufficient. The word "*consideration*" required by the statute, is material, and if omitted and no other word of similar import is substituted in the acknowledgment, it is fatal.

VENDOR'S LIEN: *Waived by taking mortgage*

When a vendee of land by title bond resells to his vendor and restores to him the bond and possession of the land, he has an equitable lien on the land for the purchase money, but he waives it if he takes a mortgage for it.

APPEAL from *Arkansas* Circuit Court, in Chancery.
Hon. J. A. WILLIAMS, Judge.
Johnson & Dooley for appellant.
Pindalls, contra.

ENGLISH, C. J.:

This was a bill to foreclose a mortgage, etc., brought in the Circuit Court of Arkansas county, by Charles C. Godden, ad-

ministrator with the will annexed, of Luther F. Frazier, deceased, against William R. Hagler and wife, Caroline, and Edward Johnson.

The material allegations of the bill as amended, are, that on the 31st day of December, 1860, William R. Hagler sold to Luther F. Frazier, the southwest quarter of section 34 T. 4. S. R. 3 W., except five acres in the southwest corner of the tract, for $2,500, of which Frazier paid $1,200 in cash, and gave Hagler two notes for balance of purchase money, one for $500, payable 25th of August, 1861, and the other for $800, payable 1st of April, 1862; and Hagler executed to Frazier a bond to make to him a title on the payment of the two notes, a copy of which is exhibted.

That on the 22d of January, 1862, after Frazier had about paid said notes, he sold said lands back to Hagler for $2,556, payable in five years, took his note for the purchase money, and a mortgage on the land to secure it, and surrendered to him his bond for title, and put him in possession of the land. The note and mortgage with certificates of acknowledgment and registration are made exhibits.

That after Frazier resold the land to Hagler, took said note and mortgage, and put him in possession of the land, he removed to the State of Senoloa, Mexico, and died in 1864, having made a will which was there duly probated.

That on the 10th of March, 1869, complainant Godden was appointed administrator with the will annexed, by the Probate Court of Arkansas county, of Frazier, and duly qualified as such.

That Hagler had paid nothing on the note, and the mortgage remained in force.

That in the year 1865, Hagler being largely in debt, for a pretended consideration conveyed said tract of land (with other lands then owned by him) to one Thomas Quinn. That in

making said pretended sale and conveyance, he combined with said Quinn, defendant Edward Johnson and others, to defraud his creditors; and in furtherance of this design, Quinn, for a nominal consideration, conveyed said land to Johnson, and he conveyed half of the land to Hagler's wife, Caroline. That Quinn paid Hagler nothing for the land, and that neither Hagler nor his wife paid Johnson any consideration for the half of the land conveyed by him to the wife.

Prayer for decree against Hagler for the amount of the note, principal and interest, secured by the mortgage of the land, that the debt be declared to be a lien on the land, and that the mortgage be foreclosed, and the land sold to satisfy the decree, etc., and for other relief, etc.

JOHNSON answered the bill. He admits the execution of the note and mortgage by Hagler, but denies that the mortgage and certificate of acknowledgment are sufficient to defeat his rights, etc.

Avers that the note and mortgage were in part for money won by Frazier of Hagler at the gaming table—that they were for a gambling consideration, etc.

Denies all fraud, collusion or confederation with Hagler and wife, or others, to defraud the creditors of Hagler. Denies that he purchased the lands of Quinn, although the deed was executed to him by Quinn. Avers that he purchased the land of one McEwen, who had advanced money to Quinn to enable him to pay Hagler for the land, and that Quinn purchased the land of Hagler nearly eighteen months before respondent purchased it, and was in possession of it, receiving the rents and profits when respondent purchased. That he purchased the land in good faith and for a valuable consideration, knowing at the time that Frazier had won the amount of the note of Hagler, and that the note and mortgage were executed for a gambling consideration.

The appearance of Hagler and wife was entered by an attorney claiming to represent them, and a decree *pro confesso* rendered against them. Afterwards, the decree was set aside on their motion, and a showing that process had not been served upon them, and that they had not authorized their appearance to be entered.

HAGLER answered the bill. He admits that he executed the note and mortgage to Frazier, but avers that part of the consideration thereof was for money won of him by Frazier at gaming.

Denies all fraud or collusion with Quinn, Johnson and Mrs. Hagler to defeat or defraud his creditors. Denies that he ever sold the land to Johnson, or that he knew any thing of the sale until some time after it was made.

Admits that he was considerably in debt, but denies that he sold the land to Quinn for a pretended consideration, and avers the truth to be that he sold to him for a valuable consideration.

A subpœna was issued for Mrs. Hagler, and returned by the sheriff served by leaving a copy with her husband. An alias was issued, upon which a like return was made. She did not answer.

The cause was submitted on the pleadings and exhibits, and the depositions of witnesses on file, and the court found, *first:* that there was no consideration from Quinn to Hagler for the deed executed by Hagler and wife to Quinn for the tract of land in controversy, and that the deed was void. *Second*, that the consideration from Frazier to Hagler for "said land, was good and valid," wherefore the court found the issues in the cause for complainant.

The court decreed that the deed from Hagler and wife to Quinn be canceled and held for naught; that complainant recover of Hagler the amount of the principal and interest due

upon the note, and declared the same to be a lien upon the land in controversy; that the mortgage be foreclosed, and condemned the land to be sold by a commissioner to satisfy the decree, etc.

Johnson excepted to the decree and appealed to this court. Hagler did not appeal, and as to him the decree must stand.

1. "All judgments, conveyances, bonds, bills, notes, securities and contracts, where the consideration, or any part thereof is money or property won at any game, or gambling device, or any bet or wager whatever, or for money or property lent to be bet at any gaming or gambling device, or at any sport or pastime whatever, shall be void." *Gantt's Dig.*, Sec. 2987.

The note secured by and described in the mortgage follows:

"$2,556.00. On or before the 22d day of January, 1867, (five years from date), I promise to pay to Luther F. Frazier, or order, the sum of twenty-five hundred and fifty-six dollars, for the S. W. quarter of section 34, township 4 S. range, 3 W., in the county of Arkansas, State of Arkansas, except five acres in the S. W. corner of said quarter. Witness, my hand and seal, this 22d day of January, A. D. 1862.

"Witness: "W. R. HAGLER, [seal.]"

Jos. H. MAXWELL."

The note being fair on its face, and the mortgage upon the land described in the note being in the usual form and duly executed, the burthen of proving that part of the consideration of the note and mortgage was for money won by Frazier of Hagler at gaming, was upon appellant, who claimed part of the mortgaged premises under the mortgagor, and pleaded the gaming act. He was obliged to establish the defense by clear and strong proof. 1 *Jones on Mortgages*, *Secs.* 622, 644.

It was proven that Frazier, while he lived about DeWitt, near which the land in controversy is situated, was a profes-

sional gambler, and that he and Hagler frequently played poker, and that he was an overmatch for Hagler, who seems to have had a passion for gaming, though not of that profession.

Hagler, whose deposition was taken for the defense, is the only witness who swore directly, positively and accurately that part of the consideration of the note and mortgage was for money won of him by Frazier at gaming.

He swears that when he purehased the land in controversy back from Frazier they had a final settlement; that Frazier had paid him on the land, a negro woman at $800, in money $200, and that he allowed Frazier for improvements made by him on the place $600, making in all $1,800; that he owed Frazier $756 for money won of him by Frazier at poker, and that this sum was included in the note, which, added to the $1,800, made $2,556, the amount of the note, and the mortgage on the land was given to secure it.

His deposition was taken on the 5th day of March, 1873,

By Sec. 22, Art. VII. of the Constitution of 1868, then in force, it was provided that: "In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, or intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This provision was continued in force by the schedule of the present Constitution, Sec. 2, subject to amendment or repeal by the Legislature.

Here, without being called by the administrator of Frazier, or required to testify by the court, Hagler testified on his own behalf, directly to a transaction between himself and Frazier, material to the issue, when Frazier was dead and no longer

able to speak for himself. He sought to destroy a solemn instrument executed by himself to Frazier when living, and expressed on its face to be for purchase money of land, by swearing that there was included in the instrument a sum of money won of him by Frazier at a game of cards.

We suppose the court below in making up its finding upon the gaming issue, did not attach any weight to the above portion of Hagler's deposition, and we shall certainly not reverse the decree on this issue, so far as it affects appellant, who claims the benefit of the same defense by regarding Hagler's statement as true, and making it counterbalance other evidence in conflict with it.

There were other depositions vaguely tending to prove that the note was to some extent tainted with a gaming consideration, but the widow, a married daughter and a son of Frazier, who lived with him on the land in controversy at the time he resold it to Hagler, positively deposed that Hagler agreed to pay Frazier $2,500 for the land, and $56 for corn, fodder and household furniture, and that the note was made for the two sums. It was proven that the daughter and son were but children from nine to eleven years old when the transaction occurred, but they were not otherwise impeached, nor were they cross-examined as to the sources of their knowledge.

Upon the whole we find no such preponderance in favor of the defense, on the gaming issue, as to warrant us in reversing the finding of the Chancellor.

2. The mortgage was recorded 23d January, 1862, the day after its execution, upon a defective acknowledgment.

The certificate of acknowledgment taken before the clerk of the Circuit Court of Arkansas county, is as follows:

"Personally appeared before me, Joseph Maxwell, clerk, etc., etc., William R. Hagler, the grantor in the foregoing mortgage, who, being personally well known to me, acknowl-

edged that he signed, sealed and delivered the foregoing instrument as his own act and deed, and *for the purposes therein expressed.*

"In testimony whereof," etc.

In order to admit the mortgage to record the certificate should have shown that the grantor acknowledged that he had executed the same "for the *consideration* and purposes therein mentioned and set forth." *Gantt's Digest*, Secs. 846, 4287.

In the above certificate the material word "*consideration*" is omitted, and no other word of similar import is used, and the omission is fatal, as indicated in the case of *Blackburn et al.* v. *Randolph et al.*, M. S., where there was a like omission. See also *Little, trustee*, v. *Dodge, guardian, etc.*, 32 Ark., 458, and previous cases cited.

The mortgage, though good between mortgagor and mortgagee, was not a valid lien upon the lands as against subsequent purchasers, etc., because not legally recorded. *Jarratt et al.* v. *McDaniel et al.*, 32 Ark., 602, and previous cases cited.

When Hagler sold the land to Frazier he retained the legal title, and by means of the bond for title conveyed to him an equitable title. When Frazier resold the land to Hagler, took his note for purchase money and put him in possession, had he done nothing more he would have had an equitable lien upon the land for the purchase money, which would have been valid against any person subsequently purchasing the land of Hagler with notice. But by taking the mortgage from Hagler upon the land to secure the payment of the note, he waived his equitable lien, and had to rely upon the mortgage; and failing to procure the mortgage to be properly acknowledged and legally recorded, it was no lien against a subsequent purchaser. *Neal* v. *Speigle*, M. S.

The deed from Hagler and wife to Quinn is not in the transcript, though it must have been before the court below at the

hearing, for the decree recites that it bore date on the 3d day of November, 1875, and the court found that it was executed without consideration, and held that it was void, not only as to Quinn but as to other persons claiming through or under the deed.

On this branch of the case Hagler testified as follows:

"Edward Johnson has made a deed to one-half of the place to my wife, Caroline. The consideration was understood between Quinn and myself, and also by Johnson and myself. Johnson only complied with the contract between Quinn and myself. When I made the deed to Quinn for the land in controversy, it was the express agreement and understanding that Quinn was to deed one-half of the land back to my wife. I did not pay Johnson, nor did my wife pay him anything for one-half of the land. Johnson, in making the deed to my wife, was only complying with the agreement entered into between Quinn and myself. I came to DeWitt to bring suit against Johnson for the land when he deeded my wife one-half of the land as a compromise. The contract between Quinn and myself was that he was to pay the taxes on all of the lands mentioned in the deed from myself to him for three years. He never made me a deed back for the lands as he agreed. He drew a pistol on me, and told me I could help myself. It was after Johnson bought the land that Quinn told me I could help myself. Next week after this Quinn was killed. I did receive a consideration for the lands—that is, Quinn agreed to pay the taxes on the lands, and I consider that a consideration. I did not receive any money in hand for the land. When I received the deed from Johnson I considered it a consideration, and the agreed consideration for the land and a compliance with the contract between Quinn and myself."

We understand from this confused statement that Hagler conveyed to Quinn the tract of land covered by the mortgage,

and other lands, upon the consideration that Quinn was to pay the taxes upon all of the lands embraced in the deed, for three years, and re-convey to Mrs. Hagler one-half of the lands; that Quinn, without making the promised conveyance to Mrs. Hagler, sold and conveyed the lands to Johnson, who, in compliance with Quinn's agreement, conveyed half of the lands to Mrs. Hagler.

It appears that at the hearing of the cause Johnson read in evidence a deed from Quinn and wife to him bearing date 18th November, 1866, which, with the certificates of acknowledgment and registration, is copied in the transcript.

By this deed the grantors, in consideration of 2,000 pounds of lint cotton to be delivered to them at DeWitt by Johnson, on or before the 1st of January, 1868, bargained, sold, released and quit-claimed to Johnson all their right, title and interest in and to the tract of land described in the mortgage; and also lots two and three in the S. E. corner of S. E. quarter of section 33, T. 4, S. R. 3 W., warranting only against persons claiming through the grantors.

It must be borne in mind that this is not a creditor's bill—not a bill to set aside conveyances made to hinder, delay or defraud a creditor, and to subject property thus conveyed to the satisfaction of a judgment or decree of the creditor. (*Murry* v. *Anthony*, 11 Ark., 441; *Williams* v. *Bizzell et al.*, Ib., 716), but it is a bill to foreclose a mortgage, in which the complainant asserts that the mortgage is a lien upon the land covered by it prior and superior to the title of the subsequent purchasers, who are made defendants, and prays a decree against the mortgagor for his debt, and that the land may be condemned to be sold to satisfy the decree.

If the mortgage had been properly acknowledged and recorded, it would have been a valid lien upon the land, and good against all persons subsequently purchasing from or

under the mortgagor, regardless of the considerations of their deeds. But the mortgage was not legally put upon record, and was valid only between the parties, and was not a lien as against any subsequent purchaser.

This not being a creditor's bill, it is not necessary to inquire or to decide whether the deed from Hagler to Quinn was made without consideration and for the purpose of defrauding Hagler's creditors, and whether the deed from Quinn to Johnson was infected with the same fraud.

It is alleged in the bill that Johnson had conveyed one-half of the land in controversy to Mrs. Hagler. This allegation Johnson does not deny; he denies only the fraud charged against him by the bill. It was also proven by the deposition of Hagler that Johnson had conveyed one-half of the land to Mrs. Hagler. What her rights may be we have no occasion to inquire in this appeal. She did not answer the bill, nor appeal from the decree; nor need we decide whether she is bound by the decree upon the facts disclosed by the record. Whether Johnson conveyed to her a particular half, or only an undivided half of the tract of land in controversy, does not appear. The answers, as well as Hagler's deposition, are loose and inaccurate.

The decree of the court below must be so modified as to exclude from the foreclosure, condemnation and sale, the one-half of the land owned and claimed by Johnson, and in other respects the decree must stand as rendered below.

BERLIN v. CANTRELL.

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PARTIES TO ACTION: *Married Women.*

A married woman may sue and interplead alone, for her separate property.

WITNESS: *Husband and wife, when competent.*

A married woman interpleading for property seized as her husbands in an action of replevin against him, is a competent witness for herself on the trial of the interplea, but her husband is not.

MARRIED WOMEN: *Schedule of separate property.*

The filing a schedule by a *femme sole* of her separate property, does not affect the common law marital rights of her after acquired husband in the property. The statute provides for scheduling by *married* women.

SAME: ——————

Property for which the scheduled property of a married woman has been exchanged, belongs to her husband unless scheduled. The schedule protects no property not mentioned in it.

APPEAL from *Jefferson* Circuit Court,
Hon. J. A. WILLIAMS, Circuit Judge.
N. T. White for appellant.
F. B. Martin, contra.

ENGLISH, C. J.:

On the 12th of January, 1876, Meyer Berlin brought an action of replevin in the Circuit Court of Jefferson county, against Henry Cantrell, for one two-horse wagon, one single horse wagon, one black mare mule, one black horse, two hundred bushels of corn, and two thousand pounds of seed cotton.

The plaintiff claimed title to the property by virtue of a mortgage with power of sale, executed to him by defendant on the 16th of April, 1865, to secure the sum of $300 for goods, wares, merchandize and supplies furnished and to be furnished defendant by plaintiff during the year 1875; the debt to be paid on or before the 1st of November of that year, and on default, plaintiff to take possession of the property and sell it, etc.

Upon complaint and affidavit, a writ of replevin was issued, and, on the execution of a bond by the plaintiff, the sheriff seized the property sued for, whereupon Ann Cantrell claimed the black horse, the one-horse spring wagon, and the two thousand pounds of seed cotton described in the complaint and writ, and delivered to the sheriff the following affidavit:

"In the Circuit Court of Jefferson county.

Meyer Berlin, plaintiff, v. Henry Cantrell, defendant.

Ann Cantrell says under oath that the black horse and one-horse spring wagon and two thousand pounds of seed cotton taken by the sheriff herein are her property, that she has the legal title to said property, and is entitled to the immediate possession of the same. Whereupon she asks that the claim be investigated and such judgment rendered as will be just and equitable.

ANN CANTRELL."

Sworn to before a justice of the peace.

Thereupon the plaintiff executed a bond of indemnity to the sheriff, and the sheriff delivered to him the property claimed, as well as the other property sued for, and returned the affidavit with the writ, etc.

At the return term, the plaintiff filed the following answer to the affidavit, treating it as an interplea:

"Comes the plaintiff, and for answer to the interplea filed herein, says that said interpleader, Ann Cantrell, is now and was before the institution of this suit the lawful wife of the defendant, Henry Cantrell, and as such has no legal capacity to sue in her own name, wherefore he prays said interplea be abated, and for general relief."

To this plea in abatement, the interpleader entered a demurrer in short, and the court sustained the demurrer.

Whereupon plaintiff filed a further answer to the affidavit of the interpleader, alleging: "That the said Ann Cantrell is

now, and was before the institution of this suit, the wife of the defendant, Henry Cantrell, and that said Ann Cantrell has never scheduled the said property mentioned in the mortgage from said defendant to plaintiff, and the same is not her separate property. Wherefore he prays judgment for said property against said interpleader."

The case was submitted to a jury at the May term, 1877, and a verdict was rendered in favor of the interpleader for the black horse and spring wagon, and in favor of plaintiff for the two thousand pounds of seed cotton.

Plaintiff moved for a new trial, which was overruled, and judgment rendered against him, in favor of the interpleader, for the horse and wagon, and if not delivered, their value, which was found by the jury to be $80, and the plaintiff took a bill of exceptions and appealed to this court.

1. The court did not err in sustaining the demurrer of appellee to the plea in abatement of appellant. A married woman may sue alone for her separate property. *Gantt's Dig.*, *sec.* 4487, 4144: *Countz* v. *Marklin*, 30 Ark., 23: *Trieber and wife* v. *Stover & Co.*, Ib., 731. Appellee claiming as her separate property the horse and wagon seized by the sheriff under the writ of replevin against her husband, had the right, under the replevin statute, to claim them, as she did, by affidavit delivered to the sheriff, and the sheriff, as directed by the statute, returned the affidavit, with the writ, into court. *Gantt's Dig.*, *sec.* 5044. She might, without joining her husband, have sued the sheriff and the plaintiff in the replevin suit for the horse and wagon, claiming them as her separte property (*Hurshy* v. *Clarksville Institute*, 15 Ark., 128) but she thought proper to interplead for them in the replevin suit, and her interplea was in the nature of a cross-suit for the property. If she could sue alone for the property, she could certainly interplead alone for it.

After the writ and affidavit were returned into court, the better practice would have been for the claimant of the property to file a formal interplea, asserting her right to the property, but the appellant treated her affidavit as an interplea, and pleaded to it, and it was in writing, embodied sufficient matter to make up an issue upon, and support a verdict and judgment. *Neal* v. *Newland*, 4 Ark., 459.

II. It appears from the bill of exceptions that on the trial of the issue to the interplea, appellee was sworn as a witness on her own behalf, and the court ruled her competent against the objection of appellant.

This was not a trial in the main replevin suit between appellant, the plaintiff therein, and her husband, the defendant in the suit. On a trial in the main suit, she would not have been a competent witness for or against her husband. *Collins* v. *Mack*, 31 Ark., 685. But the interplea was her suit, in which, in legal effect, she was plaintiff, and claiming the property interpleaded for adversely to both appellant and her husband, and she was a competent witness for herself on the trial of her own suit. *Ib., and schedule to present Constitution Sec. 2; Gantt's Dig., 248-2-3.*

III. As to scheduling the wife's property.

Appellee testified, in substance, that she was married to Henry Cantrell, defendant in the replevin suit, in the year 1872. That she was formerly the wife of Robert White, who died in the year 1870. That at the time of his death she was the owner of a bay mare and a bay colt, and after his death, on the 23d of December, 1871, she filed in the office of the recorder of Jefferson county, a schedule, claiming the mare and colt as her own individual property. Here a certified transcript of the schedule was produced and read to the jury, against the objection of appellant, which follows:

STATE OF ARKANSAS, }
County of Jefferson. } ss.

Schedule of the separate property of Ann White (colored,) of said county and State, described as follows:

One bay mare about twelve hands high, and about five years old. One horse colt about two years old, bay color, ten hands high.

I, Ann White, do solemnly swear that the property mentioned above is my own separate property, and that the same was purchased with money which was acquired by my own industry and labor, and that said property, nor any part thereof, is subject to the debts of my late husband, Robert White, now deceased, nor the property of his estate; so help me God.

ANN WHITE."

Sworn to before the clerk, and filed and recorded 23d day of December, 1871.

She further testified that some time in the spring of 1873, her then husband, Henry Cantrell, at her request, and as her agent, traded the bay mare described in the schedule, for the black horse claimed in her interplea. That the trade was made for her.

That some time in the fall of the year 1873, her husband (Cantrell) traded the colt, described in the schedule, to some man in Pine Bluff, for the spring wagon claimed in the interplea. She directed him to trade the colt for a wagon, but was not present when the trade was made. He gave the colt and $30 for the wagon; she gave him the money to pay the difference; it was her money, and she did not obtain it from him.

After giving the history of the cultivation and gathering of the cotton claimed by her, but which it is not necessary to state, inasmuch as the verdict was in favor of appellant for the cotton, she further testified:

That she did not know that her husband had mortgaged her

black horse and spring wagon until some time in the summer of the year 1875, and as soon as she found it out, she made a fuss with him about it, and he afterwards informed her it was all right. She lived with her husband during the years 1874 and 1875, and knew he was trading with appellant, but she bought nothing from him herself. None of the property mentioned and described in the interplea was ever scheduled by her.

On the scheduling feature of the case, the court, on motion of appellee, and against the objection of appellant, instructed the jury as follows.

(2.) "If the jury believe from the evidence that Ann Cantrell was formally Ann White, and that while she was Ann White she owned other property, which she had scheduled and recorded as her separate property, and that after she married Henry Cantrell, she either in person or by and through an agent, swapped it for other property, or sold it and invested the money received therefor in other property, it was not necessary for her to have the last mentioned property scheduled, and recorded in order to vest title thereto in her."

(3.) "If Henry Cantrell executed a mortgage to the property in controversy when he had no title thereto, the owner of the property is in no way bound thereby, and such mortgage does not in any manner preclude the owner from asserting her right thereto."

On the same subject appellant moved four instructions, which the court refused, and he excepted. They are as follows:

(1.) "The law requiring married women to schedule their property, confers no rights upon an unmarried person, and if the schedule in this case was made and filed before marriage or not in contemplation of marriage, then it conferred no rights under the same."

(2.) "The object of the law requiring the wife to schedule

her separate property is for the purpose of preventing her husband from having a fictitious credit, and to notify all persons that the same is her own separate property, and not liable for the debts of her husband."

(3). "If the jury find from the testimony that the property in controversy is not the property described in the schedule, but that the husband, with the advice and consent of the wife traded the property mentioned in the schedule, for other property, and that the wife never had the property so received scheduled in her own name, then in law the property is the property of the husband, and he had the right to sell the same."

(4.) "If the jury find from the testimony that Henry Cantrell, husband to the interpleader, did exercise acts of ownership over the property in controversy, with the full knowledge and consent of his wife, and that he did execute the mortgage to plaintiff on said property, they will find for plaintiff for such property."

The marital rights of the husband upon the facts in evidence, by the common law, are very plain.

Appellee claims to have been the owner of a bay mare and colt when she married Cantrell, her second husband. When Cantrell married her, and obtained possession of the property, he thereby acquired an absolute title to it; and though he traded the mare and colt for the black horse and spring wagon, claimed by her in the interplea, at her request, they likewise became his property, and he had the right to mortgage them to appellant.

Such are the common law rights of the parties, and it remains to be determined how far the common law rights have been affected by legislation, constitutional provisions, etc.

Appellee married Cantrell at some time in the year 1872, and

when the constitution of 1868 was in force, which contained the following provision:

The real and personal property of any female in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall so long as she may choose, be and remain the separate estate and property of such female, and may be devised or bequeathed by her the same as if she were a *femme sole*. Laws shall be passed providing for the registration of the wife's separate property, and when so registered, and so long as it is not entrusted to the management or control of her husband otherwise than as an agent, it shall not be liable for any of his debts, engagements or obligations." *Art. XII, sec. 6, Const. 1868.*

No scheduling act was passed under this section of the constitution of 1868, until the act of 28th April, 1873 was passed. (*See Gantt's Digest, chap. 93, secs. 4193, 4202.*)

But by sec. 16, Art. XV of the Constitution of 1868, laws then in force not in conflict with the provisions of the Constitution were continued in force until otherwise provided by the Legislature, etc.

From the adoption of the Constitution of 1868, until the passage of the Scheduling Act of 28th April, 1873, chap. III, Gould's Digest, title MARRIED WOMEN (except so much as relates to slaves) was in force. *Humphries* v. *Harrison*, 30 Ark., 88; *Hydrick* v. *Burke*, Ib., 126.

Under the provisions of that chapter the scheduling of the bay mare and colt by appellee when she was a *femme sole* amounted to nothing, and did not affect the marital rights of her husband. The statute (sec. 7) provided for a MARRIED WOMAN to schedule her property, and she was not entitled to the protection of the statute until she filed her schedule in the recorder's office, etc., unless the property was secured to her separate use (sec. 8) by deeds, etc. *Howell* v. *Howell, ad.*,

19 Ark., 344. *Beeman and wife* v. *Cowser et al.*, 22 Ark., 432.

A woman may by ante-nuptial contract with her intended husband, limit his marital rights as to her property, and protect it from liability for his debts (*Harrison* v. *Trader and wife*, 27 Ark., 288) but there is no provision of the common law by which she can accomplish the same object by a public schedule made by herself before marriage, and the statute only provides for scheduling by married women.

So the Act of 28th April, 1873, like sec. 7, chap. 93, Gould's Digest, provides that before any married woman shall have the benefit of the act she shall schedule her property. *Gantt's Digest*, sec. 4201.

The act of December 15, 1875, (Acts of 1875, p. 172) providing for the scheduling of the personal property of married women, under secs. 7 and 8, Art. 9 of the present Constitution, was passed after the execution of the mortgage, and has no application to this case.

The bay mare and colt scheduled by the wife before marriage, were traded for the black horse and spring wagon in the spring and fall of 1873, and the property obtained by the exchange was never scheduled under any act.

If we might be mistaken in attributing no value to the schedule made by appellee before marriage, surely that schedule could not protect the property claimed by her in this suit, which was not included in the schedule and which she did not own at the time it was made and recorded.

In *Howell* v. *Howell*, *ad.*, *sup.*, MR. JUSTICE SCOTT said:

"It is plain that the true intent of the Legislature, in reference to the schedule, was not only that it should perform the office of notice to creditors and purchasers, but also the not less important one of evincing, on the part of the married woman, her election to avail herself of the benefits of the law.

These benefits, for the enjoyment of which the law had also created for her ample legal capacity, were, nevertheless, but at the option of the married woman. Perhaps, having quietly surrendered to her husband at discretion, by force of the canons of the church, she might, for a time, desire no emancipation from his dominion, as that had been regulated by the common law; but afterwards, prudential motives, in reference to herself or her offspring, might suggest the propriety of securing for herself the property she had brought into the marriage, or which had afterwards come in from her own kindred. This, it was the manifest intention of our law, with due regard to the rights of the creditors of her husband, to permit her to do so, at any time during coverture, so far as the same had not been disposed of by her husband, or incumbered with his debts. * * But until the filing of the schedule no right accrues to her under any of the provisions of the statute, etc., save only that in case she might be possessed of property conveyed to her in and to her sole and separate use," etc.

So in *Beeman and wife* v. *Cowser, et al, sup.*, MR. JUSTICE FAIRCHILD said: To enable a wife to hold property under the married woman's law, it must be recorded as hers in the county where she lives, by means of being scheduled under the law, or by being devised, granted, decreed or transferred to her, by words that expressly set forth that the property is to be held by her exempt from the liabilities of her husband, etc.

IV. Henry Cantrell, the husband of appellee, was sworn as a witness on her behalf, against the objection of appellant, and permitted to testify, in substance, that his wife owned the bay mare and colt when he married her, that at her request, as her agent, and in her absence, he traded the mare and colt for the black horse and spring wagon claimed by her in the interplea, that they were her property and he had no right to mortgage them, and that they were put into the mortgage without

his knowledge and consent, and that when he found out that they were included in the mortgage, he procured appellant to release them, etc.

If this had been a trial of the main replevin suit between appellant and Henry Cantrell, he would have been a competent witness in his own behalf, but he was not competent to give the above testimony on the trial of his wife's interplea, which was her suit, as above shown. *Collins* v. *Mack*, *sup*.

V. On the subject of the release of the property, the court instructed the jury as asked by appellant, and he does not complain, on this appeal, of an instruction in his favor.

Appellee having failed to prove her title and right to possession of the black horse and spring wagon as alleged in her interplea, the court below erred in refusing appellant a new trial.

Reversed and remanded for a new trial.

HILL, FONTAINE & CO. v. COOLIDGE.

1. TRUSTS: *Property into which trust funds are converted, held subject to the trust.* 33 621 / 58 261 / 33 621 / 81 283

Leonidas Johnson executed to Horner a deed of trust on his claim probated against the estate of Thomas Johnson, deceased, to secure a debt he owed to Coolidge, and left the claim with Horner. The deed was duly recorded. Afterwards the lands of the deceased were sold by order of the Probate Court, and part of them were purchased by Leonidas Johnson, who paid for it by receipting the administrator for the probated claim without the knowledge or consent of Coolidge. Afterwards Hill, Fontaine & Co. recovered judgment against Leonidas Johnson and had the land sold under execution to satisfy it, and at the sale bought the land. Held; that the trust on the claim followed and attached to the land into which the claim was converted.

2. BONA FIDE PURCHASER: *Notice.*

A purchaser at his own execution sale is not an innocent purchaser. The question of notice does not arise in such case.

APPEAL from *Phillips* Circuit Court, in Chancery.

Hon. J. N. CYPERT, Circuit Judge.
Palmer—Rose for appellant.
Tappan & Horner, contra.

HARRISON, J.:

This was an action in equity by Charles R. Coolidge, as surviving partner of the firm of H. P. Coolidge & Co., against Hill, Fontaine & Co., Leonidas L. Johnson, George E. Johnson, Mathias C. Hall and John J. Horner.

The material averments of the complaint were: That Leonidas L. Johnson and George E. Johnson, on the 17th day of July, 1871, conveyed to John J. Horner, by their deed of that date, their several crops of cotton and corn then growing on their respective plantations in Phillips county; and the said George E. Johnson, the mules, farming implements and certain other personal property on his plantation; and the said Leonidas L. Johnson also conveyed and transferred to him the following claims that had been probated and allowed by the court of probate of Phillips county against the estate of Thomas P. Johnson, deceased, and of which he was the assignee and owner, viz: Bartley, Johnson & Co.; for $13,427.97; Thomas W. Stoneman; for $2,019.23, and J. W. Roberts; for $487.50; but which were described in the deed as the claim of said Leonidas L. Johnson, probated against said estate, and in the hands of Tappan & Horner, in trust to secure to A. P. Coolidge & Co., their note to them of that date for $8,000, payable on the 1st day of December, 1871, and to bear ten per cent interest after maturity; and the said Horner was, by said deed, empowered, if the note was not paid at maturity, to take possession of the property so conveyed, and after giving twenty days notice by publication in some newspaper printed in said county, to sell the same, including said claims, at the court house door in Helena, at public auction for cash, for the pay-

ment thereof: which deed was, on the 18th day of July, 1871, duly acknowledged and recorded.

That the Probate Court of said county, at the November term, 1871, made an order for the sale of the lands owned by said Thomas P. Johnson, at the time of his death, for the payment of his debts; which lands were particularly described in the complaint, and of which there were 1,708 acres; and in pursuance of the order, Barty Turner, the administrator of said Thomas P. Johnson's estate, on the 15th day of January, 1872, offered the same for sale, and they were bid off and purchased by the said Mathias C. Hall and Leonidas L. Johnson—an undivided three-fourths part by Hall, and an undivided one-fourth part by Johnson—for the sum of $10,000.

That said Hall and Leonidas L. Johnson were the only creditors of Thomas P. Johnson's estate—Hall holding three-fourths of all the indebtedness, and Johnson one-fourth—Johnson's part consisting of the claims before mentioned; and that they paid no money on their purchase, but gave in payment thereof receipts and acquittances to the administrator for their claims—the estate paying but a *pro rata* thereon of fifteen and one-third per cent—and that the administrator on the same day executed a deed for an undivided three-fourths part of the lands to Hall, and for an undivided one-fourth part to said Leonidas L. Johnson.

That to such use of the claims, H. P. Coolidge & Co., gave no consent, and were ignorant of the fact that they were so used until some time afterwards.

That Hill, Fontaine & Co., on the 23d day of May, 1872, recovered judgment against George E. Johnson and Leonidas L. Johnson in the Circuit Court of Phillips county for $1,838.38, upon which they afterwards sued out an execution and caused it to be levied on Leonidas L. Johnson's undivided part of the lands, which, was sold thereunder by the sheriff, and it was

bid off and purchased by said Hill, Fontaine & Co., for $11,000, and the sheriff afterwards, on the 10th day of November, 1873, executed to them a deed for the same.

That there remained due on the note $5,098.57, with interest from the 1st of April, 1874.

And that Henry P. Coolidge, who, with the plaintiff, composed the firm of H. P. Coolidge & Co., was dead.

The complaint prayed that a lien should be declared in favor of the plaintiff on the undivided part of the lands purchased by Leonidas L. Johnson at the sale by the administrator of Thomas P. Johnson, to the same extent and with like object and effect as that secured by the deed of trust upon the claims.

Hill, Fontaine & Co. filed a demurrer to the complaint, upon the ground that it did not set forth or show a cause of action, which, was overruled. They then filed an answer. and admitted everything alleged in the complaint, except that the claims were conveyed and transferred to Horner in the deed of trust, which, they denied.

The other defendants made no defense.

The cause was heard upon the complaint and the exhibits therewith, the answer of Hill, Fontaine & Co., and the sworn statement of James C. Tappan, admitted by consent, as a deposition in the cause, subject to proper objections for want of relevancy or competency.

The clause in the deed of trust in respect to the conveyance or transfer of the claims, is as follows:

"And the said Leonidas L. Johnson also hereby conveys to the said party of the second part, *his claim* probated against the estate of Thomas P. Johnson, deceased, and now in the hands of Tappan & Horner."

The statement of James C. Tappan was: That he drew the deed of trust, and that the property described in it as "his claim

probated against the estate of Thomas P. Johnson, deceased, and now in the hands of Tappan & Horner," were the allowances against said estate in favor of Bartley, Johnson & Co., Thomas W. Stoneman and J. W. Roberts, mentioned in the complaint, which had been before assigned in writing to Leonidas L. Johnson, and were then in their (Tappan & Horner's) hands for collection, and were the only claims against said estate in their hands, in which Leonidas L. Johnson had any interest.

That the order for the sale of the lands was obtained by him, and he attended the sale; and that he gave for Leonidas L. Johnson a receipt for the pro rata sum due on the claims, to the administrator, and the receipt and satisfaction of the claims was all the consideration paid by Leonidas L. Johnson in his purchase.

The court, upon the hearing, found that it was the intention of the parties to the deed of trust, that Leonidas L. Johnson should, and that he did, thereby convey and transfer the claims to Horner, and decreed that a lien upon the undivided fourth part of the lands resulted from Leonidas L. Johnson's purchase thereof with the claims in favor of the plaintiff, and now exists to the same extent and with like effect as that created by the deed of trust upon the claims.

Hill, Fontaine & Co. appealed.

It is conclusively shown by the evidence of Tappan, that the claims for which Leonidas L. Johnson receipted in the purchase of the lands, and which constituted the sole consideration, were included in the deed of trust, and it follows as a very clear proposition, that a trust in favor of H. P. Coolidge & Co., attached to the lands or the undivided part so purchased.

Judge Story says; "Wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrong-

fully converted into another species of property, if its identity can be traced it will be held in its new form liable to the rights of the original owner or *cestui que trust*. The general proposition which is maintained both at law and in equity upon this subject is, that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state or form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right, (not being *bona fide* purchasers for a valuable consideration without notice) any more valid claim in respect to it than they respectively had before such a change." 2 *Story's Eq. Jur.*, Sec. 1258; Ib., 1201; *Bisph. Eq.*, Secs. 80, 86; *Adam's Eq.*, 142, 143; *Osborne* v. *Graham*, 30 Ark., 66.

But it is contended for the appellants, that though, as between the parties to the deed of trust parol evidence might be offered to explain it, and show what property was conveyed, as to others such evidence was inadmissible, and the evidence of Tappan for that purpose should have been excluded from the consideration of the court, and that the deed of trust, so far as it related to the claims, was as to them void for uncertainty.

To this it may be answered that they purchased at their own execution sale, and therefore were not, nor do they claim to have been, innocent purchasers; and no question as to notice arises in the case.

Whether the deed was uncertain or not was no matter of theirs; they stood upon no better ground than Leonidas L. Johnson did, and hold the lands, as he did, charged with the trust.

The decree is affirmed.

J. C. Meyer & Co. v. Smith.

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Contract: *Landlord and tenant.*

When a lessee abandons the leased premises, refuses to pay rent, and repudiates his tenancy without any fault of the lessor, the latter may stand upon the contract of lease and recover the whole rent; and in such case he may take possession and re-rent the premises for the benefit of whom it may concern, and credit the proceeds upon the first lease.

APPEAL from *Jefferson* Circuit Court.
Hon. John A. Williams, Circuit Judge.
N. T. White, for appellant.
Carlton & McCain, *contra*.

Eakin, J.:

K. Smith sued J. C. Meyer & Co., who were merchants doing business in Pine Bluff, for the rent of a certain store-house situated upon a plantation upon the Arkansas river. He filed with his complaint an instrument of writing, as follows:

"Greenwood, March 15, 1876.

"We hereby certify that we are willing to pay K. Smith the "sum of $50.00 per month for the store known as the K. "Smith store, from to-day until the first day of January, "1877, with privilege of the same until first day of May, 1877, "at the same rate.

"S. G. Meyer & Co.,
"Per Emil Meyer."

Defendants denied the debt and the execution of the writing. They set up further that the plaintiff, in disregard of the supposed contract, had let the same premises to a third party and put him in possession from October 1, 1876, to the end of the year.

It was shown by the testimony that the store-house in question had been renting for $50 per month previous to the time

of the supposed lease to Meyer & Co., and had been rented to one Sunnenshine at that rate for the year. Sunnenshine had a stock of goods in it, and being indebted to Meyer & Co., about the time of the date of the instrument, sold out to them. Emil Meyer was in their employment as a salesman, and they sent him to take charge of the stock, make a schedule, etc. They had been advised of the renting by Sunnenshine for the year, and of the rates. Emil Meyer, as their agent, executed the instrument on behalf of the firm. He says he had no authority from the firm to do so, or to sign their name, but thinks he told Sol. Meyer, one of the firm, of the contract next day, on his return.

Meyer & Co., kept possession of the store-house, selling goods, etc., for about six weeks, when they abandoned possession, leaving it open and unprotected, and giving no notice of their intentions to Smith. Whilst so occupying, and shortly after the contract was made, Sol. Meyer came to the place and had a conversation with Smith, telling him they were going to put in a large stock of groceries there. Smith says that in the conversation, Sol. Meyer remarked that he thought the rent was too much. Smith wrote two or three letters afterwards to the firm about the rent, but did not mention the written contract made by Emil. He received no answers. He never made any demand of the rent under the contract, but says he furnished Emil with a copy of it when executed. Sunnenshine says that when he told Meyer & Co. of the rents, at the time of his sale, he advised them that they must make the arrangements for the future, and that J. C. Meyer, one of the firm, replied that Emil Meyer would go down with him and arrange that matter. After the sale Sunnenshine continued in the store whilst it was kept up, selling goods as the agent of the firm. After the abandonment of the house it lay vacant until

about the 1st of October, when Smith let it to Scherm, a third party, for the remainder of the year, at $25 per month.

Sol. Meyer, another partner, testified that Emil was sent to take stock of the goods and accounts, to see if they came up to the representations, and that he had no authority to use the firm name in executing the instrument. He denies that he knew of the instrument until suit began; acknowledes that the firm received the letters concerning the rent, and did not answer them, but says the letters never mentioned the contract, nor any specific sum as due; says he does not remember having a conversation with Smith about the rent at the time he spoke with him about taking a large stock of goods there, nor does he remember that Emil ever told him about the contract.

J. C. Meyer denies that he told Sunnenshine that Emil would arrange for the rents; admits that Sunnenshine told him of his own contract for the year, but says that Sunnenshine claimed that he had unsettled accounts with Smith, and did not know that any rents would be due. He concurs with Sol. Meyer in denying the authority of Emil, and all knowledge of the written instrument before suit. This was substantially all the evidence.

The court, upon trial, on motion of the plaintiff, instructed the jury substantially:

1st. That if they found that Emil executed the writing without authority, but that defendants knew of it, and afterwards continued to use the store-house, without expressing any dissent within a reasonable time, it amounted to a ratification.

2d. If, from all the circumstances, the jury believed that Emil had authority to rent, and did rent, and defendants used and occupied after the renting, they must find for the plaintiff; and,

3d. If the jury believed that defendants did ratify the contract, it did not matter whether they used and occupied it the

whole time or not, except the time it was occupied by Scherm. This last instruction was afterwards explained to the jury by the court, as follows:

"The amount of rent received by Smith from Scherm should be credited by the jury upon the entire amount of rent claimed by Smith, as set out in the contract, if they shall find the contract binding upon the defendants."

Defendants asked six instructions. The first, third and fourth were given, to the effect, that the agent could not bind the principal outside of the scope of his authority; that if he had no authority to do so at the time he executed the writing, and the defendants did not afterwards ratify it, they must find for the defendants; and that the burden of proof was on the plaintiff to show the power or the ratification, which should be done by preponderating testimony.

The instructions refuseed were as follows:

"2d. The occupation of the store-house, after the execu-
"tion of the writing is not sufficient ratification as would bind
"defendants for the payment of the rents, and unless the jury
"find from the evidence that the defendants were notified of
"the existence of the writing before they left the store, they
"will find for defendants."

"5th. If the jury find from the testimony that the plaintiff
"violated his contract with Meyer & Co., (if any did exist) by
"renting the store-house to others before the expiration of
"the time for which it was let, then in law he cannot recover,
"and they must find for defendants."

"6th. The writing sued on in this case, if it be a contract
"at all, and binding on defendants, is an entirety for the full
"time specified therein; and if the plaintiff, by his own act
"has so treated the same as to place it beyond the power of
"himself to have the property always, during the term of the

"lease, ready for the occupation of the defendants, he cannot "recover for any part thereof."

In lieu of the second instruction, the court. on its own motion, gave this: "The occupancy of the store-house by "Meyer & Co., is no ratification of the contract made by Emil "Meyer, unless they were aware, at the time they so occupied "it, of the existence of the contract and its terms."

There was a verdict and judgment for the plaintiff in the sum of $400—motion for new trial on the ground that the verdict was not sustained by law and evidence, and because of error in giving and refusing instructions. The motion was overruled, exceptions taken and appeal.

It was the province of the jury to determine whether Emil Meyer had express or implied authority to bind the firm of Meyer & Co., by the contract of renting, or, if they found none, to determine whether or not the firm had ratified it afterwards. The instructions given for plaintiff and defendants, fairly presented these questions to the jury with all due qualifications, and with correct instruction as to what should guide them in determining upon the matter of ratification. There was evidence to justify the jury in finding that Emil Meyer had been expressly authorized to make the contract; also evidence that he had reported it to them, and they knew of it and acted under it. There is a conflict of evidence on these points, but the verdict of the jury seems sufficiently well founded to sustain their finding as to the validity of the contract, and the liability of defendants, unless there be some valid defense.

The defense relied upon is, that the plaintiff himself violated the contract by entering upon the premises on tbe first of October, and putting in another tenant for the remainder of the year, thereby rendering himself unable to give possession to defendants, and protect them in their quiet enjoyment. They contend that if the contract is relied upon by plaintiff, that

contract itself vested in them the right to let the house lie vacant, or to keep it in reserve for any possible uses that might chance to be required. Certainly that is the law, but there are no facts to sustain such a view of the case. They kept the house about six weeks, refused to respond to all letters concerning the rents, withdrew from occupancy, and left the house open and unprotected. They never intimated to the landlord any design to return. Do not now say they had any intention or desire to do so. They never acknowledged any liability for rent after a short occupation to serve their business purposes, but acted in such a manner as to indicate, beyond doubt, their fixed purpose to repudiate the tenancy.

Supposing the contract to be valid, as the jury must have found, the law applicable to the case would be, that if they further found that defendants had abandoned the occupation, refused to pay rents, and repudiated the tenancy, without any fault of the lessor, the latter might stand upon his contract and recover the whole rent. He was under no obligation to the defendants to take back his property and do the best he could for the remainder of the term. But he was not precluded from taking possession upon pain of forfeiture of his contract. He was not obliged to stand by and see his property abandoned, and open to the elements, and all manner of trespassers. He might take it in charge, without any wrongful act, and at his peril might re-rent for the benefit of whom it might concern. The same principle applies to these chattel interests which applies to goods, bargained for and not taken. The vendor is not obliged to abandon possession and throw them away. He may re-sell and credit the proceeds on the contract. This is for the benefit of the vendee, as in this case the re-letting was *pro tanto* for the benefit of the lessees.

Had the lessees, at any time, returned and claimed their lease, or had they shown any fault, or gross misconduct in the

management of the property after plaiatiff resumed possession, or that he had let it at grossly inadequate rates, new questions might have arisen. But the onus of this showing was on defendants, and in the absence of evidence of what the property mlght reasonably have been rented for at the end of the year, for the short period of three months, it was not erroneous to charge the jury to deduct from the contract price the amount actually received.

We find no substantial error in the instructions, taken all together, or in refusing those not given. The matter was fairly presented to the jury, and upon the whole case the judgment seems right.

ELLSWORTH v. HALE, ADM'X.

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1. TENANTS AT WILL: *Possession and power of to lease, etc.*

When a person in possession of land permits his daughter and her husband to use aud improve the land, they become at most mere tenants at will; their possession would not ripen into a title without some act or declaration indicating an intention to hold adversely; nor would it empower them to grant leases to strangers with any more permanent rights than they enjoyed.

2. INJUNCTION: *To restrain trespasses upon land.*

Where repeated and continuing injuries to the freehold are of a nature to constitute a nuisance equity has jurisdiction to enjoin them; but injuries to chattel interests in lands, or mere acts of aggression and injury not rendering the freehold less fitting for enjoyment and amounting to mere trespasses, however often repeated, afford no grounds for an injunction, unless in case of insolvency or some other peculiar equity; and it is in all cases essential that plaintiff should show a clear right to the possession.

3. SAME: *To prevent multiplicity of suits.*

To warrant an injunction on the ground alone of preventing a multiplicity of suits, the same rights should be claimed by different persons against one or by one against many. It is not authorized to prevent the necessity of suing one person for a succession of wrongful acts.

APPEAL from *Garland* Circuit Court in Chancery.

Hon. J. M. SMITH, Circuit Judge.

B. F. Rice, for appellant.

EAKIN, J.:

J. C. Hale held lands in the Hot Springs reservation under claim of title. He placed his son-in-law and daughter, Mr. and Mrs. Warren, in the possession and enjoyment of a portion of it, but gave them no title. So far as it appears, they were tenants at will.

Ellsworth, a resident physician at Hot Springs, rendered valuable medical services to Warren, for which Warren had promised him a lease of a portion of the ground at a nominal rent, but died before executing it. Ellsworth, in November, 1868, built an office upon the lot and took possession, Hale making no objection. The office was destroyed by fire on the 5th of December following. Meanwhile, Ellsworth had continued his professional services to Mrs. Warren, the daughter of Hale, and she, to carry out her husband's intentions, and as further compensation for services to herself, executed a lease of the lot to Ellsworth in January, 1869. The lease was for ten years, at a nominal rent. Shortly afterwards she died, leaving complainant in possession.

The bill was filed in December, 1870, alleging that complainant, intending to build again on the lot, had got together upon it lumber and material for the purpose, which defendant would continually remove by force and arms, in order to prevent him; and that these trespasses were frequent and repeated. He states that he can have no relief at law, save by multiplicity of suits, and prays that defendant may be enjoined from further interference with his possession, and for further relief. An interlocutory injunction in accordance with the prayer was issued by order of the Circuit Judge.

The defendant, Hale, denied that he had given the lands to

Warren and his wife, or either of them, although he had permitted them to use and occupy it, and had allowed Warren to improve a portion of it, on condition that he would pay one-third of the expenses of a pending litigation concerning the title. He denies the authority of his daughter to make the lease. He insists that the occupation of complainant has been unlawful, and prays that the injunction may be dissolved, the bill dismissed, the complainant held to an account of rents and profits, and that he be required to deliver up his possession.

Pending the suit the defendant died, and the cause was revived against Sarah Hale as his administratrix.

A mass of depositions was taken on both sides, which were used upon the hearing. They do not change the material features of the cause presented above. The court dissolved the injunction and dismissed the complaint. The court further declared from the allegations of the pleadings and the proof in the case, that defendant would be entitled to the possession of the property; but as his answer was not made a cross bill, the writ of possession was on that ground alone denied. It was further ordered that an assessment of damages, resulting from the interlocutory injunction, be made at a future day, which was designated.

Pending the proceedings for the assessment of damages, complainant prayed an appeal from the decree, which was granted. The defendant has not appealed, and this court is not called upon to decide whether or not he was entitled to any relief on the facts stated, and the prayer of his answer.

The only ground upon which the interference of the court, by injunction, was invoked, was, to prevent the necessity of a multiplicity of suits to recover for repeated trespasses. It was not shown that the acts of defendant tended to the irreparable injury of the property, nor that the defendant was insolvent and thus beyond the reach of ordinary legal redress.

Complainant claims only a chattel interest in the lot, and claims that under one who derived possession from defendant, under such circumstances as made his lessor herself, at most, a mere tenant at will, without a shadow of legal title. The defendant, being in possession of the lands, might lawfully allow his daughter and her husband to use and improve them as long as he chose to extend the favor. Such possession on their part would not ripen into a title without some act or declaration indicating an intention to claim adversely, nor would it empower them to grant leases to strangers with any more permanent rights than they had themselves. As to third persons, their relation to the owner and the total absence of all documentary evidence of title required by the statute of frauds, sufficiently explained the nature of their possession, and none could be misled without the grossest carelessness upon their own part. In this case the evidence leaves no doubt that complainant understood the matter thoroughly.

Courts of equity have always interfered to restrain repeated or continuing acts which amount to a nuisance to real estate, and to prevent waste between those having privity of estate, but never, until a comparatively recent period, to restrain acts of trespass as such. Lord Thurlow seems to have set the precedent in a case repeatedly quoted and cautiously followed by Lord Eldon [*Flamarey's case*, cited in *Mitchell* v. *Dors*, 6 *Vesey, Jr.*, 147; *Hanson* v. *Gardner*, 7 Ib. 308.] That was a case where permanent injury to the freehold would have resulted from the trespass. The doctrine is in consonance with the feudal sentiment, which attributes to a freehold interest in land a peculiar value, different from a chattel interest, or mere personal property. No one piece of land can, in this view, be considered as good as another. Its loss or injury cannot be fully compensated by other lands or by money with which other lands may be purchased. Later still, and very

reluctantly, the courts have extended the doctrine to slaves and other personal property, which may have a *pretium affectionis*, such as family pictures, relics, etc., an injury to which will now be restrained. I do not meet in the English books, any cases where the doctrine has been applied to mere chattel interests in lands on the sole ground of irreparable injury, independent of insolvency or some other equitable element. A chattel interest does not come within the reason of the rule, being transient as personal property is. The court is not prepared to say that a peculiar case may not occur, in which the interference by injunction to protect a chattel real might be properly invoked. To protect a trust for instance. But ordinarily, without some peculiar grounds, it ought not to be done, and no peculiar grounds are shown here.

Where repeated and continuing injuries to the freehold are of a nature to constitute a nuisance the jurisdiction to enjoin them stands upon ancient grounds. The distinction is taken by Lord Hardwick in *Corelson* v. *White*, 3 Atk., 21. He says: "Every common trespass is not a foundation for an injunction in this court, where it is only contingent and temporary; but if it continues so long as to become a nuisance, in such case the court will interfere and grant an injunction to restrain the person from committing it." The distinction is obvious between such continued acts as render the *corpus* of the freehold less fitting for enjoyment; such as turning water upon it, obstructing the light, or infecting the air, and mere acts of aggression and injury; such as pulling down fences and the like. In the former class of cases there arises a nuisance which may be enjoined. In the latter there are mere trespasses, which, however often repeated, may be, each time, remedied by action. As remarked by Justice Lumpkin, in *Hatcher* v. *Hampton*, 7 Geo. 48: "It has never been supposed, that because one person chooses daily to pull down the

fence of another" (or, he might have said, to take away his lumber) "and turn his stock in his fields, that this would authorize the courts of chancery to restrain the intruder by injunction."

Again; upon the ground of avoiding multiplicity of suits, the rule against enjoining has been further relaxed, and injunctions have been issued upon that equity. But that does not mean to save a person from the necessity of suing the same person for a succession of wrongful acts, which he may persist in doing. Any man has the power to subject himself to a great number of suits, by a great number of trespasses of any kind, and courts of chancery would undertake too much in undertaking thus to coerce the general peace of the community, or to protect the property of individuals. To warrant the interference of chancery on the ground, alone, of preventing multiplicity of suits, the same rights should be claimed by different persons against one, or by one against many. *High on Injunctions, sec.* 459.

There are other cases applicable to real as well as personal property where injunctions may issue upon the ground of the insolvency of the wrong doer; and, as ancillary to a bill to remove a cloud from title, it would doubtless be proper in a chancellor to restrain the adverse claimant from acts of trespass *pendente lite.*

These relaxations of the rule are exceptional, and in all of them (save in cases to remove a cloud) it is essential to the exercise of this prompt and somewhat dangerous remedy, that complainant should in the first place show at least a clear right to the possession, if not to the freehold. This court, in *Conway et al. ex parte*, 4 Ark., 344, adopts, on this point, the language of Chancellor Kent in *Garder* v. *Newberry*, 3 *John Ch.*, 165, as follows:

"The interference rests upon the principle of a *clear and*

certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which upon just and equitable grounds ought to be prevented."

Again: it was held by this court in a case similar to this, where the defendant claiming possession of lands owned by the United States, had sued out a forcible entry against the occupant, that an injunction will not be granted to restrain a mere trespass, where the injury is not irreparable, and destructive of the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. *Foster ex parte*, 11 Ark., 304.

The complainant in this case does not complain of any nuisance, irreparable injury, or insolvency. He does not show any clear title in himself, nor really any injury to the lease beyond a mere technical breaking of the close. The injury is to a lot of personal property which he has been collecting for building purposes. He says it will be repeated, and he asks the court to relieve him of the trouble, loss of time and expense of suing at law. The case does not come within any of the exceptions under the most relaxed state of the old rule. The injunction should not have been granted, and there was no error in dissolving and dismissing the bill.

Affirm the decree and remand the cause for further proceedings in accordance with equity practice for the assessment of damages.

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BENTON COUNTY v. RUTHERFORD.

DEED: *Statutory covenant, when broken.*

If a grantor conveys land by the words "grant, bargain and sell," and the deed contains no express words limiting their force, and he is not at the time the owner in fee simple of the land, the statutory covenant of seizin expressed by those words is instantly broken technically, and the grantee may sue at once for the breach without showing eviction.

——— *Damages for breach of covenants.*

(For rule of damages for breach of covenant of seizin see opinion.)

MARRIED WOMEN: *Not bound by covenants.*

A married woman is not bound by the covenants contained in a deed executed by her and her husband.

APPEAL from *Benton* Circuit Court.

W. J. HOWARD, Special Judge.

E. P. Watson, for appellant.

J. D. Walker, *contra*.

ENGLISH, C. J.:

Benton county sued Rutherford and wife on the covenant of siezin in a deed, defendants demurred to the complaint, the court sustained the demurrer, and plaintiff appealed. This court dismissed the appeal because there was no final judgment. See *Benton County* v. *Rutherford and wife*, 30 Ark., 665.

On the remanding of the cause to the Circuit Court the plaintiff declined to amend her complaint, relying on the sufficiency thereof, and judgment was rendered discharging defendants with costs, and plaintiff again appealed.

The suit was commenced 13th March, 1874, and the complaint follows:

"Benton county, plaintiff, by attorney, complains of Joseph R. Rutherford and Tennessee P. Rutherford of a plea of covenant broken:

"Plaintiff states that on the 4th day of January, A. D. 1871, the defendants executed and delivered to the plaintiff

their certain deed in writing, which is in words and figures as follows, to-wit:

"Warranty deed with release of homestead and dower.

"This indenture, made the 4th day of January, 1871, between Joseph R. Rutherford and Tennessee P. Rutherford, his wife, of the first part, and the county of Benton, in the State of Arkansas, of the second part, witnesseth: that the said parties of the first part, in consideration of the sum of twelve hundred and fifty dollars in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the party of the second part, his heirs and assigns, all that piece or parcel of land situate in the town of Bentonville, county of Benton, etc., to wit: Lots number ninety, (90) ninety-one, (91) ninety-four, (94) ninety-five, (95) of said town of Bentonville, together with the appurtenances thereunto belonging, and all the estate, right, title, interest, claim and demand of the said parties of the first part herein.

"And the said Joseph R. Rutherford and Tennessee P. Rutherford, his wife, parties of the first part, hereby expressly waive, release, relinquish and convey unto said party of the second part, and *his heirs*, executors, administrators and assigns, all right, title, claim, interest and benefit whatsoever, in and to the above described premises, and each and every part thereof, which is given by or results from any and all laws of this State pertaining to the exemption of homesteads; and the said Joseph R. Rutherford and Tennessee P. Rutherford, his wife, for themselves, their heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, and *his heirs* and assigns, that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, and his heirs

and assigns, the said party of the first part, shall and will forever warrant and forever defend.

"In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

"JOSEPH RUTHERFORD, [SEAL.]
"TENNESSEE P. RUTHERFORD, [SEAL.]

"Said deed was duly acknowledged by said defendants before a proper officer, in accordance with the law of the State, etc. A copy of said deed and acknowledgment is hereto annexed and made a part of this complaint, etc.

"The plaintiff, in fact, says that at the time of the execution and delivery of said deed to the plaintiff, said Joseph R. Rutherford and Tennessee P. Rutherford were not the owners of, and did not hold the fee simple title to said lot number ninety-five, in said deed mentioned, nor have the said Joseph R. Rutherford and the said Tennessee P. Rutherford acquired a fee simple title to said lot number ninety-five since the execution and delivery of said deed to the plaintiff. Wherefore, plaintiff prays judgment for the sum of three hundred and twelve dollars and fifty cents, the amount paid for said lot by plaintiff, together with the interest thereon from the delivery of said deed, at the rate of six per cent per annum, and for other relief."

Defendants demurred to the complaint on the grounds:

1st. No cause of action set forth in the complaint.

2d. No breach of the covenants contained in the deed set out in complaint, alleged.

3d. Not alleged in whom the title to the lot is vested.

4th. No averment of eviction or disturbance of plaintiff's peaceable possession of the lot.

By statute:

"The words, *grant, bargain and sell*, shall be an express

covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by the deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed." *Gantt's Digest*, Sec. 829.

The deed set out in the complaint contains the words "grant, bargain and sell," and does not contain any express words limiting their force.

The complaint alleges a breach of this statute covenant of seizin; affirms that the grantors were not the owners in fee simple of one of the lots embraced in the deed at the time of its execution, and had not since acquired a fee simple title thereto.

If the appellees were not the owners of the land in fee simple at the time of the execution of the deed, as alleged in the complaint, the covenant of seizin was instantly broken technically, and a right of action for breach of the covenant at once accrued, and it was not necessary for appellant to aver eviction. *Logan* v. *Moulder*, 1 Ark., 322; *Alexander* v. *Schreiber*, 10 Mo., 460; *Brandt* v. *Foster et al.*, 5 Iowa, 295.

Says MR. WASHBURN:

"If the covenant of seizin be untrue, it is broken the instant it is made, and an immediate right of action accrues to the purchaser to sue for the breach, and he is entitled to recover damages, the measure of which may be the consideration and interest, or less amount, or mere nominal damages, according to the nature and extent of the breach in the particular case. If the failure of title be only as to part of the land, or if the purchaser has himself extinguished the paramount title, or if his actual possession be of such a character, and continued for

such a length of time as to make the title valid under the statute of limitation, or if, for other cause, the breach be merely a technical one, the purchaser will not be entitled to have the damages measured by the consideration money and interest. Such is the proper measure of damages only where there is an entire failure of title, or where the purchaser has the right to treat it as such; and in the latter case the effect of a recovery of an equivalent in damages would be to entitle the bargainor to a reconveyance." 3 *Washburn on Real Property*, 420.

Mrs. Rutherford being a married woman at the time she joined her husband in the execution of the deed, is not bound by the covenants contained in it, and not personally liable in damages for breach of the covenant of seizin. The demurrer to the complaint was therefore properly sustained as to her, but should have been overruled as to her husband. *Bishop on Married Women*, Sec. 603.

The judgment of the court below as to the wife, must be affirmed, and reversed as to her husband. *Trieber and Wife* v. *Stover & Co.*, 30 Ark., 727.

By act of February 27, 1879, Pamphlet Acts 1878–79, p. 13, passed since the submission of this cause, particular sections of *Gantt's Digest*, and all laws and parts of laws making counties corporations, and authorizing them to sue and be sued as such, are repealed; and the act provides that when any county has any demand against any person or corporation, suit thereon may be brought in the name of the State for the use of the county.

The costs of reversal will be rendered against appellee, Joseph R. Rutherford, in the name of the State, for the use of Benton county, and the cause remanded to the court below for further proceedings in the name of the State for the use of said county.

BOWLES, ADMR., VS. EDDY & WILBUR.

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1. CONTRACTS: *Lex Loci—Usury.*

The validity of a note as to usury, must be determined by the usury statutes of the State where it was made, unless it designates another place for payment.

2. LAWS OF OTHER STATES: *Proof of.*

Certified extracts by a notary public, of the laws of other States, are not evi-evidence of them: They should be proved as indicated in *McNeill* v. *Arnold et al.*, 17 Ark., 154.

APPEAL from *Chicot* Circuit Court.

Hon. T. F. SORRELLS, Circuit Judge.

Reynolds, for appellant.

Dodge & Johnson, *contra*.

ENGLISH, C. J.:

On the 5th of August, 1873, John Eddy and David Wilbur, partners under the firm name of Eddy & Wilbur, brought ejectment in the Circuit Court of Chicot county against Oscar Bowles for a number of tracts of land described in the complaint.

At the return term, September, 1873, defendant, by leave of the court, entered his plea of not guilty in short upon the record.

At the September term, 1874, the death of defendant, Oscar Bowles, was suggested, and Wm. W. Bowles, his administrator, substituted as defendant, and the cause continued.

At the July term, 1875, the case was called for trial, and by consent of parties submitted to the court upon the pleadings, evidence introduced, and argument of counsel, and, by consent, the court took the case under advisement until the next term.

At the October term, 1875, the court rendered judgment in favor of plaintiffs for possession of the lands, and for costs.

At the same term, on the 5th of November, 1875, the court

set aside the judgment, and again took the case under advisement until the next term.

At the January term, 1876, defendant filed a motion to set aside the submission of the cause, and for leave to set up as a special defense, in addition to the plea of not guilty, theretofore entered, that the deeds relied on by plaintiffs to show title to the lands in themselves were based upon illegal and usurious contracts, as to which defendant had introduced testimony at the hearing, and were null and void, so that the pleadings might conform to the evidence introduced in the cause.

Which motion the court took under advisement until the next term.

At the July term, 1877, the court overruled the motion to open the submission, and again rendered judgment in favor of plaintiffs for possession of the lands, and for costs.

Defendants filed a motion for a new trial, which the court overruled, and he took a bill of exceptions, setting up the evidence introduced by the parties on the submission of the cause and appealed to this court.

I. The motion of appellant to open the submission of the cause, and for leave to plead specially that the deeds relied on by appellees for title to the lands sued for, were based on usurious contracts, etc., was, under the circumstances disclosed by the record, addressed to the sound legal discretion of the court, and the overruling of the motion was not an abuse of such discretion.

It is stated in the motion, however, that the purpose of appellant in asking to be permitted to plead further, was that he might make his pleadings correspond with the evidence introduced by him on the hearing of the cause; and we deem it proper, therefore, to examine and determine whether appellant in fact proved that the deeds relied on by appellees were based

on usurious contracts, and null and void, as stated in the motion.

It appears from the bill of exceptions that appellees read in evidence a deed of trust, executed 17th February, 1866, by Charles W. Campbell and Oscar Bowles (appellant's intestate) upon the lands in controversy, to John T. Trezevant, of Memphis, as trustee, to secure the payment of a note made by said Campbell and Bowles to appellee for $14,300, payable 1st of January, 1867, with power to the trustee to sell the lands on default of payment.

Also a deed bearing date May 3d, 1870, executed by Trezevant as such trustee, to appellees, showing that he had advertised and sold the lands at Lake Village, on the 19th of March of that year in pursuance of the power vested in him by the trust deed; that they were purchased by appellees for $2,500, and conveying the lands to them.

Appellant read in evidence a copy of the note secured by the deed of trust, which follows:

"MEMPHIS, February 17, 1866.

"14,300. On the first day of January next, we jointly and severally agree to pay to the order of Eddy & Wilbur the sum of fourteen thousand three hundred dollars, value received, as witness their hands and seals.

"C. W. CAMPBELL, [SEAL.]
"O. BOWLES," [SEAL.]

It appears that appellees resided in New York; Campbell and Bowles in Chicot county, Arkansas, where the lands are situated, and that the note and deed of trust were made in Memphis, Tennessee, where Trezevant, the trustee, resided.

The note upon its face bears no interest; but appellant attempted to prove that it was executed for moneys advanced by appellees to Campbell and Bowles to aid them in cultivating cotton, upon contracts that the moneys were to be repaid with

interest, and that appellees were also to have a certain portion of the cotton produced.

Usury, as at present understood, is unknown to the common law, and depends wholly upon statutory enactment. *Tyler on Usury*, p. 64.

"In some cases importance seems to be attached to the circumstance that one or both of the parties were inhabitants of the State or county where the contract was made. But there is, probably, no force in the distinction attempted to be made. The rule upon the subject is, that the law of the place where the contract is made is to control it, unless it appears upon the face of the contract that it was to be performed at some other place, or was made with reference to the laws of some other place; and the reason of the rule is, not the allegiance due from the contracting parties to the government where the contract is made, or is to be executed, but the supposed reference which every contract has to the laws of the State or country where it was made, or to be executed, whether the parties are citizens of that State or country or not. But the *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy. And yet the rule is well settled, that when a contract is made with reference to another country in which it is to be executed, it must be governed by the laws of the place where it is to have its effect. But the *lex loci* is to govern, unless the parties had in view a different place, *by the terms of the contract.* To repeat then: the general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be considered according to the laws of the place where the contract is to be executed (*Vide Lee* v. *Selleck*, 33 N. Y., 615.) This is the doctrine of the authori-

ties as well as the elementary writers; and it would seem as a general proposition, that, from the rule, there would be no difficulty in ordinary cases of alleged usury to determine the status under which they are to be decided." *Ib*,, *pp*. 81–82; *Jones* v. *McLean*, *sur. et al.*, 18 Ark., 462.

The note complained of as usurious having been executed at Memphis, Tennessee, and upon its face designating no other place of payment, its validity must be determined by the usury statutes of the State of Tennessee.

The only evidence offered by appellant of the usury statutes of Tennessee is stated in the bill of exceptions, thus:

Defendant "read a part of the plea in *Laird* v. *Hodges*, 26 Ark., 357, which is as follows: 'And the said defendant further avers that by the law of the State of Tennessee any promisory note or other instrument wherein is reserved any greater rate of interest than the rate of six per centum per annum, is wholly void.' And also read from *Martindale's Legal Directory*, pp. 593–400, as follows: 'Prior to 1870, an instrument bearing a higher rate of interest on its face than allowed by law, could not be sued on, or if sued on and usury pleaded, both interest and principal were lost, but since the enactment of 1870 it is thought only the excess of the interest is abated, and recovery may be had for the principal together with six per centum interest thereon,' to show what the usury laws of Tennessee were in 1866, the time said contracts and loan was made."

Neither what Hodges stated in his plea, in the case of *Laird* v. *Hodges*, nor *Martindale's Legal Directory*, was competent evidence of the usury statutes of Tennessee. *McNiel* v. *Arnold et al.*, 17 Ark., 154; *Gantt's Digest*, Secs. 2445–6.

The evidence offered by both sides at the trial, and objected to, was admitted; the court reserving its opinion as to competency, etc., to the final decision, and doubtless the court dis-

regarded the above evidence of the usury law of Tennessee in making up and rendering its judgment.

Appellee for the purpose of showing that the note was not void, by the laws of Tennessee, for usury, but that the lender lost only the excess of interest, read in evidence what purports to be extracts from interest statutes of that State, authenticated by the certificate of a notary public of Memphis.

This was not competent evidence of the usury statutes of Tennessee, and doubtless the court disregarded it in making up and rendering its judgment.

The modes of proving the laws of the States, when relied on in our courts, were plainly indicated in *McNeil* v. *Arnold*, *sup.*, and need not be repeated here.

II. A further ground of the motion for new trial was that the court failed to find and state its conclusions of facts, and its conclusions of law, as required by section 4686, Gantt's Digest.

The statute is that, "Upon trials of questions of fact by the court, it shall state in writing its conclusions of fact found, separately from the conclusions of law."

It is not shown by the bill of exceptions whether the court did or did not reduce its findings to writing, or that it was asked and refused to do so. It does not appear that any declarations of law were asked by either party, or that the court made any.

It found for the appellees, on the evidence, nearly all of which is documentary, and is set out in the bill of exceptions.

If the court failed to reduce its findings upon the facts to writing, it should have done so upon the request of either party, and might have done so after as well as before the rendering of the judgment, for a memorial, as held in *Apperson & Co.* v. *Stewart*, 27 Ark., 619, and the refusal of the court

so to do might be error. *Chrisman et al.* v. *Rogers, ad.*, 30 Ark., 359; *Wood et al.* v. *Boyd*, 28 Ib., 77.

Appellees having proven, by the deeds introduced, title to the lands, and right of possession, and appellants failing to show that the deeds were invalid, or to make out any other good defense, the court could not have done otherwise than find in favor of, and render judgment for appellee, and the judgment must be affirmed.

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WORTHINGTON'S ADMR., V. DEBARDLEKIN, AD.

Practice in Supreme Court, where no declarations of law by Circuit Court.

Where there is a motion for new trial in the Circuit Court, though the Court make no declarations of law, the Supreme Court will look into the bill of exceptions to see if there is any evidence to sustain the findings of the Court. sitting as a jury, and whether as matter of law, a party is entitled to judgment upon the facts found.

LIMITATIONS:

The statute of limitations did not begin to run against a note executed during the war until the proclamation of peace, 2d April, 1866.

SAME: *Non-claim.*

Where the bar of the statute does not attach in the life of a party, the general statute of limitations ceases and the statute of non-claim is applied.

SAME: *New promise.*

A verbal promise to pay a barred debt does not revive it, and a promise in writing does not revive the old debt, but gives a new cause of action co-extensive with the promise.

BANKRUPTCY: *New promise.*

A verbal promise to pay a debt discharged in bankruptcy revives the debt.

APPEAL from *Chicot* Circuit Court.

Hon. T. F. SORRELLS, Circuit Judge.

Reynolds for Appellants.

Rose Contra.

ENGLISH, C. J.

This suit was commenced in the Probate Court of Chicot county, upon the following claims:

Estate of Elisha Worthington, Dr., To H. F. DeBardlekin, administrator of David Pratt.

To twenty-five per cent. of the amount of a due bill made by said Elisha Worthington in his life time to Daniel Pratt, for $5,760.00, and which said Worthington promised Mr. T. F. Ticknor, agent, etc., at divers times that he would pay twenty-five per cent. of $5,760.00.....$1,440.00.

The claim was authenticated by the affidavit of Henry F. DeBardlekin, as administrator of Daniel Pratt, deceased, made before a justice of the peace on the 14th day of November, 1874.

It was presented by him for allowance to E. T. and J. M. Worthington, administrators of Elisha Worthington, deceased, on the 3d of December, 1874, and by them rejected.

It was filed in the office of the clerk of the Circuit Court on the 15th of April, 1875, and presented to the court for allowance at its January term, 1876, and the court upon the evidence produced by the parties, and without formal pleadings, allowed the claim for $1,440.00 against the estate of Elisha Worthington, and his administrators appealed to the Circuit Court.

At the January term 1877, of the Circuit Court, the case was submitted to the court sitting as a jury, upon depositions and other evidence introduced by the parties, and by the court taken under advisement until the following July term, when the court announced its findings in writing as follows:

"This cause coming on to be heard and both parties being represented by their counsel, and this cause being submitted to the court sitting as a jury, and there being no declarations of law required of the court by either party, but the cause being

submitted on the depositions and other evidence in the cause, the court doth find that the defendant's intestate, after his discharge is bankruptcy, did make an unconditional promise to pay plaintiff twenty-five cents on the dollar of the debt barred by his bankruptcy, and that said promise is within the statute of limitations.

"From the above findings of fact, the court declares the following to be the conclusion of law, viz: That the claim herein is a legal claim against said defendant's intestate for the sum of $1,440 with interest thereon from December 3d, 1874, and that said claim be classed in the 5th class of claims against said estate to the amount of said sum and interest as aforesaid."

Judgment was entered accordingly.

The defendants filed a motion for a new trial on the following grounds:

1. The findings or conclusions of fact are not sustained by the evidence.

2. The conclusions of law are erroneous.

3. The decision and judgment of the court are contrary to the law and evidence.

4. Upon the whole case the findings and judgment of the court should have been for defendants.

The court overruled the motion, and the administrators of Worthington took a bill of exceptions, and appealed to this court.

I. It is submitted by the counsel for appellee that no question of law having been reserved in the court below, there is nothing for this court to decide, citing *State Bank v. Conway, 13 Ark., 344*, and subsequent cases in which the ruling in that case was followed.

In the leading cases cited, the court, after reviewing the previous decisions on the subject, and discussing the province of the jury, or the court sitting as a jury, to pass upon the

the facts, the law in reference to the granting of new trials, etc., *held* that where a party merely excepts to the finding of the court, or jury, setting out the testimony without any motion for a new trial, and without any exception whereby he shall put his finger upon the alleged error of law as to any ruling or decision of the court below, there is no case presented for the consideration of the court, on error or appeal.

In the case now before us, there was a motion for a new trial, and though the court made no declarations of law, none being asked by either party, we certainly can look into the bill of exceptions to see if there was any evidence to sustain the findings of the court, sitting as a jury, and whether, as matter of law, the plaintiff below was entitled to judgment upon the facts found.

II. The court found from the evidence that after Elisha Worthington had been discharged in bankruptcy, he made an unconditional promise to pay twenty-five per cent upon the note mentioned in the claim sought to be probated against his estate, and that the promise was not barred by limitation, and declared as a conclusion of law, upon the facts found, that the plaintiff below was entitled to judgment allowing and classing the claim against the estate of Worthington, and rendered judgment accordingly.

It was proven that late in the year 1859, or early in the year 1860, Daniel Pratt sold to Elisha Worthington of Chicot county, Arkansas, twelve eighty-saw gin-stands, at six dollars per saw, or $480 for each stand, making $5,760.00, for which Worthington afterwards executed to Pratt the following note, which is the due bill referred to in the claim sought to be probated.

"$5,760.00, Chicot county, Arkansas, March 6, 1862. Due Daniel Pratt, when the blockade is removed, that cotton can be freely sold in the market in New Orleans, five thousand

seven hundred and sixty dollars, with interest on said sum from the first of January, 1861, til paid. Interest at the rate of eight per cent per annum.

E. WORTHINGTON."

It was admitted that Worthington went into bankruptcy in February, 1868, and was discharged 20th of February, 1870.

He died 19th November, 1873, and on the 25th of the same month, letters of administration upon his estate were issued to appellants.

It was admitted that Pratt and Worthington were both residents of this State before and during the civil war, and that the Federal forces captured New Orleans May 24th, 1862. That Worthington never, in writing, made any promise that would take the claim or said due-bill or note out of the statute of limitations if the same was otherwise barred

It was also admitted that the lands belonging to the estate of Worthington, were valued on the tax-book at $32,000.00, and that the account current of his administrators showed a balance in their hands of over $7,000, and that all of the debts probated against his estate had been paid except the claim sued on, and a judgment which had been appealed from, of Martha W. Mason, for $12,000.

As to the promise of Worthington to pay twenty-five per cent on the note; Samuel F. Tichnor, on his examination in chief, deposed, in substance, that as agent of Daniel Pratt, he called on Worthington in the winter of 1868, at his residence, Sunny-Side Landing, and asked him to pay for the gin-stands. He replied that he could not then pay, but would pay, as it was a just debt.

Witness called to see him again in January, 1870, and he then said he had paid a large debt, which he regretted, and had paid some other debts for twenty-five cents on the dollar, and promised that he would pay that amount on the gin-stands;

said that he had some of them on hand, and was using them. At this time he was living near the Lake, on his Red Leaf plantation.

Witness called on him again 18th December, 1871, and he then said that he would pay the twenty-five per cent on the gin-stands, and that witness need not call again. That he thought that he could pay a part of the money that winter, and would either send a check or pay the money over to Esquire Springer. The reason why he thought that he could not pay that winter was, he said, that he had to build a house to live in. He further said to witness: "I am not telling you lies to get rid of you; that would be very absurd in me, an old man." He said further, that Pratt had not opposed him in getting his discharge in bankruptcy, and upon the honor of a man that the twenty-five per cent of the amount of the gins should be paid out of that crop and the next.

On cross-examination, witness repeated, in substance, the above statements, and also deposed that he offered to give up the old papers to Worthington, and asked him to give new ones, and he said that the old one was good, and gave witness his word and honor that he would pay the amount agreed on.

The testimony of this witness was to some extent corroborated by the deposition of Martha W. Mason, who lived with Worthington, and heard some of the conversation between him and Tichnor about the gin-stands debt.

The only promise proven to have been made by Worthington to pay twenty-five per cent upon the debt, after his discharge in bankruptcy, was that of 18th December, 1871, which was about one year, eleven months and seven days before the grant of letters of administration upon his estate to appellants.

The note not being under seal, five years was the period of limitation applicable to it. It was executed 6th of March, 1862, when the civil war was flagrant, payable on the removal

of the blockade at New Orleans, but the statute of limitations did not commence to run against it until the proclamation of peace, 2d of April, 1866. *Mayo & Jones* v. *Cartwright, ad. et al*, 30 Ark., 414; *Shinn* v. *Tucker*, M. S.

Putting out of view the bankruptcy of Worthington, and the verbal promise after his discharge to pay part of the debt, any suit upon the note was barred by the statute of limitations before his death, which occurred 19th November, 1873, and of course there was no right of action upon the note against his administrators.

Moreover, at the time the promise was made (18th December, 1871), the note was barred by limitation, as well as discharged in bankruptcy.

The court below, however, treated the suit as being founded upon the new promise to pay part of the debt, and not upon the note, and found that the promise was made within the period of limitations.

If the suit was upon the new promise and could be maintained upon it, three years was the period of limitation applicable to it, the promise being verbal, and the time had not run out when letters of administration were granted to appellants, and then the general statute of limitations ceased to run, and the statute of non-claim applied, and the suit was commenced against the administrators within two years from the grant of letters. *Walker as ad.* v. *Byers*, 14 Ark., 247.

But by statute, a verbal promise to pay a debt barred by limitation will not revive the debt, or remove the bar. Of course such a promise to pay part of the debt will not remove the bar as to such part.

If Worthington had made a written promise to pay one-fourth of the note, after it was barred by limitation, such promise would not have revived the old debt, but would have

given a new cause of action, co-extensive with the promise. *Duffin* v. *Phillips*, 31 Ala., 573, and citations.

So a verbal promise to pay a debt discharged in bankruptcy will revive the debt. *Apperson & Co.* v. *Stewart*, 27 Ark., 619; and a promise to pay part of the debt, may, limitation being out of the way, give a new cause of action for so much.

But here the whole debt was barred by limitation, and the verbal promise removed the bar from no part of it.

There were no written pleadings, and none were required, but appellants relied on two defenses; the statute of limitations and the discharge of their intestate in bankruptcy. The latter defense was defeated by the verbal promise to pay the part of the debt sued for, but the former defense was in no way avoided.

It follows that upon the facts in evidence, appellee was not entitled to a verdict and judgment.

Reversed and remanded for a new trial.

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33 658
74 525

CONNELLY ET AL. V. WEATHERLY, ADM'R.

1. PROBATE COURT: *Practice and Pleading in.*

Where a guardian has died, his wards should present against his estate, several claims for their respective shares of an amount shown by his account in the Probate Court to be due them, and not a joint claim for the whole; but the Probate Court being confined to no course of procedure, may sever the demand and allow to each the sum he is entitled to

2. GUARDIANSHIP: *Sureties on bond—action against. Settlement by his administrator.*

It is the duty of the administrator of a deceased guardian to make settlement of his guardianship. Until such settlement, no action can be maintained against the sureties on his bond.

3. ——— *Claim against administrator of guardian, when barred.*

Until the final settlement of a guardianship the statute of limitations never begins to run. But the claim of a ward against a deceased guardian must be presented to his administrator within two years after the grant of administration, or it will be barred, whether there has been a final settlement of the guardianship or not.

APPEAL from *Phillips* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Palmer, for appellant.
Brown, contra.

HARRISON, J.:

At the June term, 1873, of the Phillips Circuit Court, then having original jurisdiction of administrations and guardianships, the following claim against the estate of William Weatherly, deceased, was presented for allowance:

"ESTATE OF WILLIAM WEATHERLY, DECEASED,

"To John Connelly and Martha A. Connelly, his wife, Walter Underwood, son and heir of Mary Jane Underwood, deceased, by his next friend, J. C. Davis, and Harvey J. Pasley and Helen M. Pasley, his wife—the said Martha A., Mary Jane and Helen M., born Thompson, and the late wards of said decedent—

DR.

"1872. November.

"To amount shown to be due his said wards by second annual settlement account, filed in Phillips Probate Court, April 28, 1859.....$3,278 17

"Interest on same to Nov. 1, 1872, at 6 per cent, thirteen years and six months..... 2,556 84

$5,835 01

The claim was authenticated by the affidavit of John R. Connelly.

The administratrix, Martha Weatherly, filed an answer to the claim and denied that anything was due from her intestate's estate to his late wards; the sum shown in his hands by the settlement referred to in the claim having been, she said, expended afterwards in their maintenance and education; and

as a further defense she pleaded the statute of limitations of three years, and also of five years.

The claimants demurred to the paragraphs of the answer setting up the statute of limitations, and the demurrer was sustained as to the plea of three years, and overruled as to that of five years.

The case, when the present Constitution was adopted, was remitted to the Probate Court, and John R. Connelly having died, it was abated as to him.

It appears from the record that William Weatherly, the decedent, was, on the 28th day of October, 1854, appointed by the Probate Court of Phillips county, guardian of Martha A., Mary Jane and Helen M. Thompson—the said claimants, Martha Connelly and Helen M. Pasley, and the said Mary Jane Underwood, and he executed to each, as required by the statute, a separate bond, and that at the April term, 1859, he filed his second annual account, which, instead of a separate account with each, was a consolidated account with all; and in it he charged himself with the sum of $3,278.71 in his hands as belonging to them in common; and that the account was, at the July term following, confirmed. This was the last account he ever filed.

The record also shows that the administratrix, upon the hearing of the claim in the Probate Court, produced evidence that her intestate, after the settlement in 1859, maintained and supported, for several years, each of the said wards, and of the cost or value of their maintenance and support, and claimed, in behalf of the estate, credit therefor. The court thereupon found as upon final settlement of the several guardianships then made with her, that the estate was entitled to a credit in the guardianship of Martha A. Connelly of $660; in that of Mary Jane Underwood of $840; and in that of Helen M. Pasley of $800; and after deducting these several credits from the

share of each in the sum admitted in the settlement of 1859, in his hands, allowed as several claims against the estate, Martha A. Connelly $432.73, Walter Underwood $250.72, and Harvey M. Pasley and Helen M. Pasley, $292.92, which it ordered paid as claims of the fourth class.

The administratrix appealed to the Circuit Court.

The claimants in the Circuit Court again demurred to the administratrix's plea of the statute of limitations, and the same ruling on the demurrer was made as in the Probate Court.

The cause was submitted to the court. It stated as the conclusions of fact found, that the defendant's intestate was, by separate appointments and the execution to each of separate bonds, the guardian of the wards mentioned in the claim; and that they presented for allowance a joint demand for the aggregate amount of their several demands against his estate for money he severally owed them as their guardian. And as a conclusion of law, that several parties cannot recover jointly upon a several demand, and found for and rendered judgment in favor of the estate.

The claimants moved for a new trial, because the finding of the court was contrary to law and evidence.

The motion was overruled and they appealed to this court.

It was certainly very irregular, and the Probate Court should not have permitted Weatherly, instead of filing an account with each of his wards, and charging himself with their several shares of the money in his hands, to file a consolidated one with all, and to charge himself with the money of all as belonging to them in common.

But we cannot see how such an irregularity could affect the rights of his wards.

Though the claimants should have presented several claims for their respective shares, and not a joint one for the whole, the Probate Court, being confined to no prescribed course of

procedure, could adopt any method it deemed appropriate for arriving at the merits and justice of the case, and as it very properly did, sever the demand and allow each the sum the evidence showed she was entitled to. The statute says:

"The court shall hear and determine all demands presented for allowance under this act, in a summary manner, without the forms of pleading." *Gantt's Digest*, Sec. 115.

No possible prejudice that we can see was, or could have been done the estate, by the course pursued, and there is no apparent reason that the claim should have been dismissed, and they required to begin anew by exhibiting their several demands, which amounted in the aggregate to the sums jointly claimed.

But it is insisted by counsel for appellee, that until final settlements of the guardianships, it could not appear that the intestate was indebted to his wards, or that they had claims against his estate.

It was the appellee's duty to make settlements with the Probate Court of the unsettled guardianships.

Until such settlement was made there could be no action upon his bond against his sureties; but it does not follow that they might not, as creditors, exhibit their claims against the estate. Whether the settlement was made or not, they were compelled to exhibit their claims within two years after the grant of administration, or be barred by the statute of non-claim. A right of action against the sureties, after the settlement, would have remained; but they may have been insolvent, and that the only available remedy against the estate.

The Probate Court did, however, allow the administratrix to prove the credits her intestate was entitled to in the accounts between himself and his wards, and proceeded to adjust the same and ascertain the balance due each.

Why this might not be done, when considering their claims,

though there had been no regular settlement of the guardianships, is not easily perceived.

The claims to the extent allowed by the Probate Court, were, it seems to us, fully established by the evidence; and the finding of the Circuit Court was clearly against the evidence. Yet we do not deem it necessary to state the evidence as to the merits or justice of the claims, as it was not, as appears by the court's conclusions of fact, considered relevant, or passed upon by it.

No final settlement of the guardianship having been made in the life time of Weatherly, the statute of limitations never commenced running. We, therefore, need not consider the demurrer overruled by the court.

The judgment is reversed and the cause remanded to the court below for further proceedings, and not inconsistent with this opinion.

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33 663
64 397

FERGUSON ET AL. v. DOXEY.

——— COURT COMMON PLEAS: *Appeal from.*

There is but one way of taking an appeal from the Court of Common Pleas to the Circuit Court, and it must be moved for and taken at the term at which the judgment is rendered.

APPEAL from *Prairie* Circuit Court.
Hon. J. N. CYPERT, Circuit Judge.
Compton, for appellant.
Gatewood, contra.

HARRISON, J.:

The appellee recovered judgment in the Court of Common Pleas of Prairie county, at the April term, 1877, against appellants for the sum of $107. Appellants made no motion for an appeal, and none was granted at the term; but they filed

with the clerk, in vacation, and within thirty days after the judgment was rendered, an affidavit and bond for an appeal, and he transmitted the original papers, with the affidavit and bond and a certified transcript to the clerk of the Circuit Court, as in cases of appeal.

The Circuit Court, on motion of the plaintiff, dismissed the case because no appeal had been taken.

The defendant appealed to this court.

It is insisted that an appeal to the Circuit Court was properly taken; that section 17 of the act of December 14, 1875, establishing Courts of Common Pleas in Prairie and certain other counties, provides two modes of taking an appeal from the Court of Common Pleas to the Circuit Court;—one as a matter of right upon a motion filed therefor at the term at which judgment was rendered, and the other, as was done in this case, by filing the affidavit and bond with the clerk, and without any action of the court.

The section is as follows:

"Sec. 17. That any person aggrieved by any judgment rendered by any of said courts, except a judgment of dismissal for want of prosecution, may, in person or by agent, take an appeal therefrom to the Circuit Court of the county upon complying with the following requisites:

"*First*—The appellant or agent shall make and file with the clerk an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done.

"*Second*—The appellant, or some person for him, together with one or more securities, to be approved by the clerk, must enter into an obligation to the adverse party in a sum sufficient to secure the payment of such judgment and the costs of appeal.

"*Third*—The appeal shall be granted by the court as a matter of right, upon motion filed at the same term of the court at

which the judgment was rendered; and the entering of the order granting the appeal shall be a sufficient notice to the adverse party that an appeal has been taken.

"*Fourth*—In order *to make the appeal effective*, the affidavit and bond for the appeal must be filed with the clerk within thirty days after the appeal is granted; and upon the filing of said affidavit and bond, all further proceedings in said court shall be suspended; *provided*, that either party may appeal without giving any bond; but in such cases the judgment shall not be suspended."

The language of the section is too plain and explicit to require or admit of any construction. Obviously there is but one way of taking an appeal provided, and it must be moved for and taken at the term at which the judgment is rendered.

The Circuit Court having acquired no jurisdiction of the case, it was properly dismissed.

Judgment affirmed.

ANDERSON ET AL. PARTEE'S HEIRS V. LEVY, ADM'R., ET AL. [33 665 / 74 158]

PRACTICE: *Parties; Heirs; Administrator.*

Upon the death of a party, the title to his lands passes at once to his heirs or devisees, and the administrator can not represent them in court. In al cases where title to lands is to be affected they are necessary parties, and the court should of its own motion refuse to proceed until they are brought in.

APPEAL from *Jefferson* Circuit Court in Chancery.

Hon. J. A. WILLIAMS, Circuit Judge.

Bell and Compton for appellant.

Carlton, contra.

EAKIN, J.:

This is a suit in equity brought by S. W. McCrary, on the

4th of September, 1873, against H. A. and R. D. Partee, and J. B. McGehee as partners, under the firm name of Partee, McGehee & Co., and J. J. Freeman. The objects of the bill are, to cancel and set aside certain conveyances of lands to H. A. Partee, and to vest title in complainant, upon the grounds that they were held as securities for a debt already paid up: or, in default of that relief, to have an account of the dealings between complainant and H. A. Partee and a personal decree. Freeman holding as trustee from H. A. Partee, to secure an individual debt of Partee to another person, is made a party.

The case made by the bill is substantially as follows: On the 1st of December, 1866, McCrary bought from John Donelson and wife, a plantation in Jefferson county, for $15,000; of this amount $8,000 was paid in cash. For the balance of $7,000 a note was executed due January 1st, 1868, bearing ten per cent. interest from January 1st, 1867. This note was assigned by Donelson, to Henry W. Reynolds, who, (as developed in the case) claims an interest in the lands sold.

Complainant, in partnership with others (who have no interest in the matters in controversy) conducted large planting operations during the year 1867, doing their business through the house of Partee, McGehee & Co., of Memphis. As claimed by said firm, complainant with his partners fell in their debt. Having confidence in their statement, complainant executed to them his note for this balance in the sum of $16,500. This was for too large an amount, and it is charged, was fraudulently obtained. He calls for an account current. To secure this note, complainant with one of his partners (March) made a deed of trust to Charles L. Partee, including the Donelson place and a large amount of mules and other personal property, with power to sell and apply the proceeds. It is charged that he did take possession of and sell the personal property but not to the best advantage, nor did he fully apply

the proceeds to the debt. An account of these sales is sought also.

In the fall of 1868, Reynolds was pressing for payment. Defendants agreed to accept drafts to pay him, for which complainant was to ship cotton. To secure Partee, McGehee & Co., for these advances, complainant, on the 5th of September, 1868, made another deed of trust to C. L. Partee of a large amount of personal property, cotton, etc., worth $10,000, conditioned upon repayment of the amount advanced by them, to take up Reynold's note, and future advances, that the said trustee should re-convey to complainant the Donelson lands by quit claim deed.

Complainant continued his business with Partee, McGehee & Co., during the year 1869, drawing supplies, receiving advances and shipping cotton. Believing himself, from the representations of the firm, to be still largely indebted to them, he with his wife, on the 2d of March, 1869, made a quit claim deed of the Donelson place to H. A. Partee, one of the firm. This was expressed to be in consideration of amounts advanced, and to be advanced, by him and his firm in payment of said landed property.

Before this time, on the 9th of January, 1869, a balance being due on the Reynold's note, Partee, McGehee & Co., refused to pay the same, unless Reynold's and wife should convey the Donelson lands to H. A. Partee. This had been done and the balance of the note fully paid up. This deed was referred to in the subsequent quit claim of McCrary and wife, on the 2d of March, 1869.

Complainant took possession of the Donelson place at the time of purchase, and has kept it since. He paid taxes with the exception of one year, in which he failed. The lands were sold for taxes, and purchased by Wm. Reynolds, a son of Henry W. On the 21st of November, 1870, complainant

re-purchased the tax title and afterwards, in March, 1872, he transferred it to H. A. Partee. This, he says, was done in order to enable Partee to make to him a good and complete deed back, At the same time with this transfer, complainant executed to Partee two notes for $2,000 each, for the rent of the lands for the years 1873 and 1874. This he says was done to enable H. A. Partee to raise money on them, and for no other purpose.

On the 16th of January, 1871, complainant, as he alleges, purchased another contiguous body of lands, called the Barkdale place, containing about 200 acres. For this land he paid to the vendor as a part of the cash payment, $536.66. For the balance of the cash payment, which in all amounted to $3,020, to bear interest from 24th December, 1870, at eight per cent., he drew upon Partee, Burleson & Co., (successors to Partee, McGehee & Co.). He also drew upon them for the deferred payment of $3,000 due 24th December, 1871, with like interest from December 24th, 1870. When the drafts were paid H. A. Partee took the deed in his own name.

On the 21st of June, 1873, H. A. Partee made a deed of trust of all these lands to J. J. Freeman, to secure his own debt of about $8,000.

Referring back to the trust deed of September 5, 1868, complainant, explaining the circumstances, says: That in the spring of that year he had gone to North Carolina, filed his petition there in bankruptcy, and been discharged. On his return he applied to Partee, McGehee & Co., to re-purchase the Donelson place, and to obtain advances of supplies for future planting operations. The deed of trust was executed in this view, and Partee, McGehee & Co., gave him a certificate showing that said last named deed of trust was made to secure them in assuming the payments on the Donelson place, and for advances to be made thereafter. Having taken the benefit of the

bankrupt act against the old indebtedness of himself and his planting associates, to Partee, McGehee & Co., they asked him, in consideration of the renewed favor, to revive the old debt. He agreed to that, and to secure it by three life policies—two for $5,000, and one for $7,000, which have been since transferred to H. A. Partee. At the time of taking out the last policy, he says that Partee, McGehee & Co., gave him a writing explaining the purposes of the policies, and expressing that upon the payment of the purchase money for the Donelson place the title to the same was to be re-conveyed.

On the 13th of March, 1872, he had a settlement with the firm of Partee, Burleson & Co., showing a balance against him of $1,833.34. This, by the 16th of March, had been overpaid by the amount of $851.59, which was paid complainant. Complainant says this settled all the payments due from him on the two places; that he executed a note to H. A. Partee for about $9,000, which was wholly for a balance of the old debt revived in 1868, secured by the life policies; and, in no part, for subsequent advances, or for payment on land. He says, further, that the two rent notes which had been given for Partee's accommodation, he intended, if the payment fell upon him, to claim them as credits upon the $9,000 note.

He charges that the deed of trust to Freeman was a fraud, and that H. A. Partee declines to make title.

He prays that all the said conveyances to H. A. Partee be set aside and annulled; that the lands be released from the trust deed of Freeman in case the money secured thereby can be made out of H. A. Partee, or has been paid; that if he cannot obtain title to the lands he may have an account with said H. A., and those he represents; that the life policies may be delivered up; that he may have a personal decree against said H. A., and general relief.

H. A. Partee, in his answer, says: That he was an old

friend of complainant; desired in every way to aid him, and induced mercantile firms with which he was connected to give complainant credit and accommodations. He files an abstract of the accounts up to April, 1868, for the settlement of which the note for $16,500 was executed, and says the life policies were taken out to secure it. He explains the indebtedness by saying that complainant and his partners had failed to ship the crop of 1867, as promised, but had sold it in New Orleans. The trustee in the first deed of trust proceeded to realize what he could on the personal property, and apply the proceeds, which, with other credits, reduced the amount due on the note to about $12,875. This debt respondeut assumed and took an assignment of the note; and Partee, McGehee & Co., closed their account with McCrary and his firm. Partee, Burleson & Co., agreed to make future advances to McCrary on respond ent's guaranty. It was part of the consideration for this arrangement that McCrary and wife should give him a quit-claim deed of the Donelson lands, and that Reynolds and wife should also execute to him a title. The intention was to have the legal title vest absolutely in himself; but, as an act of friendship, he gave McCrary a writing in which he agreed to re-convey, in case he would pay $7,000 out of his crop after settling with Partee & Burleson for advances; and as for the balance he would give time. This arrangement, made in 1868, was consummated in 1869 by deeds.

The Reynolds note was subsequently paid out of shipments of cotton to Partee, Burleson & Co., by McCrary, over and above their charges for advances, save a balance of about $2,800, which was taken up by respondent.

It was agreed that if McCrary did not repurchase, he would pay rent at the rate of $1,400 per year from January 1, 1868. He was, meanwhile, to pay taxes, and respondent the life premiums.

In the fall of 1871, McCrary advised respondent that he would be unable to purchase; and in March, 1872, they had a final settlement. Complainant surrendered the written agreement concerning the purchase, and it was destroyed. Respondent gave up to him the note for $12,875 (balance). A general settlement of all matters was made, and complainant, to show the ultimate balance, gave a new note to respondent for $9,788.99, dated March 17, 1872, due at one day, bearing ten per cent interest. Next day complainant executed his final release to respondent of all interest in the land which he may have acquired by virtue of the purchase of the tax-title from Wm. Reynolds.

As for the Barksdale lands, respondent says that he bought and paid for them with his own means; complainant advanced without his knowledge or request something over $500 on the cash payment, which was afterwards refunded to him.

Since the settlement in March, 1872, respondent says that Burleson & Patterson have continued to make advances to complainant, on respondent's guaranty, and that he has paid out for complainant about $2,009.87.

He says the trust deed to Freeman was made in good faith, to secure the debt therein expressed, and to get an extension of credit, and, generally, denies all charges of fraud.

Freeman, the trustee referred to, denies all fraud and collusion on his part; says he knows nothing of the matter between H. A. Partee and McCrary, and that the trust deed was made in good faith to secure a *bona fide* debt, which remains unpaid; says that the beneficiaries in the deed whom he represents, as well as himself, are innocent purchasers. He has advertised the lands for sale, and prays that any purchasers at the sale may be protected.

R. C. Daniels, pending the suit, was allowed to become a party, and file an answer and cross bill, with a prayer for a

receiver. He says that on the 21st day of January, 1873, H. A. Partee desired him to become security upon a note to the Merchants' National Bank for $8,000; that said Partee exhibited to him his titles to the lands in question, which respondent thought satisfactory. He accordingly indorsed for him, and the deed of trust for his security was made to Freeman. Afterwards, when the note became due, he was compelled to pay it. Neither at the time of endorsement, nor of payment, did he have any notice or knowledge of complainant's equities, or of any transactions between him and Partee. He shows, further, that the trustee had sold under the provisions of the deed of trust on the 24th day of December, 1876, (meaning, doubtless, 1873), and that he had bought in the land for $6,750, which was credited on the debt, and deed executed. He claims to be the absolute owner of the land under said purchase, entitled to the immediate possession, but does not bring ejectment because the title is already involved in this suit. He prays that his title may be confirmed against the complainant and all others, parties to the suit; charges that complainant is sub-letting the lands, and unless prevented will collect the rents, which are worth $2,000 a year, and that he has no property out of which it can be made, not exempt. He prays a receiver. This answer and cross bill was filed on the 25th day of February, 1874. The heirs of McCrary were not made parties. It appears from the next order of court, no date of which appears in the transcript, that on motion of "the defendants' attorney, and upon suggestion of the death of the plaintiff, S. W. McCrary," it was ordered that the cause be revived in the name of J. F. Vaughan, as his administrator. The heirs do not appear ever to have been made parties or brought in.

The cause was heard on the 30th of August, 1875, upon the pleadings, exhibits, and a great mass of depositions on both

sides. The court found that, at the institution of the suit the complainant, McCrary, was the equitable owner of the property, and had fully paid for all the lands; that the life policies were given for the balance of his indebtedness to Partee, McGehee & Co., and to H. A. Partee, to be kept alive by them by payment of the premiums; that the allegations of fraud on the part of H. A. Partee were fully sustained by the evidence; that the trust to Freeman was a fraud upon the trustee, but as complainant had contributed to making it possible by taking a lease as a tenant, the equities of the beneficiaries in said trust deed were superior to those of complainant, in the event that said Freeman cannot, by reason of the insolvency of Partee, save them harmless without resort to the lands. It was further held that the purchase was made by Daniels, *pendente lite*, in Tennessee, for cash and without any notice in Arkansas, and in violation of our laws, and was consequently null and void. The deeds and conveyances to Partee were held for naught. The title to the lands was divested out of him and vested in the lawful heirs of S. W. McCrary. It was further ordered that Freeman, as trustee, have leave to amend his answers and cross-bill in accordance with the rulings of the court made in this cause, and proceed to foreclose, if the proper allegations be made.

Fees were settled and allowed to complainants' attorneys, and ordered to be paid by the administrator out of the first moneys coming into his hands belonging to said estate, and to be charged in his settlements. No order was made for accounting between the parties with regard to the old transactions. From this decree Freeman, Partee and Daniels appealed.

This detail of the pleadings and matters of record, has been necessary to show the points at issue in the case, and the interest claimed by the several parties, so as to render the sug-

gestions which the court may make, intelligible to the profession. To that end it is further necessary to observe upon the weight of the evidence.

We think upon the transcript, as now presented, it is clear that the Donelson lands were held by Partee as a security for a debt until the settlement between him and complainant in March, 1872—certainly as a security for the sums advanced to pay for it. Whether he could have held them as a security for the note given for the general balance then ascertained, is a matter which it was not necessary for the court below to decide. As for the Barksdale lands, it seems plain that they were bought wholly by Partee with his own means, but with the intention of allowing complainant to pay for them, and keep them in connection with the others, if he could. It was not clear, under these circumstances, that complainant had any equity in them, which he might enforce against the will of H. A. Partee, the purchaser. It is not a case of one employed by another to purchase, and taking the title in his own name. He was not the agent of McCrary, but, on the contrary, McCrary was his, and the deed was made as intended. Any equity McCrary might have would spring out of the necessity of the Barksdale place to the full use and enjoyment of the other, to the best advantage, and the acknowledged right to redeem the latter, connected with an agreement on Partee's part to allow McCrary to redeem both together, and proof that the land was purchased as a necessary addition to the Donelson place. In this view it may not have been erroneous in the court to hold that the Barksdale place was held as a security for the money advanced on that. This certainly was the mutual understanding of the parties up to the date of the March settlement.

This case should have turned on the settlement in March, 1872, which seems to have changed the condition of the property and the relation of the parties. H. A. Partee then held

the old note for $16,500, in his own right. It had been reduced to something over $12,000 in 1868, the balance with interest being unpaid. He claimed to have advanced about $3,000 on the Reynold's note, conceding that the other payments had been made by McCrary. This (about $2,800 with interest) was due to Partee. He had paid for the Barksdale place over $6,000, which (on the supposition of McCrary's right to redeem) was also due with interest. Besides, there seems to have been other debts which a careful accountant made up into the statement. Nothing was due to either of the mercantile firms of which H. A. Partee was a member. The credits of these firms had been extended through Partee, who assumed the debts and made it an individual matter.

The evidence seems to establish clearly that owing this vast amount he dispaired of being able to redeem at any time. He gave up his written evidence of right, and conveyed to Partee an outstanding tax title, took credit for the value of the lands on the account as it would have stood with all payments made for it charged against him, and gave his note for the balance. The full legal title was unconditionally in Partee, and had been before, save only as to the outstanding tax title. This was conveyed and McCrary took a lease as Partee's tenant. It is difficult to perceive the grounds upon which, in the face of these facts, the court held that the lands had been fully paid for and belonged to McCrary. The preponderence of testimony is largely against it, and in favor of the conclusion, that McCrary, on that settlement, abandoned all his rights to the land and received therefor a credit of about $20,000—giving for the balance his note for something over $9,000, secured by life policies. If the court below had taken this view of it, it would have followed that the trust deed to Freeman, and all proceedings under it, were matters concerning which complainant had no right to inquire.

The decree, and all proceedings in the court below, with regard to the land, after the suggestion of McCrary's death, were erroneous. The administrator might have prosecuted the writ for an account against Partee and a personal decree. But that branch of the case was abandoned. Upon the death of a party the title to his lands passes at once to his heirs or devisees, and the administrator cannot represent them in court. In all cases when title is to be affected they are necessary parties. It is well settled that the heirs of a mortgagor are necessary parties defendants to a bill to foreclose, or as complainants in a bill to redeem. A bill to assert an equitable title to land, to which the legal title is in another, on the grounds that it was in fact a mortgage, is in fact a bill to redeem. The success or failure of it effects the heirs, and they *must* in all cases be brought in. It does not cure the omission to decree in favor of the absent heirs. The propriety of the jurisdiction cannot depend upon the result. Absent parties are not bound by decrees, and should take no advantage from them. The action of the court in such cases is erroneous *ab initio*. It should, of its own motion, refuse to proceed until the heirs are brought in, and can have an opportunity to be heard.

There may arise cases where an administrator, also, may properly be made a party in a suit concerning the title to the lands. He has a qualified statutory right to the possession, and for the purpose of paying the debts, may apply to the probate court for their sale. To protect or enforce this right of possession and right to use lands as assets for debts, he might, perhaps, on a proper showing of the necessity, be made a party with these heirs, but not without them. The substantial right and title is cast by descent upon the heirs, and the right of the administrator is in the nature of a contingent burden.

Since this cause has been appealed, the death of H. A. Partee has been suggested here, and his administrator, widow and

heirs all been made parties. This is good practice and should have been pursued in the court below with regard to McCrary's representatives, widow and heirs, in a contest for title to land, and for a personal decree. The death of McCrary may give rise to a further account concerning the proceeds of the life policies, and amounts advanced to Burleson, Patterson & Co., upon a supplemental bill to be filed in this cause, for which purpose the administrators of both parties will be necessary parties.

It will be seen that in the present status of this cause, it is premature to make any authoritative ruling either upon the law or the facts. Nevertheless as great labor has been expended upon it by the attorneys, and considerable expense incurred in the appeal, it has been thought advisable by the court to intimate its views upon the whole transcript as it now appears. What changes of aspect the case may assume in its further progress cannot be anticipated, and it will be understood, that when properly brought to hearing with proper parties, in the court below, the whole cause is to be heard *de novo*.

For the error in hearing the cause without reviving in favor of the heirs of complainant McCrary, the decree is reversed and the cause remanded for further proceedings. The administrator, widow and heirs of H. A. Partee having appeared here will follow the case below.

CAMPBELL & STRONG v. SAVAGE ET AL.

PRACTICE: *Application to be made party to suit.*

C. & S. filed their bill against Savage to foreclose a mortgage executed by him on certain lands, making Deadwiler, who was in possession and claiming an interest in them, a party defendant. Atwood showing that he claimed title to the land and that his tenant was in possession and had refused to pay him rent because he was made party defendant in the suit to foreclose, asked to be made party defendant, and to file his answer and cross-complaint to plaintiff's complaint. Held, that his application was properly allowed.

SAME: *Judgment on overruling demurrer to cross-complaint.*

On overruling a demurrer to a cross-complaint, the judgment should be *respondeat ouster* and the plaintiff be allowed to answer it.

APPEAL from *Dorsey* Circuit Court.

Hon. J. M. BRADLEY, Special Judge.

Carroll & Jones, for appellants.

McCain, *contra*.

ENGLISH, C. J.:

On the 8th of June, 1875, Campbell & Strong filed a bill in the Circuit Court of Dorsey county against Joseph J. Savage and wife, and P. W. Deadwiler, to foreclose a mortgage.

The bill alleges, in substance, that on the 13th of May, 1872, Joseph J. Savage made a note to complainants for $3,951.45, payable at their office in New Orleans, on the 1st of January, 1873, with ten per cent interest from maturity.

That to secure the payment of this note, Savage and wife, America Elizabeth, on the 15th of May, 1872, executed to complainants a mortgage upon certain lands, which are described, then situated in Lincoln county, where the mortgage was recorded, but now in Dorsey county.

That defendant, Deadwiler, was in possession of the lands, claiming some interest therein as purchaser, mortgagee or tenant.

That no part of the debt or the interest had been paid.

Prayer for decree against Joseph J. Savage for the debt and interest and expense of foreclosure, which was provided for in the mortgage, and that the lands be condemned and sold by a commission to satisfy the decree.

Subpœnas were issued on the filing of the bill, returnable to the following fall term of the court, which were served upon the defendants, but none of them made any defense.

At the return term, on the 6th of October, 1875, Curtis B. Attwood applied to the court to be made a defendant to the bill, and to file an answer and cross-complaint.

On the next day the motion was heard, and against the objection of the complainants, granted, and the answer and cross-bill were filed, a receiver appointed to take charge of the lands, and rent them out for the year 1876, and the cause was continued with leave to the complainants to amend their bill by the first day of the next term of the court.

The answer and cross-bill of Attwood set up tax deeds for most of the lands embraced by the mortgage, and alleged that defendant, Deadwiler, was in the occupancy of the lands as tenant of Attwood.

In the transcript before us there is a hiatus from the September term, 1875, to the September term, 1876, no orders or entries appearing to have been made in the cause at the spring term, 1876.

On the 8th of September, 1876, complainants filed a motion to transfer the cause to the Circuit Court of the United States for the Eastern District of Arkansas, which was stricken from the files, on motion of counsel for Attwood. Whereupon complainants filed a demurrer to the cross-complaint, which was argued, and by the court, overruled. "Thereupon complainants immediately made application to file their answer to the cross-bill on to-morrow morning, which was objected to by defendant, Attwood, for the reason that plaintiffs were required by

the court to file their answer on or before the first day of the last term of this court; and on consideration, said application was rejected by the court, to which ruling, plaintiffs excepted."

Thereupon plaintiffs filed their tender to Attwood of moneys paid out by him for the lands claimed in his cross-bill, and also filed their motion to dismiss the suit, which was overruled by the court.

Thereupon, complainants making no further appearance, the court rendered a decree in their favor against defendant, Joseph J. Savage, for the debt and interest secured by the mortgage, and foreclosed the mortgage as to several tracts of land not embraced in Attwood's tax deeds, and ordered them sold by a commissioner, etc., and decreed the remaining lands covered by the mortgage, with the rents in the hands of the receiver, to Attwood.

Campbell & Strong appealed to this court.

I. The tax deeds exhibited with the cross-bill are dated subsequent to the execution of the mortgage; most of them are auditor's deeds, and all of them were procured by Attwood in the years 1873–4–5.

Appellants might have made him a defendant as a purchaser subsequent to the execution of the mortgage, and it would have been the better practice for them to have done so to prevent litigation with him in another suit, and to make a clear title under foreclosure, decree and sale of the lands. *Bliss on Code Practice*, p. 101.

It was proper for the court to permit him to become a defendant, and file an answer and cross-complaint, on the showing made by him that he claimed title to most of the lands, and that his tenant was in the occupancy of the lands and had refused to pay him rent because he was made a defendant to the suit to foreclose. *Gantt's Dig.*, Secs. 4476, 4482. This case differs from *Files* v. *Files*, 28 Ark., 151.

II. The court permitted appellants to file a demurrer to the cross-complaint, and after the demurrer had been argued, submitted and overruled, we can see no good reason why the court should have refused appellants the privilege of answering the cross-complaint, and showing, if they could, that any or all of the tax deeds relied on by Attwood were invalid.

The record does not show that the court had in fact made an order at the term the cross-bill was filed, for the appellants to answer it at the next term.

The entry was that the cause be continued, with leave to appellant to amend their bill. If the court made an order for them to answer by a particular time, the record should have shown it. The statement of counsel that such order had been made as a reason why the court should not permit an answer to be filed, amounts to nothing in the absence of a showing of record that such an order had been made. Record entries made at the time orders are made by the court, are the proper memorials of such orders, and not the memories of counsel, however good. If an order is in fact made, and not entered at the time, it may afterwards be entered, on a proper showing, *nunc pro tunc.*

True, the court had a discretion in the matter of the time of filing the answer, but having permitted the demurrer to be filed, and thereby treated the cross-complaint as open for defense, we can see no good reason why the answer might not have been filed on the overruling of the demurrer. The proper judgment on overruling the demurrer *was respondeat ouster.*

So much of the decree as was in favor of appellee, Attwood, on the cross-matter, must be reversed at his costs, and the cause remanded with instructions to the court below to permit appellants to answer the cross-complaint, etc.

NECKLACE V. WEST.

UNLAWFUL DETAINER: *Action of—Mortgagee can not maintain.*

The action of unlawful detainer can not be maintained on the mere right of possession, but the relation of landlord and tenant must exist between the plaintiff and defendant. A mortgagee, or purchaser under the mortgage, having only a right of possession, can not maintain the action.

SAME: *Amendment of action.*

An action of unlawful detainer can not be changed by amendment to ejectment, where the defendant has been dispossessed under the writ.

APPEAL from *Randolph* Circuit Court.

Hon. L. L. MACK, Circuit Judge.

Moore, for appellant.

Henderson & Caruth, contra.

ENGLISH, C. J.:

On the 24th of September, 1875, Louis F. Necklace brought an action of unlawful detainer, in the Circuit Court of Randolph county, against David C. West, for possession of a tract of land, together with mill-house, steam engine and boiler, corn-mill, cotton-gin and press, and other machinery, upon and attached to the land described in the complaint.

The complaint alleges, in substance, that plaintiff is the owner and entitled to the possession of the premises, describing them. That defendant unlawfully holds possession, and detains over the premises; and for ten days past has unlawfully detained over and kept plaintiff out of possession, after lawful demand made. Prayer for judgment for possession of the premises, and for damages for detention thereof. The complaint was sworn to, and plaintiff also filed with it an affidavit, stating that he was lawfully entitled to the possession of the premises, describing them, and that defendant unlawfully detained over the same after lawful demand made therefor.

Upon the complaint and affidavit a writ was issued, com-

manding the sheriff to deliver possession of the premises to the plaintiff, upon his executing a bond, etc., as required by the statute.

The plaintiff executed a bond, with security, conditioned as prescribed by the statute, and the sheriff put him in possession of the premises, and summoned the defendant.

At the return term defendant answered, denying that plaintiff was entitled to possession of the premises, and that he unlawfully detained the same, etc., etc.

The case was submitted to a jury at the August term, 1877.

The plaintiff introduced in evidence a mortgage, with power of sale, executed by defendant, on the 22d day of June, 1874, to Levi Hecht & Brother, upon the premises described in the complaint, to secure the payment of a note, $1,381.07, payable on the 1st of May, 1875, with interest, etc.

The mortgagees were empowered by the mortgagor to sell the premises on ten days' public notice, upon default of defendant to pay the note secured by the mortgage, at maturity.

Plaintiff also read in evidence a deed executed to him on the 10th of August, 1875, by Levi Hecht & Bro., reciting the mortgage, the failure of defendant to pay the note at maturity, notice and sale of the premises under the power contained in the mortgage, purchase by plaintiff at the sale, and conveying the premises to him; defendant admitting the recitals in the deed to be correct, etc.

Defendant also admitted that he was in possession of the premises at the time the suit was commenced, and that before suit plaintiff made a lawful demand upon him, in writing, for possession of the premises.

The above was all of the evidence introduced on the part of the plaintiff.

Defendant testified that he was in possession of the premises in his own right, and did not receive or hold such possession

by virtue of any contract, either express or implied, from plaintiff, or Levi Hecht & Bro., under whom plaintiff claimed possession, by virtue of his purchase at the sale, made pursuant to the power contained in the mortgage.

The parties then introduced conflicting evidence in relation to the value of the rents and profits of the premises, from the time defendant was dispossessed to the time of the trial, which it is not deemed material to state.

The plaintiff moved the following instructions, which the court refused:

"1st. When any person shall wilfully, and with force, hold over any lands, tenements, or other possessions, after the determination of the time for which they were demised or let to him, or shall lawfully and peaceably obtain possession, and by force, or shall fail or refuse to pay the rent therefor, when due, and after demand made, in writing, for the delivery of the possession thereof, by the person having the right to such possession, his agent or attorney, shall refuse to quit such possession, such person shall be guilty of an unlawful detainer.

"2. Actions of unlawful detainer shall extend to and comprehend all estates, whether freehold or less than freehold.

"3. In a deed of conveyance to real estate, the legal possession follows and goes to the grantee or mortgagee, unless otherwise expressly reserved in the conveyance.

"4. If the jury find from the evidence, that the defendant, by a mortgage, conveyed the property in controversy to Levi Hecht & Bro., and that, after default, said Levi Hecht & Bro., after said default, sold the mortgaged premises in pursuance of the terms of said mortgage, and that plaintiff, herein, purchased at said sale, he was entitled to the immediate possession of the mortgaged premises: and the defendant's possession was, afer that time, only permissive, and that he held the

possession of the mortgaged premises as a tenant at will or sufferance.

"5. If the jury find from the evidence, that defendant held the possession of the premises in controversy, as a tenant of the plaintiff, and unlawfully withheld the possession of the same after lawful demand made by the plaintiff therefor, before commencement of this suit, and that plaintiff was entitled to possession thereof, they will find for the plaintiff.

"6. Where no damages are proved in an action of this kind, the jury may find merely nominal damages."

Against the objection of plaintiff the court instructed the jury as follows:

"Before the jury can find for the plaintiff, they must find from the weight of the evidence that the defendant was put in possession of the premises in question under a contract, express or implied, to return possession at some future time, and that defendant held the same over after the expiration of said time, after lawful demand in writing, of defendant by plaintiff, for possession. If such be not proved, they will find for the defendant.

"If you find from the evidence that there was no contract between plaintiff and defendant, either expressed or implied, by which the relation of landlord and tenant can be established, then you will find for the defendant, and assess his damages at such sum as you may believe, from the evidence, he is entitled to.

"The jury are instructed that the conveyance of the property described in the complaint by the mortgage to Levi Hecht & Bro., and a sale by virtue of a power contained in said mortgage to the plaintiff Necklace, with demand made by plaintiff of the defendant for possession, is not alone sufficient to enable the plaintiff to maintain this form of action; but they must further find that the defendant received the possession

from either the plaintiff Necklace or Levi Hecht & Bro., under a contract by which he was bound to restore said possession under said contract, or you will find for the defendant, and assess his damages at such sum as you may find him entitled to from the evidence.

"If the jury find for the defendant, they will assess his damages at the yearly rental value of the premises taken by the writ in this action, from the time the defendant was put out of possession up to this date."

The jury returned a verdict in favor of defendant, and assessed his damages at $906.66.

Plaintiff moved for a new trial, and in arrest of judgment.

The court overruled the motion for a new trial upon defendant entering a remitter for all the damages assessed in his favor by the jury in excess of $400. Also, overruled the motion in arrest, and rendered judgment in favor of defendant for $400 damages, and for restitution of the property; and plaintiff took a bill of exceptions and appealed to this court.

The complaint, affidavit, writ, bond, seizure of the premises by the sheriff, the turning of defendant out, and putting of plaintiff into possession of the property before trial, the answer, instructions of the court, verdict and judgment, all show that the suit was an action of unlawful detainer under the act of March 2d, 1875, (Acts of 1875, p. 196,) to establish the law of forcible entry and detainer, aud not an action of ejectment.

In *Dortch et al* v. *Robinson et al.*, 31 Ark., 298, this court held that under this act, which was a literal re-enactment of *Chapter 72 of Gould's Digest*, an action of unlawful detainer would not lie on the right of possession merely, but the relation of landlord and tenant, express or implied, must exist between plaintiff and defendant to entitle the former to maintain this form of action against the latter.

There is no evidence in the case that the relation of landlord

and tenant, express or implied, ever existed between plaintiff and defendant.

Defendant mortgaged the land to Levi Hecht & Bro., with power to sell on his failure to pay the note secured by the mortgage at its maturity; he made default and they sold the land and fixtures under the power, and they were purchased at the sale by plaintiff, who received a deed therefor, and on refusal of defendant to surrender possession on demand, plaintiff brought this suit. He, upon the facts disclosed, was entitled to possession of the premises, but he should have brought ejectment instead of unlawful detainer.

Counsel for appellant submits that the complaint contains all the material allegations requisite in a complaint in ejectment, and that under the code practice he ought not to fail in the suit because of a mistake in the proper form of action.

This may be true as a general rule, but it would be an unjust application of the rule to allow a plaintiff to bring the statutory action of unlawful detainer, deprive defendant of possession of the premises in advance of a trial, fail upon a trial to prove his right to maintain the action, and then avoid the consequences of the mistake, and defeat the defendants claim to damages under the statute for having been wrongfully dispossessed in a summary mode, by taking judgment in ejectment.

That the statute did not intend to substitute unlawful detainer for ejectment, is manifest from its provisions that a judgment in the former action shall be no bar to the latter, and that ejectment may be brought during the pendency of unlawful detainer. Secs. 21, 23.

The court did not err in refusing the instructions asked by appellant, nor in giving the contrary instructions, upon the facts disclosed in evidence; and the motion for a new trial was properly overruled.

There was no ground for arrest of judgment.

The appellant having failed to prove his right to maintain this form of action, the statute authorizes the jury to assess appellee's damages for being dispossessed under the writ, and he was entitled to judgment for the damages, and for restitution of the premises. Sec. 17.

Affirmed.

MASSIE ET AL. v. ENYART ET AL.

33 688
59 214

EXEMPTION: *Personal property not exempt from judgments for fraud.*

The exemption of personal property is in cases of debt by contract only; and a judgment or decree for tort or fraud is not a debt by contract, nor are the costs, which are but an incident of the judgment.

MOTION to vacate *supersedeas.*

Davidson, for the motion.

Pettigrew—J. D. Walker, contra.

HARRISON, J.:

The appellants having sued out an execution upon the decree in this court in their favor against the appellees for the cost of the appeal in this case, the appellees filed with the clerk schedules of property they claimed to hold exempt from the execution—one including a homestead, and the clerk thereupon issued a supersedeas as to the property so scheduled.

The appellants, for the cause that the execution is not for the collection of a debt by contract, have filed a motion to quash the supersedeas. As will be seen by the report of the case—*Massie et al.* v. *Enyart et al*, 30 Ark., 251—the action was in equity, and brought by the appellants against the appellees to set aside a deed of conveyance of a tract of land, upon the ground that it was made in fraud of the plaintiffs' rights

as creditors of the grantor, and that the same was for that cause by the decree set aside and canceled.

There can be no question as to the exemption of the homestead.

The homestead of a resident of the State, who is married, or the head of a family, and the owner in this case is shown to be such, is not subject to sale under execution, or other process, upon any judgment or decree whatever, not rendered for "the purchase money, or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them, and other trustees of an express trust for moneys due from them in their fiduciary capacity." *Cons., Art. IX., Sec.* 3.

The exemption of personal property is, in cases of debt, by contract only. Section 1 of said article.

A judgment or decree in an action for tort, or fraud, is not a debt by contract, nor are the costs, which are but an incident of the judgment or decree. 2 *Tidd*, 945. If the defendant's personal property is not exempt from sale under an execution, for the damages recovered against him in an action for torts, we are unable to understand why it should be for the cost, the mere incident of the damages. In New York, it is expressly held that a judgment rendered against the plaintiff for costs in an action brought by such plaintiff for damages for an alleged tort, is not a judgment for a "debt contracted," within the meaning of the exemption law of that State. *Schoulton* v. *Kilner*, 8 How. Pr., 527; *Latterof* v. *Singer*, 39 Barb., 396; and see *Thompson on Homesteads and Exemptions*, Sec. 383.

Proceedings against the homestead were properly stayed and superseded, but there being in this case no exemption of the personal property, the supersedeas as to that must be quashed.

BRODIE ET AT. V. MCCABE, COLLECTOR.

1. TAXATION BY TOWNS AND COUNTIES: *Limits of their power under Constitution of 1874 Obligations of contract not impaired by.*

It is now well settled that where municipal or county bonds have been is ued under authority of law, and where, at the same time, the law has directed a tax to be levied for their protection, or where there is a general law authorizing and directing a tax in all like cases applicable to such bonds, the law becomes a part of the contract. The holder has a right to look to the taxing provision as a part of his security, and to demand at the proper time that it be exercised in his favor. The measure of that right is the Constitutional limit of the power which the Legislature could grant to the municipality when the contract was made. Such contracts are protected by the Constitution of the United States, and no subsequent act of a State Legislature or Constitutional Convention can impair them.

2. TAXATION BY COUNTIES AND TOWNS: *How far power of, limited by Constitution of 1874.*

It was the intention of the Constitutional Convention of 1874, to cut off utterly all power in counties, cities and towns, to levy taxes beyond the limits assigned in Art. XI., Sec. 4, and Art. XVI., Sec. 3 of the Constitution. But where bonds had been lawfully issued by them under a law directing a levy of taxes to pay them, such bonds are protected by the Constitution of the United States; and the constitutional limit of five mills for old indebtedness existing at the ratification of the Constitution may be exceeded, if necessary, for the payment of such debts. But there is no power after having levied a tax for such protected debt, to levy besides, a tax of five mills for other indebtedness.

Appeal from *Pulaski* Chancery Court.
Hon. D. W. CARROLL, Chancellor.
B. D. Turner & J. M. Moore, for appellant.
Newton—Howard, contra.

EAKIN, J.:

This bill was filed on the 2d of April, 1879, in the Pulaski Chancery Court, against the Collector of the county, by Brodie and others, tax-payers, for the purpose of restraining him from the collection of certain county and city taxes, alleged to be illegal, and from returning their property to the clerk as

delinquent. The jurisdiction for such bills in this State, rests upon section 276 of the civil code, as amended in 1873, which provides that "the Judge of the Circuit Court may grant "injunctions and restraining orders in all cases of illegal or "unauthorized taxes and assessments by county, city or other "local tribunals, boards or officers." (See *Gantt's Digest*, Sec. 3451.)

The bill, exhibiting the order of the court, shows: That at the October term, 1868, the County Court of said county assessed the following rates of taxes upon property for county purposes, to-wit:

1. For general county purposes on each dollar of valuation ..... 5 mills
2. For the purpose of paying old indebtedeess, to be appropriated as follows: 3 1-2 mills to pay judgments of the United States Court on county warrants issued before the adoption of the present Constitution; the proceeds of which tax the collector was ordered to pay, when collected, into the United States Court; and 1 1-2 mills to the payment of interest on bonds issued, and to be issued, during the present year, in compromise of county bonds heretofore issued ..... 5 mills
3. For the purpose of paying judgments on bonds issued to the Memphis and Little Rock railroad, (act of 1859) ..... 2 mills
4. To pay judgments on funding bonds, issued under the act of April 29, 1873, and to pay interest on new bonds issued, and to be issued, in lieu of said funding bonds, to be appropriated to the judgments, 2 mills; and to the interest on the new bonds issued in lieu, 1 mill ..... 3 mills

Further, that on the 10th day of October, 1878, the council

of the city of Little Rock, in said county, by ordinance exhibited, levied the following taxes on each dollar of the valuation of property in the city, to-wit:

1. To pay judgments of the Pulaski Circuit Court, rendered upon indebtedness outstanding at the time of the adoption of the Constitution of 1874, in favor of certain parties whose claims are described, for the specific levy of which tax a peremptory mandamus issued from said court..... $3\frac{1}{4}$ mills
2. For the purpose of paying balance of a certain judgment in favor of Bagley in the United States Court, for which a peremptory mandamus had issued from said court..... $1\frac{3}{4}$ mills
4. To pay interest on certain bonds of the city, issued Sept. 1, 1875, and July 1, 1877, under the provisions of the general incorporation act of March 9, 1875..... 2 mills
5. To pay interest on indebtedness created before the Constitution of 1874, by virtue of Sec. 4, Art. 12, of said Constitution, for general purposes..... 5 mills

These levies of ten mills in the aggregate, by the county, and eleven and one-half mills by the city, for the payment of debts, over and above the levy of five mills by each, for general purposes, are alleged to be illegal, because in excess of the restrictions of Art. XVI., Sec. 9, and Art. XII., Sec. 4, of the Constitution.

Nevertheless, the city levies have been certified to the county clerk, and by him charged on the tax books.

Of the State taxes no complaint is made. Complainants allege that they have tendered them to the collector, and also ten mills upon the dollar, for county, and the same for city taxes, which amounts they claim are, in the aggregate, all which could be lawfully levied.

The answer set up the judgments of the United States Circuit Court rendered in favor of divers holders of bonds issued to the Memphis and Little Rock Railroad Company, under the provisions of the act of February 5, 1859; also judgments of the same court in favor of divers holders of bonds issued under the act of April 29, 1873, authorizing certain counties to fund their outstanding indebtedness; also divers judgments of the same court in favor of other parties, upon warrants of the county, issued before the adoption of the Constitution of 1874. Upon all these judgments writs of mandamus had issued from said court, commanding the County Court to levy a tax to raise a fund for their payment.

Further, that under the provisions of an act of March 6, 1877, the County Court had issued funding bonds to take up prior bonds issued under the act of 1873, and other acts authorizing the funding of the county debts; and that the original obligation of the county to provide, by taxation, for the payment of the bonds so taken up, attached also to those which were substituted. Whereupon he claims that the levies for these purposes were warranted by law and not in excess.

That the levy of five mills on the dollar to pay indebtedness existing at the time of the adoption of the Constitution, was authorized and required by its terms, and was judiciously distributed so as to obey the writs of mandamus of the Federal Court, and to further a scheme to reduce the county indebtedness; and that this was done by arrangement and agreement, whereby the County Court was permitted to make a levy manifestly insufficient for the purpose.

Defendant denies that complainants have paid the State and other undisputed taxes, or have offered to do so, except on condition of getting receipts in full for all taxes charged. He also demurs to the bill.

An amended answer, regarding the city levies, shows that

the assessed value of real and personal property in the city subject to taxation in 1868, was $4,985,531.

That to pay judgments rendered in the Pulaski Circuit Court upon old indebtedness, and upon which writs of mandamus issued, the sum of $12,254.15 would be necessary, with interest, and that the product of the levy of three and one-quarter mills would give $16,202; also that the levy for the Bagley judgments was about sufficient to pay the debt.

These two levies, (amounting to five mills), were made under section 4 of article 12 of the Constitution of 1874.

That the tax of four mills was levied by virtue of the act of February 5, 1859, and in obedience to a mandamus of the United States Circuit Court, to pay a judgment of said court upon bonds issued under act of April 9, 1869, in lieu of bonds issued to said Memphis and Little Rock railroad.

That the tax of two mills was levied to pay interest on bonds issued September 1, 1875, and July 1, 1877, under the general incorporation act of March 9, 1875, and the tax of one-half mill was levied under authority of sections 65 and 66 of said act to provide a sinking fund for the redemption of bonds issued to take up all indebtedness prior to the adoption of the Constitution.

Upon hearing, the Chancellor found the first and second items of the county levy to be in strict accordance with the Constitution, and valid. That the power to levy a tax to pay the bonds issued to the Memphis and Little Rock railroad was incorporated in the act of 1859, and became a part of the contract, which could not be impaired by the Constitution of 1874; and the levy of two mills to pay judgments on those bonds was, therefore, valid. As for the levy of one mill out of the gross levy of three, it was held invalid, because the limit of taxation had been already passed, and because, also, the levy was made in part to pay interest on obligations not yet con-

tracted. As for the rest of this levy, that of two mills to pay judgments of the Federal Court, it was sustained.

Passing to the city levies, the court held: That, for reasons stated in the discussion of the county levies, they were all valid, save the fourth and fifth items. As for the two-mill tax to pay interest on city bonds of September 1, 1875, and July 1, 1877, these having been issued under the new Constitution, were held bound by its limitations, which had been already exceeded. For the same reason the levy of one-half mill was also held invalid.

Whereupon the court ordered the injunction, as to the levies held illegal, upon terms, that complainants pay all taxes legally levied.

Both parties appealed.

It is now well settled that where bonds of a county or municipality have been issued under authority of law, and where, at the same time, the law has directed a tax to be levied for their protection—or where there is a general law authorizing and directing a tax in all like cases, applicable to said bonds, the law becomes a part of the contract. The holder is entitled to look to the taxing provision as a part of his security, and has a vested right to demand, at the proper time, that it shall be exercised in his favor. The measure of that right will be the constitutional limit of the power which the Legislature could grant to the municipality when the contract was made. Such contracts are protected by the Constitution of the United States, and no subsequent act of a State Legislature or Constitutional Convention, can impair them.

The Constitution of 1836 did not limit the powers of taxation which the Legislature might grant to municipalities.

The Constitution of 1868, (Art. V., Sec. 47), prohibited the Legislature from authorizing any municipal corporation "to levy any tax on real or personal property to a greater extent

than two per centum of the assessed value of the same;" and further, with regard to cities and villages, imposes upon the Legislature the duty of restricting their powers of taxation, borrowing money, assessment, contracting debts and loaning their credit, so as to prevent the abuse of that power. It is evident that counties were meant to be included in the term "municipal corporation."

The Constitution of 1874 provided, (Art. XII., Sec. 4), that "no municipal corporation shall" * * * "levy any tax on real or personal property to a greater extent, in one year, than five mills on the dollar of the assessed value of the same; *provided*, that to pay indebtedness existing at the time "of the adoption of this Constitution, an additional tax of not "more than five mills on the dollar, may be levied."

With regard to counties, which, in this Constitution, are treated separately, it is provided, (Art. XVI., Sec. 9), that "no county shall levy a tax to exceed one-half of one per cent "for all purposes; but may levy an additional one-half of one "per cent to pay indebtedness existing at the time of the rati-"fication of this Constitution."

Upon a careful consideration of these provisions, in connection with the history of the State, and the existing evils which the Convention of 1874 had probably in view, as resulting from the improvidence and recklessness of counties, cities and towns, in the creation of debts, we conclude that it was the intention of that body to cut off utterly all power to levy taxes beyond the limits assigned. Of course the members who framed the Constitution, knew that, under previous laws, counties and cities had been competent to create debts which would require a higher rate of taxation to discharge them; and which debts, with the means of payment, would be under the protection of the Constitution of the United States. But we cannot presume they knew that such powers had been

exercised, or were aware that the limit they fixed would actually conflict with the superior Constitution. Where such cases arise, the State Constitution must open sufficiently to give place to the full operation of that of the United States, but need do so no further. Both must stand together as far as possible, and the restriction of the State Constitution continues in all respects valid, when not displaced, or pushed forward, by superior power. When that happens it is only *pro re nata*, and to the extent of the necessity. To suppose that our State Constitution intended the power to levy taxes for debts so protected, if any should exist, to be cumulative, and additional to the power allowed to be granted to levy five mills for existing debts, would do violence to the language, without any safe guide to the real intention. It must, therefore, be held, that where a tax is levied to pay one or more of these "protected debts," as the attorneys have called them, it so far exhausts the five mill power. If the five mills be not enough, the levy may go to the extent required by the Constitution of the United States; or if it be not all required, the remainder may be levied for payment of other old indebtedness. But there is no power, after having levied a tax for such protected debt, to levy besides, a tax of five mills for other indebtedness.

Several of the levies, both for the county and city, were made under peremptory writs of mandamus, issuing from the Federal Circuit Court for the Eastern District of Arkansas, and from the Pulaski Circuit Court of the State.

The use of the writ of mandamus, directed to county courts, or boards of supervisors of counties, to compel them to levy taxes in satisfaction of judgments at law, has been common in the Federal Court for a number of years. The decisions of the Supreme Court of the United States have sustained that power; and until the Supreme Court may change its rulings,

we concede that to the extent to which this power has been sustained, the judges of the Federal Circuit Courts are constrained to continue its exercise. We cannot yield our assent, however, to the principle upon which this power is founded. We look upon a mandamus as an original writ, and not as a mere process in execution, founded upon a judgment, and continuing the jurisdiction in the court in which the judgment was rendered. It was, in England, a high prerogative writ issued in the king's name, and directed to "any person, corporation, or superior court of judicature, requiring them to *do* some particular thing therein specified." It is, in no true sense, process in a pending action, or in execution of a judgment.

The writ of mandamus is, in itself, a *writ*, a litigation of a right in a court of justice, seeking a decision upon a matter not involved in the litigation in which any judgment may have been rendered which gives the right to the writ. It has been so considered by the Supreme Court of the United States. (See Note d. to p. 297, 1st *Kent's Com.*) When addressed to the courts of a State commanding them to perform official duties under powers derived alone from the State, it is most proper that they should emanate from those superior courts of the State which have supervising control of their own tribunals; otherwise the harmony of our complicated systems of State and Federal jurisprudence may be seriously disturbed. If the officers of a State neglect their duty, the courts of the State may, and have interposed to compel them, in favor of creditors, who have obtained judgments in the Federal courts. (*Soutter* v. *Madison City*,) 5 Wis., p. 30; also *State ex rel. Carpenter* v. *Beloit.*)

The Federal courts, however, have proceeded upon the ground that it is neither a prerogative writ nor a new suit, when issued to enforce a judgment of their courts, but a mere auxilliary proceeding.

In announcing my dissent from this view, and my conviction that the Federal courts have been mistaken, and have herein transcended their just authority and gone counter to the ideas which prevailed for three-quarters of a century in the history of Federal judicature, and that they have given a character to the writ of mandamus not warranted by common law, nor a sound construction of any statute, I must be understood as expressing my individual opinion. Upon this point in this case my associates are silent.

The jurisdiction of the Pulaski Circuit Court is proper and unquestioned, and as to the action of the United States Circuit Court, we concur in the view that comity requires it shall not be collaterally attacked, unless plainly and palpably in violation of those provisions of our State Constitution and laws, which are not in conflict with those of the United States. The authority to issue the writs of mandamus from the Federal courts, and to enforce the levy and collection of taxes to satisfy their judgments, is predicated upon the supposition that the debts upon which the judgments were rendered were protected, as to this remedy, by the Constitution of the United States. This is a quesition, the final determination of which, belongs to the Supreme Court of the United States, and upon which an appeal lies not only from the Federal Circuit Courts, but from this court also. Its supremacy in this respect must be recognized. The decisions upon the several writs of mandamus, in the Federal and State Circuit Courts, were subject to appeal directly, or indirectly, to that supreme tribunal. Until so appealed and reversed, they are not void but voidable. The members of the Pulaski County Court represented the county in those suits; and, having failed to appeal, were bound to respect the orders made in the cases. However repugnant to the views of the individual members of this court the exercise of the authority may have been, it would be

unseemly and might lead to grave consequences to forbid, in a collateral proceeding, the performance of acts which the courts have directed to be performed, and for the non-performance of which the defendants in the writs of mandamus would incur the severe penalties of contempt. This court could not protect them against the authority of the United States; and if it could, eventually, it would still consider the clash of a conflict as a thing much to be deplored, and avoided by all possible means.

A calm, earnest and anxious deliberation upon this point, with a full sense of the grave responsibilities devolving upon us, has resulted in a concurrence of opinion, to respect the mandates of the Federal and State Circuit Courts, with regard to these levies, when they have not attempted, palpably, to confer powers upon State officers not granted by the constitution and laws of the State. We have conceded that there may be cases in which the taxing power would extend beyond the express limits of the State Constitution, and comity requires us to presume, as indeed we believe, the Federal and State courts have meant to act within those powers. If they have erred, the due order of proceedings, which is essential to the harmony of State and Federal governments, and the stable administration of justice in each, requires that the errors should be corrected by appeal, or upon failure, acquiesced in with respect, and not be met with a clash of independent tribunals.

We will now proceed to consider the items, *seriatim*, in the light of these views, passing, as of course, the levy of five mills by the county and city respectively, for general purposes.

The county levy of five mills for old indebtedness was divided, Three and a half mills were levied under order of the Federal Circuit Court, rendered upon county warrants issued before the adoption of the Constitution of 1874. The orders were

not appealed, and the levy being in obedience to them, was not enjoined by the Chancellor. So far he was right.

The remnant of the five mills, (being 1 1-2) was for the purpose of paying interest on bonds issued and to be issued, during the year, in compromise of county bonds heretofore issued. The courts were authorized to issue these bonds by Act of March 6th, 1877. By Section 6, it was made the duty of the court "to levy a special tax of sufficient amount to pay "the principal and interest of said bonds as they shall become "due, *not to exceed the limit of taxation, together with all other* "*taxes* levied during that year, prescribed in the Constitution "of the State." Those who took, or might take these bonds, evidently submitted to the constitutional limit of taxation under the present Constitution. The Chancellor declined to enjoin this tax because it was part of the levy of five mills, which the county had the right to make, by express authority of the constitution, to pay old indebtedness; having failed, it seems, to notice the next item in this connection; which, being a protected debt, and levied under a mandamus, more than exhausted the remnant of the taxing power. This levy of one and a half mills should have been enjoined; the next item was properly sustained.

The fourth item was properly divided by the Chancellor, the levy of two mills sustained, and the levy of one mill enjoined. These new bonds could only be issued under the act of 1877, above mentioned.

Of the whole county tax two and a half mills must be enjoined.

Passing to the city levies: the first, of 3 1-4 mills, made upon writs of mandamus from the Pulaski Circuit Court, will not, upon the principles herein announced, be interfered with in this proceeding. If the outstanding indebtedness upon which these judgments were rendered was not under the pro-

tection of the Constitution of the United States, an appeal should have been taken to this court from the peremptory writs of mandamus. The second item, to pay the balance on the Bagley judgment, upon mandamus from the Federal court, stands, of course, upon what has been said.

The third item is to pay the judgments of the Federal Court rendered upon certain certificates of indebtedness, which were issued under authority of the general incorporation act for cities and towns, of the 9th of April, 1869. These certificates seem to have been issued to the Memphis and Little Rock railroad company in lieu of bonds which had been issued under Act of February 5, 1859. The bonds had been protected to their full extent by the Constitution of the United States, but where new certificates of indebtedness were taken in lieu thereof, with different provisions for payment, it became a novation.

Turning to the general incorporation Act of 1869, beginning with Section 3295 of *Gantt's Digest*, we find that the city was authorized, thereby, to assess and collect a tax of five mills for any indebtedness existing at the time of the levy. Section 3298 authorized the issuance of bonds for the purpose of extending the time for payment of indebtedness heretofore incurred, with provision for a tax to create a sinking fund of not more than a mill on the dollar, to be annually levied, and to be paid to the extinguishment of the bonds or funded debt, These were the certificates meant, being the same which came before this court in the case of *Vance* v. *The City of Little Rock*, 30 *Ark.*, 436. Those who took them did so upon terms, and they doubtless relied upon the security for their payment, provided by the act authorizing their issuance. Whatever their rights might have been under the original bonds, when they took these certificates they could only claim from the city a levy of five mills in the aggregate, for all general indebted-

ness, and one mill for a sinking fund for the certificates—being six mills at most. Perhaps, if the city authorities had appeared in response to the writ of mandamus, and shown all this, the Federal Court would not have made it imperative beyond one mill. However that may have been, the court issued the mandamus for four mills, and the Chancellor acted properly in refusing to disturb it.

The bonds of the city, issued September 1st, 1875 and July 1st, 1877, were, of course, subject to the constitutional provisions of 1874. The limits of the city's power to levy under this constitution, had been already exceeded, and this tax, together with the tax of half mill, to pay interest on indebtedness created before the Constitution of 1874, was properly enjoined.

The decree of the Chancellor will be modified so far as he erred in not including in the injunction the amount of one and a half mills out of the general county levy for old indebtedness.

A decree is directed here, declaring the following taxes illegal and enjoining their collection, to-wit:

COUNTY TAXES.

That portion of the levy of five mills, for old indebtedness, which provides for new compromise bonds.... 1½ mills

That portion of the three mill levy providing for the same..... 1 mill

CITY TAXES.

Tax for interest of bonds of September 1, 1875, and July 1, 1877..... 2 mills

Interest on old indebtedness..... ½ mill

and it will be further ordered that the benefit of this injunction be extended to all tax-payers of the county, and that in the return of delinquent taxes, these items shall not be included by the collector; and that he, as collector, pay the costs of this appeal, to be allowed him on settlement.

TOWN OF JACKSONPORT V. WATSON ET AL.

MUNICIPAL CORPORATIONS:—*Injunction against illegal appropriations by.*

A court of equity may, at the suit of property holders or taxable inhabitants of a municipal corporation, restrain the corporation and its officers from making an unauthorized appropriation of the corporate funds.

SAME:

Municipal corporations have no authority to expend the corporate funds in establishing and operating free ferries without the limits of the corporati n, to promote trade, commerce, etc.

APPEAL from *Jackson* Circuit in Chancery.

Hon. WILLIAM BYERS, Circuit Judge.

Coody, for appellant.

Minor, *contra*.

ENGLISH, C. J.:

The bill in this case was filed in the Circuit Court of Jackson county by Elbert L. Watson and Julia Boyer, against the incorporated town of Jacksonport, to enjoin the town council from appropriating money to maintain a free ferry across White river, without the limits of the corporation.

The bill alleges, in substance, that complainants are citizens of the State and residents and tax-payers within the limits of the corporation.

That, in November 1876, the town council appropriated from its treasury $200, in State scrip, for the purpose of establishing a free ferry at Scott's Point, on White river, about a half or three-quarters of a mile from the town, and without the limits of the corporation. That, under directions of the Council, the scrip was sold, and proceeds expended in purchasing a ferry-boat and skiff.

That the council had employed Jack Moore to run the ferry at $23 per month, and was about to appropriate money out of

the treasury of the corporation to pay his wages, and would do so unless restrained.

That defendant was not authorized to run a public ferry at Scott's Point, or to appropriate money for that purpose out of its treasury; nor had it a license from the County Court or elsewhere to keep the ferry.

Prayer for injunction against appropriating the money of the corporation to maintain the ferry, etc.

The defendant answered that the object of the town council in establishing a free ferry at Scott's Point, was to induce citizens residing west of White river to make Jacksonport their place of trading, and thereby to increase the trade and commerce of the town, and promote its growth, prosperity, etc.

That on the 1st of January, 1876, the County Court granted a license to John Cost, to keep said ferry for that year, which license defendant acquired by purchase. That on the 1st of January, 1877, Thad D. Kemnan obtained license to run said ferry, and transferred the license to defendant, under which it was operating the ferry free of charge to promote the business of the town, etc.

On the filing of the bill, an interlocutory injunction was granted, and on the final hearing the court rendered a decree making the injunction perpetual, and defendant appealed to this court.

I. A court of equity may, at the suit of property holders or taxable inhabitants of a municipal corporation, restrain the corporation and its officers from making an unauthorized appropriation of the corporate funds. This is so because the corporation holds its money for the corporators, the inhabitants of the town or city, to be expended for legitimate corporate purposes, and a misappropriation of these funds is an injury to the tax-payer, for which no other remedy is so effectual or

appropriate as an injunction. *Dillon on Municipal Corporations, Secs. 731, 732*, etc.

II. In the act of 9th March, 1875, for the incorporation, organization and government of municipal corporations, (*Acts of 1874-5, p. 1*,) we find no express grant of authority to councils of cities or towns to expend the corporate funds in establishing and operating free ferries without the limits of the corporation, to promote trade, commerce, etc.

Counsel for appellant submits that the power to maintain the free ferry in this case, may be implied from general grants contained in section 22 of the act.

The section provides, among other things, that "municipal corporations, etc., etc., shall have power to make and publish by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve morals, order, comfort and convenience of such corporations and the inhabitants thereof."

If under these general expressions, a corporation may appropriate corporate funds to establish and maintain a free ferry without its limits, it may as well aid in the construction of railroads, bridges, etc., and subject the corporations to burdens for such purposes, under the plea of promoting the prosperity of the corporation and the inhabitants thereof.

To engage in such enterprises, express grants are required. *Dillon on Municipal Corp., Sec.* 104, 1064; *Chisholm* v. *City of Montgomery*, 2 Wood. 594.

Affirmed.

LAMBETH V. PONDER.

LIEN: *Landlord's superior to Mortgagee's.*

The lien of a landlord for rent is superior to that of a mortgagee, upon the crop grown upon the rented premises.

APPEAL from *Lawrence* Circuit Court.

HON. WM. R. COODY, Special Judge.

T. J. Ratcliff, for appellant.

Henderson & Caruth, *contra.*

ENGLISH, C. J.:

Willis M. Ponder brought this action in the Circuit Court of Lawrence County against Robert Lambeth; the complainant alleging that on the 1st day of November, 1874, the defendant with force and arms unlawfully seized and converted to his own use 5,200 pounds of seed cotton, the property of plaintiff, of the value of $177.

The defendant answered, denying the allegations of the complaint.

Verdict and judgment in favor of plaintiff for $104; defendant filed a motion for a new trial, which the court overruled, and he took a bill of exceptions and appealed.

The grounds of the motion for a new trial were:

1st. That the court erred in permitting incompetent and irrelevant testimony to go to the jury.

2d, 3d and 4th. In substance, no evidence to sustain the verdict.

5th. That the court erred in instructing the jury.

I. The bill of exceptions fails to show that the appellant objected to the competency or relevancy of any evidence introduced by appellee on the trial. All of the evidence offered by appellee appears to have been admitted without any objection by appellant.

Nor, if it might be done here, does the counsel for appellant indicate in his brief what particular evidence introduced by appellee he deems to have been improperly admitted.

II. The appellee claimed title to the cotton in controversy, by virtue of a mortgage, with power of sale, executed to him for supplies, by J. C. Owen, who was a tenant of appellant.

The mortgage was read in evidence without objection, but counsel for appellant submits that it having been executed upon a cotton crop not in being prior to to the passage of the act of 11th February, 1875, (Acts of 1874–75, p. 149) vested in appellant no legal title to the cotton, or lien upon the crop, which he could assert in this action.

The mortgage bears date 23d of May, 1874, by which time cotton in this climate is usually growing. Moreover the mortgagor, in the language of the mortgage, conveys to the appellant: "The following described property, to-wit: All his present growing crop of corn and cotton, now growing on the farm of Dr. Robert Lambeth, known as the Lambeth place, situated in Lawrence County," etc.

The growing crop was the subject of a valid mortgage (*Apperson & Co., v. Moore*, 30 Ark. 66,) but the lien of appellant upon the crop for rent, as the landlord of Owens, the mortgagor, was prior and superior to the title of appellee, the mortgagee. *Tomlinson v. Greenfield*, 31 Ark. 557.

The evidence introduced on the part of appellee conduced to prove that appellant not only received a sufficient amount of the cotton after it was gathered, to pay the rent due to him from Owens, but that he took and appropriated an over quantity of the cotton, the value of which appellee claimed in this suit.

On the contrary, the testimony of appellant conduces to show that he did not get more of the cotton than was due him for rent.

What the truth of the matter may be we do not know. Upon the conflicting evidence, the jury found for appellee, as above indicated, and it was their province, not ours, to judge of the weight of the evidence.

III. To the charge which the court gave to the jury, and which is divided into four paragraphs, the counsel for appellant made a general objection in the court below, as shown by the bill of exceptions, and has repeated it in his brief here, no specific objection being made to any one of the paragraphs or to any principle of law announced in either of them.

We deem it unnecessary to copy the charge thus objected to.

It seems to be fair, appropriate to the issue and the evidence introduced by the parties, and we can discover in it no erroneous announcement of law.

Affirmed.

SMITH v. CARDER.

1. LIMITATION: *Pleading.*

The statute of limitations of five years is not applicable to an action on a writing obligatory executed before the adoption of the Constitution of 1868.

2. ——— ———

The defendant, with intention to become surety on a note, wrote his name on a blank paper and left it with the principal, who afterwards wrote the body of the note and signed his own name above that of the surety, and attached a seal to each name. Held, that the defendant was not bound by the instrument.

ASSIGNMENT: *Of writing obligatory not governed by law merchant.*

The statute making writings obligatory assignable so as to vest the legal title and right of action in the assignee, did not put them upon the footing of commercial paper, and bring them within the rules of the law merchant. Assignees took them at their peril as to defenses.

APPEAL from *Desha* Circuit Court.

Hon. J. A. WILLIAMS, Circuit Judge.

McCain, for appellants.
Pindall—Weatherford, contra.

ENGLISH, C. J.:

Action upon the following instrument as a writing obligatory:

"$5,120.36. On the first day of January next, we, or either of us, promise to pay to James W. Felts, as the executor of the estate of John F. Smith, deceased, the sum of five thousand, one hundred and twenty (36-100) dollars, to bear interest at the rate of ten per cent per annum, value received.

"THOS. FLETCHER, [Seal.]
"W. M. CARDER, [Seal.]
"J. N. ALLMUND, [Seal.]

"January 18, 1860."

The instrument was delivered by Fletcher, the principal, to Felts, executor of Smith, for slaves purchased by him at a public sale made by Felts, of the property of his testator, under an order of the Probate Court of Arkansas county.

Felts endorsed the obligation, without recourse, to John W. Simpson, the guardian of the plaintiff in this suit, then a minor, who was a son and legatee of John F. Smith, and after the plaintiff (Richard H. Smith), became of age, Simpson delivered the obligation to him.

The plaintiff commenced this suit in the Circuit Court of Desha county, against W. M. Carder, April 3, 1874.

The defendant pleaded, Code fashion, *non est factum*, and limitation of five and of ten years.

The court sustained a demurrer to the paragraph of the answer setting up five years as a bar.

Verdict and judgment for defendant, the court refused plaintiff a new trial, and he took a bill of exceptions and appealed to this court.

I. The instrument sued on bearing date before the adoption of the Constitution of 1868, which abolished private seals, and appearing on its face to be under seal, or a writing obligatory, the statute of limitations of ten years, and not of five, was applicable. *Gould's Digest*, Sec. 15, chap. 110; *Dyer* v. *Gill*, 32 Ark., 410.

The instrument matured 1st of January, 1861, and saying nothing of a payment made upon it by Fletcher 1st of March, 1864, but counting out the period of the civil war, during which the running of the statute was suspended, the action was not barred when commenced. *Shinn* v. *Tucker*, *MS*.

II. On the trial the testimony introduced by appellant conduced to prove that the body of the obligation and the three seals were in the hand-writing of Fletcher, and written, perhaps, with a different ink from that with which the signature of appellee was written.

Appellee proved that before the sale of the slaves Fletcher called at his office and asked him to sign a note for him, but having no note written, at the request of Fletcher he wrote his name upon a blank sheet of paper, which he supposed was taken out of the office by Fletcher.

The court below, in its instructions to the jury, followed the decision of this court in *Cross* v. *State Bank*, 5 Ark., 525, where it was held that "a writing purporting to be a bond, signed and sealed by a party with a blank left for the sum, which blank is afterwards filled and the writing delivered by one not authorized under seal, is not the deed of the party signing and sealing. The rule is otherwise as to promissory notes and bills of exchange."

This is a stronger case against appellant than the one cited. There the party signed and sealed the instrument in blank, as to the sum. Here, appellee wrote his name upon a sheet of blank paper, and Fetcher, without other than implied verbal

authority, wrote the body of the instrument, affixed a seal to the signature of appellee and delivered it to Felts after the purchase of the slaves.

By statute in force at the time the instrument bears date, writings obligatory were made assignable, so as to vest the legal title and right of action in the assignee, but they were not put upon the footing of commercial paper and governed by the law merchant. Hence persons taking them took them at their peril as to defenses. *Gould's Digest*, chap. 15, Sec. 3.

The cases cited by counsel for appellant are unlike the one now before us. The bonds on which the obligors were sought to be charged, were complete in body and seals when they were signed. See *Nash* v. *Fugate*, 24 Grattan, 202, where similar cases are reviewed.

In this case appellee wrote his name on a blank sheet of paper, and afterwards, when he was not present, and without competent authority from him, the whole instrument was written over his name, and a seal made for him.

No intentional wrong is imputed to the principal maker of the instrument. He made a payment upon it, and would, doubtless, have paid the whole debt if he had not been broken down in his fortune by disasters of the civil war. He made free use of the name of a confiding friend, but he could not legally bind him by writing the body of a bond over his name and adding a seal, though he might have bound him by making a commercial instrument.

Affirmed.

HUMPHRIES ET AL. V. STATE.

BAIL BOND: ——

It is no objection to the validity of a bail bond that there is no order on the record for the issuance of a bench warrant on which the party is arrested. Nor is a bail bond void because it is the joint bond of two or more defendants for the same sum that was required of each of them for bail, by the order of the judge endorsed upon the indictment.

APPEAL from *Arkansas* Circuit Court.

Hon. JOHN A. WILLIAMS, Circuit Judge.

Dooley, for appellants.

Henderson, Attorney-General, *contra*.

ENGLISH, C. J.:

At the March term, 1876, of the Circuit Court of Arkansas county, James W. Collins and David Collins were jointly indicted for stealing a mare.

On the day that the indictment was returned into court by the grand jury (29th March), the presiding judge made the following endorsement upon it:

"Bail will be received in this case in the sum of $500 each.

"JOHN A. WILLIAMS, Judge."

On the same day a capias was issued by the clerk for the arrest of the parties accused, in the form prescribed by the statute (*Gantt's Digest*, Sec. 1808), upon which the clerk made the following endorsement:

"The defendants may give bail in the sum of $500, and the same may be taken by the sheriff of the county in which they are taken, or by the sheriff of Arkansas county." Signed by the clerk.

The sheriff of Arkansas county, to whom the writ was delivered, arrested the defendants on the 30th of March, 1876, and on the next day they executed a joint bail bond in the penal sum of $500, with Zach. Humphries, John H. Barker, and

William Garrison as the sureties, conditioned that they would appear in the Circuit Court of Arkansas county on the first day of the following September term, etc., to answer the indictment, etc.; and the sheriff duly returned the capias and bail bond.

It seems that on the application of James W. Collins, the venue as to him was changed to the Circuit Court of Jefferson county.

At the March term, 1877, of the Arkansas Circuit Court, David Collins failed to appear, and a forfeiture was entered upon the above bail bond, and an alias bench warrant ordered against him, and a summons issued to his sureties, upon the forfeiture, returnable at the next term.

The alias capias was returned *non est* as to Collins, and the summons was served upon Zach. Humphries and John H. Barker, two of the sureties, and returned not found as to Wm. Garrison.

At the return term, Humphries and Barker answered, setting up the defenses below stated and considered.

At a subsequent term the case was submitted to a jury, and the prosecuting attorney read in evidence the indictment, the bench warrant issued thereon, the bail bond, the entry of forfeiture and the summons, all of which were admitted against the objection of defendants. No other evidence being introduced, the jury returned a verdict in favor of the State for $250. Defendants filed a motion for a new trial, which was overruled, and they took a bill of exceptions. Judgment was entered in accordance with the verdict, and defendants appealed.

The first point of defense made by appellants is that the State failed to show that the court made an order for the issuance of the bench warrant upon which their principal was

arrested, and that therefore the warrant, arrest, and bail bond were void.

The principal was indicted for a bailable felony, and was not in custody or under recognizance when the indictment was found. It would not have been proper, therefore, for the court to have caused to be entered of record, and thereby made public, an order for the clerk to issue a bench warrant for his arrest. *Gantt's Digest*, Secs. 1799, 1800.

The presiding judge endorsed upon the indictment, when it was returned into court, the amount of bail required, and, it must be presumed, ordered the clerk to issue the bench warrant, as required by the statute, (*Gantt's Digest*, Secs. 1806, 1810), but a prudent judge would hardly announce such order openly from the bench, and direct it to be entered of record, subject to public inspection.

If the parties indicted, on being arrested, had moved to quash the capias on the ground that no order appeared of record for it to issue, the court, of course, would have overruled the motion, and the sheriff would have put them in jail had they failed to give bail.

The second point of defense made is that each of the parties indicted was required by the endorsement to enter into bail in the sum of $500, and that the sheriff accepted a joint bail bond from them in the penal sum of $500 only.

If both of them had made default, there could not have been a forfeiture and judgment for more than the penalty of the bond. On the default of one of them only, the condition of the bond was broken, and there might have been a forfeiture and judgment against appellants for $500, but the verdict and judgment against them were for only $250, which was an error of which they have no cause to complain. *See Gantt's Dig.*, Sec. 1726.

Affirmed.

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57 527

HODGKIN V. FRY, COLLECTOR.

SCHOOL DISTRICTS:—*Notice of Elections for directors and voting tax.*

It was the duty of the district school trustee under the former law, and now of the directors, to designate the place of meeting for electing directors and voting taxes for school purposes, and notice of the time and place of meeting is essential to the validity of the tax. But the statute designates the *time* for the meeting, and all are bound to take notice of it. If notice of the *place* be given, the meeting will be legal, though the *time* be not specified in the notice.

DISTRICT SCHOOL TAX—

Unless the judges make return of the election or vote, to the County Court, it can not levy the tax.

APPEAL from *Chicot* Circuit Court.

Hon. T. F. SORRELLS, Circuit Judge.

Reynolds, for appellant.

Valentine, *contra*.

HARRISON, J.:

Edgar G. Hodgkin, in behalf of himself and all other taxpayers of school district No. 9, in the county of Chicot, filed his complaint in equity against Reuben M. Fry, as collector of taxes of said county, to enjoin the collection of the school tax of said district, levied by the County Court for the year 1876.

The complaint alleged that the tax was levied by the County Court without a vote therefor by the electors of the district.

No annual school district meeting, it averred, was held on the third Saturday in August, 1876, and no notice for such a meeting was given either by the trustee or the sheriff, but that fourteen, of about four hundred electors of the district, met together on that day at the court-house in Lake Village, and organized themselves as the annual school meeting of the district, and having chosen three judges and one clerk for that purpose, proceeded to hold an election for three directors, and proceeded to determine whether any and what tax should be levied for

that year; and they voted a tax of five mills; a report of which proceedings was filed with the county clerk; but no return of the result of the election was made by the said judges to the County Court.

The report of said proceedings, a copy of which was filed as an exhibit with the complaint, was as follows:

"Pursuant to call the annual school meeting of McConnell school district No. 9, Chicot county, Arkansas, met at the court-house, in the town of Lake Village, Saturday, August 19th, 1876, at 2 o'clock, p. m., to order by the trustees, and was organized by electing S. H. Holland, chairman, who explained the object of the meeting.

The trustee read his report for the past year, which, on motion was received and adopted. On motion, the meeting proceeded to the election of three school directors; and Aaron Walker, Phan Walker and William Miles, were chosen judges of the election, and W. H. Logan appointed clerk, who were duly sworn * * * * * * * * * * * * * And the votes being counted, the judges reported as follows: * * * * * * *

For tax, 5 mills..... 14 votes.

Against..... no votes.

* * * * * * * * * * * * On motion, the school directors were instructed to have taught each school in the district a term of three months, and as much longer as they may be able.

A copy of the proceedings of this meeting was directed to be filed with the county clerk.

On motion, the meeting adjourned.

H. W. GRAVERS, Clerk. S. H. HOLLAND, Ch'm."

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of

action. The court sustained the demurrer and dismissed the complaint. The plaintiff appealed.

The act "to maintain a system of free common schools," of December 7th, 1875, is a revision of the former school law. It retains the provisions for the annual school meeting of the district, on the third Saturday in August, in each year, but more particularly directs the mode of proceeding at such meetings, in determining the tax to be levied, and provides for the election, at the first annual school meeting, of three directors in place of a trustee.

The former law—*Section 5436, Gantt's Digest*, required the trustee to give notice of each annual, and of each special meeting, by posting notices thereof at least fifteen days previous to such meeting, in three or more conspicuous places in the district, which duty is now required of the directors; and the first section of the act of December 1st, 1875, requires the sheriff, by proclamation, to give twenty days notice of the time and place of holding the election for ascertaining the will of the electors as to the tax; which provision, not being inconsistent with the act of December 7th, 1875, is not repealed by it; and the notice by the sheriff is additional to that given by the directors, or formerly by the trustee.

It is somewhat remarkable that we find no where in the present, or in the former law, any provision fixing the place of the annual meeting, or in any very clear terms, indicating whose duty it is to designate it. As, however, the trustee, formerly, and the directors now, "have charge of the school affairs and the local educational interests" of the district, it must necessarily have devolved on the former, and now on the latter.

Notice of the time and place of voting the taxes is essential to its validity. Judge Cooley says: "A popular assembly for any legal purpose must be regularly convened in such manner

as the law may have prescribed. The coming together of a majority of the people of a municipality, or even of all the people, at a time and in a manner not provided for by law, and the voting upon the levy of a tax, will have no legal force or validity whatever. In levying taxes, or in exercising any other function of government, the local community are wielding a part of the sovereign power of the State, but only with the State's permission, and under such conditions, instructions and regulations as the State has prescribed. One of these invariably is, that the power shall be exercised in an orderly manner, at a meeting assembled after due notice, and conducted according to legal forms, in order that there may be full opportunity for reflection, consultation and deliberation upon the important work to be done." *Cooley on Taxation*, 245.

The statute having fixed the time of the annual school meeting, all are bound to take notice of it. The right to hold the meeting comes from the statute, and not from the published notices, which are but to remind the people that the law has provided for such a meeting; and though omitted, the meeting then held at the place legally appointed and in accordance with the provisions of the statute in regard thereto, is the lawful annual school meeting of the district. *Ib.*, 246.

But it is as important and essential to its authority that it be held at the proper place as at the proper time.

There is nothing, however, in the record before us to show that the place at which the meeting referred to in the complaint, was appointed by the trustees, whose duty, we have before said, it was to fix or designate it; and consequently it does not appear that said meeting had the power to vote the tax.

The act of December 9, 1875, went into force at the date of its passage, but the first election for directors did not take place until at the annual school meeting on the third Saturday

in August, 1876, and until then the teachers necessarily continued in office.

The first section of the act of December 1, 1876, before mentioned, is as follows:

"Be it enacted, etc., That hereafter an election shall be held in every school district in this State on the third Saturday in August in every year, for the purpose of ascertaining the will of the qualified electors, and the rate of taxation for school purposes within such district; which election shall be held and conducted as other elections; and the sheriff of each county shall give twenty days notice of the time and place of holding such election, by proclamation throughout the county; and the returns of such election shall be made to the county clerk of the county in which such election is held, who shall certify the result to the County Court of such county, which shall proceed to levy the tax thus voted, in the manner now required by law."

Among other provisions of Sec. 56 of the act of December 7, 1875, concerning the annual school meeting and its powers, are the following: "The annual district election shall be held by the school directors as judges, who shall have power to appoint two clerks; and if any of the directors should not attend, the assembled voters may choose judges in the place of those not attending, and the judges and clerks shall take the oath prescribed by the general election law. The ballot of the vote shall, in addition to the name of the persons voted for as directors, have written or printed on it the words, "for tax," or "against tax," and also the amount of the tax the voter desires levied. When the polls are closed the judges shall proceed to count the votes, ascertain the result and make return thereof to the County Court, showing the number of votes cast for each person voted for for school director; also the number cast for and against tax; and the number of votes cast

for each amount or rate of tax voted for. Such return, together with the ballots, shall be sealed up and delivered by one of the judges to the county clerk at least ten days before the meeting of the County Court for levying the taxes.

"In other respects the election shall be held according to the general election law."

It was provided by Sec. 59, that at the first annual school meeting after the passage of the act, (which was that in 1876), three directors should be elected for one, two and three years respectively.

So far, if at all, as the provisions of the act of December 1, 1875, are inconsistent with the provisions of the act of December 1, 1876, just read, they are repealed by the latter act.

It evidently was the intention of the Legislature, that after the passage of the act revising the whole school system, the tax should be voted and the election conducted and the return made in the manner there provided; although at the first election thereafter there could be no directors to serve as judges. According to the general election law, when the judges appointed by the County Court are not present when the polls are to be opened, the electors may appoint others; and at all subsequent elections under the act, if any of the directors do not attend, the electors may choose other judges.

It is therefore clear to our minds, that the electors should have appointed, as they did do, the judges for that election.

But it was alledged, and the demurrer admitted it, that the judges made no return of the election or vote to the County Court. Without such return the County Court had no authority to levy the tax. *Murphy* v. *Harbison*, 29 Ark., 132; *Cairo & Fulton Railroad Co.*, v. *Parks*, 32 Ark., 131; *Worthen* v. *Badgett*, *Ib.*, 496.

"Every essential proceeding in the course of the levy of taxes must appear," say the Supreme Court of Michigan, "in

some written and permanent form in the records of the bodies authorized to act upon them." *Moser* v. *White*, 29 Mich., 59; *Cooley on Taxation*, 247.

Had there been no change in the law as to the manner of voting the tax, and making return to the County Court, and had the assemblage of electors on the third Saturday in August been the annual school meeting of the district, the report of its proceedings filed with the county clerk would, perhaps, have authorized the levy of the tax by the County Court; but the law requiring the judges of the election to make the return, their return could alone be considered or acted upon by the court.

The decree of the court below is reversed and the cause is remanded for further proceedings.

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BEAVERS v. BAUCUM.

PLEADING: *Mistake in name, the effect of. How corrected.*

A mistake in the name of a party does not affect the pleading or the merits of the action, and can be corrected only by motion to correct, or by the court of its own motion.

PARTIES: *Married women.*

A married woman may sue alone, upon a note which is her separate property, without joining her husband with her in the action.

EXHIBITS: *Effect and pleadings.*

An exhibit is part of the record, and when it is the foundation of the action will explain or even control an averment in the pleadings.

DEED: *Acknowledgment of.*

The acknowledgment by a married woman of a relinquishment of dower, in a deed containing no relinquishment, is not sufficient for a deed in which she is the grantor, and a purchaser entitled to a good title from her will not be required to accept such deed.

APPEAL from *Lonoke* Circuit Court, in Chancery.
Hon. J. W. MARTIN, Circuit Judge.

Hallum—Clark & Williams, for appellant.
Oliphint, contra.

HARRISON, J.:

This was a suit in equity, which the appellee brought by the name of Rebecca McRae against W. B. Beavers, to enforce a lien on a tract of land for the payment of a note given in the purchase of it.

The complaint alleged, in substance, that the plaintiff, on the 15th day of October, 1873, bargained and sold to the defendant the land in question, part of the price of which he paid in cash, and executed to her his note for $250, the remainder, with ten per cent interest from date, payable on the 1st day of November, 1874; and she executed to him a bond to make him a title upon the payment of the note, and gave him possession of the land.

That after the note became due, she offered, if he would pay it, to make him a deed to the land, and had tendered one to him, but that, with the exception of $130, paid on the 18th of January, 1876, the note remained unpaid. And that he was, and had been ever since his purchase, in possession of the land.

It also stated that since the tender of the deed, she had assigned and delivered the note to H. B. Strange, as collateral security for a debt which Eliza Smith owed him, who still held it; and besides the prayer for the foreclosure and sale, asked that the decree stand as a security for the debt instead of the note.

She filed the note and a copy of the bond for title, as exhibits, with her complaint; but no assignment of the note to Strange appears.

The answer of the defendant admitted the purchase of the land, the giving of the note for a part of the purchase money,

the execution to him of the bond for title, and his entry into and continued possession of the land under his purchase; but denied that the plaintiff had ever tendered him a sufficient deed, and averred that the plaintiff, when she sold, had not, nor had she since had, any title to the land, the same having before then been sold for taxes, and the title was then in —— Rogers and J. E. England, who had a tax deed for the same; and she never had had an absolute title to more than an undivided fourth part—whatever title she had having been conveyed to her by a deed from Archibald A. McKay for her own use, and as trustee for Helen McRae, Elizabeth McRae and Roger W. McRae, minor heirs of Daniel McRae, dated November —, 1866. Denied that plaintiff had assigned the note to Strange, or that he or she had any interest in it, the same being, it said, the property of Eliza Smith, to whom the plaintiff had given it. Admitted that there was still a balance due on the note, but claimed a further credit of $8.76 for taxes of 1873, paid by him at plaintiff's request.

The plaintiff, it averred, a few days after the sale to the defendant, inter-married with George F. Baucum, who was still living; and that her name was Rebecca Baucum, and not Rebecca McRae.

A copy of the deed from Archibald K. McKay to the plaintiff, referred to in the answer, was filed with it as an exhibit.

The plaintiff, by an amendment to her complaint, brought into court and tendered to the defendant a deed for the land containing covenants of warranty of title and quiet enjoyment from George F. Baucum, Rebecca Baucum, John S. Gibson, Helen Gibson, Roger W. McRae, J. Floyd Smith, and Eliza Smith, the persons, as stated in said amendment, named in the defendant's answer as grantees and beneficiaries in the deed from Archibald K. McKay, or having an interest in it. No answer was made to the amendment.

The court, upon the hearing, found the remainder due upon the note to be $200, and rendered a decree for the same, and also for a foreclosure and sale.

It also found that the note was, as stated in the complaint, pledged to said Strange as security for a debt Eliza Smith owed him, and of which $100 was still due; and it ordered that the decree stand as security for said debt in lieu of the note.

The decree was entered in the name of Rebecca Baucum, without any amendment of the pleadings.

The defendant appealed.

There was, upon the hearing, no controversy as to the averment in the answer that the plaintiff, after the sale of the land, inter-married with George F. Baucum; that fact was conceded; but the mistake in her name did not affect the pleadings or the merits of the action. Such defect can now be reached only by motion to correct the mistake, or such correction may be made by the court on its own motion, as was very properly done in this case. *Newm. Plead. and Prac.*, 287.

The note was the separate property of the plaintiff, upon which she could sue alone, or without joining her husband with her in the action. *Gantt's Digest*, Secs. 4193, 4194.

It was stated in the complaint that the plaintiff had *assigned* the note to Strange as a collateral security, yet it is apparent from the fact that there is no assignment upon the note, and also from the general tenor of the evidence—the witnesses saying only that it was deposited with him—that nothing more was meant by that averment than that she had simply deposited it with him as such security.

The note being an exhibit, became a part of the record; and an exhibit, when it is the foundation of the action, as in this case, will explain, or even control, an averment in the pleadings. *Newm. Plead. and Prac.*, 252.

The property in the note being in the plaintiff, the action

was properly brought in her name, and though Strange had a beneficial interest, and might have been made a party, he was not a necessary one, and the defendant not having demurred to the complaint because he was not joined in the action, the objection was waived.

Indeed, the note seems to have been in the hands of the plaintiff, as she filed it as an exhibit with the complaint, having been delivered back to her most likely for the purpose of the suit.

It was not averred in the complaint, nor is it so stated in the deed, that George F. Baucum is the husband of Rebecca Baucum; John S. Gibson, of Helen Gibson, and J. Floyd Smith, of Eliza Smith, nor what were their respective interests; but it does so appear by the certificates of acknowledgment of the deed; and moreover, as no answer was made to the amendment of the complaint, in which the grantors were averred to be the sole owners of the land, it was admitted that they were such, and if properly executed, the deed would have been sufficient.

But it appears from the certificate of Mrs. Baucum's acknowledgment, that she acknowledged to have signed a relinquishment of dower, although there was no such relinquishment in the deed, and there was no acknowledgment of the execution of the deed by her. Title being in her, she should have acknowledged its execution as a grantor.

The deed, therefore, was not such as the defendant could be required to accept.

There was no proof that the land had been sold for taxes.

The court, it appears, allowed the defendant the additional credit claimed by him, but computed the interest for the whole time at ten per cent when the note bore that rate only until maturity, and after that but six per cent.

The decree must be reversed, and the cause will be remanded

with direction to the court below that should the plaintiff bring into court a proper and sufficient deed to the defendant for the land, to enter a decree in her favor for the true amount due upon the note and as heretofore rendered.

REINHARDT, ADM'R, v. GARTRELL.

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1. ADMINISTRATION—*Jurisdiction of Probate Courts:*
Art. VII, Sec. 34, Constitution of 1874, relegated to the Probate Courts their old jurisdiction in matters of administration, etc., which had been transferred to the Circuit Courts by Act of 16th April, 1873, without restriction or qualification.

2. ——————*Jurisdiction of Chancery Courts:*
Courts of Chancery have no power to take administration cases out of the Probate Courts for the purpose of proceeding with the administration, but may correct any fraud in the settlements of administrators and executors. When that is done, if there be still a necessity for further proceedings in the administration, they should be had in the Probate Court. But if there be no such necessity—if the assets be all collected and the debts ascertained, and nothing remains but to fix the liabilities of administrators, executors and their sureties, and the rights of creditors, heirs, legatees and distributees, and make adjustment on equitable principles, all this can be better done in Chancery, and the cause should be retained there for completion.

3. ——————*Practice in Chancery:*
In referring administration settlements to a master for the correction of fraud, the Chancellor should find and designate the points in which the fraud consists, and confine the reference to those points: and his finding of fraud should always be upon the allegations of the bill, specifically pointing it out, and not upon vague and general charges. Proof of the fraud devolves upon the party alleging it.

4. *Parties in Chancery:*
Sureties of an administrator are proper parties to a bill to correct fraud in his account.

APPEAL from *Prairie* Circuit Court in Chancery.
Hon. J. N. CYPERT, Circuit Judge.
Gatewood—Clark & Williams, for appellant.
Compton, contra.

EAKIN, J.:

This bill was filed February 12, 1876, by the widow and children of Francis C. Gartrell, deceased, who were devisees and legatees, equally, under his will, against D. F. Reinhardt, the executor, and his sureties. It charges fraud in his settlements, seeks to have them re-opened, a re-statement of the accounts and a decree against the executor and his sureties, in favor of the several complainants, according to their rights. It seems the debts of the estate have been paid up, leaving nothing to be done, beyond making a fair distribution.

The sureties demurred: Because, 1st. There was no equity in the bill. 2d. No fraud was shown. 3d. They were joined in the bill as defendants, when their liability was only at law, after the liability of their principal might be established. The demurrer on hearing of the cause, was overruled, and it may be convenient now to dispose of this branch of the case *in limine*.

Courts of probate, during their existence in this State, have ever had and still have exclusive original jurisdiction in the matter of the administration of the estates of decedents. This was statutory until the abolition of these courts, by act of April 17, 1873. By an act approved April 16, 1873, this "*exclusive original jurisdiction*, in all matters pertaining to probate and of administration," was transferred to the Circuit Court. The experiment was not satisfactory, and by the Constitution of 1874, the Probate Courts were re-established. It was provided, (Art. VII, Sec. 34,) that they should have "*such* exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, etc.," * * * as is *now vested* in the Circuit Court, or may be hereafter prescribed by law! Obviously, it was meant to relegate to the Probate Courts their old jurisdiction, without restriction or qualification. The decis-

ions of this court regarding their former power apply now. Their jurisdiction has been simply elevated from a statutory to a constitutional basis; being as to limits, unchanged.

The courts of Chancery have no power to take such cases out of the Probate Courts, for the purpose of proceeding with the administration. But their power and functions to relieve against fraud, accident, mistake, or impending irremediable mischief, is universal; extending over suitors in all courts, and over the decrees in those courts, obtained by fraud, or rendered under circumstances which render it inequitable that they should be enforced. Hence, any frauds in the settlements of administrators or executors may be corrected. When that is done, if there be still a necessity for continued proceedings in the course of administration, such proceeding should go on in the Probate Court, upon the basis of the reformed settlement. The object of Chancery intervention having been accomplished, the jurisdiction in equity should cease with the necessity. Otherwise, the courts of Chancery might make themselves courts of Probate, in violation of the spirit and intention of the Constitution. If however there be no continuing necessity for a further course of administration; if the assets be collected in, and the debts be all ascertained, and nothing remains but to fix the liabilities of administrators, executors and their sureties, and the rights of creditors, legatees and distributees, and to make adjustment on equitable principles, all that business comes within the more facile and effective operation of the remedial processes peculiar to equity practice. This makes no conflict of jurisdictions, and it is most proper, in such cases, for the Chancery Court to retain the cause for completion.

As for the sureties of an administrator or guardian, it is true that they cannot be sued at law, upon the bond, until the liability of the principal has been fixed, and there has been a breach of its conditions. Courts of equity have a wider regard for

the interests of those who may be affected by their decrees; and their power of adjustment render multiplicity of issues regarding the same subject matter, much less objectionable than at law. Sureties have a very material interest in the determination of the liabilities of their principals; and it concerns that complete and effective disposition and adjustment of all rights, at once and forever, which courts of equity are emulous of attaining, that the sureties should have day in court, and be bound by decrees, which may and should be so moulded as to protect their rights of exoneration, so far as may consist with the rights of the parties secured.

In this view it has been, heretofore, held by this court that the sureties of an administrator are proper parties to a bill to correct fraud in his accounts; not only that they may be heard in a matter which may affect them ultimately, but for the purpose of subjecting them to the direct operation of the decree to be rendered. *Clark, ad.*, v. *Skelton*, 16 Ark., 474; *Moren et al.* v. *McCown et al.*, 23 Ark., 93; *Osborn et al* v. *Graham, ad.*, 30 Ark., 66; *Jacks* v. *Adair*, 31 Ark., 616.

The answer of the executor admits some of the errors charged as fraudulent, and endeavors to excuse them on the ground of inadvertence and mistake. As for the rest, it may suffice to say, that it consists of explanations going to show that no fraud was intended, but that manifest errors being corrected, the settlement should be confirmed as proper and just. A detail of the charges and explanations would be more prolix than useful to the profession.

The Chancellor, upon the hearing, found the administrator amenable to the charge of fraud in the following respects:

1. In failing to charge himself in any settlement with sixty dollars received by him in currency for the estate.

2. In taking credit, in his settlements, for interest in his disbursements at the rate of ten per cent per annum.

3. In taking credit for excessive commissions.

4. In failing to charge himself with a large amount of rents collected.

5. And because of other errors and mistakes appearing in his settlements.

It was, therefore, ordered that all the settlements of the executor should be set aside and held for naught, and that the accounts should be re-stated. The matter was referred, for this purpose, to a master, with directions to charge the executor with the amount of all assets which came to his hands, and to credit him with all payments legally made, and all unavoidable losses, if any; and, also, with all reasonable attorneys' fees, and with the maximum rate of commissions allowed by law. In stating the account the master was directed to use the pleadings and papers on file in this cause and in the Probate Court, giving them such value as evidence as the law, or the admissions of parties attached thereto. He was further empowered to examine the parties and such witnesses and papers as might be produced before him. He was also to ascertain and state what amount of gold the executor had received as assets, what he had paid out to the legatees, and whether he had used any part for himself, and at what time; and, *if he had*, to charge him with the premium at the time. He was further directed to state an account of the sums which had been paid to the legatees.

In accordance with this order, to which defendant at the time excepted, the master proceeded to state the whole account *de novo*, from the time of the testator's death, reforming it in all respects, according to his views of the law and the weight of evidence, as well as with regard to matters not found by the court to be fraudulent as with regard to those that were. This appears from the report itself and the exceptions on both sides. Of these, six, taken by the defendant, were overruled.

The first four were for the exclusion of allowances made by the Probate Court and refused by the master upon matters not embraced in the findings of the court as fraudulent. Two more were on account of charges of interest made by the master when no fraud at all had been found by the court on failure to charge any interest whatever. The fraud was found in the credit of interest on sums disbursed. A decree was rendered, save as to some exceptions sustained, in accordance with the master's report, against the executor and his sureties, *in solido*, for the amount found in his hands, and in favor of the several complainants respectively for the proportion coming to each. The defendants appealed.

The first question for this court arises on the decree and order of reference. Upon a review of the evidence, we think the Chancellor was justified thereby in reaching the conclusion that the settlements should be held fraudulent, and the accounts re-stated. The executor was shown to be a man of unblemished honor and high character for integrity, and it is easily conceivable that he entertained no actual purpose of defrauding the estate. Perhaps no one circumstance would be sufficient of itself, to warrant the interference of a court of equity. Mere error or irregularity in matters within the jurisdiction of the Probate Court, not tinged with actual *mala fides*, ought to be corrected only on appeal. The same may be said of excessive allowances for commission and attorneys' fees, or any other illegal credits. If made by the Probate Court, upon a fair consideration of all the circumstances, with full knowledge of the facts, and without concealment or improper practice on the part of the executor, they become the judgments of a court having jurisdiction, and are simply erroneous, voidable on appeal, not fraudulent and void; and so with regard to mistakes and omissions. They may be the result of accident, consistent with good faith. But in this case there was a com-

bination of acts, omissions, irregularities and erroneous allowances, sufficient, altogether, to satisfy the mind that if fraud had not been really intended, there had, at least, been such gross carelessness and reckless disregard of the rights of others as to make the inference of fraud necessary to the purposes of justice. The court did not err in re-opening the settlement of the accounts. The question is, whether it went too far in its directions for the purpose? ought the re-statement to have been confined to the matters adjudged fraudulent? or was it proper to open the whole matter *de novo*, to embrace the action of the executor during a period of more than ten yeaas, without any regard to the matters adjudged by the Probate Court?

The principles applied in the re-statement of accounts on account of fraud, as derived from the authorities, are thus classed by JUSTICE STORY in his Equity Jurisprudence, Sec. 5231: "In some cases, as of gross fraud, or gross mistake, or "undue advantage, or imposition made palpable to the court, "it will direct the whole account to be opened and taken *de* "*novo*. In other cases, where the mistake, or omission, or "inaccuracy, or fraud, or imposition is not shown to affect or "stain all the items of the transaction, the court will content "itself with a more moderate exercise of its authority. It "will allow the account to stand, with liberty to the plaintiff "to surcharge and falsify it, the effect of which is to leave the "account in full force and vigor, as a stated account, except "so far as it can be impugned by the opposing party, *who has* "*the burden of proof* on him to establish errors and mistakes. "Sometimes a still more moderate course is adopted, and the "account is simply open to contestation as to one or more "items, which are specially set forth in the bill of the plaintiff "as being erroneous or unjustifiable; and in all other respects "it is treated as a conclusion."

These rules apply to accounts stated between parties, and

not with the same latitude to accounts settled and adjudicated by courts of peculiar and exclusive jurisdiction. With regard to the latter class, and in view of the constitutional dignity of our courts of Probate, there are high considerations of public policy, which require that the interference of courts of Chancery should be restricted to and limited by the necessities of each particular case. Their powers should be invoked for the particular occasion, and invoked only for correction. The exclusive jurisdiction of courts of Probate would fall speedily into contempt, if the discovery of a few errors of a fraudulent nature could be made the ground in chancery of sweeping away all that has been properly adjudicated, taking control of the whole subject matter as upon appeal, and hearing, *de novo*, and overruling the decisions of the Probate Court with regard to matters concerning which no fraud was alleged, and upon which parties may, for years, have rested.

It is a difficult and delicate duty to lay down the boundaries of chancery jurisdiction, in its overlapping extension into fields peculiar to other tribunals. It may be safe, in general, to say that it should not exceed the necessity for the correction of fraud, accident and mistake, and for the prevention of irremediable mischief.

Whilst, on the one hand, the courts of Chancery should be jealous of the rights of children, widows, relations and creditors, and should take care that frauds upon them should not be sheltered by the exclusive jurisdictiou of the Probate Courts, it must be remembered on the other hand that the proceedings in such courts are not generally technical, nor always conducted under skillful professional advice. Substantial justice may be done, often in a rude and informal way, and administrators and executors may be men not used to preserving records and memoranda of their transactions. One may conceive a very lamentable state of confusion and injustice, which might

arise in the case of old administrations, if, upon the discovery of some erroneous items, infected by fraud, the administrator or executor should be put to the proof again, in a different tribunal, of every matter connected with the administration, and made to sustain the *onus*, after witnesses may have died or been removed, or documentary evidence been lost.

We think the Chancellor should have found the particular points in which the fraud consisted, and have confined the reference to the correction of the settlements as to those points where the errors originally occurred, and where they entered into subsequent statements, and this finding should, itself, be always upon the allegations of the bill pointing out the fraud, and not upon vague and general charges. General assertions of fraudulent intent add nothing to the strength of a bill, unless made applicable to specific acts or declarations. The onus of establishing the errors and mistakes should be upon those alleging the fraud; and in all other respects the settlements of the Probate Court should be allowed to stand as conclusive. This rule, as we have seen, is often applied to accounts settled between parties, and should, for much stronger and more obvious reasons, be applied to constitutional courts of exclusive jurisdiction.

It was not sufficient for the Chancellor to add that the accounts and settlements were fraudulent because of other errors and mistakes. They should have been specified, and the reference confined to them, and the accounts, as they might be affected by them. We are satisfied that this is the only safe rule of practice, without which all the better and more competent class of men will shrink from the administration of estates, and those interested in estates will be encouraged to neglect the proper vigilance over their interests in the Probate Courts, in the hope of an entire new hearing at some future day in a court of Chancery. There are many cases in

which the protection extended to the interests of children and married women, must, of necessity, be adjusted in accordance with a high public policy. If any evils are to be apprehended from the supineness of guardians, husbands, relations and friends, and in concluding them by the action of the Probate Courts, the remedy must be sought by greater care on the part of the people to fill those tribunals with a class of judges whose ability, industry and integrity will justify the important trust reposed in them by the Constitution; and the respect which this court is constrained to pay them as judges of constitutional courts of record.

It is unnecessary to consider the master's report and the exceptions. It was error in the court to annul the whole action of the Probate Court, and to order a new account from the beginning. The matters into which the elements of fraud entered should have been specified, and the reference confined to a re-statement of the accounts so far as they might be affected thereby, leaving them to stand in other respects as *res judicata*. Upon striking the balance it will be proper to ascertain the proportion belonging to each legatee, and to render a decree accordingly.

For the error of the Chaneellor in setting aside and holding for naught the entire settlements in the Probate Court, and in referring the whole matter of the administration to a master for a re-statement, and in failing to specify more particularly the matters of fraud to be corrected, the decree must be reversed, and the cause will be remanded with directions to re-hear the cause, and for such other proceedings as may be in accordance with law and this opinion.

WATSON V. JOHNSON ET AL.

LIEN—*Landlords' for rent, superior to mortgagee's.*

The lien of a landlord on the crop of his tenant for rent, is superior to that of a mortgagee

Pleading and Practice—new matter.

Under the Code practice no reply is allowed setting up matter of defense only. The statute makes issue to matters of avoidance, and they must be proved.

APPEAL from *Ashley* Circuit in Chancery.

Hon. ———— Circuit Judge.

Van Gilder, for appellant.

ENGLISH, C. J.:

The bill in this case was filed on the chancery side of the Circuit Court of Ashley county, in July 1877, by E. D. Watson, against A. L. Johnson and Isaac Cohen, to foreclose and enforce the lien of a mortgage upon cotton.

The bill alleged, in substance, that on the 29th day or February, 1876, defendant Johnson, executed to complainant a mortgage, to secure his then indebtedness, and also such advances as complainant might make to him during that year, whereby he conveyed to complainant, among other things, the crop of cotton that he would raise on fifteen acres of ground on a place in Ashley county, known as the Robert Daniel place—which mortgage was acknowledged and filed for registration in the recorder's office of Ashley county on the day it was executed, and duly recorded, and is exhibited and made part of the complaint.

That the mortgage was conditioned to be void if Johnson paid complainant all his indebtedness on or before the 1st of November, 1876, which he wholly failed to do.

That he was indebted to complainant in the sum of $162.46, for goods, wares and merchandise advanced to him upon the mortgage, as per bill of particulars made an exhibit.

That in the year 1876 there was grown and raised on the fifteen acres of land above described, gathered, ginned and baled 1,542 pounds of lint cotton or more; and that defendant, Isaac Cohen, without consent of complainant, took possession of said cotton on or about the — day of February, 1877, and so disposed of the same as to put it out of the power of complainant to get possession thereof, and out of the reach of the process of the court. That the cotton, so disposed of by him, was of the value of about $180.50.

Prayer for decree against defendant, Johnson, for $162.46, etc.; that the lien of the mortgage be declared and enforced against the cotton, etc., and for decree against Cohen for the sum due to complainant from Johnson.

Johnson did not answer the bill but made default.

Cohen answered, in substance, that he knew nothing of the alleged transaction between complainant and Johnson, except from the statements of the bill.

That he had no certain knowledge as to the amount of cotton raised by Johnson on the Robert Daniel place in the year 1876. Denies that he took any cotton from complainant, with or without his consent. Admits that he did receive of Johnson three bales of cotton, produced on said place in the year 1876, but states that it was in payment of the rent for that year, and that the cotton did not weigh more than 1200 pounds, and was sold in New Orleans for the net sum of $105. That it was not necessary that he should have the consent of the complainant to enable him rightfully to receive said cotton. That he took the cotton as coming from Johnson to Julia A. Daniel, to discharge a debt which she owed respondent. That his connection with the whole affair was brought about in this way, and in no other manner: That is to say, the said Julia A. Daniel had rented to Johnson a portion of the Robert Daniel place (that part mentioned in the bill) for the year 1876, for the

um of $109, and taken his note therefor. That she was desirous of purchasing goods and supplies of respondent during said year, and to enable her to do so, she delivered to him said rent note for $105, as collateral security for such articles as she might purchase of him. That in pursuance of this arrangement she bought of him more than $105 worth of goods and supplies. And in the month of October or November, 1876, respondent carried the note to Johnson and demanded the rent, having with him Julia A. Daniel's agent Joseph Daniel, and Johnson, then and there delivered a lot of seed cotton to the respondent, which amounted to three bales of lint cotton, and respondent, under the directions of the agent of said Julia A. Daniel, then and there delivered up the rent note to Johnson, That the said cotton was afterwards ginned and baled by Johnson, and the three bales delivered at points named for shipment.

Respondent submits, that holding the rent note as collateral security for a subsisting debt, based on the faith of the note, entitled him to receive said cotton, and that complainant had no manner of lien thereon, and ought not, in good conscience, to have a decree against him for any sum whatever.

The cause was heard upon bill and answer, and decree rendered against Johnson for $162.46, and the bill dismissed as to Cohen, and complainant appealed.

The lien of Mrs. Daniel upon the cotton, for rent, was paramount to the lien of appellant under the mortgage, (*Tomlinson* v. *Greenfield*, 31 Ark., 558), and if appellee had proven the matters in evidence alleged in his answer, the decree would have been right.

Under the Code practice no reply is allowed to an answer setting up matters of defense only. The statute makes an issue to matters in avoidance alleged in the answer. *Gantt's Digest*, 4561, 4569, 4608.

Appellee admitted, in effect, the execution and registration of the mortgage, and that he had received of Johnson, the mortgagor, three bales of the cotton covered by the mortgage, and appropriated them to his own use. To avoid the effect of these admissions, he alleged, in substance, that Mrs. Daniel had a lien on the cotton for rent, and that the three bales of cotton received and appropriated by him were, in effect, delivered to her in payment of rent. The *onus* of proving these allegations—this new matter in avoidance, was upon him.

The cause having been heard on bill and answer, without deposition or oral proof, and the material allegations of the bill being admitted, and the affirmative allegations of the answer made by way of avoidance, being put at issue by the statute, and not proven by the appellee, appellant was entitled to a decree against him.

The decree must be reversed, and the cause remanded for a re-hearing, with leave to appellee to produce, if he can, proof of the affirmative allegations of his answer.

ALLEN V. BANKSTON, COLLECTOR.

COUNTY SCRIP: *Right of County Court to cancel.*

The statute authorizing the County Courts to call in county warrants for cancellation and reissuance, is constitutional and the law of the contracts as to warrants issued after the passage of the act, and the holder takes them subject to this power.

SAME: *Notice of order insufficient; scrip not barred.*

When the notice of an order of the County Court calling in warrants for cancellation is published in only one newspaper, the scrip will not be barred by failure of the holder to present it within the time required by the order, though he have actual notice of it. The notice must be given as required by the statute: but presentation of the scrip is a waiver of the insufficiency of the motion.

APPEAL from *Desha* Circuit Court.
Hon. J. A. WILLIAMS, Circuit Judge.
Pindall, for appellant.

ENGLISH, C. J.:

The County Court of Desha county, at its July term, 1876, made an order calling in all county warrants, scrip, jury and witness certificates, etc., previously issued and outstanding, and requiring all holders of such warrants, etc., to present the same at the following January term of the court, to commence on the first Monday of January, 1877, for cancellation, reissuance, etc., on pain of being forever barred; and the clerk was required to deliver a copy of the order to the sheriff, to be by him posted and published, as required by law.

A copy of the order was duly furnished by the clerk to the sheriff, who put up copies thereof at the court-house door, and at each election precinct in each township of the county, and published the order in the Pine Bluff *Republican*, a newspaper printed and published at Pine Bluff; but in no other newspaper.

Thomas H. Allen, who resided in Memphis, Tennessee, was the holder of warrants of the county, and some jury and witness certificates, and failed to present them to the County Court within the time prescribed by the order. Shortly before the time expired, he was personally informed by a person who went from Desha county to Memphis, that such an order had been made, and sent over his warrants, etc., but they were too late.

He was the owner of real and personal property in Desha county, which was assessed for the year 1876. On the 3d of March, 1877, he tendered to Isaac Bankston, the collector, the warrants and certificates held by him, in payment of county taxes charged upon his property on the tax book in the hands

of the collector, and they were refused on the ground that they were barred and worthless.

He applied to the Circuit Court of Desha county for a mandamus to compel the collector to receive his warrants and certificates. The collector answered, setting up the order of the County Court calling in the warrants, etc., the posting and publication of the order, etc., and the failure of Allen to present his warrants, etc., within the time prescribed by the order, etc.

The court overruled a demurrer to the answer, and heard the case upon the petition, answer and evidence.

In addition to the facts shown above, it was proven that on the 11th of January, 1877, the County Court made an order declaring that all warrants, etc., not presented within the time prescribed by the order made at the previous July term, were forever barred, etc.

The plaintiff moved the court to make the following declaration of law:

"1. That the publication of the order of the County Court of Desha county of July term, 1876, in one newspaper, was not a sufficient compliance with the provisions of section 615, *Gantt's Dig.*, to affect the plaintiff with notice of said order calling in said scrip for cancellation and re-issue.

"2. That no other character of notice than that prescribed by the statute was sufficient.

"3. That to authorize the order of January 11, 1877, the defendant must prove that the notice required by section 615, had been published in more than one newspaper printed and published in the State of Arkansas.

"4. That the personal notice to plaintiff, attempted to be shown by the testimony of Griffin W. Myers and Jacob Ross, was insufficient to bind said plaintiff, if the notice required by law had not been given."

The court refused to give the declarations numbered 1, 3 and 4, but declared the law to be as stated in declaration number 2.

On motion of defendant the court declared the law to be, "that the publication of said order of July term, as recited in the order of the 11th January, 1877, was sufficient notice to plaintiff of said order."

"The court thereupon found the facts to be that notice of the said order of the July term, 1876, was given by the sheriff of Desha county by posting a copy thereof on the court house door and in each election precinct in said county of Desha for the time required by law, and by advertising the same in the Jefferson *Republican*, a newspaper printed and published in the State of Arkansas, for the time required by law; but in no other newspaper whatever; and that plaintiff had personal notice of said order by the information delivered to him by said Griffin W. Myers, as testified by said Myers and alleged in defendant's answer."

The court refused the mandamus and dismissed the petition at plaintiff's costs.

Plaintiff moved for a rehearing, which the court refused, and he took a bill of exceptions, and appealed.

The statute requires the sheriff to give notice to holders of county warrants, etc., of an order of the County Court calling them in, etc., "by putting up at the court house door and at the election precincts in each township of said county, at least thirty days before the time appointed by the order of said court for the presentation of said warrants, a true copy of the order of the court in the premises, and by publishing the same in *newspapers* printed and published in the State of Arkansas, for two weeks in succession, the last insertion to be at least thirty days before the time fixed by said court for the presentation of said warrants." *Gantt's Digest*, Sec. 615, *Act of January* 6, 1851; Sec. 2, *Acts of* 1856–7, p. 51.

The order in question was published in but one newspaper. It was not published in *newspapers* (plural) as required by the statute.

The appellant took his warrant subject to the power of the County Court to call them in for cancellation and re-issuance on the public notice prescribed by the statute, which was enacted before the warrants was issued. The statute was constitutional and the law of the contracts. *Parsel* v. *Barnes & Bro.*, 25 Ark., 261.

The warrants were not barred by the order calling them in, because of the failure of appellant to present them within the time fixed in the order, if the sheriff failed to give the public notice as required by the statute.

The statute manifestly requires the order to be published in more than one newspaper, leaving the selection of the papers to the discretion of the sheriff.

The information given to appellant by Myers that the County Court had made an order calling in warrants, amounted to nothing. It was not the notice required by the statute. It was without authority.

Had appellant presented his warrants within the time fixed by the order, and submitted them to the court for examination, cancellation and re-issuance, it would have been a waiver of the insufficiency of the public notice, and had his warrants been rejected he might have appealed.

The judgment must be reversed, and the cause remanded with instructions to the court below to award the mandamus as prayed.

YOUNG, TRUSTEE, ETC. V. KING ET AL.

1. NEW TRIAL—*Rule in Supreme Court when no motion for.*

Where there is no motion for a new trial, the Supreme Court will not review a decision of the Circuit Court admitting or rejecting evidence, or giving, or refusing instructions.

2. APPEAL FROM JUSTICE OF THE PEACE:—*Affidavit for, amendable*—

An informal affidavit for appeal from a Justice of the Peace may be amended in the Circuit Court; and if not objected to there, it is not good practice to allow objections to it in the Supreme Court.

APPEAL from *Lonoke* Circuit Court.

Hon. J. W. MARTIN, Circuit Judge.

Clark & Williams for appellant.

Chapline & Trimble, contra.

ENGLISH, C. J.:

This was an action of replevin for two mules, commenced before a justice of the peace of Lonoke county, by E. A. Young, trustee in a deed of trust, for the use of Banyan Payne, against J. M. King, sheriff, etc.

It seems from the sworn complaint that King, as sheriff, had levied upon and taken possession of the mules by virtue of an execution issued by a justice of the peace, upon a judgment in favor of S. Blum, against John T. Miller, and that the plaintiff in this suit claimed the mules under a deed of trust executed by Miller for the use of Payne.

On the application of Blum he was made a defendant.

The justice rendered judgment in favor of the plaintiff for the mules, and the defendant appealed to the Circuit Court.

In the Circuit Court, at the October term, 1877, by consent of parties the cause was submitted to the court sitting as a jury.

The plaintiff, to sustain the issue on his part, produced and read in evidence a deed of trust, executed to him, as trustee,

on the 22d December, 1876, by John T. Miller and Robert B. Miller, partners under the firm name of John T. Miller & Bro., conveying the mules and other property to plaintiff, in trust, to secure debts due from them to Payne. The court, on inspection of the deed, pronounced it fraudulent and void on its face and rejected it as evidence of title to the mules in the plaintiff.

The plaintiff offering to introduce no other evidence, the defendant proved the value of the mules, and the court found in their favor, and rendered judgment for restitution, etc.

The plaintiff took a bill of exceptions without moving for a new trial, and appealed to this court.

The cause has been submitted on briefs upon the merits, and also upon a motion of appellees to dismiss the case because no motion for a new trial was made by appellant in the court below.

I. During the time of the five judges, it was repeatedly held by this court that under the Code practice it would not review decisions of the Circuit Court admitting or rejecting evidence, or giving or refusing instructions where there was no motion for a new trial. *Steck* v. *Mahar*, 26 Ark., 536; *Merriweather* v. *Erwin*, 27 Ib., 37; *Worthington et al.* v. *Welch ad.*, Ib., 464.

Such also appears to be the practice under the Kentucky Code, from which ours was copied. *Detherage* v. *Montgomery*, 4 Bush., 46; *Humphreys* v. *Walton*, 2 Ib., 580.

In *Harper* v. *Harper*, 10 Bush., 451, the court of appeals, by Justice COFFER, said:

"When an appeal is prosecuted from a judgment on a verdict without a motion for a new trial having been made and overruled, nothing is brought before this court except the pleadings, verdict and judgment; and if the pleadings and verdict authorized the judgment rendered, it will be affirmed

without regard to the rulings of the court at the trial further than they appear in the judgment.

"But when a motion for a new trial is made, it is the duty of the Circuit Court to review all its rulings during the trial, which were excepted to by the unsuccessful party, and grant a new trial, if error has been committed to his prejudice; and if the court fails to do so, and overrules the motion, the order will be erroneous, because of the previous errors, and this court will review the order, and remand the case with directions to award a new trial."

It follows under this rule of practice that the decision of the court below pronouncing the deed of trust fraudulent upon its face, and rejecting it as evidence of appellant's title to the mules, is not properly before us for review on this appeal."

II. Counsel for appellant submit that the affidavit for an appeal from the judgment of the justice of the peace to the Circuit Court, was not in good form, and therefore, the latter court acquired no jurisdiction of the cause.

The affidavit follows :

"Personally appeared before me, R. Anderson, a justice of the peace, in and for the said county and State, Thos. C. Trimble, attorney in the above cause for defendants, and stated that said appeal is not taken for daily, to vex, harrass or annoy plaintiff, but that justice might be done in the *premises*.

The county, State and names of the parties are in the caption, and the affidavit was sworn to before the justice who tried the case.

The statute provides that the applicant for an appeal, or some person for him, "shall make and file with the justice an affidavit that the appeal is not taken for the purpose of delay, but that justice may be done him. *Gantt's Digest*, Sec. 3821.

No objection was made in the court below to the sufficiency of the affidavit.

Had a motion been made to dismiss the appeal for want of a more formal affidavit, the party taking the appeal might have been permitted to amend the affidavit if deemed by the court to be in bad form. *Gantt's Digest* Secs. 3827–8.

No objections to the affidavit having been made in the court below, but appellant having submitted to a trial *de novo*, it is not good practice to permit the objections to be made here for the first time. *James et al. adr.* v. *Dyer, adr.*, 31 Ark., 489.

The judgment of the court below must be affirmed.

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VERNON V. NELSON ET AL.

1. TAX SALES:
The revenue act of March 17, 1873, suspended the tax sales for that year.
2. SAME:
A sale for taxes on a day not appointed by law, is void.

APPEAL from *Jefferson* Circuit Court.
Hon. WILLIAM BYERS, Circuit Judge.
Rice & Bishop, for appellant.
Butler, *contra*.

HARRISON, J.:

This was an action of ejectment by the appellant, James Vernon, against the appellees, Isaac Nelson and Chas. Sneed, for forty acres of land—the east half of the east half of the northeast quarter of section sixteen, in township thirteen north, range five, west.

The plaintiff claimed title under an Auditor's deed. It was averred in the complaint that the tract, which then was owned by the defendant, Nelson, was assessed for taxation in 1873;

that the taxes were not paid, and it was returned delinquent; that at a sale of lands for non-payment of taxes, on the 2d Monday, the 9th day of June, 1873, it was offered by the collector, and no one offering to pay the taxes, penalty and costs, it was bid off by him in the name of the State; that two years having expired, and it not having been redeemed, the sale of it to the State was certified by the county clerk to the Commissioner of State Lands; and that the plaintiff had purchased it from the State, and the Auditor, on the 8th day of September, 1875, executed to him a deed for it.

The defendants were, it was alleged, in possession.

It was recited in the deed, which was filed by the plaintiff as an exhibit with the complaint, that the tract was offered by the collector in June, 1873, but the day of the month was not stated.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

The demurrer was sustained and judgment rendered in favor of the defendants.

The revenue act of April 28, 1873, continued in force the act of March 25, 1871, "for the purpose of making the collection and settlement of the taxes of 1872.

But by the previous act of March 17, 1873, the Legislature extended the time for the collection of that year's taxes, thirty days from the 31st day of March, 1873, and also for a like period, the time in which the collector was required to file his delinquent list, and make settlement with the county clerk.

The day fixed by the act of 1871 for the sale of lands for taxes, was the second Monday of May; but though the time for the collection of the taxes and also for filing the delinquent list and making settlement was extended, no other day was appointed for the sale.

It is manifestly clear that there could be no sale on the second Monday of May. Section 99 of the act of March 25, 1871, required the notice of the sale to be published in the official paper, weekly, for two weeks, between the first Monday of April and the first Monday of May.

It was provided by section 180 of the act of 1871, and the revenue act of 1873 contained the same provision, that "in all cases where any county clerk, by any inadvertence or mistake, shall have omitted in any year, or in any future year shall omit to publish the delinquent list of his county, according to the requirements of this act, or any previous law of this State, it shall be his duty, in case the taxes and penalty with which the land or lot or part thereof, therein stands charged, shall not, before the first of April of the next succeeding year, have been paid, to charge the lands or lots with the said taxes and penalty, and also the taxes of the current year, and record, certify and publish the same as part of the delinquent list."

If it could be held, but we know of no rule by which such a construction of the statute might be made, that the tax sales were also postponed for a like period of thirty days, the sale which was on the ninth of June was not on the thirtieth, but the twenty-eighth day after the second Monday of May, that being the 12th of the month.

If the Legislature had intended that there should be a sale of the delinquent lands that year, we cannot conceive why such intention was not manifested by the appointment of a day therefor; for it was apparent that if the provision of the statute in regard to the length of notice was observed, there could not be a sale on the second Monday.

We conclude, therefore, it was the intention to suspend the sales for that year.

But in any aspect in which the case may be viewed, it plainly appears that the sale was made at a time not appointed or pro-

vided for by law; and consequently without authority of law, and was void; and that the plaintiff obtained no title by his purchase from the State.

We deem it unnecessary to notice other objections raised by appellee's counsel.

The demurrer was rightly sustained, and the judgment of the court below is affirmed.

WALWORTH V. FINNEGAN.

1. DAMAGES—*Rule of in entire contract, where part only is performed.*

Where there is an entire contract to do work at a stipulated price for the whole, and part only is performed, if not accepted there can be no recovery; but if accepted, or if the work be upon property of the defendant, and necessarily enures to his benefit, the most reasonable rule is that the plaintiff should recover the entire amount of the contract price, less the amount still necessary to complete the work entirely.

2. PRACTICE IN SUPREME COURT—*Where verdict of jury will be set aside:*

Where a verdict is the result of a plain, palpable mistake in the jury or of pr judice, or may be, of some knowledge on the part of the jury of the circumstances, the Supreme Court will set it aside.

APPEAL from *Chicot* Circuit Court.

Hon. T. F. SORRELLS, Circuit Judge.

Valentine, Dodge & Johnson, for appellant.

Reynolds, contra.

EAKIN, J.:

Finnegan sued Walworth at law to recover for work done under a levee contract. The contract, in writing, is exhibited, whereby it appears that plaintiff agreed to build a certain levee on defendant's plantation "as laid off and staked out by Col. C. W. Fry," * * * * "to the full height, base and crown designed by Col. Fry's survey and level." It provided

that the work should be immediately commenced, and that sufficient hands be put upon it to complete the whole line by the first day of February, 1876, and before any high water should interfere with the progress of the work. It was further provided that the defendant might have the right, in case he should fear that it would not be completed in time to protect the plantation, to employ additional laborers upon it at the cost of Finnegan. Provision was made for paying for the work done, at certain rates per cubic yard. Three-fourths of the price of the work done to be paid when it was half completed, and "the balance of the whole work when the whole line is completed and measured by Col. Fry, and the work estimated, and pronounced, by him, to be in accordance with the contract."

It is alleged that plaintiff entered upon the work, and continued it from time to time, until it was all completed in accordance with the contract—although not in the time specified. After the expiration of the time, plaintiff proceeded with the work, "with the consent and at the solicitation" of defendant. That according to the estimates of said Fry, (the engineer) as to the amount of work in said levee, and the price to be paid for the same, fixed by the contract, the whole amounted to the sum of $3191.60, of which, at various times, the sum of $1375, had been paid, leaving due the sum of $1816.66.

Upon proper affidavit and bond an attachment issued against defendant as a non-resident; which was levied upon the lands.

The answer denies that plaintiff complied with his contract, in completing the levee, as agreed; but wholly failed, and denies further that he, after the time, completed it at defendant's request or by his consent.

Upon trial the jury returned a verdict for plaintiff for $1895.78. Judgment accordingly, with an order of sale of

the lands attached, a motion for a new trial was overruled, bill of exceptions taken and appeal.

The plaintiff testified that he completed the levee according to the estimate made by the engineer. There were two small sections left open for the purpose of moving some houses through them. They were not in the estimate of the work plaintiff was to perform. Mr. Ernest Walworth was the agent of defendant, and desired them to be left open. The high water broke the levee about the 25th or 26th of February, and the plantation was overflown. Afterwards defendant agreed with plaintiff to allow him to go on and complete the levee, and he should be paid. The engineer was on the work several times, but did not measure or estimate it. After the first overflow it was completed according to the survey, but it was not high enough. The water came just after the completion of the work, ran over the top of it, and washed most of it away.

Fry, the engineer, testified that he made the estimates for the levee to be built—that after the first break and overflow he had a conversation with the defendant, who absolved Finnegan from all blame in the matter. Witness advised him to allow Finnegan to go on and complete it, but does not know that the contract was renewed. He says the two sections left open were in his estimate, and were not completed. His estimate was of the amount of work which would be required—never estimated the work done, because of the high water and washing away of part of it—could not have done so if he had been called upon—but the estimate of the work required corresponds with that stated in the complaint. He was on the work a day or two before the last rise. The greater part of it seemed to be completed at the time, and plaintiff was working on the uncompleted parts. The levee was not large enough nor high enough, but was laid off as requested by defendant.

Eugene Llewellyn testified, on behalf of plaintiff, that when

he was last on the levee the hands were at work on the old levee, in the woods, and there were only two sections then unfinished, *on that portion*, besides the two at the gin ridge.

Ernest Walworth, the son and agent of defendant, says: the two sections at the gin ridge were left open at his request, to be done last. Was on the levee the day before Finnegan quit work. It was on the old portion where he was working. There were two sections there uncompleted, and in all, as near as witness could judge, these were uncompleted:

2 sections at the gin ridge, about	160	yards
1 near old levee	80	"
1 on old levee	80	"

The work was not estimated nor measured, because it was washed away.

Plaintiff was allowed to introduce a letter of Ernest Walworth to himself, of date of 19th June, 1876. The purport of the letter is to express his regret that a certain draft given by him to plaintiff for a portion of the levee work had been unpaid, and explaining the reasons.

The admission of this letter is made the first ground of a motion for a new trial. So far as it had any bearing upon the issues, the object of it is not easily conjectured. It concerned a payment for undisputed work, for which credit had been given, and with regard to which no contest existed. It could not have influenced the jury in determining how much work had been done, at what time, or the value of it. Its admission, if erroneous, was unimportant; and could not have prejudiced defendant.

The second ground, that the court erred in giving the first instruction for plaintiff, is not pressed in argument, and may be passed, being clearly untenable.

The third ground is, that the court erred in instructing for plaintiff as follows: "If the jury believe, from the evidence,

that plaintiff entered into said contract, to build said levee, and was prevented by the act of God from completing the same, and the said levee was to be measured and estimated by C. W. Fry, and said measurement was prevented by the act of God, then the jury will find for plaintiff, and assess his damages at the value of the work actually done, with interest from the time the same became due and payable."

There has been a considerable degree of diversity in the cases on the subject of the amount of recovery to be had where there has been an entire contract to do work at a stipulated price for the whole; and where part only has been performed. If not accepted there can be no recovery at all. If accepted, or if the work be upon property and enures necessarily to the benefit of the owner, the rule has undergone much discussion. The most reasonable doctrine would seem to be that complainant should recover the amount of the whole contract, diminished by the amount still necessary to complete the work entirely. This may not always be commensurate with a *quantum meruit*, and considered as an abstract proposition, the first part of the foregoing instruction was not strictly correct. The instruction was unexceptionable, however, so far as it advised the jury that if they found the work had been completed, and the measurement by Fry prevented by the act of God, they might, nevertheless, find for the work actually done. The plaintiff would not forfeit his right to any payment whatever for want of an estimate and measurement in a particular mode, which had become impossible. And in the case actually before the jury the whole instruction could not well be misleading. In estimating the value of the work done they would be governed, naturally, by the rates per cubic foot, or yard agreed upon, which would lead to a true and just result. This was not a case of an entire work to be done for a sum *in solido*, but for work to be done at stipulated rates. It is analogous

to a contract for the delivery of a certain quantity of wheat at so much per bushel. A recovery may be had, at the stipulated rates, for the amount actually delivered, unless there be shown some peculiar reason for recoupment. The failure to complete the levee in the time stipulated in the original contract, was confessedly waived; and no definite time substituted. Whether that failure would have been excused by the act of God or not was not important.

It seems that the law, as applicable to the evidence in the case, was given to the jury correctly. It was not denied, but positively proven, that the overflow, which finally stopped the work and destroyed a portion of it, went over the levee; and the damage was not imputable to any delay in its completion but the insufficiency of the plan. With that plaintiff had nothing to do, and could not thereby be justly deprived of the value of the work and labor he had expended. He was entitled to the amount actually done, and at the stipulated rates, and so the jury must have understood.

They found that the whole work had been completed and gave the plaintiff a verdict for all he claimed, and a sum over, which exceeded the interest at six per cent upon the sum claimed from the date of filing the complaint. It was filed December 11, 1876.

The remaining grounds of the motion are based upon this action of the jury.

They had been also instructed on the part of the defendant, 1st. That if they believed the defendant had paid three-fourths of one-half of the work, according to the estimate, and that said work was never surveyed, estimated and received by said Fry, or that there was no new contract between the parties not containing this condition, then they must find for defendant; and 2nd, that if they believed from the evidence that plaintiff

made a contract with defendant for building a levee, and failed to comply with said contract, they must find for defendant.

The plaintiff does not appeal, and the defendant relies upon these instructions to show that the verdict was contrary to the law as given by the court. It certainly is, if these last instructions are to be considered alone. They ignore all excuses for non-completion, and all those provisions of the law applicable to contracts completed in part. They are to be construed, however, with those given for plaintiff, and, taken all together, are substantially correct.

Did the jury find against the evidence?

Finnegan, the plaintiff, says generally that he completed the work according to the estimates made by Fry, except the two gaps at the gin ridge, which were not included in them.

Fry, his own witness, testifies that the estimates made for the work were the same stated in the complaint, but that the gaps *were* included. His testimony, together with that of Llewellyn and Ernest Walworth, satisfies the mind beyond all reasonable doubt, that the western section could not have been fully completed at the time of the second overflow, and that the plaintiff's general assertion to that effect must be taken with some qualification. This is not a case of mere preponderance against the verdict, which, of itself, would not be sufficient, in this court, to cause its disturbance. It is a plain, palpable mistake in the jury, or the result of prejudice, or maybe of some knowledge on the part of the jury of the circumstances.

We are satisfied that (whilst the evidence supports the general verdict) there is not sufficient to support so much of it as is excessive, or based upon the supposition of the *entire* completion of the work according to the estimates. It is a very dim "scintilla," and there must be some reasonable limit to the doctrine that an appellate court should not disturb a ver-

dict on the mere grounds of preponderance of evidence against it.

For the purposes of this opinion and our action here, we think it fair to take the testimony of young Walworth with regard to the amount left unfinished. It is definite to a reasonable degree, although being in round numbers, not perhaps strictly accurate. It will do against such uncertain estimates as are relied on by complainant. The contract was at eighteen cents per cubic yard for work on the new levee, and nineteen cents on the old. There seems to have been three sections of new levee unfinished, containing about eighty yards each, including the gin ridge gaps; and one section of old levee, or as the witness puts it, about eighty yards on the old levee. These ought to be deducted from the whole estimate, as follows:

Whole estimate		$1,816 66
Deduct 240 yards, at 18 cents	$43 20	
Deduct 80 yards, at 19 cents	15 28	58 40
		$1,758 26
Int. from Dec. 11, 1876, the date of filing the bill, to July 23, 1877, date of judgment		$ 65 04
		$1,823 30

For all over this amount the verdict was excessive.

The judgment will be reversed and the case remanded for a new trial, unless appellee remits this excess here, pays the costs of the appeal and submits to the usual practice of the court in waiving rights on the supersedeas bond. This he may do and the judgment will be affirmed.

ARRINGTON V. MCLEMORE ET AL.

1. WILLS: *Probate of not essential to their validity.*

A will determines the rights of parties under it, *proprio vigore*, from the death of the testator. Its probate is necessary to fix the right of the executor to execute it, to point out the person authorized to act, and as a basis and prerequisite to letters testamentary, but is not essential to its validity. Rights under it are not lost by failure to probate; and to establish or protect them the validity of a will may be shown in any court.

2. ——— *Lost—Statute limitations.*

The statute of limitation is not applicable to proceedings by a *non compos* to establish a will that has been fraudulently concealed.

APPEAL from *Lincoln* Circuit Court in Chancery.
Hon. T. F. SORRELLS, Circuit Judge.
Carlton & McCain, for appellant.
Pindall, *contra*.

EAKIN, J.;

This is a bill by some of the children of West Arrington, deceased, (the appellees) against his widow and a son, West A. Arrington. It alleges the intestacy of the deceased, and seeks partition of his estate. James P. Stanley is also made defendant, concerning whom it is alleged that he pretends to be the guardian of said West A. Arrington, and as such, "or otherwise," claims some interest in the lands. The bill states that West A. was declared *non compos* by a pretended order of the Drew county Circuit Court, on the 28th of January, 1874, and that Stanley was subsequently appointed his guardian, but alleges that the proceedings declaring said West A. *non compos*, were void, for reasons stated.

Stanley was allowed, as guardian, to file an answer. He says that West Arrington left a will, making dispositions of his property, different from that made by law in case of intestacy—the nature of which dispositions are set forth, and

appear, if true, to be in favor of said West A. He says he was duly appointed as guardian of said West A., on the 26th of April, 1876, by the Probate Court of Drew county, of which said ward was a resident, and that he is in fact a lunatic, and that respondent is his next friend. He says that the plaintiff, or Mary S. Arrington, the widow, concealed or destroyed the will, and withheld the same from probate, with the fraudulent intent to defeat the rights of said West A., and that proceedings are now pending in the Probate Court of Drew county by said West A., to have the will probated. A copy of the will is embodied in the answer, and it appears to be duly executed. He makes his answer a cross-bill against complainants and the widow, praying discovery as to the execution of the will, and of their knowledge of it, and that they be compelled to produce it.

The complainants demurred to the answer for divers causes, amounting together to these: That it did not appear thereby that the will was ever duly probated, or that defendant, Stanley, had any authority to act as guardian, or that said West A. had been duly declared *non compos*. They demurred to the cross-bill, because the Circuit Court of Lincoln county, in which the proceedings were had, was not authorized to grant the relief prayed, or to establish the will, or give it effect until it may have been properly probated in Drew county, the residence of deceased. Also because the claim was stale, and barred by the statute of limitations.

The court sustained the demurrer, and Stanley rested. A decree for partition was rendered, and he appealed.

The demurrer admitted that a will had been duly executed, making such disposition of the property as was shown by its terms, as set forth in the copy; that it had been concealed by complainants, or the widow, or destroyed, and that proceedings were pending in the proper tribunal to establish it; that

West A. Arrington had been declared *non compos*, and that defendant had been appointed his guardian; that he was in fact a lunatic, and defendant was his next friend. If the matters were not set up with all recitals and allegations to show their complete validity, yet if the resultant fact, as alleged, implies them, the remedy was by motion to make the answer more definite and certain. The character of defendant, Stanley, as guardian, or next friend of West A., could not be questioned by demurrer. Proper application should have been made, by motion, to have him show his authority, or to have the answer struck from the files. A demurrer questions the sufficiency of the facts set up in the pleadings to constitute a meritorious cause of action or defense. The propriety of allowing the defense to be made by guardian was matter of practice to be determined by the court on facts brought to its knowledge outside of the pleadings—whether they were matters of record or matters *in pais*.

A will determines the rights of parties under it, *proprio vigore*, from the death of the testator. Its probate is necessary indeed to fix the right of the executor to execute it; to point out the person authorized to act, and as a basis and prerequisite to letters testamentary; but is not essential to its validity. Rights under it are not lost by failure to probate; and to establish or protect them the validity of the will may be shown in any court. *Janes et al.* v. *Williams et al.*, 31 Ark., 175.

The facts admitted by the demurrer show that the court should not proceed to partition as of an intestate's estate. If they were false the complainants should have gone to hearing. If true, the bill should have been dismissed.

The cross-bill, or so much of the answer as was meant for such, was such as the Chancellor might decline to entertain in this action.

The subject matter was pending in the Drew county Probate

Court. Perchance the will may be produced and established there; and if it should finally turn out that it has been lost or destroyed by accident or design, it would be better to commence independent proceedings in chancery under the statute, to establish it, and certify the decree to the Probate Court clerk.

The statute of limitations does not apply to the case made by the pleadings.

For error in sustaining the demurrer to the answer, the decree must be reversed and the cause remanded for further proceedings consistent with this opinion.

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BENNETT V. HUTSON ET AL.

1. VENDOR AND VENDEE: *Resulting trust.*

An uncompleted sale, where a deed has been executed and the consideration has not been paid, and where there is no intention of a gift or a sale on time, makes a resulting trust in favor of the vendor; not for the purchase money, but for the whole land. Equity will treat it as no sale, and hold the vendee as trustee of the dry legal title; and a purchaser from such vendee, with notice of the facts, will acquire no title.

2. FRAUDULENT CONVEYANCE: *When conveyance to wife is: Homestead not lost by.*

A conveyance to a married woman in consideration of payments made by the husband, is in effect as if he had taken the deed to himself and then conveyed to the wife; and if made to avoid an existing debt of the husband, is fraudulent and void to the extent of the creditor's rights, which may be enforced by proper preceedings, but not in contravention of the policy of the homestead laws in force at the time and applicable to the debt.

A debtor does not forfeit his homestead rights by making a fraudulent conveyance of the homestead.

3. EXEMPTED PERSONALTY: *May be sold by debtor; property taken in exchange for, relains its own nature.*

Exempted personal property may be sold by the debtor, and the execution creditor cannot follow it into the hands of the purchaser. But property taken in exchange must take its position subject to the exemption laws in

force. If it be personal, it must go to make up the amount exempted; if real, it must take its place subject to the laws governing real estate, and be exempt or not, as other property of like nature: and if the title be taken to a wife, child or stranger, being volunteers, courts of equity will subject it to the same burdens in favor of creditors, which it would have borne at law if conveyed to the debtor himself.

4. EQUITABLE INTERESTS: *Sale of, under execution; Practice in equity.*

The sale under execution at law, of equitable interests not well defined and marketable, has been strongly disapproved by this court. There is no objection to making the levy; and where the interest is ascertainable like the equity of redemption in an undisputed mortgage, etc., the sale may proceed; but in all cases where a bill in equity will in any event be necessary to fix an equity or determine its extent, it should be first fixed and then sold for its fair value. The better practice in all such cases after making the levy, is to file a bill in equity against all claimants to ascertain the true nature and extent of the equity.

Courts of equity should exercise a sound discretion and set aside sales under execution at law in all cases where the rights sold have been of such doubtful character as to deter fair competition.

HOMESTEAD: *Sale of, under execution. Scheduling.*

An insolvent debtor purchased land and had it conveyed to his wife, with a view to avoid an existing debt. Afterwards, while residing on it as a homestead, it was sold under execution at law for that debt. He forbade the sale on the ground that it belonged to his wife, but made no schedule of it as a homestead, and soon afterwards died in possession. Held, that his wife was not by the sale deprived of the homestead.

APPEAL from *Van Buren* Circuit Court in Chancery.

Hon. J. W. MARTIN, Circuit Judge.

B. D. Turner, Jr., and J. H. Frazer, for appellant.

House, contra.

EAKIN, J.:

Bennett sued Permelia J. Lay (now Hutson), for a tract of land, in the Code form of ejectment, founding his claim upon two deeds. One from Fountain M. Lay and his wife (said Permelia), to Nathan A. Sanders, bearing date of August 19, 1874; another from said Sanders and wife to plaintiff, of the 8th November, 1875.

Defendant denied plaintiff's ownership, and on her part claimed title under a deed to herself from James Brown and wife, of the 29th of May, 1874. She says that the contract of sale made by herself and husband to Sanders was made for cash, and that Sanders, finding himself unable to pay the same, had agreed to a rescission of the conveyance, and that defendant had notice of this when he purchased of Sanders. That she had remained in possession after the pretended sale, and that plaintiff had obtained the deed from Sanders by fraudulently pretending to be the owner, and without consideration. She makes her answer a cross-bill, brings in Sanders, asks that the cause be transferred to the equity side, and the deeds relied upon by plaintiff be canceled, or, as alternative relief, that she have a lien for the purchase money. The cause was transferred, and plaintiff given time to answer.

He then filed a supplemental bill and answer to the cross complaint, denying the agreement to rescind, or that he had notice of it, or that he obtained his deed by fraud. He sets up new and additional grounds of action, alleging, that in March, 1875, he recovered a judgment in the Circuit Court against Fountain M. Lay for $472.67, and costs. That shortly before that, Lay bought the lands from Brown, and had the deed made to defendant, his wife; that the same was kept secret and not recorded until April 29, 1875; that he sued out execution on the 16th of April, 1875, which was levied upon the lands; that they were sold under execution and bought in by him for $300, which sum after payment of costs, was credited on the judgment; and that he received the sheriff's deed in due course of time. Further, that at the time of the levy and sale said Lay owned no other real estate, save a homestead, on which he resided, and a very small amount of personal property; and that at the time of plaintiff's purchase, under the execution, he knew nothing whatever of the deed to Sanders.

In reply to this supplemental matter, defendant denied that the delay in recording the deed was from any fraudulent intent. She says the place was bought for a homestead, and that her said husband lived on no other; says that he owned no other lands, nor did she herself. That he was a married man, resident of the State, and the head of a family; was on his death bed when the sale under execution was made, and has since died, leaving his wife, the defendant, and four minor children.

Under this state of the pleading the proof conduces to show, that Fountain M. Lay was in debt to plaintiff in the month of May, 1874; that he was a man of small means, not having as much personal property as was exempt from execution under the Constitution of 1868; that he bought the land from Brown for the purpose of making it a home for his family, and had the deed made to his wife to avoid annoyance from creditors, having this debt in view. That he was in bad health and moved upon the place before the judgment was obtained under which plaintiff purchased. That he sent a friend to forbid the sale on the ground that the title was in his wife, but made no schedule of the property as his homestead, and that he soon aftewards died in possession.

During the previous summer, and after the purchase from Brown, he and his wife agreed to sell to Sanders for $600, to be paid in cash. The deed was written out and defendant, Permelia, acknowledged it before a magistrate, with her husband. On a separate examination she stated that "she had of her own free will signed and sealed the relinquishment of dower, and all her right, title, claim and interest in and to said lands, for the consideration and purpose therein mentioned, without compulsion or undue influence of her said husband." The deed, when prepared, was given to Sanders, with the understanding that he was to convert some county

securities into money and pay cash, and he filed it in the clerk's office, with instructions *not* to record it until further directed. Sanders being unable to raise the money, the contract, by mutual understanding, was rescinded, but the deed was left lying in the office. Some time after plaintiff's purchase under the execution, he discovered it by accident, and obtained a conveyance from Sanders for the nominal consideration of fifty dollars, which he has not yet paid. He then caused the old deed to be recorded with Sanders' deed to himself.

The levy of the officer under the execution, fails to designate whether the "township eleven," in which the land lies, is north or south of the base line, and misdescribes a division of a quarter section. The latter mistake is not repeated in the certificate of purchase.

Upon hearing, the Chancellor ordered the deeds from Lay and wife to Sanders and from the latter to plaintiff to be canceled; declared the levy and sale by the sheriff void, as well from uncertainty of description as because the title was in defendant. The sheriff's deed was canceled, and the title of defendant quieted. It was further ordered that the credit entered on the judgment be set aside. The plaintiff appealed.

The acknowledgment of Mrs. Lay is irregular. The land was hers, under the deed from Brown, and she should have acknowledged that she had *executed* it, or used equivalent words. That is proper where the wife's land is the subject matter. The magistrate's certificate also fails to show that she "voluntarily" appeared before him for separate examination.

It is unnecessary, however, to discuss the validity of the acknowledgment. An uncompleted sale, where the deed has been executed and the consideration has not been paid, and where there has been no intention of a gift or a sale on time, makes a resulting trust in favor of the vendor—not for the purchase money, but for the whole land. Equity will treat it

as no sale, and hold the vendee a trustee of the dry legal title. This is one of the fourth class of resulting trusts treated of by Mr. Bispham, in his excellent work on "Principles of Equity," sec. 79.

The plaintiff had notice of the circumstances, unquestionably. He was told by Sanders that he had no title, and as yet had paid nothing. This attempt to gain an advantage, and fortify his title was vain and futile; whether Mrs. Lay had properly acknowledged the deed or not. The equities of the plaintiff must rest wholly upon his judgment and proceedings under it.

The conveyance of the land by Brown to Mrs. Lay, upon consideration of payments made by the husband, was, in effect, as if Lay had taken the deed to himself and made a voluntary conveyance to his wife. It was done to avoid an existing debt, and must be held to the extent of the creditor's rights, to be fraudulent and void. The creditor had an equity, by proper proceedings, to subject the land to the payment of his judgment; so far as he might be able to do so without contravening the policy of the homestead laws, in force at the time, and applicable to that debt.

The debtor, however, would not forfeit the rights he had, by a vain attempt to confer greater upon his wife. Equity, in relieving the creditor, will not place him in a better position than he would have occupied if the defendant in execution had taken the legal title to himself.

It is contended, that inasmuch as the defendant in execution did not have as much personal property as was exempt, he might, without fraud, have used it in purchasing property for his wife—that nothing would be taken from creditors which they were entitled to seize; and they would have nothing of which to complain. It is certainly true that exempted per-

sonal property may be freely sold by the owner, and the execution creditor cannot follow it into the hands of the purchaser.

But property taken in exchange must take its position subject to the exemption laws in force. If it be personal, it must go to make up the amount exempted. If it be real it must take its place subject to the laws governing real estate; and be exempt, or not, as other property of like nature; and if the title be taken in the name of the wife, child or stranger, being volunteers, courts of equity will subject it to the same burdens in favor of creditors, which it would have borne at law, if conveyed to the debtor himself. Just this much and no more. Equity will do justice, but not punish. Whilst, on the one hand, it will not allow debtors to withdraw from their personal effects successive amounts just short of their exemptions, and invest them for the benefit of relatives, it will not, on the other, deprive them of their just and legal advantages of exemption as a penalty for unsuccessful efforts to evade the law.

The husband, when living, might, if the property had really been his own, have scheduled it as a homestead. He did not choose to do so, but forbade the sale. The property belonged to Mrs. Lay, as against her husband and all the world, except his creditors—and now, unless precluded by the sale, she has, even against creditors, the same rights of homestead which her husband had in his life time. What has been the effect of the execution sale upon her rights!

By statute, in this State, executions may be levied upon "all real estate, whether patented or not, whereof the defendant, *or any person for his use*, was seized in law or equity on the day of the rendition of the judgment, order or decree whereon execution issued, or at any time thereafter." Under this statute the practice has grown up of levying upon such equitable interests as debtors are supposed to have in property held in the

name or others, under conveyances thought to be fraudulent, buying it in for a trifle, and then filing a bill to enforce the rights, whatever they may be. At such sales there can be no competition. They become mere speculations; and oftentimes vast interests of innocent widows and children are swept away in consequence of attempted frauds on the part of those on whom they depend: which go to enrich creditors who were entitled to their debts and nothing more. Whilst this court has been constrained to give reasonable effect to the act, and sustain sales of equitable interests in some cases, it has nevertheless appreciated the full force of the danger and injustice of the practice; and wherever the equitable interest has not been well defined and marketable, has strongly disapproved of such proceedings. There can be no objection to making the levy; and where the equitable interest is ascertainable, like an equity of redemption under an undisputed mortgage, or trust deed, for specified debts, no injustice can result from proceeding with the sale. But in all cases where a bill in Chancery will, in any event, be necessary, either to fix an equity or determine its extent, every consideration of humanity, justice, fair dealing and public policy demands that it should be first fixed and ascertained, and then sold for its fair value. Where there must be a lawsuit, sold and bought, the competition will be only amongst speculators, and those of a class not to be encouraged. Generally the creditor gets the land and retains the greater part of his debt.

The better practice in all such cases, after making the levy, is to file a bill against all claimants, to ascertain through a court of Chancery, the true nature and extent of the equity. The Chancellor may, after guarding all just rights, subject it to sale for the satisfaction of the judgment. Thus a clear title or a well defined equity will be put upon the market, which bidders may buy at a fair value; and the proceeds will go to

all beneficially interested. Justice will be done to creditors, whilst those entitled to the surplus will be protected without more litigation than would in any case have been inevitable.

Courts of Chancery, in pursuance of this policy of discouraging a pernicious use of the statute, should always exercise a sound discretion, and set aside such speculative sales in all cases where the rights sold have been of such a doubtful character as to deter fair competition. In all such cases the old principles governing creditors' bills should apply; at least to the extent of suspending sales after levy until it may be ascertained what it is to be sold.

The pleadings in this case, after all amendments, stood as if the complainant had filed a bill to divest defendant's title, and to quiet his own under the sheriff's deed; and as if the defendant, insisting upon her own title, had also set up the homestead right of her husband as an alternative defense. This he might have done if the deed to his wife had, in his life time, been declared fraudulent. The proof showed that the sale had been made under circumstances unfair towards the rights of the wife. The sale did not produce over one-half of the value of the land, and she was cut off from all advantage of a surplus, which might have resulted from a fair sale. Besides, she is entitled to some consideration with regard to the homestead right, which would have remained in the husband if the deed had been declared fraudulent.

The plaintiff comes in, seeking the aid of equity, and relief should be granted only on such terms as seem just. The Chancellor properly canceled the title derived through Sanders, and set aside the sale under execution, but erred in quieting defendant's title under the deed from Brown. The question of validity of the levy becomes unimportant.

For the error just noted, let the decree be reversed and the cause be remanded, with directions to the court below to enter

a decree there declaring the conveyance of Brown to defendant fraudulent, as against the judgment of complainant against her husband; and that said judgment be declared a lien upon said lands to remain until the same be satisfied, but not to be enforced during the time said lands may be occupied as a homestead by defendant, or any of the minor children of Fountain M. Lay, deceased. The appellee will be charged with the costs of this court and the whole costs of the court below will be in the discretion of the Chancellor.

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ANDREWS, ADM'X. V. SIMMS, AD.

1. EVIDENCE: *Privileged communications; Attorney and client.*

Any communication made by a party to an attorney while taking his professional advice, is privileged and not admissible in evidence. This is a rule of public policy and for the interest of justice. The most unlimited confidence between attorney and client should be encouraged by requiring that in all facts communicated in professional consultation, the lips of the attorney should be forever sealed. It makes no difference that no fee is charged by or paid to the attorney.

2. WRITING OBLIGATORY: *Endorser and endorsee; Statute of limitations.*

The endorsement of a writing obligatory or promissory note, after maturity, makes it in effect as between endorser and endorsee, an inland bill of exchange. The endorsement of a note or writing obligatory constitutes a new and distinct contract from the note. The maker and endorser are liable on different contracts, and the statute of limitations of five years applies to the endorsement, and ten years, to the writing obligatory.

3. ENDORSEMENTS IN BLANK: *Rights of assignee.*

The holder of paper endorsed in blank may write over the endorser's name directions to whom it shall be paid, and anything consistent with the endorser's liability, but can not write "demand and notice waived;" for this would enlarge his liability.

4. DEMAND AND NOTICE: *Waiver, inferred from circumstances.*

A waiver of demand and notice may be found from circumstances and facts *aliunde.*

APPEAL from *Hempstead* Circuit Court.
Hon. J. K. YOUNG, Circuit Judge.
Gallagher & Newton, for appellant.
Williams & Battle, contra.

CARUTH, *Special Judge.*

Suit on two writings obligatory, made in the fall of 1863, and due in the fall of 1864, payable to Ephraim Mirick, or order. Both notes bear the following endorsement:

"For value received I assign the within to William W. "Andrews, waiving demand and notice of non-payment.

"*November* 3, 1864. "EPHRAIM MIRICK."

They are both sealed instruments.

Mirick departed this life on the 7th day of April, 1874, and these writings obligatory properly verified, were, in March, 1875, presented to Thomas H. Simms, the appellee, his administrator, for allowance as just claims against his estate. They were disallowed, and the disallowance approved upon hearing before the Hempstead Probate Court. An appeal was prosecuted to the Hempstead Circuit Court, and the case was heard by the court sitting as a jury.

The appellee interposed the following defenses:

First—The statute of limitations.

Second—That the endorsements of the writings obligatory offered by plaintiff as the basis of her claim, were not made by said Mirick except as to the signature.

Third—The want of demand upon the makers of said writings obligatory, and notice of non-payment.

To sustain plaintiff's case she read in evidence her notice given to the defendant before presentation to the Probate Court, for allowance; her authentication of the same; the endorsement of disallowance; and finally the original writings obligatory with their respective endorsements.

The date of the death of Mirick was agreed as above indicated.

The defendant, to sustain the issues on his behalf, called A. B. Williams, Esq., and testified himself. A. B. Williams testified substantially, that he had practiced law for many years at Washington, where appellant's intestate lived, and had frequently done business for him. That some time in the winter of 1865, or 1866, Andrews came to him as a lawyer for his opinion, stating that these notes had been endorsed to him by Mirick in blank, and asked his advice as to his rights in the premises. He advised him that he might fill up the blanks as they now appear, and Andrews did so. Doesn't remember whether he consulted him at his office or not. The opinion he gave Andrews was as a lawyer, and supposes he so took it, but did not consider himself as his attorney, and made no charge for the advice.

The plaintiff moved to exclude his testimony as being within the rule protecting privileged communications. This motion was overruled.

Simms testified that Andrews told him he had received the writings obligatory endorsed in blank, and that afterwards, under the advice of A. B. Williams, Esq., he had filled in the endorsements as they now appear.

The court declared its conclusions of law:

First. Overruling the plea of the statute of limitations.

Second. That the filling in of the endorsements was void in law, and a fraud in Mirick.

Third. That a demand and notice, or a waiver thereof, was necessary to bind Mirick, and disallowed the claim.

To reverse which, this appeal is prosecuted.

The initial point of consideration is the admission of Williams' testimony against the objection of defendants' counsel.

The motion to exclude should have prevailed.

Any communication made by Andrews to Judge Williams, whilst taking his professional advice, is privileged. Such is the rule, wisely laid down by the law, and we see nothing in the record which would justify us in making this an exception. It was adopted from reasons of public policy, and through a regard to the interests of justice. A wise policy encourages and sustains the most unlimited and generous confidence between lawyer and client by requiring that on all facts confided in professional consultation the lips of the attorney shall be forever sealed. In this case, it is clear Andrews went to Williams as a lawyer for legal advice. It matters not whether a fee was charged on Williams' books. He had an unquestionable right to charge and doubtless Andrews so expected. It is clear the relation of attorney and client existed between them.

The rule does not require any particular form of application or engagement, nor the payment of fees. It is enough—to use Mr. Greenleaf's language—that he was applied to for advice or aid in his professional character. 1 *Greenl. Ev.*, Sec. 241.

Our statute on this subject provides the following persons shall be incompetent to testify:

"An attorney concerning any communication made to him "by his client in that relation, or his advice thereon, with-"out the client's consent." *Gantt's Digest*, 2482.

Believing, as we do, that the principle thus laid down is both salutary and wholesome, and tends to conserve interests of the highest character, we follow it strictly, and hold that the testimony was inadmissible and should have been excluded.

The conclusion of law reached by the court below, that the same statute of limitation applicable to the makers of these writings obligatory, applied to this suit of the assignee against the payee and assignor, Mirick, was an error.

These sealed notes were assignable only by reason of the statute of assignments, and non-negotiable in their character. Andrews' claim must have been and was based upon the contract of assignment or endorsement. As to the note, being a sealed instrument, the statute bar was ten years, and to other written contracts, five years. The endorsement of these writings obligatory, together with the contract implied therefrom, by law, and which the endorsee had a right to insert over said indorsement, constituted a written contract between Andrews and Mirick, within the intent and meaning of the statute prescribing limitations for such contracts. It was separate, distinct and independent from the contract of the maker as evidenced by the writing obligatory, and carried with it, of necessity, its obligations and corresponding enforcement. This contract was not under seal, and we see no reason why the limitations applicable to sealed instruments should be enforced as to it.

That it was such a new contract, seems to be established both upon principle and precedent. Says Mr. PARSONS, in his work on *Notes and Bills*.

"An endorsement being a new and independent contract, every endorser of a bill makes a new contract, and will be considered by the law as the drawer of a new bill. The indorser of a note does not stand in the situation of maker to his indorser." *Parsons' Notes and Bills, vol. 2, p. 25.*

The Supreme Court of the United States, in *Ross* v. *Jones*, 22 Wallace, 589, uses this language:

"The indorser is not a surety in the general sense, but stands in the attitude of a drawer of a new bill, and the maker and indorser *are liable in different contracts*;" and proceeds to hold that the cause of action never accrued at the same time as to the endorser and maker.

So, the Supreme Court of Iowa held the endorsement of a

promissory note constituted a distinct contract. *National Bank of Michigan* v. *Green*, 33 Iowa, 140. And so rigidly was this doctrine enforced in Louisiana, that her Supreme Court decided in a case where the note itself was void, and not enforcible against the maker, that the contract of assignment was so distinct and independent of the contract of the maker, it should be enforced. *Succession of Weil* 24 *Lou. Ann.*, 139. And the same doctrine obtains in Georgia. *Graham* v. *Maguire*, 39 Ga., 53. The case of *Whistler* v. *Bragg*, 31 Mo., 124, is in point. In that case a non-negotiable promissory note, when past due, was assigned by the payee to Whistler. The Missouri statute of limitations, as to the note, would have been ten years; but the court held that in a suit between the assignee and assignor, another and different limitation applied, and inasmuch as more than five years elapsed since the cause of action accrued against the assignor—pronounced against the plaintiff. See also *Barker* v. *Cassiday*, 16 Barb., 180.

This court held in *Levy* v. *Drew*, 14 Ark., 336, that when a note has been endorsed after its maturity, it is, in legal effect, as between the indorser and endorsee, an inland bill of exchange, payable on demand; while between the indorsee and maker it remains a note. These notes were endorsed after maturity, and accordingly, as between Andrews and Mirick, became in effect, inland bills of exchange, and as such must be considered in applying the statute of limitations. More than five years having elapsed, the statute was properly pleaded, and the plea should have been sustained.

The only remaining point for consideration is as to the conclusion of law of the court below, releasing the assignor, because no demand and notice of non-payment was shown. The testimony of Simms discloses the fact that these notes were endorsed in blank, and that long afterwards, Andrews,

without the knowledge or consent of Mirick, wrote over them the waiver of demand and notice. That when these notes were offered in trade to Andrews, he refused them, saying the makers were insolvent, and he would not pick them up in the street; whereupon, Mirick remarked, my name on them makes them good, and they were then accepted.

The contentions of the learned counsel for appellant, are:

First. The endorsement, in blank, justified Andrews in filling it as he did; and,

Second. If it did not, the language used by Mirick at the time of the contract, was equivalent to a waiver of demand and notice.

We cannot subscribe to either proposition.

The holder of paper, endorsed in blank, may not only write directions to whom it shall be paid, but may, as we believe, write what else he will, consistent with the liability assumed by the endorser. He cannot, for example, write over the indorser's name, "demand and notice waived," for this would enlarge the liability of the indorser. 2 *Parsons Notes and Bills*, *p.* 20.

It follows, therefore, that the endorsement of the waiver of demand and notice, over the signature of Mirick was unauthorized, and by it he can take nothing.

But it is insisted that the expression used by Mirick at the time of the trade, when it was objected that the makers were insolvent, to-wit; that his name made the notes good, was equivalent to a waiver on his part. There is nothing in that expression which justifies the conclusion that Mirick intended to waive any right. On the contrary, it is in no wise inconsistent with the idea, that being bound as indorser made the paper good, in the event the makers failed to pay on due demand, and he had notice thereof.

We have carefully examined the authorities cited by learned

counsel for appellant. They unquestionably establish the doctrine that a waiver may be found from the circumstances and facts *aliunde;* but none such appear here. No demand and notice having heen made and given by Andrews to Mirick, the indorser was discharged. Such has been the invariable ruling of this court.

It follows from what we have above said, that although the court below erred in the admission of Williams' testimony, and in overruling the plea of the statute of limitations, yet, inasmuch as its judgment of disallowance was right, it must be affirmed.

Let it be so ordered.

RYAN & CO. v. BOYD.

NOTICE: *Judgments without, enjoined.*

Courts of equity have jurisdiction to enjoin the execution of a judgment rendered without notice to the defendant, actual or constructive. The statute (Sec. 2619, *et seq., Gantt's Digest*), is but a cumulative remedy.

INJUNCTION: *Pleading.*

The defendant in a judgment rendered against him without notice, need not show in his bill for injunction that he had a good defense to the action in which it was rendered.

APPEAL from *Pulaski* Chancery Court.

Hon. J. R. EAKIN, Chancellor.

Duffie & Hill, for appellant.

Watkins, contra.

C. B. MOORE, *Special Judge.*

This is a suit brought to the September term of the Pulaski Chancery Court by F. H. Boyd against A. H. Ryan & Co., and H. H. Rottaken, sheriff of Pulaski county.

Boyd, in his bill of complaint, alleges that on the 26th of

September, 1873, A. H. Ryan & Co., obtained a judgment against one B. R. Murphy and himself for the sum of $182.70, with ten per cent interest from the 15th of March, 1873, before one E. H. Chamberlain, an acting justice of the peace of Big Rock township, Pulaski county, but who was neither elected nor appointed to the office, nor commissioned—or if commissioned, that his term of office had expired long before the date of the rendition of the judgment. That on the 8th of August, 1877, an execution was issued on the judgment by J. R. Howe, Esq., an acting and duly commissioned justice of the peace, which was returned "*nulla bona*," and that on the 29th of August, a transcript of the judgment was filed in the office of the clerk of the Circuit Court of Pulaski county, and an execution issued therefrom, which was levied by Rottaken, the sheriff, on certain real estate of Boyd's, and which was advertised and about to be sold.

The summons in the suit before Chamberlain was duly returned by the constable, and on its face showed personal service on both Boyd and Murphy. The bill denies the correctness of the return; that "it is untrue and utterly false so far as service on defendant, Boyd, is concerned;" denies that he was ever in any manner summoned, and claims that the judgment is illegal and void; prays that the sale of his property be enjoined, and for other proper relief.

Affidavits, which do not appear in the transcript, were exhibited, and a temporary injunction was granted.

At the March term, 1878, Ryan & Co., demurred to the bill, assigning eight causes of demurrer, as follows:

1. That the bill does not state sufficient facts.

2. That it does not show that plaintiff has no relief at law.

3. That it does not show sufficient diligence on the part of complainant in respect of the debt.

4. That it does not offer to pay what is admitted to be due.

5. That it does not show that there was any fraud practiced by A. H. Ryan & Co., or any of them, in obtaining the judgment complained of.

6. That it does not show that complainant had any defense on the merits.

7. That it does not show that the judgment is wrongful or for an improper amount.

8. That not denying the debt to be due, it does not show that any part of it has been paid.

The case was submitted on the demurrer and the same overruled by the Chancellor, and defendants declining to answer, the injunction was made perpetual, and Ryan & Co. excepted and appealed.

The real and only important questions presented by the bill and raised by the demurrer, necessary to be determined here, are those contained in the two first grounds alleged.

We pass over the allegations in the bill which charge that Chamberlain, the justice who rendered the judgment, was not elected, appointed or commissioned. These allegations are not sufficient as they stand in the bill to render the judgment void on demurrer. The complainant admits, in the first part of his bill, and by the qualifying sentence, that if ever commissioned his term of office had expired, that he was a *de facto* officer, exercising the functions of a justice of the peace, at least under color of authority and law.

We are led, then, *first*, to the important inquiry, whether a judgment rendered against a party without any notice or service of summons, either actual or constructive, should be allowed to bind him, and become a lien on his property, and may execution issue thereon and his property be sold to satisfy such a judgment? and, *secondly*, has a court of equity the right to interpose, by injunction, to restrain the enforcement of such a judgment and execution?

We are well aware of the great danger and mischief there would be in allowing a person against whom a judgment has been obtained, to dispute the truth of the return of the officer of service of the summons, and to have a judgment set aside or execution thereon enjoined or quashed, without the strictest proof; and we recognize the wise policy of the law making the return of the officer *prima facie* true and conclusive.

It will be borne in mind that, in this case, the question is raised by demurrer, which admits the allegations of the bill to be true, and for all present purposes they must be considered as proved.

The bare statement of the first of the above questions would seem to imply its answer, and we should hardly stop to give any reason for an answer in the negative, but for the fact that much stress is laid upon this point by counsel for the appellants, and because we find there is apparently some conflict in the decisions of the courts of other States, at least when the aid of equity is invoked.

The Constitution of the State provides (Art. 2, Sec. 21), "that no person shall be deprived of his life, liberty, or property, except by the judgment of his peers, or the law of the land." And the Legislature has very explicitly defined the manner in which suits shall be brought and process served, and when it is proved or admitted, as in this case, that no notice or summons was ever, in anywise, served on the defendant, can he be deprived of his property without a hearing? without "a day in court?" or have a cloud to overshadow his title without the fact being brought to his attention? He may justly owe the debt, and yet there may be a thousand good reasons why the creditor is not entitled to a judgment on it; and without an opportunity to present these reasons to the court, shall he be deprived of his plain constitutional right? or

as the Chancellor, in the lower court, in righteous indignation exclaims, "Is this the law of the land?"

We think not, and so hold.

As to the second question presented; Has a court of equity a right to interfere and grant an injunction against such a judgment? or, in other words, is the remedy of the appellee complete or exclusively at law?

The general principle that courts of chancery have jurisdiction over, and power to relieve against, void and fraudulent judgments, and to enjoin the execution of such judgments, is recognized in all elementary works in equity jurisprudence, and is too familiar to the profession to require citations, or indeed more than an announcement of the doctrine.

The cases in which it has been doubted or denied are where some other complications exist, or where, either in fact or it is supposed, that adequate relief is afforded by the exclusive jurisdiction conferred by statutory enactment on the courts of law out of which the executions, on void and fraudulent judgments, have issued, or where it has been held that the plaintiff having a meritorious defense to the action, and having been duly summoned, failed or neglected to plead or offer the same in the original suit.

We are cited to Sec. 2619 of *Gantt's Digest*, which provides in substance that if any person against whom any execution may have been issued, shall apply to the judge of the court out of which the execution or order of sale may have been issued, by petition verified by affidavit, setting forth cause why such execution ought to be stayed, set aside or quashed, reasonable notice of such intended application being previously given to the adverse party, his agent or attorney of record, such judge shall thereupon hear the complaint, and if it shall appear that such execution ought to be stayed, set aside or quashed, and the petitioner shall enter into a recognizance to

be approved by the judge, conditioned for the payment of the debt or surrender of property, then the judge shall make an order for stay of execution. Sections 2620 and 2621 provide for the return of the execution, and for the hearing and determining of the petition, and the perpetual stay or quashal of the execution, or for the enforcement of the execution.

There is little doubt but if the judgment in this case had been originally rendered in the Circuit Court, appellee might have effectually resorted to this statutory provision, and had the execution stayed and finally quashed by the law court. But the judgment, it is shown, was rendered in a magistrate's court, and the execution under the provisions of the statute issued out of the Circuit Court on the filing of the copy of the judgment of the justice, and his certificate that an execution had been issued by him and returned *nulla bona*. Had the appellee undertaken to rely on the provisions of section 2619, etc., the Circuit Court could have looked alone to the record presented to it, which could only have been the certified copy of the judgment, etc., and as this on its face showed a valid service and a valid judgment, it is evident that the Circuit Court would have summarily dismissed the petition at the hearing.

In the case of *Anthony & Brodie* v. *Shannon*, 8 Ark., 52, referred to and relied on by appellants, an execution had been issued by a justice of the peace on a forthcoming stay-bond, executed by one Lewis, with Shannon as surety. Property of Lewis was levied on, and at the sale, failing to bring 2-3 of its appraisement under the act of 1840, it was re-delivered by the constable to Lewis on his giving a delivery bond with other security. After this latter bond was forfeited, the constable levied on the property of Shannon, surety on the first bond. He filed a bill for injunction, claiming that the consta-

ble should have proceeded against Lewis on the security in the delivery bond.

This court, on appeal, said: "If the judgment was satisfied on the execution improperly issued, Shannon had a right to apply to the justice who issued it, to set it aside, the justice possessing power to set the same aside," and added, "In that case his remedy was complete at law, and he had no right to apply to equity for relief."

Here Shannon was cognizant of all the proceedings; he had his "law day," and all the proceedings were before the justice of the peace.

And in *Bently's, executor*, v. *Dillard*, 6 Ark., 79, Dillard filed a bill in chancery to enjoin a judgment obtained against him in a suit by the executor. The gravamen of the charge was, that the note on which judgment was obtained had been paid to the testator in his life-time. Though regularly served with process, Dillard made no defense to the suit at law, nor did he in his bill render any excuse why defense was not made. The injunction having been granted by the lower court, on appeal, this court quoted as the rule the doctrine laid down in *Andrews* v. *Fenter*, 1 Ark., 186, that, "to authorize a party to be relieved against a judgment at law, it must appear conclusively that the judgment was obtained by fraud, accident, or mistake, unmixed with any negligence on his part. The defendant cannot come into a court of Chancery for new trial or relief when there is no special ground of surprise or ignorance of important facts suggested; or where no equitable circumstances have arisen since the trial, and where he has neglected to defend himself with due diligence in the proper place," and then adds: "This rule, however, is confined to cases of the same character as the one before the court where the defense is purely legal, and is of exclusive common law jurisdiction. But if a court of law and a court of equity have

concurrent jurisdiction over the subject matter, the party may make his election as to the tribunal which shall determine the controversy.

This whole subject was very fully examined, and the authorities reviewed in the case of *Hempstead & Conway* v. *Watkins, administrator*, 6 Ark., 317.

Hempstead and Conway were the sureties of one McDonald, on a note executed to Mrs. Byrd, Watkins' intestate. Being desirous of coercing McDonald to pay the debt, and releasing themselves from liability, as sureties, they gave notice to Watkins, in writing, to sue within thirty days. Watkins sued within thirty days—but brought suit in his *individual* capacity. In this suit he failed, and then, nearly a year afterwards, he brought a suit in his representative capacity. The sureties made no defense to the last suit, and judgment was rendered against them. Execution was issued and levy made on their property. They filed a bill to enjoin the same on the ground that having given notice, under the statute, to the administrator, and he having failed to sue, properly, within the time limited—the judgment in the second suit was erroneous as against them. A temporary injunction was granted and dissolved by the Circuit Judge, as Chancellor, on the ground that the complainants might have interposed their defense at law, "and had been guilty of laches and neglect."

This court held on appeal, reversing the decree, that the defense, confered by our statute, allowing a surety to give notice to sue, etc., and if not done that he is relieved of liability, was only cumulative or concurrent with existing Chancery jurisdiction in such cases.

The case of *Bentley's executor* v. *Dillard et al.*, are carefully reviewed, and harmonized, and the conclusion summed up in these words: "Upon a careful review of the authorities the court is confirmed in the correctness of the rule laid down in

Bentley's ex'r v. *Dillavd*, that where the jurisdiction of courts of Chancery and courts of common law is concurrent, in consequence of courts of law having enlarged their jurisdiction by their own acts, or of its having been enlarged by act of the Legislature, without prohibitory words, the party may make his election as to the tribunal to which he will make his defense, and once having made that election, he is bound by the decision, whatever it may be, and that his right to submit the matter to a court of Chancery, is in no degree impaired by the power of courts of law, at this time, to take cognizance of the subject."

The proceedings authorized by the 2,619th section of *Gantt's Digest*, are, in their nature, and almost in express terms, such as are prescribed for a bill in Chancery to obtain an injunction.

The Legislature, by act of February 30th, 1838, (see *Gould's Digest*, *Chap.* 60,) made provision for foreclosing mortgages by petition in the Circuit Court.

In construing this statute, this court said, in *McLain & Badgett* v. *Smith*, 4 Ark., 244. "The case, in our opinion, is unquestionably within the jurisdiction of a court of equity; and although under the existing organization of our judicial tribunals, the Circuit Court has jurisdiction over it, its powers in this respect, are derived from the provision in the Constitution, investing it with jurisdiction in matters of equity.

No one ever supposed that this form of proceeding precluded the ordinary bill in Chancery to foreclose a mortgage—but it was always considered as a cumulative and concurrent remedy or proceeding therewith—and the same may be said of the provisions of Sec. 2619.

All the other grounds of demurrer alleged, are comparatively unimportant, except it may be the sixth, which is that the bill does not show that the plaintiff (appellee) had a meritorious defense to the original suit. This ground is strenuously urged

in the argument of appellee's counsel. We find a conflict in the decisions of the courts of some of the other States on this point; but we have found none more satisfactory or that declares the true doctrine more clearly, or places it on firmer ground than does the Supreme Court of Tennessee, in the case of *Ridgeway* v. *The Bank of Tennessee*, 11 Humphries, 523, and which has been approved in the more recent case of *Bell* v. *Williams*, 1 Head, 227.

The bill in that case was like this, a bill to enjoin execution of a judgment without notice on a false return. The court held there was no remedy at law. That the judgment was void for matter extrinsic, and remedy only in Chancery. The language of the court is—"Nor is it material in such cases to enquire whether the defendant (in the original suit) could have made any valid defense. The injury of which he justly complains is, that a judgment was rendered against him, without notice, and without defense; we cannot doubt but that in the view of a court of equity it is unjust and unconscientious to to attempt to enforce a judgment so obtained."

Wherefore, we conclude that the statutory provision in *Sec.* 2619, *et seq.*, *Gantt's Digest*, was but a cumulative remedy, and at most, only conferred on courts of common law jurisdiction concurrent with Chancery, in the matter of staying or enjoining executions on fraudulent and void jugments, and in particular cases, as in the one at bar, that the remedy is alone in a court of equity.

The demurrer was correctly overruled, and the decree of the Pulaski Chancery Court is in all things affirmed.

Hon. J. R. Eakin, J., did not sit in this case.

DESHA COUNTY v. NEWMAN.

COUNTY COURT: *Allowance by.*

Allowances made by the County Courts since the passage of the act of March 28, 1871, (Acts 1871, p. 312), for blanks and stationery for justices of the peace, are illegal.

——— Allowances by, are in the nature of judgments.

JUDGMENT: *Of Circuit Court; vacation of.*

By statute the Circuit Courts are authorized, in specified cases, to vacate or modify their judgments after the term at which they were rendered.

——— *Of County Courts; vacation of; county scrip collaterally assailed.*

As a general rule County Courts have no power to vacate their judgments after the expiration of the term, but by statute (*Gantt's Digest*, Secs. 614, 616, 611, and *Acts* 1875, p. 177) County Courts are empowered to review all allowances made at previous terms, and if illegally made, to reject warrants issued upon them, and also to reject warrants otherwise illegally or fraudulently issued. Warrant holders take them subject to this power of the County Court to reject them; and it has been held in suits upon county warrants that the allowances upon which they were issued may be collaterally assailed for illegality as matter of defense. *Shirk* v. *Pulaski county*, 4 Dillon, 209.

APPEAL from *Desha* Circuit Court.

Hon. J. A. WILLIAMS, Circuit Judge.

J. P. Clayton, for appellant.

Pindall, contra.

ENGLISH, C. J.:

The County Court of Desha county, at its July term, 1876, made an order calling in the outstanding warrants, etc., of the county, requiring holders to present them at the January term following.

Within the time prescribed by the order, C. G. Newman filed for examination, cancellation and re-issuance, thirty-two warrants issued to him prior to the date of the calling order upon allowances, in his favor, amounting in the aggregate to the sum of $1,798.75.

The court at its January term, 1877, proceeded to examine the warrants filed by Newman, the accounts and orders upon which they had been issued, and found and decided that all of the warrants, except for the sum of $176.25, had been issued contrary to law and without consideration, and rejected them, and directed the clerk not to re-issue them; and Newman excepted and appealed to the Circuit Court.

The matter was heard anew in the Circuit Court and judgment rendered, ordering the clerk of the County Court to renew all of the warrants filed by Newman. A new trial was refused the county, and it took a bill of exceptions and appealed to this court.

On the trial Newman read in evidence the following order of the County Court, made 15th of May, 1875:

"On this day the court, on its own motion, doth order that the clerk hereof furnish the justices of the peace of Desha county any suitable blanks now in his office, and to purchase any blanks needed by justices, if the same can be purchased for Desha county scrip."

Also read in evidence the following account filed in the County Court by him, verified by affidavit and the orders of allowance thereon.

1. An account for printing marriage licenses and bonds allowed 28th of April, 1875, for.....	$ 16 25
2. An account filed Sept. 29, 1875, for publishing list of allowances.....	202 50
And for printing 1,140 quires magistrates' blanks, as per order, at $1 per quire.....	1,142 50

The two items of this account, making $1,342.50, were allowed October 5, 1875, and the clerk ordered to draw warrants upon the Treasurer for the amount, and the court further ordered that all justices wanting blanks might apply to the clerk for the same and should pay therefor $1 per quire,

and it was made the duty of the clerk to report to each term of the court the amount of money collected by him for the sale of said blanks, and to publish the order, etc.

3. An account for printing constables' and justices' blanks..... $ 40 00

And for printing Circuit Court blanks..... 190 00

This account was also allowed and warrants ordered October 5, 1875.

4. An account for printing blanks, etc., kind not named, allowed and warrants ordered April 4, 1875, for..... $ 210 00

The total allowance being for $1,798.75, which was the aggregate amount of the warrants presented by Newman under the calling order.

The attorney for the county offered to prove that the justices' and constables' blanks charged in the several accounts for which allowances were made and warrants issued thereon, had not in fact been received by the county.

Also that no appropriation had been made, nor any taxes levied for the purchase of justices' and constables' blanks.

The court ruled the evidence inadmissible.

On behalf of the county the following declarations of law were moved.

"1. That when the County Court finds, upon calling in the county scrip, that certain scrip has been issued upon allowances made by the former orders of the court, for blanks that the county was not legally empowered to purchase, the court may legally cancel such scrip and refuse the issuance of other in lieu thereof.

"2. The County Court was not empowered by law to purchase blanks for which no appropriation had been made and no tax levied by the County Judge and justices in County Court assembled.

"3. That the County Court had no authority, by law, to purchase the justices' and constables' blanks in this cause mentioned."

Which the court refused, but declared the law to be as follows:

"1. Where scrip has been regularly issued in accordance with an allowance regularly made by the County Court, the consideration for such scrip cannot be inquired of in a proceeding to call in and re-issue the scrip of the county under the provisions of Secs. 614, 615, 610, *Gantt's Digest.*

"2. An allowance of an account in favor of a creditor of the county by the County Court, upon a claim regularly presented to it, is a judgment of such court, and such judgment cannot be disregarded, held for naught or inquired into under this proceeding.

"3. Scrip issued under a regular allowance of the County Court is not, in contemplation of law, scrip illegally issued."

The contest on the trial in the Circuit Court seems to have been in relation to the allowances for blanks for justices and constables, and the warrant issued thereon.

It appears that there was an allowance, 5th of October, 1875, of $1,142.50, for blanks for justices; and an allowance as of the same date of $40, for blanks for justices and constables, making together $1,182.50. Deduct this sum from $1,798.75, the amount of all of the allowances and warrants, and the remainder is $616.25, for which appellee was entitled to have renewed warrants, nothing appearing to the contrary in the record before us, and to that extent the judgment of the Circuit Court was right.

We do not find that there was ever any statute requiring or authorizing County Courts to furnish printed blanks to constables at the expense of the public.

Nor that there was at any time a statute authorizing County

Courts to procure and supply justices of the peace with printed blanks.

An act of July 25, 1868, (Acts of 1868, p. 337), required each justice of the peace to keep as his dockets, two good and substantial leather-bound books of at least eight quires each, and to procure all necessary blank forms and stationery for his office. *Sec. 1.*

And it was made his duty to make out an account for all records, blank forms and stationery that might be necessary for his office, and to certify that such account was true and correct, and that the articles therein mentioned were necessary for his office, and to submit the same to the County Court, which was required, if the account was found correct, to order the same to be paid out of the county treasury. *Sec. 2.*

By act of 28th March, 1871, (Acts of 1871, p. 312), the above act was repealed; and it was made the duty of the County Court, upon the application of any justice of the peace, to furnish him with two good and substantial leather-bound books of at least six quires each, to be used as civil and criminal dockets; *provided*, that he had none and was not entitled to receive them from his predecessor in office. See *Gantt's Digest*, Sec. 3710.

The repeal of the act of the 25th of July, 1868, and the provision in the repealing act for furnishing justices of the peace with dockets only, was equivalent to an expression of legislative will that justices should not thereafter be furnished with blank forms and stationery at public expense.

It follows that the allowances by the County Court in favor of appellee for printing blanks to be furnished by the clerk to justices of the peace were illegally made. In other words, the court had no authority or discretion to make such allowances.

The allowance by the County Court of a claim against the county in favor of the claimant is in the nature of a judgment. *Jefferson County* v. *Hudson, Sheriff*, 22 Ark., 595.

As a general rule the County Courts, like the Circuit Courts, have no power to set aside, vacate, modify or disregard their judgments after the close of the term at which they are rendered. *Reiff et al.* v. *Conner et al.*, 10 Ark., 241.

But by statute the Circuit Courts are authorized in specified cases to vacate or modify their judgments after the expiration of the term, at which they are rendered, and this court has not doubted the constitutional power of the Legislature to give them such control of their judgments in the cases, and for the causes indicated in the statute. *Badgett* v. *Jordan*, 32 Ark., 157.

Warrants upon the county Treasurer (commonly called scrip), are issued upon, and for the payment, of allowances made by the County Court. *Gantt's Digest*, Sec. 600, 606, Act of 1875, p. 51, etc.

The statute empowers the County Courts as often as once in three years to call in all out-standing warrants, to examine and cause them to be renewed if legally issued, and if not to reject them. *Gantt's Digest*, Secs. 614, 616, 611, Acts of 1875, p. 13.

Thus the Legislature has empowered County Courts to review allowances made at previous terms, and if made without authority of law, to reject warrants issued upon them, and also to reject warrants otherwise illegally or fraudulently issued.

Warrant holders take them subject to the exercise of such power by the County Courts, the statute conferring the power being the law of the contracts. *Parsel* v. *Barnes & Bro.*, 27 Ark., 261.

The allowances in favor of appellee for magistrates' blanks

are not attacked collaterally, but in a direct proceeding to review them authorized by statute.

But in suits upon warrants, where allowances have been collaterally attacked, it has been held that it may be shown as matter of defense, that the allowances have been made contrary to law.

In *Shirk* v. *Pulaski County*, 4 Dillon, 209, the suit was upon warrants issued upon allowances made for five and ten times the value of the claims, in violation of law, and Mr. JUSTICE DILLON, after reviewing and citing many authorities, said: "The true rule is this: within the limits of their power, as conferred by statute, the action of the County Court in determining the amount due a creditor of the county, in the absence of fraud, or, perhaps mistake, binds the county; but the County Court cannot bind the county by ordering a claim to be paid which is not made a county charge by statute, or by allowing more than the statute distinctly limits, or by an allowance in the face of a statutory prohibition."

"Any other principle," (he adds) "would ruin municipalities and counties; and the danger which would result from it is well exemplified in this case, where ten dollars have been allowed for one, and where, it is said, the officers of the defendant, county, have in this manner issued $400,000 of warrants within a few years, which are yet outstanding."

The Circuit Court erred in directing the County Court to issue to appellee warrants in renewal of such of his warrants as were issued upon allowances for blanks for justices of the peace and constables.

If, however, the clerk sold blanks furnished by appellee, as directed by the order of the County Court, of the 5th of October, 1875, and paid the money into the county treasury, it is but just that appellee should have an allowance and warrant

for the amount so received for blanks furnished by him, and if any blanks remain unsold, they should be returned to him.

The judgment must be reversed and the cause remanded to the Circuit Court, with instruction to it to issue a mandate to the County Court in accordance with this opinion.

VALENTINE V. WASHINGTON ET AL.

EQUITY—*Injunction.*

The appellant filed his bill in equity against the defendants, alleging that on the 1st of March, 1874, Mrs. DeValcourt and Washington entered into a written contract, which was duly recorded, by which she agreed to furnish him as much land as he could cultivate, and give him all excess of 1200 pounds of lint cotton for every fifteen acres cultivated. She was also to furnish him supplies while he was making the crop, but no part of the crop was to be delivered to him until all his indebtedness to her was settled. On the 7th of August of the same year, she, by deed of trust, duly recorded, conveyed to the plaintiff all her interest in the crop, to secure the payment of a debt to Gidirl, by the 1st of January, 1875. With power to take possession and sell, upon default of payment. That Washington gathered and baled the crop, amounting to seven bales, and sold it to Willing. That his indebtedness to Mrs. DeValcourt was unsettled, but amounted to more than the value of the cotton—that the trust debt was unsettled, and Willing was about to move the cotton beyond the jurisdiction of the court. Prayer for injunction to restrain him until a settlement of Washington's account with Mrs. DeValcourt could be had, and plaintiff's rights in the cotton should be determined. Upon demurrer to the bill, held: 1st. That the contract was in the nature of a mortgage, which Mrs. DeValcourt could enforce in equity. 2d. That by the deed of trust the plaintiff acquired all her rights in the crop, legal and equitable, and was entitled to the injunction to restrain its removal.

APPEAL from *Chicot* Circuit Court in Chancery.

Hon. T. F. SORRELLS, Circuit Judge.

Reynolds, for appellant.

——————— *contra.*

ENGLISH, C. J.:

This was a bill for injunction to prevent the removal of cotton covered by a deed of trust, etc.

The bill was filed in the Circuit Court of Chicot county, 23d February, 1875, by Mark Valentine, trustee in the deed of trust, against Kate S. DeValcourt and Alexander DeValcourt, makers of the trust deed, and George Washington, a tenant of Mrs. DeValcourt, John Bergman and Thomas E. Willing.

It appears from the allegations of the bill, and the exhibits, that on the 1st March, 1874, Mrs. Kate S. DeValcourt and George Washington entered into a written contract (acknowledged and recorded 24th October, 1874) by which Washington agreed to work for Mrs. DeValcourt in the cultivation of a crop of cotton and corn on Holly Ridge plantation, upon the terms and conditions following:

She was to furnish as much land on said plantation as he could cultivate, the same to be cultivated in good and farm-like manner; and she was to pay or turn over to him all excess of 1200 lbs. of lint cotton for every fifteen acres cultivated, he to gin and bale the cotton. She agreed to sell and advance to him supplies while making the crop, and no part or interest in said crop was to be assigned or delivered to him until he arranged satisfactorily with her for the payment of all indebtedness due from him to her.

It further appears that on the 7th of August, 1874, Mrs. DeValcourt and her husband, Alexader DeValcourt, by deed of trust of that date, conveyed to complainant, Mark Valentine, as trustee, all of the interest of Mrs. DeValcourt in a certain crop of cotton and corn, then being grown on the Holly Ridge plantation, on Chicot Lake, and the mules, wagons, and farming implements on said plantation belonging to her; to secure the payment of a debt of $1,000, jointly owed by Mrs. DeValcourt and her husband, to J. J. Gidirl, of the firm of

Clapp, Bros. & Co. of New Orleans, to be paid on or before the first of January, 1875; with power to the trustee to take possession of the property, on default of payment, and sell at public auction to pay the debt, etc. The trust deed was acknowledged, and filed for registration on the day of its execution.

The bill after setting out and exhibiting the deed of trust, and the contract between Mrs. DeValcourt and Washington, further alleges, in substance:

That during the year 1874, and in order to enable Washington to raise said cotton, Mrs. DeValcourt advanced large sums of money and supplies to him, which, with the use of the land on which the cotton was raised, created an indebtedness in her favor from him of $500, which had not been paid or satifactorily arranged; and that under said contract Washington was not entitled to possession of said cotton.

That, on the — day of January, 1875, Alexander DeValcourt, as agent of his wife, said Kate S., delivered to complainant the right of possession and control of all of the interest of said Kate S. in all of the cotton raised in 1874, on said Holly Ridge plantation.

That Washington raised seven bales of cotton during said year, on said plantation, which were tied up and ready for market. That in fraud of the right of the complainant, Washington had sold, or pretended to sell said cotton to defendant, Thomas E. Willing, who was acting as the agent of defendant, John Bergman, and that Willing was about to remove the said cotton out of the jurisdiction of the court.

That the debt of Mrs. DeValcourt and husband secured by deed of trust to complainant was unsettled, but what amount remained still due, complainant was unable to allege.

That the indebtedness of Washington to Mrs. DeValcourt,

which was unsettled, amounted to more than the value of said seven bales of cotton.

That unless restrained by the court said cotton would be removed, and great and irreparable injury would be sustained by complainant.

Prayer that an order of injunction issue, directed to all of said defendants, enjoining and restraining each and all of them, their agents and attorneys, from removing said cotton, or interfering or intermeddling with the same, until a settlement of the account of Washington with Mrs. DeValcourt could be had, and the rights of complainant in said cotton ascertained and determined, and that the right of possession of complainant in said cotton be quieted, and for all other proper relief.

On the filing of the bill, the court being in session, an interlocutory injunction was granted.

At the return term, June 30th, 1875, the defendants having been served with process, the solicitor of Washington, Willing and Bergman, filed a demurrer to the bill, on the grounds:

"1. The complaint does not state facts sufficient to constitute a cause of action.

"2d. It appears upon the face of the complaint, that the court has no jurisdiction of the subject of the action."

A seperate answer to the bill was also filed for Washington, and a joint answer for Willing and Bergman.

At the October term, 1875, the demurrer to the bill was taken up and heard by the court, and sustained, the interlocutory injunction dissolved, and the cause continued, and a writ of inquiry to assess damages, ordered, returnable to the next term.

At the July term, 1877, the matter of damages having been submitted to the court at a previous term upon an agreed statement of facts, signed by complainant and the solicitor of Washington, Willing and Bergman, and taken under advisement,

the court assessed against complainant, in favor of the defendants, who had appeared and pleaded, fifty dollars damages, and rendered a decree in their favor therefor, with costs.

The complainant took a bill of exceptions, putting upon record the agreed statement of facts, and appealed to this court.

The facts agreed on are, in substance, that the cotton in controversy, at the commencement of the suit, was at the ginhouse of one J. F. Robinson, in Chicot county. That within one or two days previous thereto, the cotton had been, by defendant Washington, under the sale alleged in the complaint, delivered to the agent of defendant Bergman, so far as he had the right to deliver the same, and was by said agent marked with the mark of Bergman, and that after the issuance of the interlocutory injunction complainant shipped the cotton to New Orleans, and there sold it in the usual course of business for $306.38.

That the damages caused by the alleged wrongfully suing out of said injunction, amounted to the aggregate sum of $50.

I. The court below sustained a demurrer to the whole bill, whether upon the ground that the facts alleged did not make a case for equitable relief, or on the ground that the court had no jurisdiction of the subject matter of the bill, does not appear.

The written and registered contract between Mrs. DeValcourt and her tenant, Washington, was in the nature of a mortgage for rent and supplies. The crop was unplanted at the time the mortgage was executed (1st March, 1874), and though, by statute, she had a lien for rent, the mortgage gave her a lien in equity upon the cotton crop of her tenant when it came into existence for both rent and supplies. *Apperson & Co.* v. *Moore*, 30 Ark., 56; *Driver* v. *Jenkins*, Ib. 120; *Alexander* v. *Pardue*, Ib. 356; *Hamlet* v. *Tallman et al.*, Ib.

506; *Tomlinson* v. *Greenfield*, 31 Ark., 558; *Roberts et al* v. *Jacks*, Ib. 605.

The mortgage for supplies being at law invalid, she would have been compelled to resort to a court of equity to foreclose it and enforce her lien.

Had she not conveyed her interest in the cotton crop, by the trust deed, to appellant, she might have filed a bill in equity to foreclose the mortgage for both rent and supplies, and upon an allegation that her tenant had attempted to sell the cotton, and that it was about to be removed from the jurisdiction of the court, she would, most unquestionably, have been entitled to an interlocutory injunction to prevent its removal. *High on Jurisdiction*, Sec. 323.

By the deed of trust, she and her husband conveyed to appellant, as trustee, all of her interest in the cotton crop, but she could convey to him no greater interest, or rights, legal or equitable than she herself had.

When Washington attempted to sell the cotton, and it was about to be removed, as alleged in the bill, appellant had no adequate remedy at law to enforce his lien under the trust deed, or to prevent its removal. It was his duty as a trustee to protect the property, and upon the allegation of the bill he was entitled to an injunction to prevent its removal.

Upon the two instruments and the allegations of the bill, he made a *prima facie* case for equitable relief, within the jurisdiction of the court, and the court erred in sustaining the demurrer to the bill.

The interlocutory injunction having been dissolved upon the erroneous sustaining of the demurrer to the bill, it follows that the decree for damages and cost was also erroneous.

The decree must be reversed, and the cause remanded for further proceedings.

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STATE USE HECHT & BRO. V. SPIKES ET AL.

INTERPLEADER: *Statute construed.*

Section 2671 *Gantt's Digest*, giving to the claimant of personal property which is levied on as the property of another, the right to give bond and suspend the sale, applies as well to property about to be sold under a special execution in attachment, as to that levied on under a general execution.

FORMER JUDGMENT: *Pleading; evidence.*

Where it is necessary to plead a former judgment in bar of an action, it can not be given in evidence, unless pleaded. And it can not be pleaded when rendered after the commencement of the suit.

JUDGMENT: *Evidence.*

A judgment condemning attached property to be sold, is *pvima facie* evidence in a suit between the plaintiff in attachment and an interpleader, that the title to the property is in the defendant in the attachment, but is not conclusive.

APPEAL from *Randolph* Circuit Court.

Hon. L. L. MACK, Circuit Judge.

Moore, for appellants.

Henderson & Caruth, *contra*.

ENGLISH, C. J.:

On the 3d of August, 1875, this suit was commenced in the Circuit Court of Randolph county, in the name of the State for the use of Levi Hecht & Bro., against John F. Spikes, sheriff of said county, and Samuel R. Murdock and William Thompson, sureties, on his official bond.

The complaint, after setting out the bond and its conditions, alleged a special breach in substance as follows:

That on the 5th day of May, 1875, Hecht & Bro., in an action by attachment, recovered a judgment in the Circuit Court of Randolph county against Brilliant & Son, for $399, etc., and for costs, etc.

That on the 28th of May, 1875, a special execution issued on the judgment, commanding the sheriff to sell 600 walnut logs,

attached and condemned by the judgment, returnable in sixty days, which, on the day it was issued, came to the hands of defendant, Spikes, as sheriff, to be by him executed, etc. That he levied on the logs the 5th of June, 1875, but wholly neglected and failed to advertise and sell them, or otherwise obtain satisfaction of the execution.

At the return term, November, 1875, defendant demurred to the complaint, and on the 12th of August, 1876, the demurrer was overruled, and on the 18th of the same month they filed an answer.

On the 11th of August, 1877, by leave of the court, they filed an amended answer, in substance as follows:

I. Defendants admit that defendant, Spikes, was sheriff, that the special execution came to his hands, and was duly levied upon the property as alleged in the complaint; but aver that after said property was levied upon, and before it could be or was advertised for sale, "one Eli Heavener, claiming to be the lawful owner of said 600 walnut logs, interpleaded therefor, and by virtue of a bond, conditioned according to law, tendered, said Spikes surrendered said walnut logs into the possession of said Eli Heavener, he having by due course of law, demanded the same, and being by law entitled to the possession of said property, said execution was suspended."

II. That Brilliant & Son were not the owners of the logs.

III. That the legal fees for levying upon, advertising and selling said logs were not paid or tendered to Spikes.

Concluding with a general denial of the breaches assigned, and an averment of performance of the conditions of the bond.

The case was submitted to a jury on the day the amended answer was filed.

The plaintiff read in evidence the original writ of attachment issued 16th of March, 1875, in the suit of Hecht & Bro.

against Brilliant & Son, and the return of defendant, Spikes, as sheriff, thereon, showing that on the 23d of the same month he had attached 600 walnut logs lying on both banks of Eleven Point river, in Randolph county, as the property of Brilliant & Son.

Also the following record entry:

"RANDOLPH CIRCUIT COURT,
"Tuesday, May 11, 1875.

"Levi Hecht & Bro. v. J. S. Brilliant & Son.

"Now, on this day, comes Eli Heavener, by attorney, and by leave of the court, files a motion for leave to interplead in this cause."

Also the record entry of the judgment in the same suit, rendered by consent of the defendants therein for $399, debt, etc., 15th of May, 1875, reciting the attachment of the 600 walnut logs, condemning them to be sold in satisfaction of the judgment, and ordering a special execution for the sale thereof.

Plaintiff also read in evidence the special execution issued upon the judgment, 28th of May, 1875, with the return indorsed thereon, as follows:

"I hereby certify that the within execution was served by levying the same on six hundred walnut logs, as the property of J. S. Brilliant & Son, on the 5th day of June, A. D. 1875, in the presence of Nan Johnson, at the county of Randolph and State of Arkansas.

"JOHN F. SPIKES, *Sheriff*."

"I hereby certify that I have not sold the within 600 walnut logs, as commanded, for the reason that Eli Heavener claims the same as his property, as is shown by his pleading filed in the Randolph Circuit Court, and further has given to me, as sheriff of Randolph county, a good and sufficient bond for the

delivery of said property in case he shall fail to establish his claim to same as his property; this the 24th day of July, 1875.

"JOHN F. SPIKES, *Sheriff*.

"Returned and filed, July 26, 1875.

"THOS. T. ROBINSON, *Clerk*.

"By WM. A. LUCAS, D. C."

Here the plaintiff rested.

The defendants were permitted to read in evidence, against the objection of the plaintiff, the following record entries:

"RANDOLPH CIRCUIT COURT,

"Wednesday, August 16, 1876.

"Levi Hecht & Bro. v. J. S. Brilliant & Son.

"Now, on this day, comes Eli Heavener, by attorney, and by leave of the court files his interplea in this cause."

"RANDOLPH CIRCUIT COURT,

"Thursday Morning, August 17, 1876.

"Levi Hecht & Bro., Plaintiffs, v. J. S. Brilliant & Son, Defendants; Eli Heavener, Interpleader.

"Now, on this day, comes the plaintiff, by attorney, and moves the court to dismiss the interplea in this cause; and thereupon comes Eli Heavener, by attorney, and resists said motion, and after argument of counsel, said motion is, by the court, overruled. Whereupon the plaintiffs, by attorneys, by leave of the court, withdraw said motion, and withdraw from the case.

"And the interplea in this cause coming on to be heard, the defendants, although solemnly called, come not, but make default; whereupon Baber & Henderson, who were formerly attorneys of record for the defendants, notified the court that they had withdrawn from the cause.

"Thereupon comes a jury, consisting of C. W. Brown and eleven others of the regular panel, who, after hearing the evidence adduced, and instructions of the court, retired to con-

sider of their verdict; and after a brief absence, they returned into court the following verdict: 'We, the jury, find the property, to-wit: Six hundred walnut logs, in controversy, to be the property of the interpleader, Eli Heavener.

'C. W. BROWN, *Foreman.*'

"It is, therefore, by the court, considered and adjudged that the interpleader, Eli Heavener, be and he is hereby sustained in his possession of the property sued for, to-wit: Six hundred walnut logs, and that he have and recover of and from the plaintiffs all his costs in this suit pending."

Defendants then introduced, as a witness, John F. Spikes, who testified in substance, that the property levied on by virtue of the execution, read in evidence by plaintiff, was the same property claimed by Eli Heavener, as shown in his return indorsed upon said execution. That no legal fees had been paid or tendered to him by plaintiff in the execution, or any person for them, for serving said special execution. On cross-examination, he stated that he had agreed to serve all process in favor of plaintiff without any fees being advanced to him, but that after said agreement there had been a dispute about some fees due in an attachment suit, and after that time he considered said waiver by him for all fees for serving process for plaintiff at an end, but that he had not told them so at any time, or declined to serve their process without his fees first being paid.

Defendants also read in evidence [the bill of exceptions states] the bond returned by Spikes of Eli Heavener, with said special execution; [but the bond is not in the bill of exceptions, or in the transcript], and here defendants rested.

Levi Hecht was then introduced as a witness, who testified that Spikes had not given him any notice of requiring him to tender fees in advance for executing process in his favor, but had always told him that he would serve all process that came

to his hands without fees being advanced; that he knew he could get the money at any time called for. That witness told him that if his attorneys said the commissions he claimed were legal for levying attachment in the case referred to by Spikes, he would pay them; but that his attorney told him and Spikes that no commissions were due Spikes for levying an attachment where there was no order of sale of property attached.

John P. Blake testified, and [the bill of exceptions states] fully corroborated the testimony of Levi Hecht.

The above being all of the evidence introduced on the trial of this cause, the court, against the objection of plaintiff, instructed the jury as follows:

"1. If the jury believe from the evidence that defendant, (Spikes) was ordered by a special execution in favor of plaintiffs, (Hecht & Bro.) against Brilliant & Son, issued upon a judgment of the Circuit Court of Randolph county, in favor of said plaintiff against said Brilliants, in which judgment the property attached was adjudged to belong to said Brilliants, and that defendant, Spikes, after tender and waiver of his fees as such sheriff, from the plaintiff, failed, neglected and refused to levy, advertise and sell said walnut logs, they must find for the plaintiff; unless they further find that after the levy of the execution upon such judgment, Eli Heavener, as interpleader, in the Circuit Court, where the said judgment was rendered, and said execution was returnable, recovered said property in his right, of which recovery the plaintiff had notice, in which case the jury will find for the defendants.

"2. If the jury find from the evidence that Eli Heavener, the interpleader herein, after the levy on the property in question, and before the sale thereof, claimed said property and executed a bond in double the value of the property to the plaintiff in execution, to the effect that if said property or any portion thereof, should be adjudged subject to

execution, he would pay the plaintiff the value of the property so subject, and ten per cent thereon; and if they find from the evidence that the defendant having the execution in his hands, as sheriff, had said property appraised by three disinterested house-keepers, as required by law; and the defendant, as such sheriff, returned said bond with the appraisement annexed thereto, to the Circuit Courts of Randolph county, and that the interpleader, Levi Heavener, appeared in said Circuit Court and asked leave to interplead in said court, and upon the hearing of said interplea, said property was adjudged to be the property of said interpleader, they will find for the defendants, although they may find that the fees were tendered the defendant, (Spikes) or waived or otherwise arranged."

The jury returned a verdict in favor of defendants; and judgment was rendered against Hecht & Bro., for whose use the suit was brought for costs. A motion for a new trial was filed and overruled, and an appeal granted by the clerk of this court.

I. It appears that the interpleader's bond relied on in the first paragraph of the answer of appellees as a justification to the sheriff, for not selling the logs under the special execution, was read in evidence on the trial, but appellant failed to bring it upon the record by incorporating it in the bill of exceptions taken to the decision of the court overruling the motion for a new trial. It was the duty of appellant who seeks to reverse the judgment for error, to set out the bond in the bill of exceptions, and having failed to do so, it must be presumed that the bond was in good form—in the form prescribed by law, if there be any law authorizing a sheriff who has levied upon property under a special execution issued upon a judgment in a suit by attachment to suspend a sale, upon the execution of a bond by one who claims the property and desires to interplead for it. *Taylor* v. *Spears*, 8 Ark., 433.

The bond, we presume, was not executed under the provisions of the act of 19th of January, 1861, of which sections 469 to 473 of *Gantt's Digest*, under the general caption, "ATTACHMENT," and sub-title, "INTERPLEADER," are made up, because that act provides for the bonding of property by a claimant, and an interplea and a trial of the right of property, where there is a levy of a *writ of attachment* upon property claimed by a person not a party to the writ, etc. In its language it does not provide for bonding property and interpleading for it, where it is levied upon under a special execution issued upon a judgment in an attachment suit condemning the property to be sold to satisfy the judgment, as in this case.

Sections 432 to 436, *Gantt's Digest*, under "ATTACHMANT," provide that any person may claim property attached at any time before the sale thereof, etc., and have a trial of the right of property, and if the claimant be a non-resident, he shall give bond for costs; but no provision is made by these sections for the claimant to bond the property and stay the sale until there can be a trial of the right of property.

But no doubt, from the language used by the court below in the second instruction to the jury, the bond read in evidence was taken under the provisions of Sections 2671 to 2676, *Gantt's Digest*, caption, "EXECUTION."

The language of Section 2671 is general and comprehensive. It is, that "the sale of personal property upon which an execution is levied, shall be suspended at the instance of any person, other than defendant in the execution, claiming the property, who shall execute, with one or more sureties, sufficient for double its value, a bond to the plaintiff in the execution, to the effect that if it shall be adjudged that the property, or any part of it, is subject to execution, he will pay the plaintiff the value of the property so subject, and ten per cent thereon,

not exceeding the amount due on the execution, and ten per cent thereon."

To give this statute a narrow construction, and hold that it applies only where a general execution is levied on property, and not where attached property is about to be sold under a special execution, would make an omission in legislation, and leave a claimant in the latter case without the means of staying a sale until he could interplead and have a trial of the right of property, and perhaps drive him to a suit against the sheriff or purchaser at the sale.

It appears that Heavener had knowledge that the logs were attached before the judgment was rendered and the execution issued in the attachment suit, for he asked and obtained leave to interplead for the property on the 11th of May, 1875; and judgment was not entered until the 15th of the same month; and he might have bonded and interpleaded for the logs under sections 469–71 of the Digest. But it might frequently happen that one owning property or having a lien upon it would have no notice that it had been attached as the property of another, until after the judgment and execution ordered in the attachment suit. In such case the claimant might interplead for the property under sections 432–4 of the Digest; but unless he could stay the sale by bonding it under sections 2671–76, the sheriff would have to proceed with the sale regardless of his interplea. But be this as it may, there was a further defense in the case.

II. Appellees were permitted to read in evidence, against the objection of appellant, the record of the trial and judgment on the interplea.

It is submitted that the record was inadmissible because the judgment was not pleaded.

Where it is necessary to plead a former judgment in bar of an action, it cannot be given in evidence unless pleaded,

because of the general rule that the proof must correspond with the allegations.

In this case the judgment could not have been pleaded in bar of the action, because it was rendered after the suit was commenced. *Walker* v. *Bradley*, 2 Ark., 578; *Burton* v. *Hynson*, 7 Ib., 502.

By the second paragraph of the answer of appellees, they pleaded that the title to the 600 walnut logs was not in Brilliant & Son, the defendant in the attachment.

The onus of proving this plea was upon them. The logs having been attached and condemned to be sold by the judgment in the attachment suit as the property of Brilliant & Son, this made a *prima facie* case that the title was in them, but it was not conclusive upon the appellees, who were not parties to the attachment suit. Appellees had the right to prove, as they pleaded, that the title to the property was not in Brilliant & Son. To prove this they offered in evidence the judgment upon the interplea of Heavener. Hecht & Bro., who are the virtual plaintiffs in this suit, were the plaintiffs in the attachment suit in which Heavener interpleaded and claimed title to the logs. There was a trial and judgment, by a court of competent jurisdiction, that the title to the logs was in him, and not in Brilliant & Son. Hecht & Bro. had notice and opportunity to contest the interpleader's claim. They moved to dismiss the interplea, and, on the motion being overruled, they voluntarily declined any further contest. The trial proceeded, judgment was rendered for the interpleader, and they took no appeal as they might have done. This judgment was conclusive upon them, that the title to the logs was not in Brilliant & Son, but in the interpleader. *Hershy* v. *Clarksville Institute*, 15 Ark., 131.

III. The matter of tendering the sheriff his fees is of no consequence in this case. The statute requires them to be

tendered before he can be compelled to execute process. *State Use* v. *Brown et al.*, 30 Ark., 761, but no doubt he may waive the tender or payment of his fees in advance.

The judgment of the court below must be affirmed.

TRIPPE & SON v. DUVAL ET AL.

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1. NEW TRIAL.

Although the verdict is against the weight of evidence, the court will not render judgment *non obstante viredicto*, or grant a new trial unless the substantial rights of the party are thereby affected.

2. AMENDMENT AFTER VERDICT.

An answer which is vague and indefinite, may be amended after verdict to conform to the proof.

APPEAL from *Sebastian* Circuit Court.

Hon. J. BRIZZOLARI, Special Judge.

Rogers, for appellant.

Du Val, *contra*.

HARRISON, J.:

This was a suit by the appellants against the appellees, for negligence and breach of contract as attorneys.

The complaint alleged that the plaintiffs retained and employed the defendants, who were attorneys, in consideration of certain reasonable fees and rewards to be paid them, to commence and prosecute a suit against one James M. Collins, for the recovery of the sum of $622.47, due and owing them by said Collins, on book-account, for goods sold and delivered him; but that the defendants failed and neglected to commence the suit, whereby the debt became barred by the statute of limitations, and was lost to the plaintiffs.

The defendants filed the following answer:

"The defendants Benjamin T. DuVal and Raphael M. Johnson, say:

That after the formation of the partnership between them in the practice of law, the said plaintiffs sent by mail to the said defendant, DuVal, the account in said plaintiffs' complaint mentioned, against the said James M. Collins, for collection, purporting to be for goods and merchandise sold and delivered by the plaintiffs to the said James M. Collins; that said DuVal, soon after the receipt of said account presented the same to said Collins, and demanded payment thereof; that said Collins denied that he owed said plaintiffs any thing on said account, and stated that he had, as the agent of one Henry Nathan, purchased said goods and merchandise in said account mentioned, from the plaintiffs, for said Nathan, and that said plaintiffs knew at the time said goods were purchased that he was the agent of said Nathan. That these defendants did not commence and prosecute a suit in this or any other court, for said Collins, for the recovery of said sum of money, because they, in good faith believed that judgment could not be recovered against said Collins upon said account. That in not bringing the suit, they acted in good faith, and according to the best and utmost of their skill and ability; and they further say, that the said plaintiffs have not been damaged by reason of suit not having been commenced and prosecuted on said account against said Collins.

There was a trial by a jury, and a verdict was returned for the defendants. The plaintiffs moved for a judgment *non obstante veredicto*, which was refused; and the defendants were permitted, against the plaintiffs objection, to make the following amendment to their answer:

"The defendants, by leave of the court, for amendment to their answer, heretofore filed, say: that the said James M. Collins was not indebted to the said plaintiffs, in the sum of

six hundred and twenty-two dollars and fifty-seven cents, or any other sum, for goods and merchandise sold and delivered upon the account placed in their hands for collection, in the manner and form as the plaintiffs have set forth in their complaint."

The plaintiffs thereupon moved for a new trial; but their motion was overruled.

The appellants contend, that the answer did not deny, but in fact admitted, their cause of action, and they were consequently entitled to judgment *non obstante veredicto*, as moved for by them.

Though the answer, before the amendment, was vague and indefinite, and might for that reason have been required to be made more specific and certain; yet it did expressly deny that the plaintiffs sustained any damage or injury by their failure to institute the suit, and it obviously was the intention to deny and put in issue the alleged indebtedness of Collins to the plaintiffs; and we must suppose it was with that understanding the parties went to trial; for the whole of the defendant's evidence, which was admitted without objection, had regard to that alone.

But it is insisted by them, that it was immaterial to their right of action, whether they might have recovered against Collins or not; that by failing to bring the suit there was a breach of the defendants' promise or undertaking, for which they were entitled to a judgment against the defendants for at least nominal damages.

Whether in a case such as this, the plaintiff be entitled to judgment for nominal damages, we need not consider. Substantial justice is not, under our practice, to give way to mere form.

It is a provision of the Code—*Section* 4619, *Gantt's Digest*, that the court shall "in every stage of an action, disregard any

error or defect in the proceedings which does not affect the *substantial rights* of the adverse party," and that, "no judgment shall be reversed or affected by reason of such error or defect;" and before the Code, the rule was well settled that though the verdict be against the weight of evidence, a new trial will not be granted the plaintiff, who can recover nominal damages only. *Sedg. in Dam.*, 54; *Macrow* v. *Hull*, 1 Burr., 11; *Farewell* v. *Chaffey*, Ib. 54; *State* v. *Miller*, 5 Blackf., 384; *Jennings* v. *Loring*, 5 Ind., 250; *Futch* v. *Walker*, 1 Bail., 98; *Elwell* v. *Bradham*, 2 Spear, 186; *Brantingham* v. *Fay*, 1 John. Ca., 255; *Exparte Bailey*, 2 Cow., 479; *Remdell* v. *Butler*, 10 Wend., 119.

In the case of *Farewell* v. *Chaffey*, Lord MANSFIELD remarked, "A new trial ought to be granted to attain real justice, but not to gratify litigious passions upon every point of *summum jus*."

The amendment of the answer was rightly allowed. According to what we have said above, the effect of it was to make the answer more definite, and it was in conformity with the proof, as shown by the bill of exceptions, and also by the verdict—the jury specially finding that Collins was not liable to the plaintiffs.

"The court may, at any time, in furtherence of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to facts proved." *Section* 4616, *Gantt's Digest.*

The plaintiffs excepted to certain instructions given the jury, and also to the refusal of the court to give others asked by them; but inasmuch as the objections have not been argued or

insisted upon here, and we find them not well taken, or the rulings to the prejudice of the plaintiffs, it is unnecessary to notice them.

The judgment of the court below is affirmed.

CHANCELLOR v. THE STATE.

CRIMINAL PROCEEDINGS: *Presenting indictment.*

Where the record does not show that the indictment was brought into court, this court will reverse a judgment of conviction. The indorsement by the clerk upon the indictment, "filed in open court," is not sufficient.

APPEAL from *Benton* Circuit Court.
Hon. J. M. PITTMAN, Circuit Judge.
Gregg, for appellant.
Henderson, Attorney-General, *contra*.

EAKIN, J.:

There was, in this case, a trial and conviction, for manslaughter. There is nothing in the record to show that the indictment was brought into court by the grand jury. The indorsement of the clerk, "filed in open court," is not sufficient. *McKensie* v. *State*, 24 Ark., 636.

Inasmuch as the supposed crime may be yet the subject of a proper judicial investigation, we forbear any comment upon the testimony, further than to say, in explanation of the course now pursued in declining to send down a *certiorari* of our own motion, that we think the jury must certainly have acted under a misapprehension of the law as given by instructions, or were influenced by their knowledge of facts not appearing in the record. We cannot find any proof, sufficient to sustain a verdict that the killing was by design, or done in the commission

of an unlawful act, or under any such circumstances as to make the defendant amenable to a judgment so terrible in its disgrace.

Let the judgment be reversed, and the cause remanded, with the usual instructions in such cases adopted by this court as to its practice. See *McKensie* v. *State*, *supra*; *Green* v. *State*, 19 Ark., 178; *Holcomb* v. *State*, 31 Ark., 427.

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L. R. & F. S. R. R. Co. v. Payne.

WITNESSES: *Husband and wife, incompetent.*

Husband and wife are not competent witnesses for or against each other.

EVIDENCE: *Legislative power over.*

The Legislature has no power to divest rights by prescribing to the courts what shall be *conclusive* evidence.

RAILROADS: *Damages by; Statute construed.*

The true construction of the Act of February 3, 1875, for the recovery of damages for injuries by railroads, is, that the killing being shown or admitted, the presumption is that it was done by the train and resulted from want of due care; but this presumption may be repelled by proof. And in case the company may be liable at all, that liability is doubled by the failure to give notice of the injury required by the statute; but the failure to give notice does not create a liability for an innocent act.

APPEAL from *Johnson* Circuit Court.

Hon. W. W. MANSFIELD, Circuit Judge.

Clark & Williams for appellant.

Ford, *contra*.

EAKIN, J.:

Payne sued the railroad company before a justice of the peace, for damages resulting from breaking the leg of a horse and injuring him permanently—claiming $150. He recovered $100, and the road appealed to the Circuit Court, where, upon trial, the jury rendered a verdict against defendant for $200,

upon which judgment was entered. There was a motion for a new trial overruled, bill of exceptions and appeal.

There was a direct conflict of evidence as to the cause of the injury. Some witnesses testified that the train had run upon the horse and pushed him into a culvert; others swore roundly and directly that the train did not come within four feet of the horse, but stopped before it reached the culvert, and that the horse, which had been running along the track before the engine, jumped into the culvert and was injured. Amongst the witnesses for plaintiff who testified upon this point, was his wife. Her testimony was admitted against the objections of appellant, which makes this one of the grounds of its motion for a new trial.

This was erroneous. Husband and wife are prohibited, from motives of public policy, from testifying for or against each other. *Collins* v. *Mack*, 31 Ark., 684. The evidence of the wife was material and may have influenced the jury in arriving at their verdict.

It is urged upon the court to rule, in this case, upon other points made by the record, involving the construction and validity of the act of February 3, 1875, entitled, "An act requiring railroad companies to pay for damages to persons and property, and for other purposes."

The court, upon motion of plaintiff, and against the objections of defendant, gave, amongst others, the following instruction: "If the jury believe, from the evidence, that the defendant's engine, or cars, ran over or against the horse, mentioned in the complaint, and that the animal died from wounds or injuries thus received, they should find for the plaintiff and assess his damages at a sum equal to the actual value of the horse on the day he was injured, together with six per cent interest thereon from that until the present day. But, if the jury find for the plaintiff, and also find that the

engineer, or conductor on the train, doing such injury, knew that the same was done, and failed within one week thereafter to cause to be posted, by the station master, or overseer at the nearest station-house, and at the nearest station-house and depot house, a correct description of said horse, including his color, marks, brands, and such other natural description as might have assisted in identifying said horse; and also a notice of the time and place where said horse was injured, and to keep such notice and description so posted for twenty days thereafter; then they should assess the damages of the plaintiff at double the actual value of said horse."

The following, in effect, amongst others asked on the part of the defendant, were refused:

3. That the jury must not only find that the injury was inflicted by the train, but that it was done through the want of due care and skill or diligence on the part of defendant's agents, or employees, or some of them in charge of the train.

4. That the company was not liable for injury to animals running at large in the range, and straying upon its track, where the company and its agents use due caution and reasonable care and diligence to avoid said injury.

5. That the *onus probandi* was on the plaintiff, notwithstanding the eighth section of the statute.

6. That the company could not be made liable under the Constitution and laws of the State for double damages, as provided by the second section of the statute.

There were other instructions, principally regarding the weight of evidence and the duties of the jury with reference to the conflict therein—which, on the whole, were well given, and need not be noticed.

The statute referred to provides, by section 1, that "all railroads, which are now, or may be hereafter built and operated, in whole or in part in this State, shall be responsible

for all damages to persons and property done or caused by the running of trains in this State."

The second section makes it the duty of the conductor or engineer, when stock of any sort are killed, to make the advertisement, indicated in the instruction for plaintiff, and provides that "on failure to so advertise any stock so killed or wounded, that the owner shall recover double damages for all stock so killed and not advertised."

The fifth section provides a mode of arbitration between the company and the injured party.

The eighth section provides that "the killing of stock on any railroad track shall be *prima facie* evidence that it was done by the trains, and the *onus* to prove the reverse will be on the railroad company."

There are other sections not bearing upon the points at issue.

The court below construed the first section of the act as imposing upon the road an absolute liability to pay for stock killed by the trains, and withdrew from the consideration of the jury all considerations of negligence on the one hand or due care on the other. This would be to make the railroad companies insurers of the safety of all the live animals in the State against injury from their roads, and would either take away from them defenses, which all other corporations and persons might by law set up, or make the killing of stock conclusive evidence of want of due care, and negligence. In the absence of express language we cannot suppose that the Legislature intended either. Railroads are useful to all the community, in the development of the resources and increase of the wealth of the State. The exercise of their franchises, and the pursuit of their business, is lawful, and to hold them liable for unavoidable accidents which could not have been prevented by due care, is contrary to reason. It is not within the pro-

vince of the Legislature to divest rights by prescribing to the courts what should be *conclusive* evidence. This matter was fully considered by this court in the case of Cairo & Fulton Railroad Company v. Parks, 32 Ark., 131, which arose under a statute, which endeavored to make a county clerk's deed of lands, sold for taxes, *conclusive* of its recitals against the true owner. JUSTICE WALKER, in delivering the opinion, remarked: "The Legislature may declare what shall be received as evidence, but it cannot make that conclusively true which may be shown to be false; at all events, if such facts are necessary to show that the substantial rights of property are to be affected, and he is made to lose his property." Railroad companies have the right to run their trains, and the consequent right of being protected in doing so, unless damage to others should result from some negligence, want of due care, or culpable neglect of reasonable precautions, imposed by the legislative power. It affects their substantial rights of property to be able to show the facts, and they cannot be constitutionally deprived of the power.

There are cases where this indisputable liability has been imposed upon railroads and sustained by the courts. It has generally been in those States whose circumstances and policy have required railroads to be fenced by the company, and where there have been express laws imposing this duty. These cases, obviously, rest upon the neglect of the company in fencing so as to keep animals off the track.

In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communicated from their engines; but, in compensation, are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt.

In Georgia, by act of December 30, 1847, the Legislature

declared, in language substantially like ours, "that the several railroad companies of this State shall be held liable in law for any damage done to live stock or other property (to the owner or owners thereof) by the running of the cars or locomotives of such companies or their roads respectively." This is very broad and very positive, yet the courts of that State have never given it any other effect than to impose a *prima facie* liability and to shift the burden of proving due care on the company. *Macon & Augusta Railroad Company* v. *Vaughn*, 48 Ga., 464. The court, in that case, said: "A railroad company is not liable for an *unavoidable* accident, even under our statute, in relation to stock. If, with every reasonable precaution, proper lookout and proper speed, and proper attention, an unavoidable damage ensues, the company which has, by law, a right under such precautions, to run its trains, is not responsible." * * * * "The presumption is against the road, and the proof, under our law, must be made that there was no negligence, nor want of ordinary care."

To the same effect, upon a similar statute, have been the rulings in Alabama. *Mobile & Ohio Railroad Company* v. *Williams*, 53 Ala., 595; same case, 13 *Am. Railroad Rep.*, *p.* 153.

This is a rational construction of legislative intention, and applicable as regards injuries to stock to our own statute, which, in many respects, seems modeled upon that of Georgia. The court erred in excluding from the jury all considerations of negligence. There were no formal pleadings in the case, but the jury should have been advised to consider all the circumstances developed by the evidence, as to whether the killing resulted from unavoidable accident or might have been prevented by the exercise of reasonable care on the part of defendant's agents. They should have been instructed, also, that the burden of proof was on the defendant, to show that

there had been no negligence, nor want of due care; but if it did show that, to find for defendant.

It is apparent that the verdict of $200 in this case is based upon an estimate of $100 as the value of the horse, and the instruction for double damages, for want of the subsequent notices prescribed by section 2 of the act.

The power of juries at law to render vindictive or punitive damages for certain classes of torts, is based upon the idea of blending the interests of society with the rights of suitors, and rendering the administration of civil justice ancillary to the deterring influences of more direct punishments on behalf of the State. The same idea has prompted the Legislature, at times, to prescribe double or treble damages to be rendered in behalf of individuals, in aid of some policy of the Legislature directed to the protection of property, or the peace of society, or the ready collection of the revenue of the State. We have many such laws upon our statute books, and the courts have never considered them amenable to the charge of taking property of A for B in any unconstitutional manner. For instance: By Sec. 3190 of *Gantt's Digest*, owners of animals breaking through, or over sufficient fences, are made liable to double damages for a second trespass; and by Sec. 3192, the person damaged by animals breaking an insufficient fence, is made liable in double damages for killing or otherwise hurting them.

The only distinction between such cases and this is, that in those cited, the circumstances which aggravate the injury exist, and characterize it at the time it is done; whilst in this case the aggravation of damages is made to depend upon a certain neglect of certain directions of the statute, framed for the purpose of giving notice to the neighborhood of the injury done. It is common in this State to turn stock upon the range, where they are not under the constant supervision of the owners. Injuries

to them cannot well be known at the time by the owners, whilst the agents of the road running the trains, are generally aware of it. The statute makes it the duty of the engineer or conductor of the train to give the prescribed notice, that the owner may have an opportunity of identifying his property and taking steps for his indemnification, or proposing, or receiving proposals for arbitration, whilst the matter is fresh. In furtherance of this policy it is by another section made a misdemeanor in any employee of the road to mutilate, disfigure, or carry off the carcass of any animal killed, without notifying two citizens to note and preserve the marks and value.

The regulation is a reasonable one, and the Legislature seems to have considered its neglect such a mark of carelessness and disregard of the property of others, as to connect it with the act of killing, and make the company liable in double damages for the act of its agent, attended with such subsequent neglect. The distinction between the cases is too nice to form the ground of a constitutional objection.

The Supreme Court of Nebraska, at the October term, 1877, in the case of Atchison & Nebraska Railroad v. Baty, held an act unconstitutional which gave double damages to the owner of live stock killed by a railroad, in case the value was not paid in thirty days after demand made therefor. It was supposed to be in conflict with that clause of their Constitution declaring that all fines and penalties should be appropriated exclusively to the support of common schools, and also with the declaration that no person should be deprived of life, liberty or property, without due process of law. A careful consideration of the reasoning and authorities cited in that case, has failed to satisfy us of the correctness of the conclusion. It is a grave matter to declare an act of the Legislature null and void, and we decline to do so upon a question of doubt.

The true construction of the act in question is, that the kill-

ing being shown or confessed, the presumption is that it was done by the train, and that it resulted from want of due care. At common law the *onus* of proving these facts was on the plaintiff. The statute shifts the burden to the defendant, but does not preclude the company from showing that such due care was exercised in pursuit of its lawful business as to absolve it from liability. In case the company may be liable at all, that liability is doubled by neglect of its agents to give the notice prescribed by the statute, but the failure to give notice does not impose or create a liability for an innocent act. Whether or not the fact that plaintiff had actual knowledge at the time of the injury to his horse, being present and witnessing the accident, renders the notice unnecessary, and prevents the liability for double damages from attaching, is a question not made by the instructions given or refused, and will not be noticed here.

For error in admitting the testimony of plaintiff's wife, and also of removing from the jury the question of negligence or due care on the part of defendant, the judgment will he reversed and the cause remanded for a new trial.

HARRISON v. LAMAR.

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1. ADMINISTRATION: *Statute construed.*

The word "estate," in Secs. 6 and 7, *Gantt's Digest*, means the whole mass of the decedent's property, both real and personal, and if it is of less value than $300, is given by the law *proprio vigore* to the widow; or if no widow, to the children of the deceased, and an order of the Probate Court is not necessary to vest it.

2. ——— *Order of Probate Court declaring estate in widow; Notice to heirs; Recitals in order.*

The proceeding of the Probate Court to declare the estate in the widow is *in rem*, and no notice to the heirs is necessary; nor is it necessary that the order recite all the jurisdictional facts.

APPEAL from *Madison* Circuit Court.
Hon. J. M. PITTMAN, Judge.
Gregg, for appellant.
J. D. Walker, contra.

EAKIN, J.:

The pleadings in this case, as finally settled, present the case of an action at law by Roetna Lamar, one of the heirs of Young S. Lamar, deceased, to recover of John Harrison a tract of land. She rests upon her title by descent.

The defendant pleaded that the estate of said Young S. was of less value than $300; that he left a widow, Mary L. Lamar, in whom, by order of the Probate Court, the whole estate was vested; that she afterwards inter-married with Garrett W. Davis and, with her husband, conveyed to defendant. Under the act of 1875, regulating this sort of action, the order of the Probate Court, and the deed of Davis and wife, were exhibited.

The first shows that on the 3d of February, 1866, upon petition of the widow, and upon its being shown to the court that the estate did not amount to the sum, in value, of $300, it was ordered that the whole estate be vested in the widow, absolutely.

The deed of Davis and wife, although executed by both, was not acknowledged by her in such manner as to be valid under the statute. To the deed and order plaintiff excepted, as evidence. The court sustained the exceptions to both, because the order did not show that the children had notice of the application; and the deed was not acknowledged by Mrs. Davis in accordance with the statute. Defendant saved exceptions.

The cause was heard by the court, which, against the objection of defendant, permitted parol proof that the heirs were

not notified of the proceedings in the Probate Court, being at the time minors of tender age.

The defendant proved the purchase of the land from Davis and wife; their attempt to execute the deed; his possession under it, and that the estate of said Young S. Lamar was in fact of less value than $300. He offered to read the Probate Court order from the record, which was refused. He then offered to read the deed, which was also rejected.

The court found for plaintiff, declaring its view of the law, in effect, to be: That proceedings in the Probate Court of this nature, were *in rem*, and that notice to the heirs and creditors was not essential; but that the courts could not exercise the jurisdiction unless the estate were of less value than $800, and subject to administration; and these jurisdictional facts should be shown affirmatively by the record before they could be of any binding force as against heirs without notice, and without such showing might be collaterally questioned. Further, that the property claimed under the order should be specifically mentioned and described therein, or it would not pass from the heirs without notice.

On the part of defendant it declared the law to be that the Probate Court had power to vest the whole estate in the widow, if it were worth less than $300, but refused to declare that it so passed by operation of the statute alone, or that the Probate Court, even on proper application, could vest *real*, as well as personal property, in the widow. Judgment for plaintiff for a share of the lands; bill of exceptions taken, and appeal.

Section 6 of *Gantt's Digest*, provides that upon the death of a person leaving a widow or children, and it shall be *made to appear to the court* that his "*estate*" does not exceed $300, "the court shall *make an order* that the estate *vest absolutely* in the widow or children, as the case may be," etc. This was by act of January 2, 1851.

By an act passed two years afterwards, (Sec. 7 of *Gantt's Digest*), it was provided that upon the death of a person leaving minor children and *no* widow, and an "estate" less in value than $300, "his entire *estate* shall *pass to and vest in* his minor children, for their support and education, and the court shall not be required to appoint an administrator on such estate."

There are no grounds for drawing a distinction between real and personal property in the construction of these acts. If there were any, the "estate" must be considered as more aptly referring to real property. But under our system of administration, which regards the whole mass of property, real and personal, as assets for some purposes, in the hands of the administrator the word estate has acquired a wider application, in a popular sense, and in this sense, doubtless, the Legislature meant to use it. It means the mass of property left by decedent, and if that, in the aggregate, should be less than $300 in value, the intention of the acts, taken together, is to give it to the widow, if living, or if there be no widow, to minor children.

Notwithstanding the difference in the phraseology of the acts, which would seem to indicate that, in the widow's case, an order of the Probate Court is necessary to fix her rights, it has, nevertheless, been held that the law, *proprio vigore*, gives the right to the widow to retain in her hands the whole estate without liability to account, if it be in fact of less value than $300. *Hampton et al.* v. *Physic, adm'r.*, 24 Ark., 561.

In this case, however, there was an order of the Probate Court made in pursuance of law. It is a proceeding *in rem*, fixing the status of the property as to ownership, and declaring to all the world the course of devolution which, under the circumstances, the law gave to the property of the deceased. It did not vest the right so much as declare it, and it was not necessary that it should specify the personal property, or

describe the lands by metes, bounds or numbers. It carried the whole property without reserve, leaving nothing to be determined with regard to its identity, but the fact that it was part of the estate left by decedent—a fact, in this case, necessary to sustain the claim of either party. The statute does not prescribe any notice to be given to heirs or distributees. As to these small estates, they have no *prima facie* rights, the amount of the estate being admitted. They are taken out of the course of devolution prescribed to larger ones, and there being no right to be divested out of them, there is no other reason for making them parties than that they should have the right to question the amount of the estate—a fact admitted here, or rather not contested; and there is no reason at all for making them parties by notice or otherwise, to the Probate Court proceedings, which would not, with equal or greater force, apply to creditors.

Nor was it necessary that the order should recite all the jurisdictional facts. Courts of Probate are courts of record, with a range of jurisdiction embracing only particular subject matters, but, within that range they are entitled to all presumptions in favor of the regularity of their proceedings, accorded to superior courts of record. *Borden* v. *State*, 11 Ark., 519; *Bellows* v. *Cheek*, 20 Ib., 424. When jurisdiction of the *subject matter* appears, the jurisdiction of the person is not open to inquiry in a collateral proceeding. *Sturdy* v. *Jacoway*, 19 Ib., 516; and *Borden* v. *State*, *supra*.

The presumption is that everything was rightly done, *Welch* v. *Hicks*, 27 Ark., 292; *Thorne* v. *Province*, 31 Ib., 190, unless the record affirmatively shows the contrary. *Cook* v. *Loftin*, 31 Ib., 567. Overriding all this, however, is the power of courts of equity to amend orders obtained by fraud. The order does recite that it appeared to the court that the whole of the estate did not amount in value to the sum of

$300. That showed jurisdiction of the subject matter, and the order, standing unimpeached, cannot be questioned in a collateral proceeding, nor could it be so weakened by lapse of time as to make proof of want of notice admissible in a collateral proceeding. The court erred in excluding the order in the first place, and in afterwards admitting proof tending to show want of notice.

The property, by the order, vested absolutely, in fee simple, in the widow. By her subsequent marriage soon afterwards with Davis, his marital right attached, to enjoy the property during coverture, and to have curtesy under proper conditions. These rights he might convey, and they would protect an alienee against an action of ejectment during their existence. An abortive effort of the wife to join in the conveyance defeats the object as to the interests of the wife alone, leaving those of the husband to pass. It was not necessary, however, in this case to show any interest in the defendant. The outstanding title in the wife, even if there had been no sale, would defeat the recovery of plaintiff.

The court erred in its declarations of law, and in finding for the plaintiff, and rendering judgment accordingly, as well as in sustaining exceptions to defendants exhibits to his answer.

Let the judgment be reversed and the cause remanded for a new trial.

33 830
62 135

WARD v. WORTHINGTON.

1. PRACTICE—*Bill of Exceptions.*

An entry upon the record that a party upon a motion for continuance being sustained, agreed to admit the facts stated therein, upon which the parties went to trial, will not be noticed by this court, where these matters are omitted from the bill of exceptions.

2. REPLEVIN—*Action by tenant in common:*

One tenant in common cannot maintain replevin against his co-tenant for his part of the common crop, unless there has been a division of it, consummated by an assignment and appropriation of a part to each.

APPEAL from *Sebastian* Circuit Court.
Hon. R. R. RUTHERFORD, Special Judge.
Du Val & Cravens, for appellant.

EAKIN, J.:

Worthington sued Ward in replevin, before a justice of the peace, stating in his affidavit, that his claim was "for 372 pounds of lint cotton, of the value of $37.20, which cotton is the one-half of the undivided crop made by him on Joe Ward's farm," "which he is entitled to for cultivating said crop." A writ was issued, some cotton seized, and a delivery bond executed by defendant, to retain the property. After some very irregular proceedings, a very irregular verdict and judgment was rendered for plaintiff, and defendant below appealed to the Circuit Court.

There he filed an answer, denying that plaintiff owned the cotton, or was entitled to possession; and,

2d. Alleging that plaintiff owed him twenty-eight dollars for supplies, and money advanced; and had agreed to let him have a lien on said cotton, and hold it. A demurrer to the second paragraph was overruled. Upon trial in the Circuit Court the jury found for the plaintiff, that he have return of the

cotton replevied, valued at $37.20. Defendant moved for a new trial, which being overruled, he excepted and appealed.

There was no evidence whatever of defendants' lien. If we might notice a paper appended to the transcript and marked filed, it would appear that defendant moved for a continuance on account of the absence of a witness, who would prove that plaintiff acknowledged the existence of a lien; and an entry of record showing that the plaintiff, upon a motion for a continuance being sustained, agreed to admit the facts stated therein, upon which the parties went to trial. But all these matters are omitted from the bill of exceptions, and cannot be noticed. (*P. & Z. Phillips*, v. *Reardon & Son*, 2 Eng., 7 Ark., p. 256.

For the rest, the substance of the evidence made this case. Worthington, the plaintiff, cultivated a crop of cotton on the farm of defendant. They hauled it together to a gin, and directed the ginner to put it up in two bales, one for each; the plaintiff furnishing for the purpose his own bagging and ties. It was ginned and put up in two bales, one weighing over 400 pounds, and the other over 300 pounds. The defendant brought 300 pounds of seed cotton of his own, which was also ginned and put up in the smaller bale. Both were removed by defendant. Cotton was worth from 10 to 11 cents per pound.

Although the Code has abolished the distinction between the old common law forms of action, the proceeding by replevin is peculiar; being intended for the recovery of specific property. Its distinct nature and requisites must be preserved or the practice will fall into confusion. The recovery is for a specific article which must be identified, or for its value, which must be ascertained. Otherwise, however plain the rights of a party may be to a money compensation, this form of action ought not to be sustained. It is prompt and dangerous; and

those who resort to it should be careful to bring their cases by proper evidence within its provisions and requirements.

There was no evidence before the jury of any division of the crop, consummated by assignment and appropriation of a part to each. The baling in two parcels was with a view to that, but neither the weight nor value of bales was established, except by remote approximation, nor was it shown that any assignment of a particular bale to each was made, so that he might say "this is my property." It is not shown that the bales were equal in weight or value. The jury seem to have taken it as confessed by the pleadings before the magistrate, and in the Circuit Court that the bale replevied weighed 372 pounds, because there was no distinct denial of that in the answer. There was no proof of it at all. It was sufficient for the answer to deny the property of plaintiff, and that did not of itself amount to an admission of its alleged value. *Gantt's Digest*, 4608, nor of its description.

The remedy, by replevin, for an *undivided* part of a crop was not proper in the first place. The point was not taken and the case was tried on the merits, but it did not relieve the plaintiff from showing facts to maintain his action. We think the facts shown did not authorize the verdict, and a new trial should be granted.

Let the judgment be reversed, and the cause remanded for the purpose.

HENDRY v. WILLIS.

33 833
54 255
33 833
55 290
33 833
74 206
74 402

1. SWAMP LAND ACT: The swamp land act of September 28, 1850, made a grant *in presenti* of all lands coming within the description of the act. When they are properly designated and ascertained, the grant relates to the date of the act.
2. SAME: It made the Secretary of the Interior the judge of the lands coming within the meaning of the grant, and his decision, on this point, in the absence of fraud or imposition, is final.
3. STATE'S PATENT: *Evidence; Recitals.*

   The State's patent for swamp lands may issue at any time after the selection is confirmed, and is evidence of title in the grantee, and *prima facie* evidence of all facts recited in it, which are necessary to confer the power to issue it.
4. EVIDENCE: *Official letters; Exemplifications of record.*

   A letter from the Commissioner of the General Land Office, stating what does or does not appear on his records, is not evidence of the facts stated. Matters of record must be proved by exemplifications of the record. Negative matter may be proved by the testimony of those familiar with the record and papers, but the testimony must be taken as of any other fact. Letters will not do.

APPEAL from *Sebastian* Circuit Court.
Hon. R. B. RUTHERPORD, *Special Judge.*
Du Val & Cravens, for appellant.

EAKIN, J.:

This is an action at law by Hendry against Willis, begun August 25, 1873, to recover land. Plaintiff claims, under a patent from the Governor of the State, executed March 13, 1872. The patent, in its preamble, recites the passage of the act of Congress of September 28, 1850, granting swamp and overflowed lands to the State; that under the provisions of the State acts, the Land Commmissioner of the State, on the 27th day of February, 1872, granted a certificate to and in favor of plaintiff for the lands described; that on the 13th day of March, 1872, he had certified that said lands had been confirmed by the United States to the State of Arkansas, as a por-

tion of the lands granted by said act; and that the purchase money had been fully paid.

Defendant relied upon a patent from the President of the United States, dated August 15, 1860, issued to his grantor upon the location of a military bounty land warrant, in pursuance of an act of Congress approved March 5, 1855, with continued possession in his grantor and himself, and the statute of limitations. He further showed, upon trial, that the purchase of the land from the United States was made on the 6th day of September, 1858, and, as the bill of exceptions states, "proved by several witnesses that the premises in controversy were not swamp and overflowed lands."

Upon the trial, defendant, against the objections of plaintiff, was allowed to introduce, as evidence, an exemplification under the hand and seal of the Commissioner of the General Land Office, of the *official record of a* letter from the Acting Commissioner of the General Land Office, dated August 11, 1877, to *Curtis & Earle*, attorneys at Washington City. The letter purports to be in response to an inquiry, and says that the land in question, describing it, "does not appear on our records as a swamp land selection."

It happened, on trial, after the evidence was closed and the instructions settled, that plaintiff offered to introduce a deposition of J. N. Smithee, Commissioner of State Lands, which had been taken in the case by agreement of attorneys. The bill of exceptions states that this "had been overlooked by plaintiff's counsel, who had come into the case just before the trial, to represent plaintiff's counsel, who was absent." Leave to read the deposition was refused. If admitted, it would have shown to the jury that the records of his office had been mutilated to such an extent as to prevent him from saying whether or not the land in question had ever been patented to the State from the United States government, but it was

selected as swamp land under the act of Congress of September 28, 1850, and confirmed to this State by the United States government on the 14th of July, 1853, on list No. 1, Clarksville district, and that the entry appears to be regular and without conflict.

The court, for the plaintiff, instructed the jury if they found the lands had been confirmed to the State by the United States on the 14th of July, 1853, and that defendant was in possession, to find for the plaintiff; and that the Governor's deed was evidence of title; but refused to instruct that it was evidence of the facts therein recited.

For the defendant the court instructed: That to enable the plaintiff to recover, it must appear that the lands were selected, confirmed and deeded to the State as swamp and overflowed lands; that the defendant was entitled to a verdict on his patent from the United States, if it were the first and only deed, and the lands had not been confirmed to the State; and that the deed from the Governor, although *prima facie* evidence of title, conveyed only such title as the State had at the time of the sale.

A verdict for defendant. A motion for a new trial was overruled, and plaintiff appealed.

It is well settled that the act of September 28, 1850, made a grant to the State, *in presenti*, of all lands coming within the description. When they are properly designated and ascertained, the grant relates to the date of the act.

By the second section of the act it is made the duty of the Secretary of the Interior to ascertain the lands passed by the grant, transmit a list of them to the Governor, and, when requested by the Governor, cause a patent to be issued to the State.

The power making the grant could impose its own conditions. It constituted the Secretary of the Interior the judge

of the lands in the State coming within the meaning of the grant, and his decision on this point, in the absence of fraud or imposition, should be considered final in all courts.

The act did not prescribe for the Secretary any mode or agencies for making out his list for transmission. The plan adopted has been so long in public use in the land departments of the Federal and State governments, and has been so often alluded to in legislation, that the laws of the State cannot well be construed without taking judicial cognizance of the system. The selections have been, in fact, made by agents of the State, sent to the Secretary of the Interior, through the Commissioner of the General Land Office, approved and returned to the Governor. These tests, so approved, have been properly marked upon the plats, and filed amongst the archives of the land office of the State. They have, from time to time, been, with all other books, papers and other matters concerning the State lands, transferred from one custodian to another, upon whom the duty of keeping them has been imposed. When these lists, so approved, have been transmitted to the Governor, they have been treated in our legislative and official acts as *confirmed*, and so we must understand the word.

At the time of the execution of plaintiff's deed by the Governor, he was authorized by law to make it, upon being satisfied that the lands were confirmed, and the price paid the State. The right was determined by the confirmation, which fixed the character of the land, and vested it by relation, as of the date of September, 1850. The deed became evidence of title, because it was made in pursuance of law, and *prima facie* evidence of all those recitals in it necessary to confer the power. It would be attended with inconceivable inconvenience if every holder of the Governor's patent for swamp lands were obliged to fortify his deed with proof *aliunde*, that the lands were of the character described in the congressional grant, had

been confirmed to the State, and duly purchased by him and paid for. The court erred in declining to instruct the jury that the recitals of these facts in the patent made a *prima facie* case for the plaintiff.

It follows, also, from the authority given to the Secretary of the Interior under the act, that after confirmation of the lands by him to the State, the character of the land, as swamp and overflowed, would be conclusively fixed as against the United States, or any one holding under it by patent after confirmation. Whether such confirmation would preclude proof as to the real character of lands sold by the United States, or the State, after the passage of the act and before confirmation, is a question not necessary here to determine. It is enough to say that if the lands be really swamp and overflowed, the *right* vests in the State by the act, and when the *fact* is determined, by whatever method, this right has relation to the date of the passage of the act. Of course it would have no application to lands never selected.

There is no proper proof in this case that the lands were *not* swamp and overflowed at the time of the congressional grant. The language of the bill of exceptions, is: "Defendant then proved, by several witnesses, that the premises in controversy were not in fact swamp or overflowed land." This is setting forth the result of the testimony rather than the testimony itself; but waiving that, the proof refers to the time of trial, nearly thirty years after the act. From divers natural and artificial causes, the surface of the earth is continually changing, and lands which were wet, overflowed and unfit for cultivation in 1850, may be now high and arable; and so *vice versa*.

The letter from the Acting Commissioner to the law firm of Curtis & Earle, was not admissible to prove facts stated in it, or absence of facts. It was mere heresay. Nor could it be made evidence by any rule of the office requiring such letters

to be copied, and giving them the character of quasi records. Certified copies of them could only be evidence that such letters were written, not of the facts they contain, whether affirmative or negative. Negative matter can rarely be proved by the testimony of those familiar with the records and papers; but the testimony must be taken as for any other facts. Letters will not serve the purpose as between third parties. The court erred in letting the letter in question go to the jury. They were thus warranted by the court to find that the lands in question had never in fact been selected, and believing that, could not do otherwise than find for the defendant.

The application of plaintiff to read the deposition of Smithee after the evidence had been closed and the instructions settled, upon the ground that the attorney was not well acquainted with the case, and had overlooked it, was addressed to the sound discretion of the presiding judge. It devolves upon the Circuit Judges to preserve the due order of proceedings in their courts, and prevent the practice from falling into that utter confusion to which, since the change to the Code system, it seems to be tending. To them is now entrusted the delicate duty of building upon the Code and moulding a clear, rational system of practice, adapted to the despatch of business, and the efficient administration of justice. In doing this they must exercise their discretion very frequently, and they can better judge of the circumstances affecting any particular motion than we can here. For instance, it seems to us here that justice required that the testimony should have been admitted upon the explanation given. It would not have taken the adverse party by surprise. But it was unimportant. So much of it as went to show that the lands were included in the confirmation list of 1853, was incompetent. That list was a part of the official documents in his office, of which he was custodian, and what the list showed should have been proved by exemplifica-

tion. The deposition would only have been of use to show the mutilation of the records, and thus explain the want of proof of the issuance of a patent to the State. If this were all, we would be loth, on this account, to declare it an abuse of discretion and disturb the verdict.

For the error of the court in admitting improper testimony, and refusing proper instructions asked by the plaintiff, the new trial should have been granted.

Reverse and remand for a new trial and further proceedings consistent with this opinion.

INDEX.

ACKNOWLEDGMENT.

See MARRIED WOMEN, 2, 9. DEED, 2, 4.

ACTION, RIGHT OF.

See AGENCY, 1.

ADMINISTRATION.

1. *Sale of Real Estate for Payment of Debts.*
An order of the Circuit Court, while it had probate jurisdiction, for the private sale of the real estate of a decedent for the payment of debts, made without notice, was erroneous. Gregg vs. Gregg. 89

2. ADMINISTRATOR: *Liability to stranger for funds administered by mistake.*
An executor or administrator, receiving money by mistake, as assets of his decedent's estate, will not be excused from his liability to refund the same on the ground that the money has been applied by him in the course of administration. McCustian vs. Raney, Ad. 141

3. *Confirmation of sale; what amounts to.*
An order of the Probate Court directing an administrator to make a deed to lands sold under a previous order, is a virtual confirmation of the sale. Livingston, Ad. vs. Cochran et al. 295

4. *Probate Judge not allowed to purchase at probate sales.*
A Probate Judge should not be allowed to purchase lands at a sale ordered by himself. Id.

5. BONA FIDE PURCHASER.
The purchaser of the bid of a Probate Judge, with knowledge that he was judge, and had made the order of sale, and purchased for his own benefit, is not an innocent purchaser. Id.

6. ADMINISTRATOR: *Discharge of, by Probate Courts.*
The discharge of an administrator by the Probate Court, is only for so much of the funds belonging to the estate as is found *by his settlement* to be in his hands. He will still be liable for funds received and not accounted for by him. West and wife et al. vs. Waddell et al. 575

7. SAME: *What purchase by, not fraudulent.*

An administrator is not precluded from dealing with the purchaser of property purchased at his sale, where there is no understanding, express or implied, at the time of the sale, that he shall share in the purchase. Id.

8. SAME: *Attorney of, not allowed to buy at his sale.*

An attorney of an administrator who prepares and files the petition and obtains an order for sale of property of the deceased, is not allowed to purchase at the sale. Id.

9. SAME: *Title to the land of his intestate.* Anderson vs. Levy, Ad. 665

10. WIDOW: *Statute construed.*

The word "estate," in Secs. 6 and 7, *Gantt's Digest*, means the whole mass of the decedent's property, both real and personal, and if it is of less value than $300, is given by the law *proprio vigore* to the widow; or if no widow, to the children of the deceased, and an order of the Probate Court is not necessary to vest it. Harrison vs. Lamar. 824

11. ———— *Order of Probate Court declaring estate in widow; Notice to heirs; Recitals in order.*

The proceeding of the Probate Court to declare the estate in the widow is *in rem*, and no notice to the heirs is necessary; nor is it necessary that the order recite all the jurisdictional facts. Id.

12. CLAIMS AGAINST ESTATES.—NON-CLAIM: *Statute of, did not run during the war.*

The statute of non-claim has all the attributes and characteristics of a statute of limitation, and did not run during the war. Williamson et al. vs. McCreery, Ad. 470

13. SAME: *When the statute of non-claim begins to run.* Worthington's Ad. vs. DeBardlekin, Ad. 651

14. SAME: *Guardian and ward.*

The claim of a ward against the estate of a deceased guardian must be presented to his administrator within two years after the grant of administration—whether there has been a final settlement of the guardianship or not. Connelly et al. vs. Weatherly, Ad. 658

See GUARDIAN AND WARD, 4. JURISDICTION, 9, 10. LIMITATION, STATUTE OF, 1. PAYMENT, 1. PLEADING AND PRACTICE, 23, 24.

ADVERSE POSSESSION.

See LIMITATION, STATUTE OF, 2.

AGENCY.

1. AGENT, CONTRACT BY: *Right of action on, etc.*

A lease executed by an agent in his own name, from the body of which it is obvious that he intended to bind his principal and not himself, will be treated

as the contract of the principal, and he may maintain an action on it. The distinction at law between sealed and unsealed instruments in this respect, has ceased to exist since the abolition of private seals. Gibbs vs. Dickson. 107

2. *Officer, not agent of prosecutor—declarations of.*

An officer executing process is not the agent of the prosecutor, so as to make his declarations, even when part of the *res gestæ*, bind the prosecutor; nor can his declarations be used to prove his agency, or that there was a conspiracy between him and the prosecutor to abuse the process of the law. Carney vs. Chrisman. 316

3. VENDOR AND VENDEE: *Special contract between, as to settlement of adverse claim—Measure of recovery under, etc.*

An understanding between the agent of a vendor of lands and the vendee, that the latter should take such steps as he should deem prudent to settle the claim of an adverse occupant, or sue him if necessary, and that in either case the vendee was to be allowed upon his debt for the land such sums as he might expend, authorized the vendee to employ an attorney and pay him a reasonable fee, and to execute such bond as might be necessary in the prosecution of the suit, and if the sureties in such bond have damages to pay in consequence of the failure of such suit, they have the right to be subrogated to the rights of their principal, the vendee, against the vendor for recovery of such damages and interest. Am. Land Co. vs. Grady et al. 550

4. SAME: *Attorneys Fee—Pleading.*

Where there is a general prayer for damages in such cases, the attorney's fee paid by the vendor in a suit to recover the land from an adverse occupant, may be allowed, though not specifically prayed for. Id.

See EVIDENCE, 7.

ALTERATION.

See PROMISSORY NOTES AND BILLS OF EXCHANGE, 3.

AMENDMENT.

See APPEAL, 3. ATTACHMENT, 2. PLEADING AND PRACTICE, 21, 26, 29.

ANSWER.

See PLEADING AND PRACTICE, 6, 7, 19, 20, 29.

APPEAL.

1. TRANSCRIPT FOR SUPREME COURT. *Original papers. Practice.*

The practice of sending up with the transcript original papers filed in the cause in the court below, is disapproved; and the clerk directed to make a transcript of the same, and return the originals to the clerk of the inferior court. Blackburn vs. Randolph. 119

2. COURT COMMON PLEAS: *Appeal from.*

There is but one way of taking an appeal from the Court of Common Pleas to the Circuit Court, and it must be moved for and taken at the term at which the judgment is rendered. Ferguson vs. Doxey. 663

3. APPEAL FROM JUSTICE OF THE PEACE:—*Affidavit for, amendable.*

An informal affidavit for appeal from a Justice of the Peace may be amended in the Circuit Court; and if not objected to there, it is not good practice to allow objections to it in the Supreme Court.. Young, Trustee, vs. King et al. 745

See COURT, COUNTY, 2.

ARREST.

CHIEF OF POLICE: *Of Cities of the first class; Power to arrest in other counties.*

Under the facts of this case (see the Op.) the court is of opinion that the Chief of Police of the City of Little Rock may pursue a person charged with crime in said city, and arrest him in another county, within a few days. Chrisman vs. Carney. 316

See EVIDENCE, 12.

ASSIGNMENT.

ASSIGNMENTS OF NOTE: *Consideration of, not to be questioned by maker.*

The maker of a note, when sued by an assignee, cannot question the consideration for the assignment. Geisreiter et al. vs. Sevier. 522

See VENDOR AND VENDEE, 4, 5. WRITING OBLIGATORY, 1.

ATTACHMENT.

1. *Duty of Officer.*

It is the duty of an officer who seizes property under attachment to retain control of it, so he may return it if required. Farris vs. The State use, etc. 70

2. *Landlord's affidavit amendable.*

A defective affidavit of a landlord, in attachment for rent, is amendable. Rogers vs. Cooper. 406

3. *Judgment on Discharge of.*

Upon the discharge of an attachment the defendant should have judgment for the return of the attached property. Jackman vs. Anderson. 414

4. *None for specific property.*

Attachment is no remedy for the recovery of specific property. Gates et al. vs. Bennett. 475

5. *In Equity.*

The Civil Code authorizes proceedings by attachment, in suits in equity. Am. Land Co. vs. Grady et al. 550

See EXEMPTION, 1. INTERPLEA.

ATTORNEY.

LIEN. *Of attorney for his fees and cost.*

An attorney has a lien upon the securities in his hands for his fees and costs, as well as upon a judgment recovered upon them. Section 3622, Gantt's Digest, so far as it extends, is but a declaration of the law as it was before. Where an attorney has attached property for the collection of a debt, the lien of the attachment enures to the benefit of the attorney for his fees and cost advanced in the action, and cannot be defeatedy by any settlement made by his client and the debtor, without his consent Gist Ex. vs. Hanly. 233

See ADMINISTRATION, 8. DAMAGES, 2. EVIDENCE, 22.

BAIL BOND.

It is no objection to the validity of a bail bond that there is no order on the record for the issuance of a bench warrant on which the party is arrested. Nor is a bail bond void because it is the joint bond of two or more defendants for the same sum that was required of each of them for bail, by the order of the judge endorsed upon the indictment. Humphries et al. vs. The State. 713

BANKRUPTCY.

1. *Orders of Register not to be collaterally assailed.*

The validity of an order made by the Register in Bankruptcy, except such as the bankrupt court only has power to make, cannot be collaterally questioned, in the absence of any showing that it was disapproved by the court. Geisreiter et al. vs. Sevier. 522

2. *Assignee, etc.*

An order made after the discharge of an assignee in bankruptcy, authorizing him to sell subsequently acquired assets of the bankrupt, is equivalent to opening the discharge, or re-appointing him as assignee. Id.

3. *When title of assignee to bankrupt's estate vests.*

The assignment by the Register to the assignee, of the bankrupt's estate, relates to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all the estate of the bankrupt, both legal and equitable, vests in the assignee. Id.

4. *When an assignee in bankruptcy barred.*

By the bankrupt act, neither the assignee in bankruptcy, nor his assignee, can maintain any suit to collect a debt due the bankrupt, after two years from the time the right of action on the debt accrued to the assignee in bankruptcy. Id.

5. *Damages for breach of covenant, provable in.*

Damages for breach of covenants are provable against the estate of a bankrupt. Abbot vs. Rowan 593

6. *New promise.*

A verbal promise to pay a debt discharged in bankruptcy revives the debt. Worthington, Ad., vs. De Bardlekin, Ad. 651

BILL OF EXCHANGE.

See PROMISSORY NOTES AND BILLS OF EXCHANGE, 7.

BONA FIDE PURCHASER.

1. *Rents and profits, repairs, etc., where no actual fraud.*

Where a purchase of land is set aside as fraudulent for being against public policy, but in which the purchaser has been guilty of no actual or intentional fraud, he should be charged with only such rents and profits as he has received, or should by prudent management, have received; and should be credited with the purchase money paid by him, and taxes and all other reasonable expenditures, including improvements; and if these exceed the rents and profits, he will be entitled to the excess, with a lien upon the property for its payment. West and wife et al. vs. Waddell et al. 575

2. *Purchaser of property of infants*, at void sale; liability for rents and profits, and right to compensation for improvements, taxes, etc. Summers and Wife vs. Howard et al. 490

See ADMINISTRATION, 5. EXECUTION, 2.

BROKER.

Who are. Power of Municipal Corporations to tax.

A dealer in real estate for others is a broker, and the City of Little Rock has the power to require such to pay license for following the occupation within her limits. City of Little Rock vs. Barton et al. 436

BURDEN OF PROOF.

See CONTRACT, 2. FORCIBLE ENTRY AND UNLAWFUL DETAINER, 1.

BURGLARY.

See CRIMINAL LAW, 3. INDICTMENT, 7.

CERTIORARI.

Practice in.

The better practice in certiorari, is for a transcript of the record to be exhibited with the petition, and a writ regularly issued and returned. And where it does not appear that the record sought to be quashed was before the court, it did not acquire jurisdiction. Horner vs. O'Shields. 117

CHANCERY PRACTICE.

See PLEADING AND PRACTICE.

CHIEF OF POLICE.

See ARREST.

CLAIMS AGAINST ESTATES.

See ADMINISTRATION, 12, 13, 14.

COLLECTOR.

See OFFICER.

COMMON PLEAS, COURT OF.

See APPEAL, 2.

COMMON SCHOOLS.

See SCHOOL DISTRICTS.

COMPLAINT.

See PLEADING AND PRACTICE, 2, 15.

CONFEDERATE MONEY.

See CONTRACT, 5.

CONSIDERATION.

See ASSIGNMENT. CONTRACT, 2, 3, 5. PAYMENT, 2.

CONSTITUTIONAL LAW.

School Warrants; re-issue and cancellation of.

The first section of the Act of November 30th, 1875, providing for the cancellation and re-issue of county and district school warrrnts, provides that the holders of school warrants, previously issued, should, upon ninety days' notice, submit the validity of their warrants to a tribunal composed of the County Judge and Clerk, whose decision should be final. If the warrants were not presented, or if presented and rejected, they were to be void; if pronounced valid, the holders were to surrender them and take in lieu thereof a warrant against the school district issued by the County Clerk. *Held*, that the section imposed conditions upon the holders of the warrants not provided for by the law in existence at the time they were issued, and was unconstitutional, as impairing the obligation of the contract. (See also Parsel vs. Barnes Brothers, 25 Ark., 261, from which this case is distinguished. Rep.) McCracken vs. Moody. 81

See COURT, COUNTY, 1. CRIMINAL LAW, 5. STATUTES. TAXATION, 1, 2. WARRANTS, COUNTY, 2.

CONTRACT.

1. A party who does work for another and receives in payment a bill of exchange, and by his neglect to present the same for payment and give notice of its dishonor releases the drawer, cannot recover the value of the work under the contract. Adams vs. Boyd. 33

2. CONSIDERATION: *Burden of Proof.*

A written obligation for the payment of money imports a consideration, and upon an issue of want of consideration the burden of proof is on the defendant. Woodruff vs. McDonald et al. 97

3. ————: *Adequacy.*

Where there is any consideration for a contract, its adequacy cannot be questioned at law. Id.

4. CONTRACT TO PAY: *None implied for gratuitous services.*

Services intended at the time to be gratuitous, cannot afterwards be used to raise an implied contract to pay for them. Osier vs. Hobbs. 215

5. CONFEDERATE MONEY: *Consideration.*

Confederate Treasury notes, issued and circulated as money, were a good consideration for a contract. Young et al. vs. Mitchell. 222

6. DAMAGES—*Rule of, in entire contract, where part only is performed.*

Where there is an entire contract to do work at a stipulated price for the whole, and part only is performed, if not accepted there can be no recovery; but if accepted, or if the work be upon property of the defendant, and necessarily enures to his benefit, the most reasonable rule is that the plaintiff

should recover the entire amount of the contract price, less the amount still necessary to complete the work entirely. Walworth vs. Finnegan. 751

See CORPORATION. DAMAGES, 2. INJUNCTION, 5. LANDLORD AND TENANT, 2. MARRIED WOMEN, 1. USURY.

CONVERSION.

See TRUST, 1.

CORPORATION.

Stock Subscriptions

Subscriptions to the capital stock of a corporation were made on a loose sheet of paper which was put in a bound book, used as a record of the company, and the contents of the paper, with the names of the subscribers and amounts subscribed, were entered in the book by the commissioners appointed to open books of subscription. *Held*, that this was a sufficient subscription to the stock of the company. (See the opinion as to the effect of irregularities as between assignee and assignor of the stock.) Woodruff vs. McDonald et al. 97

CORRECTION.

See MORTGAGE, 2.

COUNTIES.

1. *What they are.*

Counties are not in any respect business corporations for private purposes, nor are they organized exclusively for the common benefit of the citizens and property holders within their limits. They are of a purely political character, constituting the machinery and essential agencies by which the free governments derived from, and modeled upon the representative and popular features of the English Constitution are upheld, and through which, for the most part, their powers are exercised. Eagle et al. vs. Beard et al. 497

2. *Their rights and liabilities when divided.*

When a county is divided the old county will, without statutory provision, retain the property and remain liable for the debts of the county, and the severed part, or new county, will be released. But it is competent for the Legislature to apportion the property and the burden between the old and new counties as it may deem proper, and compel taxation for the purpose. Id.

3. *How created; Legislative power over.*

Counties, cities, and towns, are municipal corporations created by the Legislature, and derive all their powers from it, unless otherwise provided by the State Constitution.

The Legislature has the authority to amend the charter of such corporation; to enlarge or diminish its powers; extend or limit its boundaries; divide the same into two or more; consolidate two or more into one; and even abolish it altogether at its own will and discretion, and according to its own views of public convenience, and without the consent of those comprising the body politic. Id.

See TAXATION, 1, 2. WARRANTS, COUNTY.

COUNTY EXPENSES.

See COURT, COUNTY, 3.

COUNTY SEAT.

1. *Removal, etc.*

Where an act providing for the removal of county seats is repealed, a provision of the act that there shall not be a second removal for ten years becomes inoperative. Varner et al. vs. Simmons et al. 212

2. *Same.*

A provision of an act for the removal of county seats that whenever an election has been held *in pursuance of this act*, and the county seat changed in compliance therewith, it shall not be lawful to change the county seat again under ten years, does not apply to a removal had under the provisions of a prior act. Id.

See JURISDICTION, 2.

COURT, COUNTY.

1. *Successor to Board of Supervisors.*

By the Constitution of 1874, County Courts were made successors and mere continuations of the former Boards of Supervisors of the counties. Dodson et al. vs. Mayor and Council of Fort Smith. 509

2. *Appeals from to Circuit Courts.*

An appeal lies to the Circuit Court from the judgment of the County Court granting or refusing an application to annex territory to a municipal corporation, and the Circuit Court should, on such appeal, retain jurisdiction of the subject matter for final judgment, and try the case *de novo;* but where the County Court has fairly understood the law, considered the facts and exercised its discretion upon a view of the fitness and propriety of the proposed matter as affecting the interest and convenience of the public, its action then should have not the technical, but much of the persuasive force of a political question finally determined. Id.

3. COUNTY COURT: *Allowance by.*

Allowances made by the County Courts since the passage of the act of March 28, 1871, (Acts 1871, p. 312), for blanks and stationery for justices of the peace, are illegal. Desha County vs. Newman. 788

4. ——— Allowances by are in the nature of judgments. Id.

See JURISDICTION, 2. WARRANTS, COUNTY, 1, 4.

COURT, PROBATE.

See ADMINISTRATION, 6. GUARDIAN AND WARD, 1. INFANTS, 2. JURISDICTION, 7, 8, 9, 10.

COURT, SUPREME.

Practice in Supreme Court, where no declarations of law by Circuit Court.

Where there is a motion for new trial in the Circuit Court, though the Court make no declarations of law, the Supreme Court will look into the bill of exceptions to see if there is any evidence to sustain the findings of the Court sitting as a jury, and whether as matter of law, a party is entitled to judgment upon the facts found. Worthington, Ad., vs. DeBardlekin, Ad. 651

See APPEAL, 1. JUDGMENT AND DECREES, 2. NEW TRIAL, 3, 4. REVIEW, BILL OF, 3. VERDICT, 2.

COVENANT.

See MARRIED WOMEN, 7. VENDOR AND VENDEE, 2. WARRANTY, 1, 2.

CRIMINAL LAW.

1. *In jeopardy.*

Where an indictment is quashed on demurrer, the defendant is not in jeopardy under it, and may be prosecuted under a second indictment for the same offense. State vs. Gill. 129

2. *Abusive or profane language, etc.*

Whether profane language used toward or about another, in his presence, is calculated to arouse to anger or produce a breach of the peace, would depend upon the relations of the parties, the circumstances under which it was used, the manner of the speaker, etc., which are questions to be left to a jury. State vs. Moser. 140

3. *Burglary and larceny.*

If one feloniously enter a house in the night time with intent to steal, he is guilty of burglary, though he does not accomplish the theft. If he completes the theft he is guilty of a further offense, and may, by statute, be indicted and punished for both burglary and larceny. Dodd vs. The State. 517

4. *Robbery; value immaterial.*

To constitute robbery the taking must be either directly from the person or in the presence of the party robbed, and must be by force, or a previous putting in fear. It is the previous violence or intimidation that distinguishes robbery from larceny. It is immaterial of what value the thing taken is. Clary et al. vs. The State. 561

5. *Carrying weapons; Constitutional right to bear arms.*

The Legislature may to some extent regulate the mode and occasion of wearing war arms, but to prohibit the citizen from wearing or carrying a war arm except upon his own premises, or when on a journey, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms. Wilson vs. The State. 557

6. The carrying of army sized pistols, such as are commonly used in the military and naval service of the United States, is not prohibited by the laws of Arkansas. Holland vs. The State.

See ARREST. INDICTMENT.

CRIMINAL PROCEDURE.

See BAIL BOND. EVIDENCE, 18. INDICTMENT, 4, 6, 12.

CROSS-COMPLAINT.

See PLEADING AND PRACTICE, 19, 20.

CURATOR.

See INFANTS, 2.

DAMAGES.

1. *Measure of, for injuries resulting in death.*

The measure of damages to a mother for the negligent killing by a railway train, of her infant child, is, under the statute, the expense necessarily incurred by her for medical attendance, nursing, and burial of the child, and reasonable compensation for the loss of the probable services of the child during its minority. For the loss of companionship and association of the child, and the grief of the mother at its death, the statute gives no compensation. Railroad Co. vs. Booker and wife. 350

2. *Measure of in breach of contract; Attorney and client.*

Where there is a special agreement for labor, services, or the delivery of goods at a stipulated value, and the party bound to the services or delivery is ready and willing to perform his part, but is wrongfully prevented by the other, the

measure of damages is the profit which would have accrued to the party willing to perform, if the contract had been fully executed on both sides. And in cases of special contracts for legal services which are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, he may claim the whole compensation agreed on, subject to such abatement as would, in the natural course of things, have been incurred by him if the services had been continued. Brodie et al. vs. Watkins and wife. 545

3. *For breach of covenant of seizin.* Benton County vs. Rutherford. 640

4. RAILROADS: *Damages by; Statute construed.*

The true construction of the Act of February 3, 1875, for the recovery of damages for injuries by railroads, is, that the killing being shown or admitted, the presumption is that it was done by the train and resulted from want of due care; but this presumption may be repelled by proof. And in case the company may be liable at all, that liability is doubled by the failure to give notice of the injury required by the statute; but the failure to give notice does not create a liability for an innocent act. L. R. & F. S. R. R. Co. vs. Payne. 816

See AGENCY, 3, 4. BANKRUPTCY, 5. CONTRACT, 6. SPECIFIC PERFORMANCE, 3.

DEATH.

See DAMAGES, 1.

DECLARATIONS.

See AGENCY, 2. EVIDENCE, 5, 19.

DEED.

1. *Destruction of.*

The destruction of a deed will not divest the title conveyed by it. Neil vs. Speigle et al. 63

2. ACKNOWLEDGMENT: *Official character of Clerks of another State need not be attested by Judge of Court.* Ferguson vs. Peden. 150

3. *A simple bargain and sale of land in writing,* in words of the present, and upon sufficient consideration, is a conveyance, transmitting the title from the grantor to the grantee, with or without covenants of warranty, and is no less a conveyance because it contains also clauses of quit claim or release. Holland, Ad., v. Rogers. 252

4. *Acknowledgment; What necessary in.*

An acknowledgment by a grantor that he executed the deed, or mortgage *for the purposes therein expressed*, is not sufficient. The word "*consideration*" required by the statute, is material, and if omitted and no other word of similar import is substituted in the acknowledgment, it is fatal. Johnson vs. Godden et al. 600

See EVIDENCE, 2. MARRIED WOMEN, 2, 7, 9. WARRANTY, 1.

DEMAND.

See PROMISSORY NOTES AND BILLS OF EXCHANGE, 6.

DEMURRER.

Part of the record.

A demurrer when filed, becomes a part of the record, and a judgment upon it should be shown by a record entry, and not by bill of exceptions. Gibbs vs Dickson. 107

See PLEADING AND PRACTICE, 14, 20.

DESCENT.

Heirs; Administrator.

Upon the death of a party, the title to his lands passes at once to his heirs or devisees. The right of the administrator is in the nature of a contingent burden. Anderson et al. vs. Levy, Ad. 665

DOWER.

1. *Not barred by probate sale.*

A widow's dower in the lands of her deceased husband, are not affected by a probate sale of them for payment of his debts. Livingston, Ad., vs. Cochran et al. 296

2. SAME: *When barred by limitation.*

While the heirs of a deceased husband are in possession of his lands, the statute of limitation does not run against the widow's claims for dower. Otherwise, where a purchaser is in possession holding adversely. Id.

DURESS.

Marriage.

If one having seduced a woman, marries her through fear of the natural and probable consequences of his crime, it would not, in the absence of force or threats of bodily harm at the time, be such duress as would avoid the marriage. Honnett vs. Honnett. 156

EJECTMENT.

Verdict and Judgment.

In an action of ejectment the jury rendered a verdict for the plaintiff without any assessment of damages, the Court entered judgment for the plaintiff for possession and damages; *Held*, that the judgment for damages was not sustained by the verdict. Cannon vs. Davies. 56

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 1, 3. PLEADING AND PRACTICE, 26. SEIZIN, 1.

ENDORSEMENT.

See LIMITATION, STATUTE OF, 4, 5. PROMISSORY NOTES AND BILLS OF EXCHANGE, 4, 5. WRITING OBLIGATORY, 2.

EQUITY.

FRAUD: *Not necessary to place party in statu quo.*

When courts cannot place parties wholly in *statu quo*, they are not thereby precluded from relieving against fraud. They may do so as nearly as possible, and make compensation. Myrick vs. Jacks. 425

See ATTACHMENT, 5. EXECUTION, 3. JURISDICTION, 4, 5, 8, 10. PLEADING AND PRACTICE, 23, 24.

ESTOPPEL.

Estoppel in pais.

A party who by his acts, declarations, or admissions, or by failing to act or speak when he should, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, is estopped to assert his right afterward, to the injury of the party so mislead. Jowers vs. Phelps. 465

See LANDLORD AND TENANT, 1. PARTNERSHIP, 2.

EVIDENCE.

1. *Of parties; presumptions, etc.*

When the parties to a suit testify as to matters within the knowledge of both, and material evidence of one party is not contradicted by the other, it must be presumed to be true. Matthews vs. Lanier. 91

2. *Amendment of deed by evidence on trial.*

A deed cannot be corrected by parol evidence on the trial, and then offered as evidence of title to the land in controversy. Ferguson vs. Peden. 150

3. *Admitting incompetent evidence by consent.*

A prisoner has no cause to complain of an admission of testimony, which he, as well as the State, reads in evidence. Robins vs. The State. 180

4. WITNESS: *Husband and wife.*

Husband and wife are not competent witnesses for or against each other. Phipps vs. Martin. 207

5. *Evidence of title; declaration of owner.*

Declarations of the owner of property, as to the title are competent evidence of the title, but not conclusive. Id.

6. *Pleadings as.*

Where there is an amended complaint filed in a cause, the original can no longer be used as evidence in its original state; the pleadings as amended must be considered altogether. Holland, Ad., vs. Rogers. 252

7. *Declarations of agent.*

The transactions and declarations of an agent, are not, of themselves, evidenee of his agency, as against the principal. Id.

8. *Husband and wife, incompetent.*

Husband and wife are not competent witnesses for or against each other. Beecher vs. Brookfield. 259

9. *Accounts rendered by State Treasurer.*

A copy of accounts rendered by the State Treasurer, being statements made by him to the State in the performance of his official duties, is *prima facie* evidence against him and his sureties, in an action on his official bond. State vs. Newton et al. 276

10. *Must be confined to the pleadings.*

Where there is no plea of payment, proof of it is not admissible. Robinson vs. Woodson et al. 307

11. *Not admissible against admission of pleading.*

If a defendant would introduce proof contrary to the admissions of his answer, he must first apply for leave to amend it, and accompany the application with his affidavit that the admission was made by mistake or inadvertence. Id.

12. *Telegrams.*

Telegrams between the parties, and from the defendant to a third party, in regard to the transactions resulting in the plaintiff's arrest, are admissible in an action for false imprisonment, as a part of the *res gestae,* for the purpose of connecting the defendant with the arrest. Chrisman vs. Carney. 316

13. *Of probable cause.*

Where the question at issue was probable cause the prosecution had for believing the person prosecuted guilty of the crime of false pretense, false representations made to some one else, without the design that they should reach the prosecutor and influence his conduct, are inadmissible. Id.

14. *Entries on docket of justice of peace.*
The docket entries of a justice of the peace are *quasi* records, and, when certified, receivable in evidence. Gates et al. vs. Bennett. 475

15. *Judgments of justices of the peace as.*
When a justice has jurisdiction of the subject matter and parties, his judgment (until reversed), is as conclusive as that of a court of record and may be pleaded, and proved by exemplification of his docket entries. Id.

16. *In aid of record.*
Where, in an action of replevin, the defendant pleads former recovery of the same property, from the plaintiff, and in the judgment exhibited by him the description of the property varies from that in plaintiff's complaint, he may prove it to be the same by parol evidence. Id.

17. *Filing papers may be proved by parol; but judgment not varied by.*
The filing of a complaint and affidavit in a replevin suit, and that a writ was issued, bond, executed and return upon the writ, and that they were all in regular form and had been lost or destroyed, may be proved by parol; but it is not competent to prove that a different judgment was rendered from the one offered in evidence, or that it was entered by mistake in a wrong name. Id.

18. *Evidence of testimony of witness at former trial; when admissible.*
Evidence of the testimony of a witness before the examining court, is admissible on the trial of the same offense before the Circuit Court, where the witness has forfeited his recognizance and cannot be found. And this though the substance of the witness' testimony was reduced to writing by the examining court. The statute does not now require that the evidence of witnesses before an examining court shall be reduced to writing and signed by them. It only requires that the names and places of residence of the witnesses and the substance of what was proved, be stated in the minutes of the examinations. The object of making such statement is not that it shall be used as evidence. Shackleford vs. The State. 539

19. *Declarations of prisoner. Res gestæ.*
The statements of a defendant of his intended use of a pistol at the time he borrowed it of the witness, and a like statement when he exhibited it to another witness, are admissible in evidence as part of the *res gestae.* Wilson vs. The State. 557

20. COMPETENCY: *Husband and wife.*
The husband is not a competent witness for the wife. Berlin vs. Cantrell. 611

21. LAWS OF OTHER STATES: *Proof of.*
Certified extracts by a notary public, of the laws of other States, are not evidence of them. They should be proved as indicated in *McNeill* v. *Arnold et al.*, 17 Ark., 154. Bowles, Ad., vs. Eddy & Wilbur. 645

22. *Privileged communications; Attorney and client.*

Any communication made by a party to an attorney while taking his professional advice, is privileged and not admissible in evidence. This is a rule of public policy and for the interest of justice. The most unlimited confidence between attorney and client should be encouraged by requiring that in all facts communicated in professional consultation, the lips of the attorney should be forever sealed. It makes no difference that no fee is charged by or paid to the attorney. Andrews, Ad., vs. Simms, Ad. 771

23. JUDGMENT: *Evidence.*

A judgment condemning attached property to be sold, is *prima facie* evidence in a suit between the plaintiff in attachment and an interpleader, that the title to the property is in the defendant in the attachment, but is not conclusive. State use, etc., vs. Spikes et al. 801

24. *Witnesses.*

Husband and wife are not competent witnesses for or against each other. L. R. & F. S. R. R. Co. vs. Payne. 816

25. EVIDENCE: *Legislative power over.*

The Legislature has no power to divest rights by prescribing to the courts what shall be *conclusive* evidence. Id.

26. *Official letters; Exemplifications of record.*

A letter from the Commissioner of the General Land Office, stating what does or does not appear on his records, is not evidence of the facts stated. Matters of record must be proved by exemplifications of the record. Negative matter may be proved by the testimony of those familiar with the record and papers, but the testimony must be taken as of any other fact. Letters will not do. Hendry vs. Willis. 833

See CONTRACT, 2. GAMING. FORCIBLE ENTRY AND UNLAWFUL DETAINER, 1. FRAUD. MARRIED WOMEN, 4. NEW TRIAL, 1, 5. PLEADING AND PRACTICE; 23, 28. POSSESSION, 1. REVIEW, BILL OF, 4. SEIZIN. SWAMP LAND, 3. TREASURER OF STATE, 3, 4. VENDOR AND VENDEE, 1.

EXCEPTIONS, BILL OF.

1. *Motion for new trial, etc.*

No advantage can be had of exceptions reserved at the trial and not made grounds of a motion for new trial. Gibbs vs. Dickson. 107

2. *Refusal of Judge to sign; mandamus, etc.*

The refusal of a Circuit Judge to sign a bill of exceptions tendered to him, is not the subject of an exception in a subsequent bill of exceptions. A judge should allow and sign a bill of exceptions if true; if not, he should correct and sign it. If the party is not then satisfied, the statute points out his remedy. A Circuit Judge may, in a proper case, be compelled by mandamus to sign a bill of exceptions. Garibaldi vs. Carroll. 568

3. *When to be allowed and signed; statute construed.*
Sestion 4694 Gantt's Digest, does not mean that when time is given for filing a bill of exceptions it will extend to the last day of the next term if not specially limited. Id.

4. AGREEMENT: *How brought on to the record.*
An entry upon the record that a party upon a motion for continuance being sustained, agreed to admit the facts stated therein, upon which the parties went to trial, will not be noticed by this court, where these matters are omitted from the bill of exceptions. Ward vs. Worthington. 830

EXECUTION.

1. *Equitable title subject to.*
The vendee of real estate holding a bond for title, has an equitable interest which is subject to execution. Young et al. vs. Mitchell. 22

2. BONA FIDE PURCHASER: *Notice.*
A purchaser at his own execution sale is not an innocent purchaser. The question of notice does not arise in such case. Hill, Fontaine & Co. vs. Coolidge. 64

3. EQUITABLE INTERESTS: *Sale of, under execution; Practice in equity.*
The sale under execution at law, of equitable interests not well defined and marketable, has been strongly disapproved by this court. There is no objection to making the levy; and where the interest is ascertainable like the equity of redemption in an undisputed mortgage, etc., the sale may proceed; but in all cases where a bill in equity will in any event be necessary to fix an equity or determine its extent, it should be first fixed and then sold for its fair value. The better practice in all such cases after making the levy, is to file a bill in equity against all claimants to ascertain the true nature and extent of the equity.
Courts of equity should exercise a sound discretion and set aside sales under execution at law in all cases where the rights sold have been of such doubtful character as to deter fair competition. Bennett vs. Hutson et al. 762.

See FRAUDULENT CONVEYANCE, 2.

EXEMPTION.

1. *Exemption, Supersedeas, etc.*
The fact that a Justice of the Peace was directed by a writ of mandamus, issued from the Circuit Court, to issue to the Constable a supersedeas against the sale of property seized under attachment, and claimed by the defendant as exempt, did not authorize the Constable to restore the property before the supersedeas was in fact issued. Farris vs. The State use, etc. 70

2. *Personal property not exempt from judgments for fraud.*
The exemption of personal property is in cases of debt by contract only; and a judgment or decree for tort or fraud is not a debt by contract, nor are the costs, which are but an incident of the judgment. Massie et al. vs. Enyart. 688

3. EXEMPTED PERSONALTY: *May be sold by debtor; property taken in exchange for, retains its own nature.*
Exempted personal property may be sold by the debtor, and the execution creditor cannot follow it into the hands of the purchaser. But property taken in exchange must take its position subject to the exemption laws in force. If it be personal, it must go to make up the amount exempted; if real, it must take its place subject to the laws governing real estate, and be exempt or not, as other property of like nature: and if the title be taken to a wife, child or stranger, being volunteers, courts of equity will subject it to the same burdens in favor of creditors, which it would have borne at law, if conveyed to the debtor himself. Bennett vs. Hutson et al. 762

EXHIBITS.

See PLEADING AND PRACTICE, 15, 16, 22.

FALSE IMPRISONMENT.

Malice, not necessary to be proven.
In an action for false imprisonment it is not necessary to show malice, if the arrest was unlawful. One who participates in, or instigates or encourages an unlawful arrest, is liable, however pure his motives. Carney vs. Chrisman, 316

See EVIDENCE, 12,

FERRY.

See MUNICIPAL CORPORATION, 3.

FINDING BY COURT,

See VERDICT, 1.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. *Change into ejectment, burden of Proof.*
An action of forcible entry and detainer was instituted, and, the answer putting the title in issue, was changed into ejectment, before the repeal of section 2,947 of Gantt's Digest; *held*, that the repeal of the statute did not affect the proceedings, and it properly proceeded as an action of ejectment: *Held, further*, that the burden of proof continued with the plaintiff. Cannon vs. Davies. 56

2. UNLAWFUL DETAINER: *Action of—Mortgagee can not maintain.*

The action of unlawful detainer can not be maintained on the mere right of possession, but the relation of landlord and tenant must exist between the plaintiff and defendant. A mortgagee, or purchaser under the mortgage, having only a right of possession, can not maintain the action. Necklace vs. West. 682

3. SAME: *Amendment of action.*

An action of unlawful detainer can not be changed by amendment to ejectment, where the defendant has been dispossessed under the writ. Id.

FRAUD.

How proved.

At law fraud must be shown and proved. In equity it suffices to show facts and circumstances from which it may be presumed. Myrick vs. Jacks. 425

See EQUITY. EXEMPTION, 2. JURISDICTION, 5, 8, 10. PLEADING AND PRACTICE, 23, 24.

FRAUDS, STATUTE OF.

Reformation.

The statute of frauds does not deprive courts of equity of the power to reform instruments, where parties intended to comply with the statute, and were prevented by fraud, accident or mistake. Blackburn vs. Randolph. 119

See PROMISSORY NOTES AND BILLS OF EXCHANGE, 2.

FRAUDULENT CONVEYANCE.

1. *Possession by vendor.*

Whilst possession of real property, retained by the vendor, will not, as of personalty, raise a *prima facie* presumption of fraud, it may be a fact tending with others, to show a secret trust. Apperson & Co. vs. Burgett et al. 328

2. *Execution at law.*

The practice of selling under execution at law, lands fraudulently conveyed, is not to be encouraged. Id.

3. *Decree vacating fraudulent conveyance.*

When a debtor purchases land and has it conveyed to another to avoid his debts, a decree in behalf of creditors, vacating the conveyance, should direct a sale of the land by a commissioner of the court, and not remit them to their execution at law. Turner vs. Vaughan. 454

4. *When conveyance to wife is: Homestead not lost by.*

A conveyance to a married woman in consideration of payments made by the husband, is the same in effect as if he had taken the deed to himself and then con-

veyed to the wife; and if made to avoid an existing debt of the husband, is fraudulent and void to the extent of the creditor's rights, which may be enforced by proper preceedings; but it is not in contravention of the policy of the homestead laws in force at the time and applicable to the debt.

A debtor does not forfeit his homestead rights by making a fraudulent conveyance of the homestead. Bennett vs. Hutson et al. 762

See HOMESTEAD, 2. PLEADING AND PRACTICE, 12.

GAMING.

GAMING ACT: *Burden of proof under.*

One who pleads the gaming act in defense against a note and mortgage, fair on their face, must prove the defense by clear and strong proof. Johnson vs. Godden, Ad. et al. 600

See INDICTMENT, 1, 2.

GUARDIAN AND WARD.

1. PROBATE COURT: *Claim of ward against estate of deceased guardian.*

Where a guardian has died, his wards should present against his estate, several claims for their respective shares of an amount shown by his account in the Probate Court to be due them, and not a joint claim for the whole; but the Probate Court being confined to no course of procedure, may sever the demand and allow to each the sum he is entitled to. Connelly et al. vs. Weatherly, Ad. 658

2. GUARDIAN: *Sureties on bond—action against. Settlement by his administrator.*

It is the duty of the administrator of a deceased guardian to make settlement of his guardianship. Until such settlement, no action can be maintained against the sureties on his bond. Id.

3. ——— *Claim against administrator of guardian, when barred.*

Until the final settlement of a guardianship the statute of limitations never begins to run. But the claim of a ward against a deceased guardian must be presented to his administrator within two years after the grant of administration, or it will be barred, whether there has been a final settlement of the guardianship or not. Id.

HOMESTEAD.

1. *Right of widow to, against heirs.*

A widow is entitled to homestead as well against heirs as against creditors of her deceased husband. But she can not create a homestead on her husband's lands after his death. Hoback vs. Hoback, et al. 399

2. *Right barred by decree in partition, unless claimed.*
When a widow is a party to a suit for partition among the heirs, and fails to claim her homestead right, it is barred by the decree. Id.

3. *Not lost by fraudulent conveyance, if claimed in the suit to set aside the conveyance.*
It seems from the current of adjudications that a conveyance of land, set aside for fraud, at the suit of creditors, does not estop the grantor from claiming a homestead in the premises conveyed, but he must assert his claim in that suit or he will be afterward barred. Turner vs. Vaughan. 454

4. *Fraudulent conveyance.*
Homestead not forfeited by. Bennett vs. Hutson et al. 762

5. *Sale of, under execution. Scheduling.*
An insolvent debtor purchased land and had it conveyed to his wife, with a view to avoid an existing debt. Afterwards, while residing on it as a homestead, it was sold under execution at law for that debt. He forbade the sale on the ground that it belonged to his wife, but made no schedule of it as a homestead, and soon afterwards died in possession. Held, that his wife was not by the sale deprived of the homestead. Id.

See EXEMPTION 3.

HUSBAND AND WIFE.

See EVIDENCE, 4. 8, 24. MARRIED WOMEN, 4, 5, 6.

IMPROVEMENTS.

See BONA FIDE PURCHASER, 1, 2. INFANTS, 2.

INDICTMENT.

1. GAMING: *Indictment.*
Where an indictment is based upon section 1564, Gantt's Digest, it should allege the name of the game, if known, or if unknown to the grand jurors, it should so allege. State vs. Jeffrey et al. 136

2. ——*On the Sabbath.*
An indictment for card playing on the sabbath, need not allege the game played, the offense being the desecration of the sabbath by playing cards. Id.

3. *Statutory; what sufficient.*
As a general rule, it is sufficient for indictments for statutory misdemeanors to follow the language of the statute. State vs. Moser. 140

4. *Endorsemnnt of the names of witnesses on.*
The omission to endorse the names of witnesses examined before the Grand Jury, on an indictment at the time it is found, is no cause for quashing the indictment. State vs. Johnson. 174

5. *Affray and Assault and Battery, cannot be joined.*

A count for an affray and one for assault and battery, cannot be joined in the same indictment under the criminal code of practice. But if the count for an affray is so drawn as to include a charge of assault and battery, as it may be, the parties, one or both, may be convicted of the latter offense, if warranted by the evidence. State vs. Brewer. 176

6. *Return of into court.*

Where the record shows that an indictment was returned into court by a Grand Jury through its foreman, the Supreme Court will not reverse a conviction under it, because the entry fails to show that it was returned by the foreman "in the presence of" the Grand Jury. It will presume that the Circuit Court would not have permitted it to be returned in their absence. Robinson vs. State. 180

7. *Burglary and Larceny may be joined.*

One who enters burglariously, and completes the theft, may be indicted for burglary and larceny separately, or jointly in seperate counts, in the same indictment. Dodd vs. The State. 517

8. For Robbery.

In an indictment for robbery it is sufficient to allege that the taking was done by violence, without alleging intimidation. Clary et al. vs. The State. 561

9. The Code.

A code indictment is the substance of the common law indictment, and must be direct and certain as regards the party charged, the offense, the county, and particular circumstances of the offense charged, where they are necessary to constitute a complete offense. Id.

10. *Robbery—Larceny.*

There can be no conviction for larceny under a bad indictment for robbery. Id.

11. *When should negative exceptions in a statute.*

When there is an exception in the enacting clause of a statute, it mut be negatived in the indictment, but when a statute contains provisos and exceptions, in distinct clauses it is not necessary to state that the defendant does not come within the exceptions, or to negative the proviso, Wilson vs. The State. 557.

12. *Presenting indictment.*

Where the record does not show that the indictment was brought into court, this court will reverse a judgment of conviction. The indorsement by the clerk upon the indictment, "filed in open court," is not sufficient. Chancellor vs. The State. 815

INFANTS.

1. *Jurisdiction over person and property of.* See Myrick vs. Jacks. 425

2. Same: *Improvements, rents: etc.*

In June, 1867, a curator of the estate of infants, by order of the Probate Court, sold certain town lots belonging to them, and received and paid over

to them the purchase money. The purchaser took possession and made valuable improvements upon the lots with knowledge of the infants who asserted no claim to them until the bringing of the suit: Held,

1st. That the Probate Court could not authorize a curator to sell a minor's estate, and the sale was void.

2d. That it would be unjust for the plaintiff to recover the lots and the rents and profits without returning to the purchaser the money received from him, and making compensation for the improvements made and taxes paid by him; but for such improvements as were made during their disability they can not be required to make compensation beyond the value of the rents and profits of the premises.

3d. That the rents and profits should be estimated at the real value of the lots, without the improvements made by the purchaser.

4th. That the improvements should be estimated at their value at the time of the recovery.

5th. The plaintiffs should be charged with only such of the taxes paid by the purchaser as would be chargeable upon the lots without the improvements. Summers and wife vs. Howard et al. 490

See LIMITATION, STATUTE OF, 3.

INJUNCTION.

1. *To restrain trespasses upon land.*

Where repeated and continuing injuries to the freehold are of a nature to constitute a nuisance, equity has jurisdiction to enjoin them; but injuries to chattel interests in lands, or mere acts of aggression and injury not rendering the freehold less fitting for enjoyment, and amounting to mere trespasses, however often repeated, afford no grounds for an injunction, unless in case of insolvency or some other peculiar equity; and it is in all cases essential that plaintiff should show a clear right to the possession. Ellsworth vs. Hale, Ad. 630

2. SAME: *To prevent multiplicity of suits.*

To warrant an injunction on the ground alone of preventing a multiplicity of suits, the same rights should be claimed by different persons against one, or by one against many. It is not authorized to prevent the necessity of suing one person for a succession of wrongful acts. Id.

3. NOTICE: *Judgment without enjoined.*

Courts of equity have jurisdiction to enjoin the execution of a judgment rendered without notice to the defendant, actual or constructive. The statute (Sec. 2619, *et seq., Gantt's Digest*), is but a cumulative remedy. Ryan & Co. vs. Boyd. 778

4. SAME.

The defendant in a judgment rendered against him without notice, need not show, in his bill for injunction, that he had a good defense to the action in which it was rendered. Id.

5. *Removal of mortgaged property.*

The appellant filed his bill in equity against the defendants, alleging that on the first of March, 1874, Mrs. DeValcourt and Washington entered into a written contract, which was duly recorded, by which she agreed to furnish him as much land as he could cultivate, and give him all excess of 1200 pounds of lint cotton for every fifteen acres cultivated. She was also to furnish him supplies while he was making the crop, but no part of the crop was to be delivered to him until all his indebtedness to her was settled. On the 7th of August, of the same year, she, by deed of trust, duly recorded, conveyed to the plaintiff all her interest in the crop, to secure the payment of a debt to Gidirl, by the 1st of January, 1875, with power to take possession and sell, upon default of payment. That Washington gathered and baled the crop, amounting to seven bales, and sold it to Willing. That his indebtedness to Mrs. DeValcourt was unsettled, but amounted to more than the value of the cotton—that the trust debt was unsettled, and Willing was about to move the cotton beyond the jurisdiction of the court. Prayer for injunction to restrain him until a settlement of Washington's account with Mrs. DeValcourt could be had, and plaintiff's rights in the cotton should be determined. Upon demurrer to the bill, held: 1st. That the contract was in the nature of a mortgage, which Mrs. DeValcourt could enforce in equity. 2d. That by the deed of trust the plaintiff acquired all her rights in the crop, legal and equitable, and was entitled to the injunction to restrain its removal. Valentine vs. Washington et al. 795

See JUDGMENT AND DECREES, 2. MUNICIPAL CORPORATION, 2.

INSTRUCTIONS.

1. *As to the finding of the jury.*

Where there is any evidence tending to prove the issue for the plaintiff, the Circuit Court cannot instruct the jury that there is no evidence on which they can find a verdict for him. Railroad Co. vs. Barker and wife. 350

2. *Upon hypothetical facts, etc.*

In basing an instruction on hypothetical facts, disputed facts should not be assumed to be true, nor should facts be stated hypothetically which do not appear in evidence. Id.

INTEREST.

Penalty.

Where a note promises to pay interest at five per cent per month after maturity, the interest cannot be avoided by a plea in equity that it was an agreed penalty to stimulate prompt payment at maturity. Portis vs. Merrill. 416

See USURY.

INTERPLEA.

Statute construed.

Section 2671 *Gantt's Digest*, giving to the claimant of personal property, which is levied on as the property of another, the right to give bond and suspend the sale, applies as well to property about to be sold under a special execution in attachment, as to that levied on under a general execution. State use, etc., vs. Spikes et al. 801

See MARRIED WOMEN, 3, 4.

JEOPARDY.

See CRIMINAL LAW, 1.

JOINDER.

See GUARDIAN AND WARD, 1. INDICTMENT, 5. PLEADING AND PRACTICE, 3.

JUDGMENT AND DECREES.

1. JUDGMENT: *When not sustained by the verdict.* See Cannon vs. Davies. 56

2. JUDGMENT OF SUPREME COURT: *Review by inferior court; injunction against.*

A judgment or decree of the Supreme Court cannot be reviewed, altered or modified by an inferior court for error upon the record; but for matters arising after the judgment or decree of the Appellate Court, and which would render it inequitable to carry it into execution, it may be *enjoined.* Jacks et al. vs. Adair et al. 161

3. *Correction of errors in, when and how may be made.*

When there is an error in the entry of a judgment, which is clearly shown by other parts of the record, and its correction is necessary to make the record consistent, it may be corrected at any time, even after the term; and the court will of its own motion correct it by *nunc pro tunc* order, and will annul all that may have been done under an execution issued on it. Portis & Bro. vs. Talbot & Packer. 218

4. RES JUDICATA: *Plea to merits.*

A plea to an action on a note, that the plaintiff is not the legal holder of the note, is not a plea to the merits, and a judgment of the court sustaining such plea is not an extinguishment of the debt, nor a bar to a recovery upon the note by the rightful holder. Geisriter et al. vs. Sevier. 522

5. LOST JUDGMENT: *Remedy to restore.*

At common law the plaintiff has a right of action on a judgment as soon as it is recovered. The remedy provided by Sec. 3774 *Gantt's Digest*, to revive or restore a lost judgment, is but cumulative. The plaintiff may at the same time prosecute an action on the judgment and a *scire facias* to revive it, and have judgment in both. Garibaldi vs. Carroll. 568

6. *Of Circuit Court; vacation of.*

By statute the Circuit Courts are authorized, in specified cases, to vacate or modify their judgments after the term at which they were rendered. Desha County vs. Newman. 788.

7. *As to power of County Court* to vacate judgment, and allowances of a previous term. Id.

8. DECREE: *When it becomes absolute.*

A final decree becomes absolute upon the expiration of the term at which it is rendered, and the court cannot of its own motion, or by consent of parties, open it at a subsequent term, for rehearing; an order entered at the term at which the decree is rendered, granting leave to file a petition for rehearing at the succeeding term, will not keep it within the control of the court. The decree should be opened and the cause continued. Brady vs. Hamlett. 105.

9. DECREE: *Final at expiration of term.*

After the expiration of the term at which a decree is rendered, the court rendering it cannot set it aside or modify it, except in the manner and for the causes specified in Secs. 3596, 3602 and 4692, *Gantt's Digest,* or by bill of review under the Chancery practice. Turner vs. Vaughan. 454.

See DEMURRER. EVIDENCE, 16, 17, 23. FRAUDULENT CONVEYANCE, 3. INJUNCTION, 3, 4. JURISDICTION, 7, 8. JUSTICE OF THE PEACE. PLEADING AND PRACTICE, 1, 20, 28. REVIEW, BILL OF.

JUDGMENT LIEN.

See LIEN, 1, 2.

JURISDICTION.

1. *Consent can not give.*

No consent of parties, express or implied, can give jurisdiction to a court to try a cause. Jacks et al. vs. Moore. 161

2. *Removal of county seat; jurisdiction over.*

The removal of the County Seat is a matter of local concern, over which the County Court has exclusive original jurisdiction; the Circuit Court has no authority to determine the result of an election for removal in the first instance, and before the County Court has acted in the premises, and where it assumes to do so, a writ of probibition will lie from this court. Russell et al. vs. Jacoway, Judge, etc. 191

3. INFANTS: *Jurisdiction of courts over person and property of.*

The general jurisdiction over the persons and property of minors belongs to the Chancery Court. Courts of Probate have, by statute, limited powers over the estates of minors in the hands of administrators and guardians, but the statute is the limit of their powers, and their orders, not authorized by the statute, are void. Myrick vs. Jacks. 425.

4. FRAUD: *Jurisdiction in equity.*

Wherever there is fraud, equity has jurisdiction, exclusive or concurrent, with law. Id.

5. *Jurisdiction of State courts over Hot Springs property.*

The jurisdiction of the State Circuit Court to try and determine the right of possession to lands or lots within the Hot Springs reservation, is not taken away by the Act of Congress of March 3, 1877, providing for determining the rights of occupants to purchase the parcels or lots they have made improvements on. James et al. vs. Belding et al 536

6. PROBATE COURTS: *Jurisdiction of; Judgment of, conclusive.*

The jurisdiction of the Probate Courts, since the adoption of the Constitution of 1868, is precisely what it was before the transfer of probate jurisdiction to the Circuit Courts by act of 1873; and their judgments are conclusive until corrected by appeal, or other proper proceeding of a supervising court. West and wife et al. vs. Waddell et al. 575

7. SAME: *Chancery jurisdiction over judgments of.*

There is an inherent power in equity to set aside the orders and judgments of Probate Courts, as of all other courts, for fraud; or, if such a state of facts and circumstances is presented as shows an irreparable injury impending, against which a Probate Court can grant no relief, courts of equity may interpose, but not for mere errors, however gross. Id.

8. ADMINISTRATION—*Jurisdiction of Probate Courts:*

Art. VII, Sec. 34, Constitution of 1874, relegated to the Probate Courts their old jurisdiction in matters of administration, etc., which had been transferred to the Circuit Courts by Act of 16th April, 1873, without restriction or qualification. Reinhardt, Ad., vs. Gartrell. 727

9. *Jurisdiction of Chancery Courts:*

Courts of Chancery have no power to take administration cases out of the Probate Courts for the purpose of proceeding with the administration, but may correct any fraud in the settlements of administrators and executors. When that is done, if there be still a necessity for further proceedings in the administration, they should be had in the Probate Court. But if there be no such necessity—if the assets be all collected and the debts ascertained, and nothing remains but to fix the liabilities of administrators, executors and their sureties, and the rights of creditors, heirs, legatees and distributees, and make adjustment on equitable principles, all this can be better done in Chancery, and the cause should be retained there for completion. Id.

See CERTIORARI, INJUNCTION, 1, 2, 3. PROHIBITION, WRIT OF.

JURY.

1. *Excusing jurors accepted by the parties.*

Where a juror discloses his incompetency after he is accepted by the parties it is not error in the court to then excuse him. Robinson vs. The State. 180

2. *How judges of the law.*

In criminal cases the jury must take the law from the court, but where the issue involves a mixed question of law and testimony, they are necessarily the judges of the law and testimony, in order to determine the criminal intent, etc. Id.

See CRIMINAL LAW, 2.

JUSTICE OF THE PEACE.

JUDGMENT: *Correction of, etc.*

A judgment of a justice may be corrected by his successor in office, by a *nunc pro tunc* order, upon proper application. Gates et al. vs. Bennett. 475

See APPEAL, 3. EVIDENCE, 14, 15.

LANDLORD AND TENANT.

1. A tenant cannot dispute his landlord's title. James et al. vs. Belding et al. 536

2. *Landlord, right of, when tenant abandons lease.*

When a lessee abandons the leased premises, refuses to pay rent, and repudiates his tenancy, without any fault of the lessor, the latter may stand upon the contract of lease and recover the whole rent; and in such case he may take possession and re-rent the premises for the benefit of whom it may concern, and credit the proceeds upon the first lease. J. C. Meyer & Co. vs. Smith. 627

3. TENANTS AT WILL: *Possession; Power of to lease, etc.*

When a person in possession of land permits his daughter and her husband to use and improve the land, they become at most mere tenants at will; their possession would not ripen into a title without some act or declaration indicating an intention to hold adversely; nor would it empower them to grant leases to strangers with any more permanent rights than they enjoyed. Ellsworth vs. Hale, Ad. 633

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2. LIEN, 3, 4. PLEADING. PRACTICE, 19. TAX TITLE, 1, 2.

LARCENY.

See CRIMINAL LAW, 3, 4. INDICTMENT, 7, 10.

LEASE.

See MORTGAGE, 8.

LEGAL PRESUMPTIONS.

Presumptions in favor of legislative action.

Every reasonable presumption is to be made in favor of the action of the legislative body; it will not be presumed in any case from the mere silence of the journals, that either house has exceeded its authority or disregarded a Constitutional requirement in the passage of legislative acts—unless the Constitution has expressly required the journals to show the action taken. Smithee, Land Commissioner. vs. Garth. 19

See INDICTMENT, 6.

LEGISLATURE.

See EVIDENCE, 25. LEGAL PRESUMPTIONS.

LICENSE.

See BROKER.

LIEN.

1. JUDGMENT LIEN.

The lien of a judgment is subject to all valid liens on the land at the time it is rendered, whether recorded or not. Apperson & Co. vs. Burgett et al. 328

2. LIEN: *Notice of.*

Notice of all liens and alienations attaching before judgment, may be given at any time before sale of land under execution, and will bind the purchaser. Id.

3. *Of Landlord, superior to mortgagee.*

The lien of a landlord for rent is superior to that of a mortgagee, upon the crop grown upon the rented premises. Lambeth vs. Ponder. 707

4. *Same.*

The lien of a landlord on the crop of his tenant for rent, is superior to that of a mortgagee Watson vs. Johnson et al. 737

See ATTORNEY. MORTGAGE, 8. VENDOR AND VENDEE, 3, 4, 5, 6, 7, 8, 9.

LIMITATION, STATUTE OF.

1. *When it begins to run against an estate.*

The statute does not begin to run against an estate until the appointment of an administrator. McCustian vs. Ramey, Ad. 141

2. *Adverse possession. Color of Title.*

A deed or color of title is not necessary to maintain the statute bar to the extent of the actual adverse occupancy. Ferguson vs. Peden. 150

3. *Exception in replevin.*
Three years is the limitation in the action of replevin; but the statute makes an exception in favor of infants. Phipps vs. Martin. 207

4 *Dower not barred by the statute* while the heirs of the husband are in possession; otherwise where a purchaser is in possession holding adversely. Livingston, Ad., vs. Cochran et al. 296

5. *Time, how computed.*
In computing time to ascertain whether an action is barred by limitations, the day on which the right of action accrued must be included, and the day of issuing the summons excluded. Shinn vs. Tucker. 421

6. *When stayed by fraud.*
There must be fraud by the debtor, not by the creditor, to prevent the running of the statute of limitations. Geisreiter et al. vs. Sevier. 522

7. *As to notes made during the war.*
The statute of limitations did not begin to run against a note executed during the war until the proclamation of peace, 2d April, 1866. Worthington, Ad., vs. DeBardlekin, Ad. 651

8. *Non-claim.*
Where the bar of the statute does not attach in the life of a party, the general statute of limitations ceases and the statute of non-claim applies. Id.

9. *New promise.*
A verbal promise to pay a barred debt does not revive it, and a promise in writing does not revive the old debt, but gives a new cause of action co-extensive with the promise. Id.

10. *Writing obligatory.*
The statute of limitations of five years is not applicable to an action on a writing obligatory executed before the adoption of the Constitution of 1868. Smith vs. Carder. 709

11. The statute does not apply to proceedings by a *non compos* to establish a will that has been fraudulently concealed. Arrington vs. McLemore et al. 759

12. WRITING OBLIGATORY: *Endorsement.*
The statute of ten years applies to a writing obligatory; the statute of five years to the liability of an indorser thereof. Andrews, Ad. vs. Simms, Ad. 771

See ADMINISTRATION, 12, 14. BANKRUPTCY, 4. GUARDIAN AND WARD, 3. TAX TITLE, 2.

LOST JUDGMENT.

See JUDGMENT AND DECREES, 5.

MALICIOUS PROSECUTION.

Malice; Probable cause.

Both malice and want of probable cause must exist to sustain an action for malicious prosecution. Probable cause is a mixed question of law and fact, and may usually be left by the court to the jury, and the mere innocence of the party accused will not sustain the action if the circumstances be such as to induce the prosecutor to suppose the party prosecuted to be guilty. Carney vs. Chrisman. 316

MANDAMUS.

Parties in.

It is not the practice to make any person a defendant to a petition for mandamus but the officer whose conduct is complained of. Fry, Collector, vs. Reynolds. 450

See EXCEPTIONS, BILL OF, 2. WARRANTS, COUNTY, 1.

MARRIAGE.

See DURESS.

MARRIED WOMEN.

1. *Contracts of.*

The contract of a married woman, unless for the benefit of herself or her separate estate, cannot be enforced against her estate. Collins et al. vs. Underwood. 265

2. *Her deed void when.*

The deed of a married woman not acknowledged according to the statute is absolutely void and a nullity, and incapable of confirmation. (The deed in this case was executed before the adoption of the Constitution of 1874.—Rep.) Wentworth et. al. vs. Clark et al. 432

3. PARTIES TO ACTION: *Married Women.*

A married woman may sue and interplead alone, for her separate property. Berlin vs. Cantrell. 611

4. WITNESS: *Husband and wife, when competent.*

A married woman interpleading for property seized as her husbands in an action of replevin against him, is a competent witness for herself on the trial of the interplea, but her husband is not. Id.

5. *Schedule of separate property.*

The filing a schedule by a *femme sole* of her separate property, does not affect the common law marital rights of her after acquired husband in the property. The statute provides for scheduling by *married* women. Id.

6. ——————

Property for which the scheduled property of a married woman has been exchanged, belongs to her husband unless scheduled. The schedule protects no property not mentioned in it. Id.

7. *Not bound by covenants.*

A married woman is not bound by the covenants contained in a deed executed by her and her husband. Benton County vs. Rutherford. 640

8. PARTIES: *Married women.*

A married woman may sue alone upon a note which is her separate property, without joining her husband with her in the action. Beavers vs. Baucum. 723

9. DEED: *Acknowledgment of.*

The acknowledgment by a married woman of a relinquishment of dower, in a deed containing no relinquishment, is not sufficient for a deed in which she is the grantor, and a purchaser entitled to a good title from her will not be required to accept such deed. Id.

MASTER IN CHANCERY.

See PLEADING AND PRACTICE, 23.

MISDESCRIPTION.

See MORTGAGE, 2.

MISTAKE.

See REFORMATION, 1, 3.

MORTGAGE.

1. *Mortgages to Secure Future Advances.*

If *bona fide* and sufficiently definite are valid. When the amount intended to be secured is in its nature indeterminate, or where it may be easily ascertained outside of the mortgage, the failure to set it out, will not vitiate. Brewster vs. Camfit. 72

2. *Mis-description, correction, etc.*

Where a tract of land is misdescribed in a mortgage or trust deed, the equity of the mortgagee or grantee to have it corrected is equal, and prior in point of time, to that of a subsequent judgment creditor. Id.

3. *A note for the purchase money of land,* the title to which is retained by the vendor as security for its payment, reciting that the land "is to stand as collateral security for its payment," is not a mortgage, nor in the nature of one. Rogers vs. James. 77

4. *Unrecorded.*

A mortgage or deed of trust not filed for record, is void, as against subsequent purchasers from the mortgagor. Fry vs. Martin et al. 203

5. *Agreement to execule a mortgage for purchase money will be enforced.*

An agreement between the vendor and vendee, that the latter shall execute to the former a mortgage upon the land, to secure payment of the purchase money, will give the vendor or his assignee the same rights in equity as if the mortgage had been executed. Richardson et al. vs. Hamblett et al. 237

6. *Lien of, discharged by payment or tender at the law day.*

Payment, or tender of payment, at the time mentioned in the condition of the mortgage, or payment *before* then, saves the breach of the condition, and discharges the lien and revests the legal estate in the mortgagor. In cases of tender, the debt still subsists as a personal liability against the mortgagor. But in the case of a sale by title bond, neither tender nor payment of the purchase money divests the legal title of the vendor, nor does tender extinguish his lien on the land. Schearff et al. vs. Dodge. 340

7. *Priority of record.*

Between conflicting mortgages, the one first filed for record will have priority. Mitchell et al. vs. Badgett. 387

8. LEASE: *When a mortgage.*

A lease executed by lessor and lessee reserving a lien to the lessor on the crop produced on the land, is a chattel mortgage; and a written agreement, properly executed, stipulating that amount due for rent of land, should be paid before the removal of the crop, is a mortgage of the crop. Id.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2. INJUNCTION, 5. LIEN, 3, 4. PARTNERSHIP, 2. SPECIFIC PERFORMANCE, 1. VENDOR AND VENDEE 3, 9.

MULTIPLICITY OF SUITS.

See INJUNCTION, 2.

MUNICIPAL CORPORATION.

1. *Annexation of territory to; construction of statute.*

By force of the statute of 1875, the annexation of contiguous territory to a town, follows the vote of the town and the proper formal steps to be taken in the County Court, unless there be a remonstrance filed against it and sustained. The vote of the town makes a *prima facie* case for annexation: the onus for showing sufficient cause against it is upon the remonstrants. Dodson et al. vs. Mayor and Council of Fort Smith. 509

2. *Injunction against illegal appropriations by.*

A court of equity may, at the suit of property holders or taxable inhabitants of

a municipal corporation, restrain the corporation and its officers from making an unauthorized appropriation of the corporate funds. Town of Jacksonport vs. Watson. 704

3. *Power; Funds.*

Municipal corporations have no authority to expend the corporate funds in establishing and operating free ferries without the limits of the corporation, to promote trade, commerce, etc. Id.

See BROKER, 1. COUNTIES, 3. POLICE POWER. TAXATION, 1, 2.

NEW TRIAL.

1. *Upon motion for new trial on the ground of surprise* at the trial, and want of opportunity to produce evidence, the new evidence should be incorporated in the bill of exceptions. Matthews vs. Lanier. 91

2. *Limitation on, for grounds newly discovered.*

The limitation of three years upon an application for a new trial, in cases appealed to the Supreme Court, runs from the date of the judgment of the Circuit Court. Jacks et al. vs. Adair et al. 161

3. *Motion for; practice in Supreme Court.*

Where a motion for new trial does not object that the verdict is contrary to evidence, or is without evidence in support of it, the Supreme Court will not consider the sufficiency of the evidence, further than may be necessary in considering the correctness of the instructions based upon it. R. R. Co. vs. Barker and wife. 350

4. *Rule in Supreme Court when no motion for.*

Where there is no motion for a new trial, the Supreme Court will not review a decision of the Circuit Court admitting or rejecting evidence, or giving or refusing instructions. Young, Trustee, etc., vs. King et al. 745

5. *Erroneous verdict.*

Although the verdict is against the weight of evidence, the court will not render judgment *non obstante viredicto,* or grant a new trial, unless the substantial rights of the party are thereby affected. Trippe and son vs. DuVall et al. 811

See COURT, SUPREME. EXCEPTIONS, 1.

NON CLAIM, STATUTE OF.

See ADMINISTRATION, 12, 13, 14. LIMITATION, STATUTE OF, 8.

NOTICE.

See EXECUTION, 2. INJUNCTION, 3, 4. LIEN, 1, 2. POSSESSION, 2. PROMISSORY NOTES AND BILLS OF EXCHANGE, 6. WARRANTS, COUNTY, 3.

NUISANCE.

See INJUNCTION.

OFFICER.

County Collectors are officers.

County Collectors are officers under "an act to provide for the approval of official bonds of county and township officers," approved March 1, 1875. McCabe *ex parte* 396.

See AGENCY, 2.

ORDER.

See PROMISSORY NOTES AND BILLS OF EXCHANGE, 7.

PARTITION.

See HOMESTEAD, 2.

PARTIES.

See MANDAMUS. MARRIED WOMEN, 3, 8. PLEADING AND PRACTICE, 8, 11, 13, 14, 18, 19, 20, 24.

PARTNERSHIP.

1. *Who are partners.*

If parties, after they become partners, have a common interest in the unsettled business of a former concern, or in its profits and losses, they are, as between themselves, partners in that business. McGill vs. Dowdle, Gibson & Co. 311.

2. PARTNERS: *Power of one to mortgage partnership property.*

One partner may make a valid mortgage upon the partnership crop to secure a partnership debt, but cannot mortgage the individual property of his co-partner without his consent or acquiescence, under such circumstances as to create an estoppel. Gates et al. vs. Bennett. 475.

See PROMISSORY NOTES AND BILLS OF EXCHANGE, 2.

PATENT.

See SWAMP-LAND, 3.

PAYMENT.

1. *To heirs no discharge of liability to administrator.*
One who holds the money of an estate cannot discharge his liability to the administrator by payment to heirs. McCustian vs. Raney, Ad. 141

2. *Of part, when will discharge the whole.*
In cases of contract for the payment of a liquidated sum of money, the payment of a less sum will not be a good satisfaction unless it was paid and accepted before the time when it was to have been paid, or at a different place from that appointed for the payment. Cavaness vs. Ross. 572

PENALTY.

See INTEREST, 1.

PERSONAL PROPERTY.

The brood of an animal belongs to the owner of the dam. Phipps vs. Martin. 207

PLEADING AND PRACTICE.

1. *Judgment on defective complaint:*
Trial and verdict for plaintiff, judgment reversed because the complaint shows no cause of action. Farris vs. The State use, etc. 70

2. *Complaint.*
A declaration or complaint on a lease, which begins in debt, and concludes in covenant, is not for that reason demurrable under the code. Gibbs vs. Dickson. 107

3. *Joinder of causes of action; Private seals.*
Under the code a count or paragraph on a written lease, n ay be joined with one on a verbal account stated. Id

4 *Reply, etc.*
Where the answer sets up no matter of counter-claim or set-off, a reply is improper. It should not be met by a demurrer, however, but should be stricken from the files. Cannon vs. Davies. 56

5. *Practice where the tenant of a receiver sets up title in himself.*
Where the tenant of a receiver takes advantage of his possession to acquire title in himself under an Auditor's tax deed, it is proper to bring him into court by rule, to compel him to surrender possession to the receiver. Waggoner et al. vs. McLaughlin et al. 195

6. *Denials, how must be made.*
A denial must be direct, not argumentative. The former rules of equity in regard to answering the allegations of a pleading obtain under the Code. He who submits to answer must do so fully and fairly. Young et al. vs. Mitchell. 222

7. *Time of answering.*

It is within the discretion of a chancellor to permit an answer to be filed after the time allowed for filing it, which will not be interfered with by the Supreme Court, except in cases of plain abuse or manifest mistake. It is not enough that a defendant has a meritorious defense. It must be used in a fit time. Mayes vs. Hendry. 240

8. *Necessary parties must be in court.*

Although want of necessary parties must be taken advantage of by answer or demurrer, yet if from the nature of the case, a complete and final settlement of the rights of the parties before the court cannot be had amongst themselves, the chancellor should, of his own motion, order other necessary parties to be brought in. Id.

9. PLEADING: *Allegations in must be proved.*

Fraud, when alleged, must be proved, if denied. Beecher vs. Brookfield. 259

10. *Forms of action.*

Forms of action being abolished, the actions of trespass and case may be joined: but the requisites to constitute the injury, and the proof to sustain it, are the same as formerly. Carney vs. Chrisman. 316

11. PARTIES: *Practice in equity.*

Where the court can make a final decree between the parties before it, leaving the rights of others unaffected, it may be done; but where there are outstanding equities in others the future assertion of which against the parties litigant would cause new equities or revive old ones, as between the parties litigating, this will never be done. Apperson vs. Burgett et al. 328

12. IN EQUITY: *Vacating fraudulent conveyances.*

In an equitable proceeding to vacate a fraudulent conveyance of land upon which an execution has been levied, it is not necessary to remit the party to his execution—the court may order a sale for its satisfaction, under its own direction. Id.

13. *Parties, when new should be made.*

Whenever it is discovered, in the progress of a cause, that the rights of the parties already before the court cannot be finally determined without other parties, they must be brought in. Stirman vs. Cravens. 376

14. PRACTICE IN CHANCERY: *Parties, defect of not raised by general demurrer.*

A general demurrer to a complaint does not raise the question of defect of parties. Nevertheless, when a determination of the controversy between the parties before the court, cannot be had without the presence of other parties, the court must order them to be brought in. If a bill has equities it should not be dismissed for defect of parties, until refusal of the plaintiff to bring them in upon a proper order of the court to that end; and such order should be made by the court of its own motion, if the bill present equitable grounds of relief against all the defendants when brought in. The proper practice in such cases, when defect of parties is developed by the bill, and a special

demurrer is interposed on that ground, is to sustain the demurrer and dismiss the bill, unless the plaintiff asks leave to amend by bringing in the other parties. But when the demurrer is general the court should look alone to the equities of the bill, and if the bill should stand *with* proper parties, it should overrule the demurrer, and order such parties to be brought in as are necessary to a full settlement of the matters in contest between the parties already before the court. Eagle et al. vs. Beard et al. 497

15. *Exhibits, when part of complaint.*

In an action by a mortgagee for the recovery of personal property, claiming to be the owner by virtue of the mortgage, the mortgage is not the foundation of the action, and though filed with the complaint, is no part of it, but is simply evidence for the plaintiff to be used at the trial. Chamblee vs. Stokes. 543

16. *Exhibits—Effect of.*

The Civil Code [sec. 4599, *Gantt's Dig.*] requires a pleader to make a bond, bill, note, or other writing which is evidence of indebtedness *and the foundation of the action*, "a part of the complaint," by filing it; and on demurrer it may be considered as part of the record. When the action is not *founded upon* the instrument as evidence of indebtedness, but the instrument is merely relied upon, it must still be filed [sec. 4600] but the plaintiff has no right by reference, to make it *part of the pleading*, and it cannot be noticed on demurrer further than to explain allegations—not to supply or contradict them. Abbott vs. Rowan. 593

17. *Reply.*

A reply filed when none is authorized by the code should be stricken from the files. Id.

18. *Parties; Heirs; Administrator.*

In all cases where the title to the lands of a decedent are to be affected, the heirs are necessary parties. The court should of its own motion refuse to proceed until they are brought in. The administrator cannot represent them. Anderson et al. vs. Levy, Ad. 665

19. *Application to be made party to suit.*

C. & S. filed their bill against Savage to foreclose a mortgage executed by him on certain lands, making Deadwiler, who was in possession and claiming an interest in them, a party defendant. Atwood, showing that he claimed title to the land and that his tenant was in possession and had refused to pay him rent because he was made party defendant in the suit to foreclose, asked to be made party defendant, and to file his answer and cross-complaint to plaintiff's complaint. Held, that his application was properly allowed. Campbell & Strong vs. Atwood et al. 678

20. *Judgment on overruling demurrer to cross-complaint.*

On overruling a demurrer to a cross-complaint, the judgment should be *respondeat ouster* and the plaintiff be allowed to answer it. Id.

21. *Mistake in name, the effect of. How corrected.*

A mistake in the name of a party does not affect the pleading or the merits of the action, and can be corrected only by motion to correct, or by the court of its own motion. Beavers vs. Baucum. 723

22. EXHIBITS: *Effect of.*

An exhibit is part of the record, and when it is the foundation of the action will explain or even control an averment in the pleadings. Id.

23. *Practice in Chancery on correction of administrator's settlement.*

In referring administration settlements to a master for the correction of fraud, the Chancellor should find and designate the points in which the fraud consists, and confine the reference to those points: and his finding of fraud should always be upon the allegations of the bill, specifically pointing it out, and not upon vague and general charges. Proof of the fraud devolves upon the party alleging it. Reinhardt, Ad., vs. Gartrell. 727

24. *Parties in Chancery. Same*

Sureties of an administrator are proper parties to a bill to correct fraud in his account. Id.

25. *Reply; New matter.*

Under the Code practice no reply is allowed setting up matter of defense only. The statute makes issue to matters of avoidance, and they must be proved. Watson vs. Johnson et al. 737

26. *Amendment.*

When action of unlawful detainer cannot be changed into ejectment. Necklace vs. West. 682

27. *Set-off; Reply, etc.*

Upon the failure of a party to file a reply to a plea of set off, the adverse party should move for judgment upon the plea for want of a reply; and when he fails to do so, but goes into trial as if the issue was made up, he will not be allowed the advantage of it in this court. Gibbs vs. Dickson. 107

28. FORMER JUDGMENT: *Pleading; evidence.*

Where it is necessary to plead a former judgment in bar of an action, it can not be given in evidence, unless pleaded. And it can not be pleaded when rendered after the commencement of the suit. State use, etc., vs. Spikes et al. 801

29. *Amendment after verdict.*

An answer which is vague and indefinite, may be amended after verdict to conform to the proof. Trippe and son vs. DuVall et al. 811

See AGENCY, 4. CERTIORARI. COURT, SUPREME. EVIDENCE, 6, 10, 11. EXCEPTIONS, BILLS OF, 1. GUARDIAN AND WARD, 1. MANDAMUS. MARRIED WOMEN, 8. PROMISSORY NOTES AND BILLS OF EXCHANGE, 1. REALTY, 1. VENDOR AND VENDEE, 1.

POLICE POWER.

Property of citizens held subject to police power.

Every citizen holds his property subject to a proper exercise of police power, either by the Legislature directly, or through public corporations to which the Legislature may delegate it. City of Little Rock vs. Barton et al. 436

See BROKER.

POSSESSION.

1. *Land; Possession, evidence of title.*

Where one dies in actual possession of land, it is *prima facie* evidence that he was seized in fee. Ferguson vs. Peden. 150

2. *Notice of title.*

Actual possession of land is notice to all the world of the possessor's title. Jowers vs. Phelps, Ad. 465

PROBABLE CAUSE.

See EVIDENCE, 13. MALICIOUS PROSECUTION.

PROBATE.

See WILL, 1.

PROBATE JUDGE.

See ADMINISTRATION, 4, 5.

PROHIBITION, WRIT OF.

Office of and when granted.

The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done by such usurpation. Russell et al. vs. Jacoway, Judge. 191

See JURISDICTION, 2. REVIEW, BILL OF, 2.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. PROMISSORY NOTES. ASSIGNOR AND ASSIGNEE: *When Assignor Liable. Pleading.*

When the complaint of an assignee against an assignor does not allege that the note was duly presented to the maker for payment, that payment was refused and that the assignor had due notice thereof, it shows no cause of action. Rogers vs. James. 77

2. *Proof of execution; Promise to pay debt of another; Frauds, statute of.*

A note was executed by one partner in the name of the partnership. Afterwards the other partner, on presentation of the note to him, promised to pay it, not denying that it was a partnership note. In a subsequent suit on it, he denied by answer that it was a partnership note, alleging that it was executed for the separate debt of the other partner, without his knowledge or consent. Held, that the execution of the note was the only matter in issue, and that the promise to pay was admissible to prove it, and was not inadmissible as a parol promise to pay the debt of another, under the statute of frauds. McGill vs. Dowdle, Gibson & Co. 311

3. *Blank; Alteration.*

The defendant, with intention to become surety on a note, wrote his name on a blank paper and left it with the principal, who afterwards wrote the body of the note and signed his own name above that of the surety, and attached a seal to each name. Held, that the defendant was not bound by the instrument. Smith vs. Carder. 709

4. *Endorsement.*

Effect of as between indorser and indorsee of a promissory note. Andrews, Ad., vs. Simms, Ad. 771

5. ENDORSEMENT IN BLANK: *Rights of assignee.*

The holder of paper endorsed in blank may write over the endorser's name directions to whom it shall be paid, and anything consistent with the endorser's liability, but can not write "demand and notice waived;" for this would enlarge his liability. Id.

6. DEMAND AND NOTICE: *Waiver, inferred from circumstances.*

A waiver of demand and notice may be found from circumstances and facts *aliunde*. Id.

7. BILL OF EXCHANGE—CONTRACT.

A contracted with B to do certain work and receive in full consideration therefor an order on C, who owed B. After the completion of the work this order, the body of which was as follows: "Please pay to * * * the sum of $550 and the same will be credited on your joint note to me" was delivered to A, who held it for nearly two years before presenting it to the drawer. *Held*, that the order was a bill of exchange, payable on demand, that it was the duty of the payee to present it in due time, and if dishonored to give due notice to the drawer; that the delay in the presentment was unreasonable and discharged the drawer from liability; *held* further, that A could not recover the value of the work under the contract. Adams, Ad., vs. Boyd. 33

See ASSIGNMENT.

PUBLIC SCHOOLS.

See SCHOOL DISTRICTS, 1, 2.

RAILROAD.

See DAMAGES, 4.

REALTY.

House of one on land of another, is not.

A house erected by one on land of another, with his consent, may be
ered as personal property, distinct from the land. In such case the v
each may be referred to a master, and on the coming in of his report
parties will not agree for a purchase by one from the other, the court
order a sale of lot and house together, and divide the proceeds in pro
to their respective values as found by the master. Stirman vs. Crave

RECORD.

See DEMURRER. EVIDENCE, 14, 15. LIEN, 1. MORTGAGE, 4, 7.

REFORMATION.

1. OF DEED: *Privity.*

Where a mistake in the description of land occurs in a series of conv
under such circumstances as would entitle any one of the vendees to
mation, as against his immediate vendor, the equity will work back t
all, and entitle the last vendee to a reformation as against the original
Blackburn vs. Randolph.

2. *Statute of frauds.*

The statute of frauds does not interfere with the power of courts of e
reform deeds or other instruments in which the parties intended to
with the statute and were prevented by fraud, accident or mistake.

3. *Judgment lien will not prevent.*

The equity of the vendee for the correction of a deed is not displaced
lien of a subsequent judgment, or execution issued thereunder.

REHEARING.

See JUDGMENT AND DECREES, 8.

RENT.

See LANDLORD AND TENANT, 2.

RENTS AND PROFITS.

See BONA FIDE PURCHASER, 1, 2. INFANTS, 2.

REPLEVIN.

Who may have for trust property.

Trustee may maintain replevin for possession of the trust property, but the beneficiaries in the trust cannot. Gates et al. vs. Bennett. 475

Action by tenant in common:

A tenant in common cannot maintain replevin against his co-tenant for his part of the common crop, unless there has been a division of it, consummated by an assignment and appropriation of a part to each. Ward vs. Worthington. 830

See EVIDENCE, 16, 17. LIMITATION, STATUTE OF, 3.

REPLY.

See PLEADING AND PRACTICE, 17, 25, 27.

RESCISSION.

See SPECIFIC PERFORMANCE, 1.

RES GESTÆ.

See EVIDENCE, 9, 12, 19. TREASURER OF STATE, 4.

RES JUDICATA.

See JUDGMENTS AND DECREES, 4.

RESULTING TRUST.

See TRUST, 2.

REVIEW, BILL OF.

Is not superseded by the code.

The bill of review is not superseded by the statute which authorizes the Circuit Court to vacate or modify a judgment for grounds discovered after the term at which it was rendered. The statute extends to cases at law a new remedy, without taking away any which existed in equity, and as to the latter is cumulative. Jacks et al. vs. Adair et al. 161

After affirmance in Supreme Court; Prohibition against.

A bill of review for new matter discovered after affirmance in the appellate court, is permissable; but leave to file it must first be obtained, if not from the Appellate Court, at least from the Chancellor. It rests in his sound discretion to grant or refuse it. But, if he should err or abuse his power in this regard, the remedy is not by prohibition from the Appellate Court. Id.

3. *Limitation on.*

Against bills of review for newly discovered evidence, there is no positive statutory bar. Id.

See JUDGMENT AND DECREE, 2.

ROBBERY.

See CRIMINAL LAW, 4. INDICTMENT, 10.

SALE.

See ADMINISTRATION, 1, 3, 4, 5, 17. DOWER, 1. EXECUTION, 3.

SCHEDULE.

See MARRIED WOMEN, 5, 6. HOMESTEAD, 5.

SCHOOL DISTRICTS.

1. *Notice of election for directors and voting tax.*

It was the duty of the district school trustee under the former law, and now of the directors, to designate the place of meeting for electing directors and voting taxes for school purposes, and notice of the time and place of meeting is essential to the validity of the tax. But the statute designates the *time* for the meeting, and all are bound to take notice of it. If notice of the *place* be given, the meeting will be legal, though the *time* be not specified in the notice. Hodgkin vs. Fry, Collector. 716

2. *District school tax.*

Unless the judges make return of the election or vote, to the County Court, it cannot levy the tax. Id.

SCHOOL WARRANTS.

See CONSTITUTIONAL LAW.

SCRIP.

See WARRANTS, COUNTY.

SEAL.

See AGENCY, 1.

SEISIN.

POSSESSION: *Evidence of seisin.*

Where one dies in possession of land, it is *prima facie* evidence that he was seised in fee. Ferguson vs. Peden. 150

See VENDOR AND VENDEE, 2. WARRANTY.

SET-OFF.

See PLEADING AND PRACTICE, 27.

SPECIFIC PERFORMANCE.

1. *As against purchaser with notice.*

A sold and conveyed land to B, taking from him a mortgage on the land for payment of the purchase money, and stipulating that if the purchase money was not promptly paid at maturity, B should reconvey the land to A, and A should deliver to him his note for the unpaid purchase money. After the purchase note matured, B being unable to pay, they agreed to rescind as agreed in the mortgage, by destroying the deed, mortgage and note, and to meet afterward and burn them. A died soon afterward and before the papers were destroyed. His administrator, knowing of the agreement to rescind, afterward united with B in burning the deed, note and mortgage B at the time concealing from him the fact that he had a few days before caused the deed to be recorded. B subsequently sold the land to D, who was cognizant of all these facts, for about one-third its value. Held: *First*, that the destruction of the papers did not destroy or divest the title conveyed by them. *Second*—That actual notice of the unrecorded mortgage did not defeat the title of the subsequent purchaser. *Third*—But that the agreement of B to rescind precluded A from having the mortgage recorded, and equity would enforce the agreement to rescind, against him or his vendee who purchased with notice of the facts. Neil vs. Speigle et al. 63

2. *Party seeking must be blameless.*

A party seeking the aid of chancery to compel specific performance of a contract for the sale of lands, must come with clean hands, and there must be no fraud or breach of trust in the sale. Livingston, Ad., vs. Cochran et al. 294

3. *Assignee of title bond may have; Damages in.*

The assignee of a title bond succeeds to all the rights of his assignor under it, and may sue in equity for specific performance and recover damages when performance is impossible. The measure of damages in such case will be the amount paid upon the purchase, whether to vendor or to others with his assent or directions, with the understanding express or implied, that it would be taken and credited as part of the consideration. American Land Co. vs. Grady et al. 550

STATUTES.

1. PASSAGE OF BILLS: *Constitutional requirements.*

The Constitution of 1868 contained the following provision, "on the final passage of all bills the vote shall be taken by *yeas* and *nays*, and entered on the journal." Upon the passage of a bill in the House, the journal showed the number of votes in the affirmative and the number in the negative, and the names of those voti g in the affirmative, bu, there was no entry of the names of the members who voted in the negative. Held, that the failure to enter the names of those voting in the negative, was a disregard of the constitutional requirement, and the bill did not become a law. Smithee, Land Commissioner, vs. Garth. 17

See ADMINISTRATION, 10. COUNTY SEAT, 1, 2. DAMAGES, 4. EXCEPTIONS, BILL OF, 3. INTERPLEA. MUNICIPAL CORPORATION, 1. OFFICER. REVIEW, BILL OF, 1. TAX SALE, 1. VENUE, 2.

SWAMP LAND.

1. *Swamp land Act.*

The swamp land act of September 28, 1850, was a grant *in presenti* of all lands coming within the description of the act. When they are properly designated and ascertained, the grant relates to the date of the act. Hendry vs. Willis. 833

2. *Same.*

It made the Secretary of the Interior the judge of the lands coming within the meaning of the grant, and his decision on this point, in the absence of fraud or imposition, is final. Id.

3. STATE'S PATENT: *Evidence; Recitals.*

The State's patent for swamp lands may issue at any time after the selection is confirmed, and is evidence of title in the grantee, and *prima facie* evidence of all facts recited in it, which are necessary to confer the power to issue it. Id.

SUBSCRIPTION.

See CORPORATION.

SUBROGATION.

See AGENCY, 3.

SUPERSEDEAS.

S e EXEMPTION, 1.

SURETIES.

See AGENCY, 3. GUARDIAN AND WARD, 2. PROMISSORY NOTES AND BILLS OF EXCHANGE, 3. PLEADING AND PRACTICE, 4. TREASURER OF STATE, 4.

SURPRISE.

See NEW TRIAL, 1.

TAXATION.

1. TAXATION BY TOWNS AND COUNTIES: *Limits of their power under Constitution of 1874; Obligations of contract not impaired by.*

It is now well settled that where municipal or county bonds have been issued under authority of law, and where, at the same time, the law has directed a tax to be levied for their protection, or where there is a general law authorizing and directing a tax in all like cases applicable to such bonds, the law becomes a part of the contract. The holder has a right to look to the taxing provision as a part of his security, and to demand at the proper time that it be exercised in his favor. The measure of that right is the Constitutional limit of the power which the Legislature could grant to the municipality when the contract was made. Such contracts are protected by the Constitution of the United States, and no subsequent act of a State Legislature or Constitutional Convention can impair them. Brodie et al. vs. McCabe, Collector. 690

2. *How far power of limited by Constitution of 1874.*

It was the intention of the Constitutional Convention of 1874, to cut off utterly all pownr in counties, cities and towns, to levy taxes beyond the limits assigned in Art. XI, Sec. 4, and Art. XVI., Sec. 3 of the Constitution. But where bonds had been lawfully issued by them under a law directing a levy of taxes to pay them, such bonds are protected by the Constitution of the United States; and the constitutional limit of five mills for old indebtedness existing at the ratification of the Constitution may be exceeded, if necessary, for the payment of such debts. But there is no power after having levied a tax for such protected debt, to levy besides, a tax of five mills for other indebtedness. Id.

TAXES.

See BONA FIDE PURCHASER, 1, 2. INFANTS, 1, 2. SCHOOL DISTRICT, 1, 2.

TAX SALE.

1. *The revenue act of March 17, 1873,* suspended the tax sales for that year. Vernon vs. Nelson et al. 748

2. *Same.*

A sale for taxes on a day not appointed by law, is void. Id.

TAX TITLE.

1. *Purchase by tenant; claim for penalties and improvements.*

Where land becomes forfeited to the State for non-payment of taxes by neglect of the owner, his tenant may terminate the tenancy by delivery of the possession, or protect himself from eviction by a future purchaser from the State, by advancing the taxes and holding a lien for re-imbursement, or if the lands are sold for taxes at public sale, during the tenancy, without his fault, he may purchase and set up his title thus acquired, against that of his landlord. But he cannot use his possession which he holds as a tenant, as a basis to acquire title as an *actual settler*, and thereupon found a claim hostile to his landlord. Equity will regard him and all persons holding under him, except purchasers without notice, as trustees for the benefit of the landlord, and will not permit them to speculate on such a purchase, but will allow them only the actual amount paid *in money* to the auditor or the cost of scrips used, in the purchase. No per centum beyond the legal rate of six per cent. should be allowed him, nor any penalties or costs upon subsequent taxes paid by him. Beneficial improvements made by such purchaser may be allowed. Waggoner et al. vs. McLaughlin et al. 195

2. PRACTICE IN EQUITY: *Limitation; Receiver.*

Where such purchaser is the tenant of a receiver in court, it is proper to bring him in by rule, to compel him to surrender possession to the receiver, and the statute of limitations as to actions does not apply. Id.

3. *Purchase by one receiving rents.*

A purchase of lands at tax sale by one who is receiving the rents and profits, and ought to keep down the taxes, can never strengthen his title. Hunt vs. Gaines et al. 267

TELEGRAM.

See EVIDENCE, 12.

TENANCY AT WILL.

See LANDLORD AND TENANT, 3.

TENANT IN COMMON.

See REPLEVIN, 2.

TENDER.

1. MORTGAGE.

Tender at or before the law day, discharges the lien of a mortgage. Schearff et al. vs. Dodge. 340

2. *In bill for title, tender must be kept good.*

A vendee under a title bond asking a decree for title, must tender and bring the unpaid purchase-money into court before he can obtain a decree for title. Id.

TRANSCRIPT.

See APPEAL, 1.

TREASURER OF STATE.

1. ACTS OF DEPUTY.

The State Treasurer and his bondsmen are liable for the official conduct of his deputy. State vs. Newton et al. 276

2. *Duty and liability as to funds of the State.*

It is the duty of the State Treasurer to receive from his predecessor in office the moneys and securities of the State in his hands; and to receive from the Collectors of revenue the balances certified by the Auditor to be due from them, and if he accepts in lieu thereof the receipt or check of a depository, with whom the same was left by the officer, he becomes liable therefor on his official bond. Id.

3. EVIDENCE. *Balances.*

In an action on the official bond of the State Treasurer, a copy of his accounts from the Auditor's books, properly certified, is *prima facie* evidence of the state of his accounts; and the jury should be instructed not to go into the accounts, but to take the balance certified by the Auditor, unless the accuracy of the items are impeached. Id.

4. ——; *As affecting sureties.*

A copy of accounts rendered by the State Treasurer, being statements made by him to the State in the performance of his official duties, is *prima facie* evidence against him and his sureties in an action on his official bond; the surety is bound by the acts and declarations of the principal, when they are within the scope of the business, and a part of the *res gestae.* Id.

TRESPASS.

See INJUNCTION, 1. VENUE.

TRUST.

1. *Property into which trust funds are converted, held subject to the trust.*

Leonidas Johnson executed to Horner a deed of trust on his claim probated against the estate of Thomas Johnson, deceased, to secure a debt he owed to Coolidge, and left the claim with Horner. The deed was duly recorded. Afterwards the lands of the deceased were sold by order of the Probate Court, and part of them were purchased by Leonidas Johnson, who paid for it by receipting the administrator for the probated claim without the knowledge or consent of Coolidge. Afterwards Hill, Fontaine & Co. recovered judgment against Leonidas Johnson and had the land sold under execution to satisfy it, and at the sale bought the land. Held: that the trust on the claim followed and attached to the land into which the claim was converted. Hill, Fontaine & Co. vs. Coolidge. 621

2. VENDOR AND VENDEE: *Resulting trust.*

An uncompleted sale, where a deed has been executed and the consideration has not been paid, and where there is no intention of a gift or a sale on time, makes a resulting trust in favor of the vendor; not for the purchase money, but for the whole land. Equity will treat it as no sale, and hold the vendee as trustee of the dry legal title; and a purchaser from such vendee, with notice of the facts, will acquire no title. Bennett vs. Hutson et al. 762

See VENDOR AND VENDEE, 7.

TRUSTEE.

See REPLEVIN, 1.

UNLAWFUL DETAINER.

See FORCIBLE ENTRY AND UNLAWFUL DETAINER, 2, 3.

USURY.

Lex Loci—Usury.

The validity of a note as to usury, must be determined by the usury statutes of the State where it was made, unless it designates another place for payment. Bowles, Ad. vs. Eddy & Wilbur. 645

VENDOR AND VENDEE.

1. *Construction of sale.*

A complaint alleging an indebtedness "for the sale, release of a tract of land," and "for lands sold and conveyed and released, etc., does not necessarily imply a conveyance with general warranty. Where the whole transaction discloses that the vendor was to convey any such interest as he had, a deed of "bargain, sale or quit-claim" of his interest in the land is sufficient, and admissable as evidence under the allegations of the complaint. Holland, Ad. vs. Rogers. 252

2. *Covenant of seizin, etc., when broken.*

Where a grantor conveys by deed with covenant of seizin, land which belongs to the government or to a stranger in possession, the covenant is broken as soon as made, and the grantee may sue at once for damages for the breach. But upon a covenant of warranty, where any thing passes to the vendee, no action can arise until eviction or its equivalent.

As to a vendee's rights under a covenant of warranty where no title passes, nor possession taken of land held adversely, *quere.* Abbott vs. Rowan. 593

3. VENDOR'S LIEN: *Waived by taking mortgage.*

Where a vendor of land takes a mortgage upon it to secure the purchase money, he thereby waives his equitable lien. Neil vs. Speigle, et al. 63

4. *When Security for passes to Assignee. Vendor's Lien not assignable.*
Where a vendor of land retains the title as security for the purchase money, and afterwards assigns the land note, the security for its payment passes to the assignee as an incident to the debt. But where the land is conveyed by an absolute deed, reciting the payment of the purchase money, the vendor has no security for its payment but a vendor's lien in equity, which is not assignable either by an *assignment* of the *note* or by *express transfer or assignment* of the *lien.* Rogers vs. James. 77

5. *When note reassigned by Assignee to Vendor, he may enforce the lien.*
When an assigned note for the purchase money of land, is reassigned to the vendor, or when the vendor takes up the note upon the failure of the vendee to pay it, the debt and lien become reunited in him, and he can enforce the lien in equity. Id.

6. *Taking security presumptive waiver of lien.*
The acceptance of other security raises a presumption that the vendor intended to waive his equitable lien on the land for the purchase money, but it is a matter of intention, subject to proof. Mayes vs. Hendry. 240

7. *The remedy.*
It is not necessary to the enforcement of a vendor's lien in equity, that he should first exhaust his remedy at law. Upon a valid agreement for the sale of land, the vendor until conveyance, holds the legal title in trust for the vendee, and after conveyance, the vendee holds it charged with a trust for the purchase money. Id.

8. *When waived*
A vendor executed a deed, expressly reserving a lien on the land for the purchase money, and afterwards executed a second deed to the same vendee, acknowledging payment of the purchase price, when, in fact, it was not paid. Held: that the lien in the first deed was a contract lien like a mortgage, which was, in effect, conveyed to the vendee by execution of the second deed, and under the second the vendor had the same equitable lien as if the first had never been made. Robinson vs. Woodson et al. 307

9. *Waived by taking mortgage.*
When a vendee of land, by title bond, resells to his vendor, and restores to him the bond and possession of the land, he has an equitable lien on the land for the purchase money, but he waives it if he takes a mortgage for it. Johnson vs. Godden, Ad. et al. 600

See AGENCY, 3, 4. DAMAGES, 3. DEED, 3. MORTGAGE, 3, 5. SPECIFIC PERFORMANCE, 3, TRUST, 2.

VENDORS LIEN.

See VENDOR AND VENDEE, 3, 4, 5, 6, 7, 8, 9.

VENUE.

1. *In trespass on real property.*

An action for an injury to real property must be brought in the county in which the property is situated. Jacks, et al. Moore. 31

2. *Change of in civil cases.*

The provisions for change of venue contained in section 13, chapter 177, Gould's Digest, were repealed by the adoption of the Civil Code in 1868. Chrisman vs. Carney. 316

VERDICT.

1. FINDINGS OF THE COURT SITTING AS A JURY; *When conclusive.*

The findings of a court sitting as a jury, are in the nature of a special verdict, and are conclusive as to the facts of the case when the evidence is not set forth in full, and exceptions taken to the findings. Woodruff vs. McDonald et al. 97

2. *Where verdict of jury will be set aside:*

Where a verdict is the result of a plain, palpable mistake in the jury, or of prejudice, or may be, of some knowledge on the part of the jury of the circumstances, the Supreme Court will set it aside. Walworth vs. Finnegan. 751

See NEW TRIAL, 5.

WAIVER.

See PROMISSORY NOTES AND BILLS OF EXCHANGE, 6. VENDOR AND VENDEE, 3, 6, 8, 9.

WARRANT, COUNTY.

1. *Order for re-issue and cancellation—Mandamus against Collector.*

An order of the County Court calling in county warrants for re-issue, which gives less than three months from its date to the time appointed for presenting the warrants, is invalid—and a scrip-holder is not obliged to appeal from it or quash it by *certiorari*, but may compel the county collector by *mandamus* from the Circuit Court, to receive his scrip for county taxes. Fry, Collector vs. Reynolds. 450

2. *Right of County Court to cancel.*

The statute authorizing the County Courts to call in county warrants for cancellation and reissuance, is constitutional and the law of the contract as to warrants issued after the passage of the act, and the holder takes them subject to this power. Allen vs. Bankston, Collector. 740

3. SAME: *Notice of order insufficient; scrip not barred.*
When the notice of an order of the County Court calling in warrants for cancellation is published in only one newspaper, the scrip will not be barred by failure of the holder to present it within the time required by the order, though he have actual notice of it. The notice must be given as required by the statute, but presentation of the scrip is a waiver of the insufficiency of the motion. Id.

4. *Of County Courts; vacation of; county scrip collaterally assailed.*
As a general rule County Courts have no power to vacate their judgments after the expiration of the term, but by statute (*Gantt's Digest*, Secs. 614, 616, 611, and *Acts* 1875, p. 177) County Courts are empowered to review all allowances made at previous terms, and if illegally made, to reject warrants issued upon them, and also to reject warrants otherwise illegally or fraudulently issued. Warrant holders take them subject to this power of the County Court to reject them; and it has been held in suits upon county warrants that the allowances upon which they were issued may be collaterally assailed for illegality, as matter of defense. (*Shirk* v. *Pulaski county*, 4 Dillon, 209.) Desha county vs. Newman. 788

See CONSTITUTIONAL LAW, 1.

WARRANTS, SCHOOL.

See CONSTITUTIONAL LAW, 1.

WARRANTY.

1. *Statutory covenant, when broken.*
If a grantor conveys land by the words "grant, bargain and sell," and the deed contains no express words limiting their force, and he is not at the time the owner in fee simple of the land, the statutory covenant of seizin expressed by those words is instantly broken technically, and the grantee may sue at once. for the breach without showing eviction. Benton county vs. Rutherford. 640

2. For rule of damages for breach of covenant of seizin see Id.

See MARRIED WOMEN, 7. VENDOR AND VENDEE, 2.

WEAPONS,

See CRIMINAL LAW, 5, 6.

WIDOW.

See ADMINISTATION, 10, 11.

WILL.

1. WILLS: *Probate of not essential to their validity.*

A will determines the rights of parties under it, *proprio vigore*, from the death of the testator. Its probate is necessary to fix the right of the executor to execute it, to point out the person authorized to act, and as a basis and prerequisite to letters testamentary, but is not essential to its validity. Rights under it are not lost by failure to probate; and to establish or protect them the validity of a will may be shown in any court. Arrington vs. McLemore, et al. 759

2. ——— *Lost—Statute limitations.*

The statute of limitations is not applicable to proceedings by a *non compos* to establish a will that has been fraudulently concealed. Id.

WITNESSES.

See EVIDENCE, 4, 8,

WRITING OBLIGATORY.

1. ASSIGNMENT: *Of writing obligatory not governed by law merchant.*

The statute making writings obligatory assignable so as to vest the legal title and right of action in the assignee, did not put them upon the footing of commercial paper, and bring them within the rules of the law merchant. Assignees took them at their peril as to defenses. Smith vs. Carder. 709

2. WRITING OBLIGATORY: *Endorser and endorsee; Statute of limitations.*

The endorsement of a writing obligatory or promissory note, after maturity, makes it in effect as between endorser and endorsee, an inland bill of exchange. The endorsement of a note or writing obligatory constitutes a new and distinct contract from the note. The maker and endorser are liable on different contracts, and the statute of limitations of five years applies to the endorsement, and ten years, to the writing obligatory. Andrews Ad. vs. Simms, Ad. 771

See LIMITATION, STATUTE OF, 10. PROMISSORY NOTES, 3.

TRIBUTE TO THE MEMORY OF W. W. LEVERETT, ESQ., Supreme Court, November Term, 1874.

Comes William G. Whipple, Esq., and presents to the court the following proceedings of the Bar on the death of W. W. LEVERETT, ESQ.:

"A Committee, appointed by the members of the Bar, to prepare a proper tribute of respect to the memory of CAPT. W. W. LEVERETT, deceased, present the following report:

"Death has again invaded our fraternal circle and taken from us our professional brother, Capt. W. W. Leverett, a member of our bar, who departed this life on the 12th day of November, 1874, at the age of thirty-two.

"He was born at Upper Alton, Illinois, and educated at Shurtieff College, in that city. He was a young man of education and culture, whose mind, naturally possessing great business capacity, was so trained that the strictest accuracy and efficiency pervaded all his business transactions, and he had held many positions of usefulness and trust for one so young.

"In the latter part of the war of 1861-65, he held the position of Captain and Aid-de-camp on the staff of Major-General John A. Palmer, of the United States Army. After the war he for some time held the position of Secretary of the Cairo and Fulton Railroad Company, and for a great portion of the past few years he has been one of the efficient aids in the State Auditor's office, and while filling these several responsible stations, he diligently continued his legal studies.

"He was a man of sterling integrity, of kind, obliging and agreeable disposition, and one who seemed capacitated and destined to hold high positions of usefulness.

"When he came into court he came thoroughly prepared in his cases, with his papers and all his proceedings most thoroughly and technically accurate. Such a mind, with such preparatory culture and business habits, could not have failed, with the growth of years and experience to prove an ornament to our profession, and we cannot but regret his untimely taking off.

"We sincerely sympathize with the family and relatives of our deceased brother in their sad bereavement.

"In token of our respect for our departed brother, we ask that this testimonial be spread upon the records of the several courts of which he was a member, and that upon a presentation thereof each of said courts do adjourn."

And after some remarks commendatory of the deceased, moved that the proceedings of the bar be entered of record, and that the court adjourn.

The court, by the Hon. Elbert H. English, Chief Justice, responded, and it was ordered that the proceedings be entered of record.

TRIBUTE TO THE MEMORY OF J. M. LOUGHBOROUGH, ESQ., Supreme Court, May Term, 1876.

On this day comes S. P. Hughes, Esq., a member of the Bar of this court, and presents the following resolutions, adopted by the Little Rock bar, as expressive of the feelings and sentiments of the bar on the death of JAMES M. LOUGHBOROUGH, ESQ.:

Resolved, That in the untimely death of our brother, JAMES M. LOUGHBOROUGH, the bar has sustained a severe and most afflicting loss. He was a man upright and honorable in all his dealings with his fellow men; devoted to his profession, pleasant and agreeable in his intercourse with the bar, of which he was an honored and respected member. As an active and public spirited citizen, he commanded the confidence of the community, and his capacity, sound judgment and trustworthiness of character, rendered him eminent and useful in every position in which he was placed. Possessed of these qualities, having inspired and preserved this general confidence, esteem and affection, we feel that his loss is one which will be lamented by the bar and community in common.

Resolved, That in token of the sentiments we thus entertain concerning the death of him whose loss we deplore, the members of the bar will wear the usual badge of mourning for thirty days.

Resolved, That the bar tender their sincere condolence to the family of our deceased brother in their present sad affliction.

The Hon. S. P. Hughes, Attorney-General, delivered an appropriate eulogy on the deceased, which was responded to by the Chief Justice, and the resolutions ordered to be entered of record.

TRIBUTE TO THE MEMORY OF HON. THOMAS JOHNSON, Supreme Court, November Term, 1877.

Comes R. C. Newton, Esq., and suggests to the court that at a meeting of the bar of the Supreme Court, on the death of the Hon. THOMAS JOHNSON, formerly Chief Justice of this court, the following resolutions had been adopted, and that he had been appointed to present them to this court, and prefacing his motion with an appropriate eulogy upon the late Chief Justice, moved that they be entered of record as follows:

WHEREAS, We have learned with regret of the death, on yesterday, of the Hon. THOMAS JOHNSON, at his residence, near this city, and deem it appropriate to express our high appreciation of the character and qualifications of this dis-

tinguished citizen and jurist, and our sympathy with the whole community in the loss of one who has rendered effective services to the State and legal community—

Resolved, 1st, That we, in common with all the people of the State, have heard of the death of the Hon. THOMAS JOHNSON, with the most sincere regret, and that we cherish his memory in the highest respect. He was a man of a high order of intellect, of unexceptional moral character, and eminently correct in all the relations of life, as a citizen, husband and father. As a jurist, his opinions rank with the best of those emanating from our Supreme Court, of which he was a member for many years. We had hoped that he would, in the evening of his life, be blessed with a long repose in the bosom of his family and friends; but he has gone to a higher life.

Resolved, 2d, That we tender to his bereaved family our heartfelt sympathy in the great sorrow they have been called upon to undergo in the dispensation of that Providence which doeth all things well.

The Hon. Elbert H. English, Chief Justice, responded to the address of Mr. Newton, and announced the order of the court that the resolutions be entered of record, and that the court wou'd now adjourn in respect to the memory of the late Chief Justice of this court.

TRIBUTE TO THE MEMORY OF T. M. PARSONS, ESQ., Supreme Court, November Term, 1877.

Albert W. Bishop, Esq., an attorney of this court, presented the following resolutions, adopted by a meeting of the bar, in relation to the death of the late F. M. PARSONS, ESQ., a member of the bar of this court, and prefacing his motion with a few remarks in relation to the life, character, etc., of the deceased: moved that they be spread upon the record of this court:

"*Resolved,* That in deploring the death of our brother, F. M. PARSONS, we recognize the fact that our profession has lost a competent follower, society one of its best members, and the State a valuable and useful citizen. Diligent and persevering in the practice of the profession he had adopted, he was a man whose moral integrity was undoubted, who was zealously religious, without being ostentatious, and who had positive traits of character without being obtrusive.

Resolved, That we condole with the bereaved widow and friends of the deceased, on the said event which deprived them of his protecting care and worthy example.

Resolved, That the members of the bar attend the funeral of our deceased brother to-morrow morning at 9:30 A. M.

Resolved, That the secretary transmit to the widow a copy of these proceedings, and furnish a copy to each of the papers of this city, with request to publish the same."

The CHIEF JUSTICE replied to the remarks of Mr. Bishop, and directed that the resolutions be placed on the record.

TRIBUTE TO THE MEMORY OF W. E. FORD, ESQ., Supreme Court, November Term, 1878.

Comes John Fletcher, Esq., an attorney of this court, and presents the following preamble and resolutions, adopted by the bar of this court, on the death of W. E. FORD, ESQ, a member of the bar, and moved that they be entered of record, prefacing his motion with an appropriate eulogy upon the character, etc., of the deceased:

"WHEREAS, We have heard with deep sorrow of the death of our esteemed brother, WM. E. FORD, at the residence of his father, near Austin, in Lonoke county, on the 24th instant, [24th August, 1878].

Resolved, That in the death of Mr. FORD, society has lost an upright member, and the profession one of its most devoted and worthy followers, and one who, had his life been spared, bid fair to take a high and distinguished position in his profession.

Resolved, That in deplering the early death of Mr. FORD, we recognize in his life and character, all the elements or a true friend, a kind and affectionate husband and father, and an unswerving Christian citizen.

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

Resolved, That the secretary transmit to the family of the deceased a copy of these proceedings; also, that a copy be furnished to each of the papers of this city, with a request to publish the same."

To which an appropriate response was made by the CHIEF JUSTICE, and it was ordered that they be entered upon the record of this court.

TRIBUTE TO THE MEMORY OF GRORGE A. GALLAGHER, ESQ., Supreme Court, May Term, 1878.

Comes Hon. Freeman W. Compton, a member of the bar of this court, and, after an appropriate address, presents the following as the proceedings of a bar meeting, on the death of GEO. A. GALLAGHER, ESQ., late a member of the bar of this court.

The members of the bar of this court, pursuant to adjournment, met at the Supreme Court room, yesterday at 10 o'clock, A. M., to hear the report of their committee, which was as follows:

GEORGE A. GALLAGHER, a leading and honored member of the bar of Arkansas, Vice-president of the Bar Association of the United States, and President of the Little Rock Bar Association, distinguished for his professional learning, varied attainments, and strict integrity, having departed this life September 25, 1878, the

members of the bar, assembled to do honor to his memory and bear testimony to his many virtues, have

Resolved, That we express a profound and sincere appreciation of his public and private worth, of his ability, learning and uprightness as a lawyer; of his patriotism and public spirit as a citizen; his usefulness, generosity and devotion in all works of domestic life.

Resolved, That a copy of these resolutions be furnished the family of our deceased brother, with assurance of our sympathy in their great affliction.

Resolved, That these resolutions be presented to the Supreme Court, the Circuit and District Courts of the United States, the Pulaski Chancery Court, and the Circuit Court of Pulaski county, with the request that they be spread upon the records of said courts.

The court, by the Hon. E. H. Engl sh, Chief Justice, made an appropriate response, on the presentation of the resolutions, as to character of the deceased, and ordered that the resolutions of the bar be entered of record.

TRIBUTE TO THE MEMORY OF HON. DANIEL RINGO, Supreme Court, November Term, 1879.

Solomon F. Clark, Esq., an attorney of this court, presented the following resolutions of the Bar Association of Little Rock, with suitable remarks, stating that the resolutions had been adopted by the Association on the death of the late DANIEL RINGO, first Chief Justice of this Supreme Court, which occurred on the 3d day of September, 1873, and that George A. Gallagher, Esq., had been appointed to present them, but that he had departed this life without having done so:

Resolved, That it is with profound feelings of sorrow and regret that the members of the Little Rock Bar have learned of the death of the Hon. DANIEL RINGO, late a member of that bar, and first Chief Justice of the State of Arkansas.

Resolved, That in the life and services of the deceased, we recognize an able judge, a pure statesman, a profound lawyer, a patriotic citizen, worthy the emulation of all; and one who by his patriotic labors and wise counsels, has conferred lasting benefits upon the State, her institutions and history.

Resolved, That while we deeply sympathize with the State for the loss of one of her eminent sons, with the family of the deceased for the loss of a kind and affectionate father, and with the members of the bar for the loss of an agreeable friend and wise counsellor, we can offer the consolation, sad though it may be, that he has left to all the heritage of a name not only without reproach, but which will go down to posterity honored as one among the wise and good of our State.

Resolved, That a copy of the resolutions be presented by G. A. Gallagher to the Supreme Court, with a request that they be entered in the records.

The Hon. E. H. English responded to the remarks of Mr. Clark, and the court ordered that the resolutions be entered of record.

TRIBUTE TO THE MEMORY OF THOMAS FLETCHER, ESQ., Supreme Court, November Term, 1879.

Comes Sam. W. Williams, Esq., an attorney of this court, and presents to the court the resolutions of the Bar Association of Little Rock, on the death of THOMAS FLETCHER, ESQ., as follows:

"The members of the Bar of Little Rock met upon the mournful occasion of the death of their professional associate, the Honorable THOMAS FLETCHER, of Lincoln, once a governor of the State, a citizen honored by his fellow-citizens in many ways, at many times; respected not alone on the ground of the high position he had held with credit, but for the worth of his personal character, and well and widely beloved for his amiable personal qualities, unite in their expressions of their unaffected sorrow at his loss. No man ever doubted Governor Fletcher's honor, or his purity of purpose; no man ever found him untrue to his word or to his duty, as he conceived it; no wanton speech of unkindness or uncharity ever passed his lip; a warm heart, a serene philosophy, and a genial and scholarly humor rendered him a delightful companion. It is

Resolved, That the members of the bar testify their respect for the career and character of the deceased by attending the funeral in a body, and by wearing, for the space of thirty days, the usual public token of mourning.

Resolved, That copies of these resolutions be sent to the surviving relatives of the deceased, be furnished for publication to the press, and be presented in due time at the bar of the various courts of the city."

Prefacing them with an appropriate eulogium upon the life and character of the deceased; to which the Hon. J. R. EAKIN, Justice, responded; and it was ordered by the court that the resolutions be entered of record.

TRIBUTE TO THE MEMORY OF J. W. FAUST, ESQ., Supreme Court, November Term, 1879.

Comes George M. Caruth, Esq., a member of the bar of this court, and, first delivering an appropriate eulogy upon the life and character of J. W. FAUST, late a member of the bar of this court, presents the following resolutions adopted by the Bar Association of Little Rock:

WHEREAS, JOHN W. FAUST, ESQ., has been removed, in the prime of his life and maturity of his usefulness, as a member of the bar and a leading member of society; now, therefore, the Bar Association of Little Rock, convened for the purpose of taking fitting recognition of their loss, hereby

Resolve, That we sincerely lament the death of JOHN W. FAUST, ESQ., who was so long professionally associated with us, and whose professional life was distinguished throughout by activity, fidelity and honorable success in his practice.

Resolved, That in his decease, society has lost a valuable member, who was ever alive to its highest and best interests; the friend of progress, growth and enlightenment, and vigorous in good works.

Resolved, That we hereby express to his stricken family our profound sense of this great bereavement, and sincere sympathy with them therein.

Resolved, That in token of our respect, the bar will attend the funeral obsequies in a body.

Resolved, That copies of these resolutions be presented to the afflicted widow of the deceased, and published in the city papers.

The Hon. John R. Eakin, Justice, responded to the address of the member of the bar presenting the resolutions, and it was ordered that they be entered of record.

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